

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Objet LLC, filed a petition 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.

On December 17 and 19, 2019, respectively, petitioner, appearing by Roberts & Holland LLP (Joseph Lipari, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), waived a hearing and submitted the matter for determination pursuant to 20 NYCRR 3000.12 based on documents and briefs to be submitted by August 24, 2020, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

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

Petitioner submitted 18 proposed findings of fact with their initial brief. Proposed findings of fact 2 through 5, 7 through 10, and 12 through 15 are accepted and incorporated into

this determination. Proposed findings of fact 1, 6, 11, and 16 are modified to more correctly reflect the record. Proposed findings of fact 17 and 18 are irrelevant to reaching a determination in this matter.

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. The members of petitioner are 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 that 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.’”

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes a sales tax upon the receipts from “every retail sale of tangible personal property, except as otherwise provided” Tax Law § 1101 (b) (4) (I) (A) defines a “retail sale” as a sale for any purpose “other than . . . for resale as such.” It is well settled that the term “sale” includes a rental of tangible personal property under Tax Law § 1101 (b) (5) (*see Matter of Lincare, Inc.*, Tax Appeals Tribunal, September 11, 2014). Tax Law § 1132 (c) (1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax “until the contrary is established,” and sets the burden of proving the contrary upon the vendor or its customer (*see Wegmans Food Markets, Inc. v Tax Appeals Tribunal of the State of New York*, 33 NY3d 587 [2019]; *see also* 20 NYCRR 532.4 [a] [1]; [b] [1]).

B. Petitioner claims an exemption from tax by asserting that its purchase of the Painting was for the subsequent lease, hence resale, to Richard LeFrak. In such circumstances, the statute must be strictly and narrowly construed against petitioner, albeit not so narrowly as to defeat the exemption’s purpose (*see e.g. Matter of Costco Wholesale Corp.*, Tax Appeals Tribunal, March 6, 2017; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]). Like all taxing statutes, an exemption is properly construed in a practical way (*Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). It is incumbent upon petitioner to meet this burden.

C. Initially, in order to establish entitlement to the exemption, and as provided for by Tax Law § 1132 (c) (1), the Division prescribes the use of a resale certificate. When properly completed and timely accepted by a vendor from its customer, the resale certificate satisfies the burden of proving entitlement to the resale exemption (*see* Tax Law § 1132 [c] [1]; 20 NYCRR 532.4). The resale certificate is considered “properly completed” when it contains the

information required to be provided thereon, including the date prepared, name and address of the purchaser, name and address of the vendor, identification number of the purchaser (if required on the certificate), signature of the purchaser (or its authorized representative), and any other information required to be provided on the particular certificate (Tax Law § 1132 [c] [2]; 20 NYCRR 532.4 [b] [2] [ii]; [d] [2]). The resale certificate is “timely” if it is received by the vendor within 90 days after delivery of the tangible personal property (*see* 20 NYCRR 532.4 [b] [2] [iii]).

In the instant case, though, the record lacks such a resale certificate. Moreover, there is no persuasive evidence that a resale certificate was ever provided by petitioner to Acquavella. Petitioner points out that, in early May 2015, it unsuccessfully sought a refund of the sales tax paid from Acquavella, suggesting that attempt demonstrates the existence and use of a resale certificate. However, that statement is unsupported by proof of the existence of an actual resale certificate. It is unclear as to what, if anything, was provided to Acquavella at that time. Additionally, there is no evidence that if a resale certificate was provided to Acquavella, it contained the required elements noted above. Consequently, petitioner does not qualify for the exemption for resale by virtue of a resale certificate pursuant to Tax Law § 1132 (c) (1).

D. The failure of petitioner to demonstrate the existence of a resale certificate, however, does not completely bar its right to the exemption. Instead, petitioner may rebut the presumption of taxability through other evidence (*see Matter of RAC Corporation v Gallman*, 39 AD2d 57 [3d Dept 1972]). In order to do so, petitioner must initially demonstrate that it had a valid lease with Richard LeFrak for the painting. In considering whether the transfer of the tangible personal property to the customer is a lease, the transaction must be examined, including whether the seller’s agreement with the customer is structured as a lease as borne out by the

substantive provisions of the agreement (*see* 20 NYCRR 526.7 [c]; *Matter of Galileo International Partnership*, Tax Appeals Tribunal, March 25, 2005, *confirmed Matter of Galileo Int'l Partnership v Tax Appeals Tribunal*, 31 AD3d 1072 [3d Dept 2006], *lv denied* 7 NY3d 715 [2006]; *Matter of Lincare, Inc.*). Included in those provisions must be consideration (*see* 20 NYCRR 526.7 [a]).

Contrary to the Division's position, petitioner has demonstrated that it had a valid lease with Richard LeFrak. 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. 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. 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. Additionally, in return for the aforementioned payments, consideration passed from petitioner, as the Lease allowed for Richard LeFrak to exclusively possess and maintain the Painting at his home (*see CLM Associates, LLC*, Tax Appeals Tribunal, February 12, 2018). Taking all of these facts together, petitioner has met its burden to demonstrate that a valid lease existed (*see Matter of EchoStar Satellite Corp. v Tax Appeals Tribunal*, 20 NY3d 286 [2012]).

E. Petitioner's case for an exemption falls short, though, when the transaction is examined in its entirety. In its answer, the Division stated that it determined that petitioner's purchase of the Painting "was not a purchase exclusively 'for resale as such.'" Whether a certain purchase is entitled to a resale exclusion or exemption requires that the taxpayer show that the purchase was made only for the purpose of resale (*see Matter of P-H Fine Arts v New York State Tax Appeals Trib.*, 227 AD2d 683 [3d Dept 1996], *lv denied* 89 NY2d 804 [1996];

see also Matter of Savemart Inc. v State Tax Commn., 105 AD2d 1001 [3d Dept 1984], *appeal dismissed* 64 NY2d 1039 [1985]; *Micheli Contr. Corp. v New York State Tax Commn.*, 109 AD2d 957 [3d Dept 1985]). In this matter, the evidence demonstrates that petitioner purchased the one-half interest in the Painting and subsequently leased it to Richard LeFrak. It is also clear, however, that petitioner identified itself in its refund application as a collector of fine art that occasionally enters into leases. Purchase of its interest in the Painting was consistent with the endeavor of art collection. Additionally, 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. Significantly, petitioner did not lose its status as an owner of the Painting, nor the inclusion of it in its own art collection based on the Lease. Petitioner simply gave up temporary possession, a situation it could end by terminating the Lease at any time. The mere proof that an intended purpose for the purchase of the Painting was resale is insufficient to obtain the exemption (*see Matter of P-H Fine Arts*). It must be the sole purpose for the purchase (*id.*). Instead, based on this record, which lacks any testimony or affidavits supporting petitioner's argument, and given the presumption of taxability, it must be concluded that at the time of petitioner's purchase of the Painting, it had two purposes for the acquisition – as an art collector and lessor. This conclusion does not mean that a collector could never purchase an item solely for resale and, thus, be privy to the exemption. Here, however, petitioner has 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.

F. Finally, in its reply brief filed on August 24, 2020, petitioner stated that it continued to believe that there were no unresolved factual matters in the case, requested notification by the

trier of fact if any facts remained unclear after briefing, and an opportunity to supplement the record accordingly. The Tax Appeals Tribunal has held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). The parties chose to proceed by submission without hearing pursuant to 20 NYCRR 3000.12, which specifically provides for the administrative law judge to establish a schedule for submission of all evidence and briefs. In this case, the deadline for petitioner to submit its documentary evidence was July 10, 2020, after the Division's evidence was submitted, at which point the record was closed. Meanwhile, at a minimum, petitioner was made aware of the substantive issues in this case from the Division's answer, dated July 18, 2018 (*see* finding of fact 21), well before the deadline for submission of any evidence. Petitioner's request runs contrary to the principles of *Matter of Schoonover* and must be denied.

G. The petition of Objet LLC is denied, and the refund claim determination notice dated April 14, 2017 is sustained.

DATED: Albany, New York
February 18, 2021

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE