

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
OBJET LLC : DECISION
: DTA NO. 828673
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period April 13, 2015. :

Petitioner, Objet LLC, filed an exception to the determination of the Administrative Law Judge issued on February 18, 2021. Petitioner appeared by Roberts & Holland LLP (Joseph Lipari, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel),

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on August 26, 2021, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's purchase of a one-half interest in a painting that was subsequently leased is exempt from sales tax as a purchase for resale under Tax Law § 1101 (b) (4).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also added additional facts, numbered 22 and 23, to more fully reflect the record. The Administrative Law

Judge's findings of fact and the additional findings of fact are set forth below.

1. Petitioner, Objet LLC, is a Delaware limited liability company, with an office in Wilmington, Delaware. Petitioner is a collector of artwork that, on occasion, leases pieces of art to others.

2. Petitioner is comprised of two trusts: one for the primary benefit of Harrison T. LeFrak and his family, and the other for the primary benefit of Jamie T. LeFrak and his family.

3. Richard LeFrak is the father of Harrison T. LeFrak and Jamie T. LeFrak.

4. On April 13, 2015, Acquavella Fine Arts LLC (Acquavella) issued an invoice in the amount of \$3,600,000.00 to petitioner for the purchase of a one-half share of a Pablo Picasso oil on canvas painting known as Femme a la Robe Verte (Painting). The invoice also included sales tax in the amount of \$319,500.00 on the purchase. Pursuant to the terms of the invoice, title did not pass until payment in full was received by Acquavella.

5. On April 20, 2015, petitioner purchased the one-half share of the Painting by paying the amount on the invoice to Acquavella, including the sales tax of \$319,500.00.

6. Petitioner did not provide Acquavella with a resale certificate (form ST-120--New York State and Local Sales and Use Tax Resale Certificate) when remitting payment on April 20, 2015.

7. The record lacks a copy of a resale certificate.

8. On April 13, 2015, Acquavella issued an invoice in the amount of \$3,600,000.00 to Richard LeFrak for the purchase of the other one-half share of the Painting. The invoice also included sales tax in the amount of \$319,500.00 on the purchase. Pursuant to the terms of the invoice, title did not pass until payment in full was received by Acquavella.

9. On April 20, 2015, Richard LeFrak purchased his one-half share of the painting by paying the amount on the invoice, including the sales tax of \$319,500.00, to Acquavella.

10. Petitioner obtained a certificate of authority (form DTF-17-A) from the Division of Taxation (Division) that was validated on April 20, 2015.

11. On April 20, 2015, petitioner, as lessor, and Richard LeFrak, as lessee, entered into a written one-year lease agreement (Lease), in which Richard LeFrak leased petitioner's one-half interest in the Painting. The term commenced on April 21, 2015, and automatically renewed for additional one-year periods provided that neither party terminated prior to the end of the then current term.

12. The annual rental payment was an amount equal to 1.09% of the fair market value of the one-half interest that was the subject of the Lease, plus applicable sales tax. For the first year of the Lease, that annual rental payment equaled \$39,240.00, with an additional payment of \$3,483.00 in sales tax, for a total of \$42,723.00.

13. Pursuant to the Lease, Richard LeFrak was to keep the Painting in good condition and repair at his home in New York City.

14. Richard LeFrak remitted to petitioner payment in the amount of \$42,723.00 on June 19, 2015 for the first annual rental payment under the Lease.

15. Petitioner remitted \$3,483.00 of sales tax when it timely filed a New York State and Local Sales and Use Tax Return for the quarterly period ending May 31, 2015.

16. The Lease was renewed for a second one-year term and, on April 12, 2016, Richard LeFrak provided a second check in the amount of \$42,723.00 to petitioner.

17. The Lease was renewed for a third one-year term and, on April 20, 2017, Richard LeFrak remitted a third check in the amount of \$42,723.00 to petitioner.

18. On February 24, 2016, petitioner filed an application for refund of sales tax paid in the amount of \$319,500.00 with the Division on its purchase of the Painting from Acquavella. The application identified the date of purchase as April 13, 2015. Petitioner identified itself in its application as follows: “The taxpayer is a collector of artwork. On occasion, the taxpayer leases pieces of art.” Petitioner added that it was entitled to a refund as it had purchased artwork it had agreed to lease to a lessee in New York City. Petitioner added that in May 2015 it received its certificate of authority and immediately sought a refund of the sales tax paid on the Painting from Acquavella, to no avail.

19. After an audit of the transaction, the Division issued a refund claim determination notice on April 14, 2017, denying petitioner’s refund claim, in full. The Division stated in the notice that the transaction between petitioner and Richard LeFrak “has been determined not to be a sale for sales tax purposes.”

20. The Division placed into evidence the affidavit of Heather Bell, a Transactions Tax Desk Auditor who supervised the review of petitioner’s refund claim. In her affidavit, Ms. Bell stated that “the Division determined that [petitioner’s] purported lease of its 50% share of the painting to Mr. LeFrak was not sale [sic] because both entities owned the painting as tenants in common and as such both entities had the right to possess the painting. Since Mr. LeFrak already had a right to possess the painting in its entirety, [petitioner] could not transfer possession to Mr. LeFrak.”

21. In its answer to the pending petition, the Division stated that it determined that petitioner’s purchase of the Painting “was not a purchase exclusively ‘for resale as such.’”

22. Petitioner’s sales tax return for the period ended May 31, 2015 reports \$59,257.00 in taxable sales, \$88,000.00 in purchases subject to use tax, and a total tax liability after credit of

\$12,869.06. A workpaper attached to the return indicates that the reported taxable sales consist of \$39,240.00 in “gross sales/leases” attributable to the Painting and \$20,017.00 in “gross sales/leases” attributable to “Tie Rack” by Wayne Thiebaud. The workpaper also indicates that the purchases subject to use tax are attributable to “Untitled” by Ray Parker.

23. A transcript of petitioner’s sales tax returns attached to Ms. Bell’s affidavit shows that petitioner reported \$59,257.00 in taxable sales on its returns for the periods ended May 31, 2015, May 31, 2016, May 31, 2017, and May 31, 2018. The transcript also shows that petitioner reported taxable sales in various amounts for the sales tax periods ended February 29, 2016, February 28, 2017, February 28, 2018, and November 30, 2018. The transcript also indicates that petitioner filed returns but did not report any taxable sales for the sales tax periods ended August 31, 2015, November 30, 2015, August 31, 2016, November 30, 2016, August 31, 2017, November 30, 2017, August 31, 2018, and February 28, 2019 through November 30, 2019.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that in order to establish entitlement to the resale exclusion, as provided for by Tax Law § 1132 (c) (1), the Division prescribes the use of a timely and properly completed resale certificate. However, the Administrative Law Judge noted that the record contains no resale certificate and that there is no persuasive evidence that a resale certificate was ever provided by petitioner to Acquavella. The Administrative Law Judge further addressed petitioner’s contention that its unsuccessful effort in May 2015 to obtain a refund of the paid sales tax from Acquavella demonstrated the existence and use of a resale certificate, noting that this statement alone is unsupported by proof of the existence of an actual resale certificate. Specifically, it was unclear what, if anything, was provided to Acquavella or, if a resale certificate was provided to Acquavella, whether it contained the required elements.

Consequently, the Administrative Law Judge held that petitioner does not qualify for the exemption for resale by virtue of a valid resale certificate pursuant to Tax Law § 1132 (c) (1).

The Administrative Law Judge next turned to whether petitioner could meet its burden of demonstrating an entitlement to the resale exclusion through other evidence and found that contrary to the Division's position, petitioner has demonstrated that it had a valid lease with Richard LeFrak noting: (a) the parties entered into a written one-year lease agreement, entitled "LEASE," in which Richard LeFrak leased petitioner's one-half interest in the Painting; (b) the term commenced on April 21, 2015, and automatically renewed for additional one-year periods provided that neither party terminated prior to the end of the then-current term; (c) payment was made by Richard LeFrak pursuant to the terms of the Lease on the initial term and it was renewed two times, with annual payments being made each time; and (d) in return for the payments, consideration passed from petitioner, as the Lease allowed for Richard LeFrak to exclusively possess and maintain the Painting at his home. Accordingly, the Administrative Law Judge found that petitioner had met its burden to demonstrate that a valid lease existed.

However, the Administrative Law Judge concluded that petitioner's case for an exemption fell short because a purchase is entitled to a resale exclusion when the purchase was made only for the purpose of resale. The Administrative Law Judge noted that despite what it accepted as a valid lease, petitioner identified itself in its refund application as a collector of fine art that occasionally enters into leases. The Administrative Law Judge concluded that petitioner's purchase of its interest in the Painting was consistent with the endeavor of art collection.

Additionally, the Administrative Law Judge noted that petitioner obtained its certificate of authority effective the day it purchased its interest in the Painting, and there is no evidence of

a prior certificate of authority, thereby suggesting that its principal activity throughout was that of art collector. Moreover, petitioner remained an owner of the Painting, relinquishing only temporary possession with the Lease, which it could terminate at any time.

The Administrative Law Judge thus concluded that petitioner had failed to meet its burden under Tax Law § 1132 (c) to prove that it purchased its interest in the Painting exclusively for the purpose of resale and therefore sustained the refund claim determination notice dated April 14, 2017.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Painting was purchased solely for the purpose of leasing it to LeFrak, and since it was immediately leased and petitioner has made no other use of the Painting, the resale exemption applies. Petitioner further argues that the Administrative Law Judge properly found that the Lease was valid but erred in denying the resale exclusion's application based on a second purpose of art collection in purchasing the Painting since there was no evidence to support that finding.

The Division argues that petitioner simply failed to meet its burden of demonstrating by clear and convincing evidence that the exclusive purpose for purchasing the Painting was to lease it. The Division notes that no resale certificate was issued or could have been issued since the invoice predates the certificate of authority by seven days. The Division further argues that the lease arrangement is a blueprint for tax evasion since it would take the lessor 91 years to pay sales tax on the rental payments in an amount equivalent to the sales tax paid on the purchase of the Painting and that the administrative burden of monitoring the Lease was not intended by the Legislature.

OPINION

Tax Law § 1105 (a) imposes sales tax upon “the receipts from every retail sale of tangible personal property, except as otherwise provided.” A painting is, of course, tangible personal property (Tax Law § 1101 [b] [6]). As relevant here, a “retail sale” is a sale for any purpose “other than . . . for resale as such” (Tax Law § 1101 [b] [4]). The term “sale” includes a rental or lease (Tax Law § 1101 [b] [5]). Accordingly, the acquisition of tangible personal property for the sole purpose of rental or lease is a purchase for resale for sales tax purposes (*Matter of Albany Calcium Light Co. v State Tax Commn.*, 44 NY2d 986, 987 [1978], *rearg denied* 45 NY2d 839 [1978]).

Tax Law § 1132 (c) (1) provides that all sales receipts for tangible personal property are presumed subject to tax “until the contrary is established,” and sets the burden of proving the contrary upon the vendor (seller) or the customer (20 NYCRR 532.4 [a] [1], [b] [1]).

To establish entitlement to the resale exclusion from sales tax, petitioner must show that the Painting was “purchased for one and only one purpose: resale” (*Matter of P-H Fine Arts, Ltd.*, Tax Appeals Tribunal, October 13, 1994, *confirmed* 227 AD2d 683 [3d Dept 1996], *lv denied* 89 NY2d 804 [1996], citing *Matter of Savemart, Inc. v State Tax Commn. of State of N.Y.*, 105 AD2d 1001 [3d Dept 1984], *appeal dismissed* 64 NY2d 1039 [1985], *lv denied* 65 NY2d 604 [1985]). Since liability for sales tax occurs at the time of the transaction, petitioner’s intent at the time it purchased the Painting determines whether the resale exclusion applies (*id.*; *see also* 20 NYCRR 526.2 [a] [2]). Although not determinative, later events may be relevant to ascertain intent at the time of purchase (*id.*).

To establish nontaxability, and as provided for by Tax Law § 1132 (c) (1), the Division prescribes the use of exemption documents, including resale certificates (form ST-120--New

York State and Local Sales and Use Tax Resale Certificate). When properly completed and timely accepted in good faith by a vendor from its customer, the form ST-120 resale certificate satisfies the vendor's burden of proving the nontaxability of a sales transaction and relieves the vendor of its obligation to collect and remit sales tax on that transaction (Tax Law § 1132 [c] [1]; 20 NYCRR 532.4 [b] [2], [3]). Contrary to the determination, however, the customer's burden of proving the nontaxability of a transaction remains, even where the customer has provided the vendor with a properly completed and timely resale certificate (20 NYCRR 532.4 [b] [3]).

Petitioner did not produce a resale certificate with respect to its purchase of the Painting. Even so, petitioner has the right to prove that its purchase was nontaxable, as the absence of a resale certificate does not change the tax status of the transaction (20 NYCRR 532.4 [b] [6]; *see also* Tax Law § 1132 (c) (1); *Matter of RAC Corp. v Gallman*, 39 AD2d 57 [3d Dept 1972]; *Matter of Intercontinental Audio and Video, Inc.*, Tax Appeals Tribunal, January 4, 1996).

The Administrative Law Judge examined the obligations created by the executed lease agreement and the conduct of the parties pursuant thereto. He noted that the Lease appeared to be properly executed, that LeFrak had made annual rental payments to petitioner and, that in return, he had exercised the right to exclusively possess and enjoy the Painting at his home. It is noteworthy that the Division mounted no challenge to the economic substance of the agreement or to the relationship of the bargaining parties. The Division did argue that the ownership structure of the Painting's purchasers, variously described by the Division as between "tenants in common" or "co-tenants," could not legally lend itself to a resale agreement because all owners had a co-extensive right to full possession of the Painting and thus could not transfer possession pursuant to a resale by lease.

The Administrative Law Judge rejected this legal argument and concluded that the Lease between the co-owners of the Painting was valid. The Division took no exception to this specific determination and as indicated in its brief on exception, is in agreement with the Administrative Law Judge's conclusion as to the overall validity of the Lease. In the absence of any challenge, and with the agreement of all parties, this Tribunal also accepts the determination that the Lease was valid in all respects.

While the finding of a valid lease establishes that petitioner intended to and did resell (i.e., lease) its interest in the Painting, entitlement to the resale exclusion requires, as noted, that petitioner establish that its *only* intent at the time it purchased the Painting was to resell it (*Matter of P-H Fine Arts, Ltd.*).

We find that petitioner has met its burden.

As determined by the Administrative Law Judge and agreed to by the Division, petitioner leased its interest in the Painting on the date it acquired that interest (April 20, 2015). Petitioner's certificate of authority was validated on the same date. Petitioner continued to lease its interest in the Painting through at least April 20, 2018.¹ The lessee made rental payments in accordance with the Lease. Such payments included sales tax, which petitioner reported and paid over to the Division. Petitioner thus established that it intended to resell (or lease) its interest in the Painting at the time it purchased that interest and that it did so.

In denying petitioner's resale exclusion claim, the Administrative Law Judge found that petitioner's purchase of its interest in the Painting was consistent with its self-description as a

¹ The record suggests that the Lease was renewed a third time, as petitioner's reported taxable sales for the sales tax period ended May 31, 2018, match its reported taxable sales for the periods ended May 31, 2015, May 31, 2016 and May 31, 2017 (*see* findings of fact 22 and 23).

“collector of artwork” (*see* finding of fact 18). The Administrative Law Judge also noted that petitioner obtained its certificate of authority on the date it purchased its interest in the Painting, and inferred from that fact that petitioner’s principal activity was as an art collector. The Administrative Law Judge also found it significant that petitioner gave up temporary possession under the Lease, which it could reacquire by terminating the Lease at any time.² Under such circumstances, and considering the lack of any testimony or affidavits, as well as the presumption of taxability, the Administrative Law Judge concluded that petitioner had two purposes for the acquisition of its interest in the Painting: leasing and art collecting.

We disagree with the Administrative Law Judge’s factual analysis. The fact that petitioner might, at some point, divert a leased piece of art into its own collection is not evidence that petitioner had such an intent at the time it purchased the Painting. Furthermore, should such an event transpire, the Tax Law provides a remedy: petitioner would be required to pay use tax (20 NYCRR 531.3 [a] [2]). As to the Administrative Law Judge’s conclusion regarding petitioner’s principal activity, there is no requirement that a vendor be principally engaged in leasing to obtain a resale exclusion. Additionally, the fact that petitioner gave up only temporary possession of the Painting by leasing it is not evidence of a lack of an intent to resell. Temporary possession is the essence of a lease transaction and a purchase for the purpose of leasing is a purchase for resale under the Tax Law (*Matter of Albany Calcium Light Co. v State Tax Commn.*). We thus find that the facts relied upon by the Administrative Law Judge do not constitute evidence of a taxable use or intended taxable use of the Painting by petitioner.

² We note here that this characterization of the Lease is inaccurate. Absent a default, the Lease provides only for nonrenewal at the end of each one-year term.

Moreover, we find no evidence in the record of any use or intended use of the Painting by petitioner other than the lease to LeFrak.

The Administrative Law Judge's denial of petitioner's resale exclusion claim is premised, generally, on the possibility that petitioner will make a taxable use of the Painting at some point in the future. In our view, this interpretation of the "one and only one purpose" rule is unsupported by relevant case law. As petitioner correctly notes, *Matter of P-H Fine Arts, Ltd.*, upon which the determination relies, is distinguishable. In that case, this Tribunal denied a claimed resale exclusion based on evidence of a taxable use of the subject property (a painting). Here, there is no evidence of any taxable use of the Painting by petitioner. In *Matter of Savemart, Inc. v State Tax Commn. of State of N.Y.*, also cited in the determination, a claim of a sale for resale was denied due to a lack of any evidence of an intent to resell. Similarly, in *Matter of Micheli Contr. Corp. v New York State Tax Commn.* (109 AD2d 957 [3d Dept 1985]), claims of purchases for resale were denied for a lack of evidence of a resale. Here, of course, the Lease, lease payments and sales tax payments over a three-year period constitute evidence of an intent to resell, i.e., lease. As petitioner observes, *Micheli* is particularly instructive. The taxpayer in that case was a construction contractor that also leased construction equipment to other contractors. On audit, the Division allowed resale exclusions on purchases of construction equipment that the taxpayer could document having been leased (*see* 109 AD2d at 958), even though, as petitioner observes, such equipment might possibly be used by the taxpayer on its own construction projects at some point in the future.

The cases thus indicate that a resale exclusion is properly allowed where there is evidence of intent to resell and no evidence of a taxable use. As discussed, such circumstances are present here.

The Division complains that a finding of a resale here would require the Division to “monitor” the transaction over the period of the Lease to ensure that LeFrak continues to pay sales tax on the rental payments. The Division contends that this is not a burden that the Legislature intended to place on the Division. We disagree. Given a valid lease, which the Division has conceded, this is precisely the sort of burden inherent in the administration of a resale exclusion.

Tax Law § 1139 (a) provides for the refund of sales tax that was “erroneously, illegally or unconstitutionally collected or paid.” Pursuant to the foregoing discussion, petitioner has established that it erroneously paid sales tax on its purchase of its interest in the Painting. Hence, petitioner has established entitlement to a refund of such tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Objet LLC is granted;
 2. The determination of the Administrative Law Judge is reversed;
 3. The petition of Objet LLC, is granted; and
 4. The Division’s refund claim determination notice, dated April 14, 2017, is cancelled,
- and the Division is directed to refund to petitioner sales tax paid in the amount of \$319,500.00 as indicated on the application for refund, together with such interest as may be due.

DATED: Albany, New York
February 28, 2022

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner