ART & ADVOCACY

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Tax Considerations for Museum Websites

By Christopher Lanzillotta

Tax-exempt museums operating websites, especially those with on-line gift shops or catalogs, should be mindful of the potential tax issues associated with their websites.[1]

UBIT

Museums that are otherwise exempt from income tax under Section 501(c) of the Internal Revenue Code (the "Code") should be aware that income generated from their activities that are not substantially related to their tax-exempt purpose is subject to federal income tax under the Code's unrelated business income tax ("UBIT") rules.

Gift shop sales

Whether sales from gift shops are related to a museum's tax-exempt purpose, and thus whether UBIT applies to such gift shop sales, is decided by examining sales on an item by item basis. The determination of whether the sale of a particular item is related or unrelated to a museum's exempt purpose is beyond the scope of this article and can be complex due to the wide array of items offered by various tax-exempt museums, some of which inevitably fall outside any bright lines established in IRS guidance. As such, museums are advised to consult a tax professional for guidance regarding which gift shop sales may be subject to UBIT.

Example:

An art museum that is otherwise exempt from income tax operates a gift shop. Sales of posters featuring works of art displayed in the museum are not likely to generate income subject to UBIT, as sales of those items are deemed to further the museum's tax-exempt purpose. In contrast, sales of city souvenirs unrelated to the works displayed in the museum, such as miniature reproductions of the Empire State Building, often do generate income subject to UBIT, as those items often are not considered related to the tax-exempt purpose of the museum.

These same principles described above apply to a museum gift shop's on-line sales. As such, on-line gift shops should be operating with software sophisticated enough to clearly describe and segregate sales generated through their websites.

Advertising

UBIT is also likely to apply to advertising revenues generated when a museum permits a non-tax-exempt business to place an advertisement, via a banner or otherwise, on its website. This is true whether the museum and the non-tax-exempt business have negotiated a fixed fee for the advertisement or if the fee is dependent, in whole or in part, on sales generated via the advertisement (which is typically a link to the non-tax-exempt business's website).

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Tax Considerations for Museum Websites *(continued from page 1)*

Sponsorship

The UBIT rules typically allow a tax-exempt museum to acknowledge its corporate sponsors on the museum's website. However, an otherwise tax-free sponsorship payment could be subject to UBIT in several situations, depending on the particular arrangements between the museum and its corporate sponsors. For instance, if a museum's website provides a link to a corporate sponsor's website or if the sponsorship payment is dependent on how many users of the museum's website link to the sponsor's website, all or a portion of the sponsorship payment could be re-classified as advertising revenue subject to UBIT. UBIT consequences may also apply if a sponsor's link on a museum's website takes a user directly to a webpage selling the sponsor's goods or services.

Other issues

Aside from the UBIT issues discussed above with regard to a museum's website, museums and other tax-exempt entities should be wary of providing a link to any website that could jeopardize the tax-exempt status of the organization. This could include links to websites of political, partisan or lobbying organizations, which could cause the museum to be deemed to be devoting activity to influencing legislation or engaging in an activity meant to influence a public election.

In a similar vein, a museum should be wary when allowing other websites to use its name or logo, or link to the museum's website. The placement of such a logo, name or link could be seen as a museum endorsement of the particular organization or business, which could potentially jeopardize the tax-exempt status of the museum. Further, if the placement of the museum's logo, name or link on an outside party's website generates income for the museum, for instance, through the receipt of a percentage of sales, there are potential UBIT issues for the museum.

1 To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (and its attachments), unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any tax-related matter(s) addressed herein.

Herrick's International Art Law Group is sponsoring state of the art "Acoustiguide Opus Click" listening devices at the Neue Galerie. Neue Galerie is located in an area known as museum mile on Fifth Avenue in New York. The museum is devoted to early twentieth-century German and Austrian art and design.

New York Board of Regents Adopts New Rules Regarding Deaccessioning of Artworks

By Darlene Fairman

New rules for the deaccessioning of artwork by museums and historical societies chartered by the New York Board of Regents went into effect on June 8, 2011. Pursuant to a new amendment to § 3.27 of the Rule of the Board of Regents, such institution may deaccession an item from its collection, consistent with its mission statement and collections management policy, where the item:

1. is inconsistent with the mission of the institution;
2. has failed to retain its identity;
3. is redundant;
4. has preservation/conservation needs beyond the institution's capacity;
5. is deaccessioned to refine the collection;
6. is inauthentic;
7. is being repatriated or returned to its rightful owner;
8. is being returned to a donor whose donor restrictions can no longer be met;
9. presents a hazard to people or other collection items; and/or
10. has been lost or stolen.

Institutions must include in their annual reports a list of all items deaccessioned in the past year and all items disposed of in the past year.

Government Remedies Against Possessors of Stolen Art Objects

By Yael Weitz

In recent years, art theft has become a multibillion-dollar illegal economy, second only to drugs and arms smuggling.[1] In the international market, trade of illicitly obtained antiquities alone can generate as much as $25 million annually. One of the largest consumers of such looted property is the United States.[2]

The National Stolen Property Act

The United States has turned to the National Stolen Property Act (the "NSPA") as a way of combating this issue, using the law to both criminally prosecute those who possess,[3] sell, receive, or transport stolen goods valued at more than $5,000 that have either crossed a state or United States boundary line or moved in interstate or foreign commerce, and to render such objects open to forfeiture proceedings. Violations of the NSPA are punishable by fine and/or imprisonment for up to ten years. 18 U.S.C.A. §§ 2314–2315.

In order to fall under the purview of the NSPA, an object must qualify as "stolen." While the NSPA does not expressly define "stolen," the Supreme Court has broadly construed the term, explaining that "stolen" includes "all felonious takings. . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *United States v. Turley*, 352 U.S. 407, 417 (1957).[4]

In the first criminal conviction under the NSPA relating to an art object,[5] the Ninth Circuit further defined the term. The trial court in *United States v. Hollinshead*, which had convicted the defendants pursuant to § 2314 of the NSPA for the removal, importation, and sale of a pre-Columbian stele owned by Guatemala pursuant to its patrimony law, instructed the jury that "'[s]tolen' means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession given and with the intent to deprive the owner of the benefit of ownership." *Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974). On appeal, the Ninth Circuit upheld the court's instructions to the jury, thereby affirming that court's definition of the term.

In two subsequent related decisions involving trafficking of pre-Columbian artifacts into the United States from Mexico, the Fifth Circuit addressed the novel issue of whether "a declaration [of national ownership] combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play." *United States v. McClain (McClain I)*, 545 F.2d 988, 1001 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977). Relying on the fact that prior case law had expansively defined the term "stolen," the Fifth Circuit held that an "illegal exportation of an article can be considered theft, and the exported article considered 'stolen'" where the foreign nation makes a "declaration of national ownership." McClain I, 545 F.2d at 1000-1001. In other words, the NSPA would protect "ownership derived from foreign legislative pronouncements, even though the owned objects [may] have never been reduced to possession by the foreign government." *United States v. McClain (McClain II)*, 593 F.2d 658, 664 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

In *United States v. Schultz*, the court affirmed that the NSPA, in conjunction with foreign nations' cultural patrimony laws, allows federal agents to prosecute individuals for importing illegally excavated objects into the United States. In that case, the court held not only had a valid patrimony law in place, but also had demonstrated a clear declaration of ownership of all antiquities found in Egypt. *Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd* 333 F.3d 393 (2d Cir. 2003). On that basis, the federal district court convicted Frederick Schultz of conspiring to receive stolen property that was illegally exported out of Egypt and sentenced him to 33 months in prison. The Court of Appeals for the Second Circuit affirmed.

In *United States v. Portrait of Wally*,[6] the court similarly acknowledged that the term "stolen" "should be broadly construed." *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 252 (S.D.N.Y. 2009). The court explained: "determination of whether property is 'stolen' in the NSPA context depends on 'whether there has been some sort of interference with a property interest.'" *Wally*, 663 F. Supp. 2d at 252 (*quoting United States v. Benson*, 548 F.2d 42 (2d Cir. 1977)). Based on this definition, the court in Wally concluded that it was "undisputed" that the painting at issue had been stolen, and that "no reasonable juror" could find otherwise. *Wally*, 663 F. Supp. 2d at 253.

But this finding did not end the court's inquiry. Under the "recovery doctrine," an object that has been stolen may lose its status as stolen property for purposes of the NSPA if, "before the stolen goods [reach] the receiver, the goods [are] recovered by their owner or his agent, including the police." *Wally*, 663 F. Supp. 2d at 259 (internal quotations removed). In this case, the painting "Portrait of Wally" ("Wally") had originally been owned by Lea Bondi Jaray, a Jewish art dealer in Vienna. In 1939, Ms. Bondi Jaray's gallery was "Aryanized" by a Nazi agent, who also forced Ms. Bondi Jaray to give up Wally, which was part of her personal collection. After the War, Wally was recovered by U.S. Forces and returned to Austria. But Wally was mistakenly included with the artworks of another Jewish art collector, Heinrich Rieger, and became part of the Austrian National Gallery (the Belvedere) along with other Rieger works. The painting was later purchased by Rudolf Leopold from the Belvedere, and eventually became part of the Leopold Museum (the "Museum"). According to the Museum, Wally was no longer stolen property by the time it was shipped into the U.S. by the Leopold Museum. The Museum argued that Wally had lost its status as stolen property upon its recovery by the U.S. Forces after the War. Alternatively, the Museum argued that even if Wally was still stolen when recovered by the U.S. Forces, Wally would have lost its stolen status when returned to the Austrian Federal Office for the Preservation of Historical Monuments, or the Bundesdenkmalamt ("BDA").

The court rejected both of the Museum's arguments. First, the court noted that, after the War, the U.S. Forces recovered and seized all property of suspected war criminals, "regardless of whether [the property] was stolen, Aryanized, or legitimately acquired." *Wally*, 663 F. Supp. 2d at 260 (internal quotations removed). Thus, the U.S. Forces would have had no way of knowing whether the painting had been stolen property at the time of its seizure. In addition, the U.S. Forces had "no legal duty to return seized property to its true owner." *Wally*, 663 F. Supp. 2d at 260. Instead, they were merely required to sort the seized property and transfer it to the BDA. Consequently, the U.S. Forces lacked the requisite agency relationship with Wally's true owner for the recovery doctrine to apply. The court found that the same logic also precluded an "implied agency" between Ms. Bondi Jaray and the BDA. As with the U.S. Forces, the BDA did not know that Wally was stolen while it was in its possession. Moreover, the BDA had "divided loyalt[ies]" — the BDA often sought to keep artworks in Austria so

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that they could be placed in Austrian museums. The court thereby determined that Wally had retained its status as stolen property.

In addition to requiring that property qualify as "stolen" under the NSPA, the Government must also demonstrate that the defendant knew that he or she was dealing with unlawfully stolen or converted objects. Such knowledge may be imputed based on the facts and circumstances of the case. For example, in *Hollinshead*, although the defendant claimed he had no knowledge of Guatemalan patrimony laws, he had i) bribed Guatemalan officials to export the artifacts to a fish packing plant in Belize; ii) financed and arranged for the artifacts to be packed in his presence and marked "personal effects"; and iii) shipped the artifacts to his address in California. The Ninth Circuit upheld the defendant's conviction, noting that "[i]t would have been astonishing if the jury had found that [the defendant] did not know that the stele was stolen." *Hollinshead*, 495 F.2d at 1155; *see also United States v. Aleskerova*, 300 F.3d 286 (2d Cir. 2002) (upholding the conviction of Natavan Aleskerova for possession and conspiracy to possess and sell stolen art in violation of the NSPA; the defendant's clandestine activities, including covert meetings and conversations, established the requisite knowledge that the artworks were stolen).

{ Example of a Guatemalan stele }

The Civil Asset Forfeiture Reform Act

Generally, property is subject to forfeiture if it falls under one of the following three categories: i) contraband; ii) instrumentalities of a criminal offense; or iii) property constituting, derived from, or traceable to any proceeds obtained from criminal activity. *See* 18 USC § 981(a)(1). Federal civil forfeiture actions in the United States are governed by the Civil Asset Forfeiture Reform Act ("CAFRA"). CAFRA applies to all civil forfeitures initiated under any provision of federal law – including the NSPA – with the exception of a few federal laws explicitly exempted.[7]

Jurisdiction in civil forfeiture actions is based on in rem jurisdiction over the property, as opposed to personal jurisdiction over the parties. For property located within the United States, seizure brings the property within the control of the court, and forms the basis of the court's jurisdiction. *See United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005) ("The *sine qua non* of in rem jurisdiction is seizure, control or custody of the res"). Where property that is subject to forfeiture under United States law is located in a foreign country, or where the property has been "detained or seized pursuant to [a] legal process or competent authority of a foreign government," a district court may exercise original jurisdiction over that property. 28 U.S.C. § 1355(b)(2); *see also United States v. Certain Funds Contained in Account No. 600-306211-006*, 96 F.3d 20, 26 (2d Cir. 1996) (§ 1355(b) "is a procedural provision, designed to confer jurisdiction on the district courts to entertain forfeiture actions for property located overseas"). Property located in a foreign country may be subject to section 1355 jurisdiction regardless of whether the district court meets the traditional requirements of *in rem* jurisdiction. In particular, the district court may be able to exercise jurisdiction in such cases even where it does not possess the requisite control over the property. *See, e.g., United States v. All Funds in Account Nos. 747.034/278*, 295 F.3d 23, 26-27 (D.C. Cir. 2002); *Contents of Account No. 03001288 v. United States*, 344 F.3d 399, 405 (3d Cir. 2003); *but see United States v. All Funds on Deposit in any Accounts Maintained in the Names of Heriberto Castro Meza or Espranza Rodriquez*, 63 F.2d 148 (2d Cir. 1995) (holding that section 1355 does not eliminate the requirement that the district court exercise actual or constructive control over the property). Moreover, the jurisdiction established by 28 U.S.C. § 1355 is in no way affected by a foreign country's cooperation, or lack thereof, with the U.S. court. Although the foreign country in which the property is located is not required to effectuate U.S. judgments, this can only impact "the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders." *All Funds*, 295 F.3d at 27.

In any civil forfeiture action brought pursuant to CAFRA, the Government bears the burden of proof to show, by a preponderance of the evidence, that the seized property is subject to civil forfeiture. 18 U.S.C. § 983(c). The Government may timely file its civil forfeiture action either: i) within five years of discovering the alleged offense; or ii) within two years of discovering the involvement of the property in the alleged offense. 19 U.S.C. § 1621. Where the person in possession of the property is absent from the United States, or where the property is concealed, this period of absence or concealment should not be "reckoned within the 5-year period of limitation."19 U.S.C. § 1621(2).

Although the term "alleged offense" is not defined in 19 U.S.C. § 1621, courts have interpreted the term as "the alleged offense that gives rise to the civil forfeiture action." *United States v. 5443 Suffield Terrace*, 607 F.3d 504, 508 (7th Cir. 2010). Where there are multiple offenses that could each support a forfeiture of the same property, the statute only requires that one of the underlying offenses be timely — this is true even where the statute of limitations has run out on one or more of the other alleged offenses. For example, in *Suffield Terrace*, the Government brought an action for the civil forfeiture of the home of Richard S. Connors, who had been convicted of operating a Cuban cigar smuggling and distribution business. The Government first discovered the operation of Connors' cigar smuggling business on April 7, 1996, when U.S. Customs officials stopped Connors at the Canadian border and seized his cigars. Connors argued that the Government's action was time-barred: the Government did not file its action until March 2002, or about six years after the Government's initial discovery of the smuggling operation. The Government, on the other hand, argued that the relevant "alleged offense" was not the smuggling enterprise, which was discovered in 1996, but rather two specific instances of smuggling, one discovered in March 1997 and another in October 1999. Although the court agreed with Connors that the April 1996 seizure did constitute an alleged offense, it held that the March 1997 discovery of additional smuggled cigars constituted a "fresh alleged offense," which "reset" the statute of limitations to begin to run from that later date. Accordingly, the Government could proceed with its forfeiture claim based on the March and October alleged offenses.

Pursuant to 18 U.S.C. § 983(d), an "innocent owner" defense may defeat a civil forfeiture action under CAFRA. The party asserting the defense carries the burden of proof and must establish the defense by a preponderance of the evidence. 18 U.S.C. § 983(d)(1). As defined in the statute, an "innocent owner" with a property interest "in existence at the time [of] the illegal conduct" is one who either i) "did not know of the conduct giving rise to [the] forfeiture"; or ii) "upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A). Where the property interest is acquired *after* the conduct giving rise to the forfeiture has taken place, an "innocent owner" is one who, "at the time that [the] person acquired the interest in the property," was "a bona fide purchaser or seller for value" who either did not know, or had no reason to believe, that the property being acquired was subject to forfeiture. 18 U.S.C. § 983(d)(3)(A).

Non-CAFRA Forfeiture

Cases that are initiated for the forfeiture of stolen art objects are often brought pursuant to 19 U.S.C. § 1595a, a customs statute that authorizes the forfeiture of any merchandise that is "stolen, smuggled, or clandestinely imported or introduced" or attempted to be introduced into the United States "contrary to law." 19 U.S.C. § 1595a(c)(1); *see, e.g., United States v. Davis*, 2011 U.S. App. LEXIS 11356 (Feb. 2, 2011); *United States v. An Antique Platter of Gold*, 184 F. 3d 131 (2d Cir. 1999); *Wally*, 663 F. Supp. 2d at 251. As previously noted, CAFRA does not apply to civil forfeiture actions brought under Title 19 of the United States Code. As a result, different procedural provisions apply.

Unlike CAFRA actions, under § 1595a the Government bears a vastly reduced initial burden of proof, *i.e.*, that there is probable cause to believe that the object at issue is subject to forfeiture. Once the Government meets this initial burden, the burden shifts to the possessor of the property to establish by a preponderance of the evidence that the object was not stolen merchandise introduced into the United States contrary to law. *See Davis*, 2011 U.S. App. LEXIS 11356, at *7. For example, in *Davis*, the Government initiated a forfeiture action for a work of art that had been stolen from the Musée Faure in France and that was subsequently brought into the United States. The Government presented eyewitness testimony identifying the thief and established that the thief had sold the artwork to an individual in Texas. On this basis, the Government made a successful showing of probable cause as required under the statute. Thus, the burden then shifted to the possessor of the artwork to establish that it was not stolen merchandise brought into the U.S. contrary to law.

Another significant difference between section 1595a forfeiture actions and those brought pursuant to CAFRA is the unavailability of the innocent owner defense. As defined in CAFRA, "civil forfeiture statutes" do not include any provisions that were enacted as part of the Tariff Act of 1930. This exclusion, commonly known as the "customs carve-out," applies to § 1595a. Accordingly, the innocent owner defense, which is only available in CAFRA forfeiture actions, does not apply in forfeiture claims brought pursuant to § 1595a. See *Davis*, 2011 U.S. App. LEXIS 11356, at *22-*28.

Anti-Seizure Laws

Separate and apart from the innocent owner defense, certain objects are protected from seizure by the United States Government pursuant to the Immunity from Judicial Seizure statute, 22 U.S.C. § 2459. This statute provides that when "any work of art or other object of cultural significance is imported into the United States" from a foreign country for the purpose of temporarily exhibiting or displaying that object at a nonprofit "cultural or educational institution," that object will be granted immunity from seizure if the United States has "determined that [the] object is of cultural significance" and that the temporary exhibition or display of that object is "in the national interest." Stated plainly, objects of cultural significance that are imported into the United States for temporary display will be immune from seizure by Government authorities, if the United States has determined that the object is, in fact, culturally significant and that the exhibition is in the "national interest."

In order to obtain immunity from seizure for a cultural object, the borrowing institution must submit an application to the Department of State. That application must include, among other things: i) a list of all the imported items to be covered; ii) a copy of the agreement with the foreign owner or custodian of the object; iii) a statement by the applicant certifying that it has undertaken a "professional inquiry" into the provenance of the object, and that the applicant has no reason to know of any circumstances "that would indicate the potential for competing claims of ownership" over the object; and iv) a statement establishing the cultural significance of the object.[8] If the Department of State grants the application, it will publish a notice to that effect in the Federal Register. At that point, the cultural object is immune from seizure by United States Government authorities.

Certain states, such as New York and Texas, have also enacted anti-seizure statutes. These statutes have provisions similar to those in the federal Immunity from Judicial Seizure statute, but only protect such objects from seizure by the state, as opposed to federal, government authorities.[9] In New York, "any work of fine art" that is loaned from outside the state and that is en route to or from, or that is on exhibition at, a museum, college, or other nonprofit institution within New York State, is immune from seizure by local authorities. N.Y. Arts & Cult. Aff. § 12.03. Such seizure is prohibited even if a district attorney subpoenas the artwork pursuant to a criminal investigation into whether that object constitutes stolen property. *See People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 N.Y.2d 729, 732 (N.Y. 1999) (holding that the anti-seizure provisions of § 12.03 "encompasse[d] [the] subpoena duces tecum requiring [the] production of [Portrait of Wally]", even though the subpoena was "issued by the New York County District Attorney's office pursuant to a Grand Jury investigation into the theft of [the painting]"). Interestingly, following this Court of Appeals decision, New York's statute was temporarily

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amended so that "[n]o process of. . . any kind of *civil* seizure [could] be served or levied upon any work of fine art" while that artwork was on loan from outside of New York. Assemb. B. 9075, 1999-2000 Leg., 223rd Sess. (N.Y. 2000) (emphasis added). This meant that the anti-seizure provision would apply only in the context of civil litigation, but would allow artworks to be seized pursuant to criminal investigations. The amendment included a sunset provision, however, making the amendment ineffective as of June 1, 2002. Assemb. B. 11368, 2000 Leg., 223rd Sess. (N.Y. 2000).

Unlike the New York law, the anti-seizure statute in Texas does provide an exception for stolen works of art. Pursuant to that statute, fine art is protected while "en route to an exhibition or in the possession of the exhibitor or on display as part of the exhibition" in Texas, but the limitations on seizure do not apply "if theft of the work of art from its owner is alleged and found proven by the court."Tex. Civ. Prac. & Rem. Code Ann. § 61.081.

{ Henri Matisse stolen art }

The Cultural Property Implementation Act

In addition to pursuing criminal prosecutions and civil forfeiture actions as a means of tackling the illicit art trade, the United States has also made efforts to safeguard cultural property through the Cultural Property Implementation Act of 1983 ("CPIA"), 19 U.S.C. §§ 2601-2613. This law implements the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property — the world's first multilateral treaty to address the illicit trade in cultural property. Pursuant to the CPIA, the United States has entered into special bilateral agreements with 14 countries,[10] which allow the United States to enforce those countries' export laws and give the Government the power to seize and return undocumented archaeological or ethnological objects that were imported into the United States. Significantly, the CPIA allows the United States to seize such objects even without requiring proof of ownership pursuant to those countries' patrimony laws. The CPIA also provides for the emergency implementation of import restrictions for important objects that are shown to be "in jeopardy from pillage, dismantling, dispersal or fragmentation which is, or threatens to be, of crisis proportions," and where the application of import restrictions would reduce the incentive for such pillage. 19 U.S.C. § 2603. In addition, the CPIA bars the importation of any cultural object if i) the object is "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution"; ii) the institution is located in a country that has ratified, accepted or acceded to the UNESCO Convention; iii) the object was stolen from such an institution; and iv) the theft occurred either after the date at which § 2607 became effective on January 12, 1983, or after "the date of entry into force of the [UNESCO] Convention for the [country of origin]," whichever date is later. 19 U.S.C. § 2607.

As with the NSPA, objects that fall under the purview of the Immunity from Judicial Seizure statute are also exempt from seizure under the CPIA. The CPIA also provides a number of additional exemption provisions, which are narrow in scope. For example, one exemption provides that where an object that has been imported into the United States for temporary exhibition or display has been purchased in good faith for value and without notice that such material was imported in violation of the CPIA, and has been held for more than three consecutive years by a museum or similar institution, the object will not be subject to seizure for illegal importation if one of the following three requirements are met: i) the acquisition was reported in the museum's publication, a widely published newspaper with a circulation of at least 50,000, or a periodical or exhibition catalog "which is concerned with the type of article or materials sought to be exempted"; ii) the object has been publicly displayed for at least one year during the three-year period; and iii) the object has been cataloged, and the catalog was made publicly available, for at least two years during the three-year period. 19 U.S.C. § 2611(2)(A).

Conclusion

This article has highlighted some of the tools available to the United States Government in its fight against the illicit market for art and other cultural objects, as well as the protections it offers. Although the United States remains a major destination for stolen or illegally exported objects, these measures demonstrate the efforts by the United States to curb the illicit art market.

1 Bonnie Czegledi, *Crimes Against Culture Merit Serious Consequences*, 15 Can. Crim. L. Rev. 111 (2010).

2 Gabrielle Paschall, *Protecting Our Past: The Need for Uniform Regulation to Protect Archaeological Resources*, 27 T.M. Cooley L. Rev. 353, 357 (2010).

3 Possession refers not just to the initial receipt of an object, but to the continued possession of the object as well. If a museum acquires a work and later discovers it is stolen, the museum must divest itself of the object or face a violation of the statute. *See generally* Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. Rev. 123, 159 (2010).

4 *Turley* involved the National Motor Vehicle Theft Act, 18 U.S.C.S. § 2312. The definition in *Turley* is relevant to the NSPA because the NSPA was passed into law as an extension of the National Vehicle Theft Act and both statutes appear in the same chapter of the United States Code. *See* Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 Vand. J. Transnat'l L. 1199, 1206 (2005) [hereinafter Kreder].

5 Kreder at 1207.

6 Herrick, Feinstein LLP represented the Estate of Lea Bondi Jaray throughout the United States v. Portrait of Wally litigation.

7 CAFRA does not apply to civil forfeiture actions brought under Title 19 or to civil forfeitures brought under § 22 U.S.C. 401. Section 983(i) of Title 18 provides a list of all civil forfeiture provisions exempt from CAFRA.

8 U.S. Dept. of State, *Check List for Applicants, Statute Providing for Immunity from Judicial Seizure of Certain Cultural Objects (22 U.S.C. § 2459)*, http://www.state.gov/s/l/3196.htm (last visited June 20, 2011).

9 This protection from seizure also extends to objects that would otherwise be seized in actions initiated by private, non-governmental parties. *See, e.g.*, Ronen Sarraf, *The Value of Borrowed Art*, 25 Brooklyn J. Int'l L. 729, 736 (1999) (explaining that the New York statute was drafted so as to be "all inclusive").

10 U.S. Dept. of State, *Cultural Heritage Center*, http://exchanges.state.gov/heritage (last visited July 1, 2011).

IRS Requirements To Substantiate Value of Donated Artwork

by Christopher Lanzillotta

Introduction

Persons or organizations that donate art to museums or other tax exempt organizations and take a corresponding charitable contribution deduction on their federal income tax return should be aware of IRS requirements for substantiating the value of their donation.

Background

Section 170 of the Internal Revenue Code and the rules thereunder generally allow the "fair market value" of a qualifying charitable gift of artwork to be deducted by the donor on the donor's federal income tax return.[1] The American Jobs Creations Act of 2004 and the Pension Protection Act of 2006 (the "Acts") imposed new requirements relating to substantiating the value of donated artwork. Essentially, under the Acts, donations of works whose fair market value exceeds $5,000 require the donor to obtain a "qualified appraisal" of the donated work and to attach a summary of that appraisal to the donor's federal income tax return in the year of the donation. This summary is completed on Section B of IRS Form 8283 and requires the signatures of both the donor and the appraiser. In addition, the donor must maintain records relating to the donation.

For donations in excess of $500,000 and for artworks valued at greater than $20,000, the donor must also attach the qualified appraisal itself (and not just the appraisal summary) with the donor's federal income tax return.

The Acts provide that a "qualified appraisal" means one that is prepared, signed, and dated by a "qualified appraiser" (as described below) under generally accepted appraisal standards and in accordance with IRS regulations and guidance. Further, the appraisal must be made no earlier than 60 days before the contribution date and no later than the due date of the donor's federal income tax return for the year of contribution. The appraisal fee cannot be based on a percentage of the appraised value.

The IRS rules generally require an appraisal to, among other things: (i) describe the property and its physical condition; (ii) provide the appraised value of the work as well as how that value was calculated; and (iii) include information relating to the actual donation, such as the date of contribution and the terms of any agreement or understanding between the donor and donee relating to any restrictions on the donee's use of the property or any income generated from a later sale of the property.

A "qualified appraiser" generally means a person who has earned an appraisal designation from a recognized professional appraisal organization, regularly performs appraisals for compensation and demonstrates verifiable education and experience relating to the type of property being appraised. Further, the appraiser cannot have been prohibited from practicing before the IRS at any time in the previous three years and must be independent from both the donor and donee.

Donors who fail to attach either IRS Form 8283 or, if applicable, the qualified appraisal to their federal income tax return will still be allowed their charitable contribution deduction in some instances. Specifically, if the donor: (i) obtained a qualified appraisal in the time frame discussed above; (ii) can provide Form 8283 or, if applicable, the appraisal to the IRS within 90 days of it being requested; and (iii) can show that the failure to include the form or appraisal was due to a "good faith" omission, the IRS will typically allow the deduction.

Proposed Regulations

The IRS provided further guidance relating to the appraisal and appraiser requirements discussed above via Proposed Regulations issued in August of 2008. While Proposed Regulations are not technically effective until they are finalized, they represent the IRS's intended position with regard to an issue and as such, should be considered by a prudent donor when making a donation.

While the Proposed Regulations largely agree with the rules set forth in the Acts and discussed above, they contain some changes that require further compliance by donors and their appraisers. For instance, the Proposed Regulations define an appraisal conducted according to "generally accepted appraisal standards" as one conducted in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), as developed by the Appraisal Standards Board of the Appraisal Foundation.

Further, the Proposed Regulations provide that a "qualified appraiser" will meet the verifiable education requirement discussed above if the appraiser has either (i) successfully completed professional or college-level coursework in valuing the relevant type of property and has two or more years experience in valuing that type of property, or (ii) earned a recognized appraisal designation for the relevant type of property (for example, an MAI, SRA, SREA, or SRPA).

The Proposed Regulations also increase what a donor must do to substantiate a deduction when IRS Form 8283 or a qualified appraisal was not attached to the donor's federal income tax return in the year of the donation. Rather than the "good faith" omission standard discussed above, the Proposed Regulations require a donor to: (i) submit a detailed explanation that the failure to properly attach the required documents was due to "reasonable cause" and not "willful neglect"; (ii) obtain a contemporaneous written acknowledgment of the contribution from the donee; and (iii) obtain a qualified appraisal prepared by a qualified appraiser within the time frame discussed above.

Tax Planning

The donation of valuable artwork can serve to satisfy the philanthropic desire of a donor as well as a donor's tax planning desires. Donors need to consider that in order to enjoy the fullest extent of any available tax benefits that may flow from a donation of art, they must meet strict IRS technical requirements for substantiating the value of donations.

1 The amount of a donor's charitable deductions may be limited under the Internal Revenue Code depending on a donor's particular circumstances.

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Art Law Events

Recent Events Involving Herrick's Art Law Group

February 16, 2011
Howard Spiegler lectured on restitution issues at Sotheby's Institute of Art.

March 31, 2011
Larry Kaye and Howard Spiegler spoke at the Cardozo Art Law Society event, "Human Rights and Cultural Heritage: From the Holocaust to the Haitian Earthquake." Howard was the keynote speaker and Larry spoke on a panel entitled "Nazi Era Looted Art."

March 29, 2011
Howard Spiegler spoke on "Restitution of Nazi-Looted Art: Historical and Legal Overview and a Case Study" at the International Conference for Professionals Working with Holocaust Survivors. The event was held by Self Help Community Services — the leading United States organization established to assist Holocaust survivors — in association with UJA and the Jewish Claims Conference.

March 29, 2011
Herrick's Art Law Group hosted "A Toast to the Art World" at The Jewish Museum.

April 15, 2011
Howard Spiegler was a guest lecturer at NYU Law School.

April 22, 2011
Howard Spiegler was a guest lecturer for Columbia Law School.

April 29, 2011
Larry Kaye spoke at the Congregation Beth Israel Synagogue in Portland, Oregon, in connection with Yom HaShoah ("Holocaust Remembrance Day").

May 2, 2011
Larry Kaye was the featured speaker at The Rotary Club of New York celebration of Turkey at the Harvard Club where he spoke about the work our art law group has done in connection with Turkey and the repatriation of stolen antiquities.

May 19, 2011
Larry Kaye received the 2011 Lifetime Achievement Award from the Turkish American Business Forum.

May 25, 2011
Yael Weitz spoke at a World Union of Jewish Students alumni event hosted at Herrick.

June 23, 2011
Larry Kaye, Howard Spiegler (who is President of the Art Law Commission of the Union Internationale des Avocats (UIA)), and Charles Goldstein (who is Counsel to the Commission for Art Recovery) spoke at a symposium entitled "Holocaust Art Looting and Restitution" hosted by Christie's and the Art Law Commission of the UIA. The symposium — which took place in Palazzo Turati in Milan, Italy — convened leaders of the restitution community, as well as government officials, scholars, collectors, and other interested parties, for an in-depth discussion about Nazi-era looted art.

June 28, 2011
Darlene Fairman was a panelist at an event entitled "A Snapshot of Cultural Heritage Property Law" hosted by the Lawyers in Transition and Fine Arts Committees of the New York State Bar Association's Entertainment, Arts and Sports Law Section at the Sotheby's Institute.

For questions about *Art & Advocacy*, please contact the Editor-in-Chief:

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Additional information on Herrick's Art Law Group, including biographical information, news, and articles, can be found at www.herrick.com/artlaw.

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