ART & ADVOCACY

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New Shipping Requirements in Effect:

The Art World Reacts

by Yael Weitz

Priceless art just got a little bit pricier. As a result of recent terrorist scares involving FedEx and UPS shipments, art shippers have a new cause for concern. As if properly packaging high-end art were not nerve-wracking enough, art shippers now have to contend with the possibility that airport employees, who are not trained in handling art, will open their carefully constructed crates, exposing priceless artwork, such as Picassos and Calders, to new risks.

On October 29, 2010, two cargo packages containing powerful explosives were intercepted in Britain and Dubai after a tip from Saudi Arabia's intelligence service set off an international terrorism alert. The packages, which were addressed to synagogues or Jewish community centers in Chicago, were shipped from Yemen and had passed through four countries on at least four different airplanes before being identified.[1]

In response, the Obama administration moved to tighten air cargo security, demanding new inspections of "high risk" shipments headed to the U.S. on all-cargo flights. Officials did not define what would make a package high risk, although focus is likely to be on deliveries from countries where terrorists are known to operate and deliveries from an individual, unknown shipper.[2] The administration is also considering imposing increased notice requirements about the contents of shipments on cargo flights bound for the U.S. so that officials can request additional screening before a flight takes off. The current notice requirement is four hours before the flight is scheduled to leave.[3]

Although the new screening requirements are expected to bolster an area "long viewed by experts as a weak link in post-9/11 security procedures,"[4] the new requirements raise serious concerns for art shippers responsible for safeguarding art. The main concern is the possibility that airline employees will open carefully packaged crates and search them "the way checked baggage is sometimes searched now."[5]

As it is, cargo shipments carried on commercial passenger airplanes are subject to rigorous screening requirements recently imposed by the Transportation Security Administration. The screening requirements, which were put into effect on August 1, 2010, mandate that all items shipped as cargo on passenger airplanes must be screened, affecting roughly 20 percent of the total freight carried by air into and out of the U.S.[6]

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New Shipping Requirements in Effect *(continued from page 1)*

As a result of these requirements, as well as the possibility of increased screening on non-passenger airplanes, many large museums, including the Museum of Modern Art and the Metropolitan Museum of Art in New York, the J. Paul Getty Museum in Los Angeles, and the National Gallery in Washington, have enrolled in a federal program that allows them to create secure screening facilities within their buildings. The program, called Customs Trade Partnership Against Terrorism (C-TPAT), is a voluntary government-business initiative designed to strengthen the international supply chain and improve U.S. border security. In exchange for a more expeditious supply chain, U.S. Customs and Border Protection (CBP) asks businesses to ensure the integrity of their security practices by verifying the security guidelines of their business partners within the supply chain. Enrolling in C-TPAT provides a number of benefits, including reduced border delay times, priority processing for CBP inspections, and potential eligibility for the CBP Importer Self-Assessment program, among others.[7]

{ *Art shippers now have to contend with the possibility that airport employees, who are not trained in handling art, will open their carefully constructed crates.* }

While C-TPAT provides a useful option for larger museums, which typically plan exhibitions years in advance and have sufficient time to avoid shipping via passenger planes, the program is less effective for galleries and private dealers. Unlike large museums, small museums and galleries often put shows together more quickly, meaning that "a piece in New York needs to be in Zurich or Beijing the next day."[8] Furthermore, even large galleries are unlikely to set up their own secure facilities pursuant to C-TPAT because of space and resource requirements. As a result, smaller museums and galleries will likely rely on art-shipping companies that are certified screeners, adding time and potentially major costs to shipping art.

The new requirements also complicate the frequent involvement of anonymous parties in art transactions. For example, where an owner of artwork wants to remain unknown, and his dealer finds an overseas buyer, it will be nearly impossible for the owner to remain anonymous if he is the party in possession of the artwork at the time of the shipment. Currently, the government has instructed airlines to ensure that cargo comes only from known shippers, which includes those who have filled out paperwork or have been identified in other legitimate ways.[9] A shipment from an anonymous third party is considered an "unknown shipment," and that is subject to special handling and potential delays. John McCollum, the international shipping manager for Stebich Ridder International, an art-shipping company certified by the federal government to screen cargo, explains: "You're a dealer in San Francisco and you're trying to sell a piece that happens to be in a gallery in New York, and the buyer is in Paris, but the guy in New York, for all kinds of reasons, doesn't want anyone to know that he's the one selling the piece... It's going to be a mess."[10] As it stands, it will be nearly impossible for anonymous parties to remain anonymous without added cost and time.

Despite these obstacles, enrolling in the C-TPAT program, or using art-shipping companies that have done so, is an attractive option for those dealing in fine art. Pursuant to the C-TPAT initiative, such institutions and art-shipping companies inspect, crate, and mark artwork with special seals, locks, and tape themselves, thus significantly minimizing the chances of the artwork being rescreened by airline personnel. C-TPAT is available not only for air carriers, but also for all U.S. common carriers involved in importing goods into the U.S., including ocean vessels, railroads and trucks. This, at least, is some good news in a world where shipping requirements have become all the more stringent.

[1] Cargo Bomb Plot (2010), N.Y. Times, November 2, 2010, available at http://topics.nytimes.com/top/reference/timestopics/subjects/c/cargo_bomb_plot_2010/index.html?scp=4&sq=cargo%20terror&st=cse.

[2] Eric Lipton, U.S. Sets New Rules for Packages on Cargo Planes, N.Y. Times, November 8, 2010.

[3] Barry Meier and Eric Lipton, In Air Cargo Business, It's Speed vs. Screening, Creating a Weak Link in Security, N.Y. Times, November 1, 2010.

[4] Id.

[5] Randy Kennedy, New Rule on Cargo is Shaking Art World, N.Y. Times, February 13, 2010.

[6] Art World Worried About New Rule on Air Cargo, Homeland Security Newswire, February 16, 2010, available at http://homelandsecuritynewswire.com/art-world-worried-about-new-rule-air-cargo.

[7] See C-TPAT Overview, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml.

[8] Randy Kennedy, New Rule on Cargo is Shaking Art World, N.Y. Times, February 13, 2010.

[9] Id.

[10] Id.

Holocaust Art Restitution Litigation in 2010

By Yael Weitz and Waffiyah Mian

The year 2010 was an important and varied one for the restitution of looted art. Assertions of statutes of limitations and the Foreign Sovereign Immunities Act (FSIA) are highlighted in many of the year's cases, in addition to some novel issues addressed in the cases described below. Also, a number of important European decisions addressed the restitution of Holocaust-era art. Together, these cases provide an overview of the field as it was shaped in 2010.

Grosz v. Museum of Modern Art, 2010 WL 5113311 (2d Cir. Dec. 16, 2010)

In 2009, the heirs of the German expressionist artist George Grosz filed suit against the Museum of Modern Art (MoMA) after engaging in a series of discussions beginning in 2003 over title to three Grosz paintings. The artist, who was forced to flee Germany in 1933, left behind a number of works, which he consigned to his art dealer in Berlin, Alfred Flechtheim. According to the heirs, after Flechtheim's death in 1937, the Nazis subsequently took over Flechtheim's gallery.

In New York, a replevin claim against a good-faith purchaser does not accrue until a true owner demands its return and that demand is refused. According to the heirs, the museum did not "refuse" their demand until April 12, 2006, the date that MoMA's director rejected the heirs' demand in a letter. The district court, however, found that letters from MoMA to the heirs, coupled with the museum's retention of the paintings, constituted a refusal in 2003, even without an express statement by the museum. The case was, therefore, time-barred.

The heirs appealed to the Second Circuit, arguing that the district court misconstrued the settlement negotiations between the parties. Alternatively, the heirs argued that MoMA should be equitably estopped from using the statute of limitations as a defense because the heirs relied on the negotiations with MoMA in choosing not to file suit. The Second Circuit rejected the heirs' claims, both affirming the lower court and holding equitable estoppel to be inapplicable, since "[t]he mere existence of settlement negotiations is insufficient to justify an estoppel claim."

Museum of Fine Arts, Boston v. Seger-Thomschitz, 2010 WL 4010121 (1st Cir. Oct. 14, 2010)

In *Museum of Fine Arts*, Seger-Thomschitz demanded the recovery of a painting by Oskar Kokoschka, claiming to be the sole surviving heir of the painting's true owner, who allegedly sold the painting under Nazi duress in 1938. In response, the museum brought a declaratory action to affirm its ownership of the work.

On a summary judgment motion, the district court held that Seger-Thomschitz's claim was time-barred under the Massachusetts statute of limitations. Pursuant to Massachusetts law, where circumstances exist that prevent the plaintiff from reasonably knowing that she has been harmed, the state's three-year statute of limitations does not start to run until an event occurs that would put a reasonable person on notice of the possible injury. Even with the application of this "discovery rule," however, the court held that the claimant's family had sufficient notice of possible injury since the 1940s.

On appeal, Seger-Thomschitz argued that, even if the district court had correctly applied the discovery rule, the circumstances of her claim justified displacing the limitations period with a federal common law laches defense. Seger-Thomschitz also argued that the Massachusetts statute of limitations is in conflict with, and is preempted by, the federal government's foreign policy, which disfavors the application of rigid limitations periods to claims for Nazi-looted art. The First Circuit rejected Seger-Thomschitz's argument, holding that there is no express federal policy disfavoring rigid timeliness requirements and, even if there were, the Massachusetts statute of limitations would not be preempted.

Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010); petition for certiorari filed 2010 WL 5324003 (U.S. Dec. 21, 2010) (No. 10-839)

The possessor of another Oskar Kokoschka painting also brought a declaratory judgment action, seeking to preempt Seger-Thomschitz's claim that the painting was looted by the Nazis. The plaintiff had been in possession of the painting in Louisiana for more than 30 years. Under Louisiana's civil code, a party in possession of movable property for 10 years becomes the owner of that property, even where possession was acquired in bad faith. Where the injury relates to stolen art, the court must consider whether the claimant diligently tried to recover her art.

The Louisiana district court held that the possessor had acquired valid title to the work. The court rejected Seger-Thomschitz's argument that Louisiana law should be supplanted to ensure compliance with the goals of the Holocaust Victims Redress Act, which provides that "all governments should undertake good faith efforts to facilitate the return of the private... property, such as works of art, to their rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule."

In her appeal to the Fifth Circuit, Seger-Thomschitz extended her argument as she did in the case against the Museum of Fine Arts, contending that the state's laws are preempted by U.S. foreign policy. As the First Circuit did in the Museum of Fine Arts case, the Fifth Circuit rejected Seger-Thomschitz's argument. The court emphasized that Louisiana's laws are "well within the realm of traditional state responsibilities." A petition for writ of certiorari to the Supreme Court is pending in this case.

(story continues on page 4)

Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010), petition for certiorari filed 78 USLW 3629 (U.S. Apr. 14, 2010) (No. 09-1254)[1]

In 2007, Marei von Saher, heir of noted Jewish art dealer and collector Jacques Goudstikker, initiated an action against the Norton Simon Museum of Art and the Norton Simon Art Foundation for the return of two monumental images of Adam and Eve by Cranach the Elder. The paintings had been part of Goudstikker's gallery in the Netherlands, and were looted by Herman Goering just days after the Nazi invasion of Holland. The California district court dismissed the action, finding that a 2002 California law that extended the statute of limitations for claims brought for the recovery of Nazi-looted art against museums and galleries was unconstitutional.

{ Austrian painter Oskar Kokoschka (1886–1980) poses in front of one of his works. Certain of Kokoschka's paintings were the subject of Holocaust art restitution cases in 2010. }

Affirming in part, the Ninth Circuit found that by failing to limit the statute's scope to museums and galleries located in California, the state legislature had enacted a law that did not address a traditional state interest. On this basis, the court determined that the statute was preempted by the federal government's foreign affairs power. The Ninth Circuit, however, ruled that von Saher could replead under the general California statute of limitations for stolen cultural property. Von Saher filed a petition for rehearing, but the petition was denied. The Ninth Circuit stayed the issuance of its mandate pending a petition by von Saher for a writ of certiorari to the Supreme Court. On October 4, 2010, the Supreme Court issued an order inviting the Acting Solicitor General to file a brief expressing the views of the U.S. on the matter.

Bakalar v. Vavra, 619 F.3d 136 (2d Cir. N.Y. 2010)

In *Bakalar*, the district court applied Swiss law to the sale of an Egon Schiele drawing that the plaintiffs claimed was looted by the Nazis. The drawing was sold by a Swiss gallery to a New York gallery. Applying the traditional "situs rule," the district court held that since the transaction occurred in Switzerland, Swiss law should apply, giving the New York gallery good title to the drawing. Unlike the U.S. rule, which provides that even a good-faith purchaser cannot acquire valid title to stolen property, Swiss law permits title to transfer to a good-faith purchaser.

On appeal to the Second Circuit, the court rejected the application of the situs rule in favor of an "interest analysis." Pursuant to this analysis, the circuit court held that New York's interest in ensuring that it did not become a haven for stolen property overrode any interests Switzerland may have had in the transaction. The circuit court also highlighted the fact that the drawing's presence in Switzerland was fleeting; the property left the country almost as soon as it was purchased by the New York gallery. The Second Circuit vacated the lower court decision, holding that New York law, not Swiss law, should govern. The case was remanded to the district court for further proceedings.

In Re Flamenbaum, 899 N.Y.S.2d 546 (N.Y. Sur. Ct. 2010)

In *In Re Flamenbaum*, the Vorderasiatisches Museum in Germany sought the return of a thirteenth-century gold tablet in possession of the estate of Riven Flamenbaum. In 1913, the tablet was discovered during an excavation by German archaeologists in northern Iraq and thereafter was displayed at the Vorderasiatisches Museum. After World War II, an inventory by the museum revealed that the tablet was missing. Eventually, the tablet came into the possession of Riven Flamenbaum, a Holocaust survivor, who brought the tablet with him when he emigrated to New York in 1949. Upon Flamenbaum's death in 2006, a dissatisfied heir contacted the museum and disclosed the tablet's where-abouts, and the museum initiated its claim for the tablet's return.

The facts showed that the missing tablet was never reported to legal authorities or listed on any international art registries, even after the museum learned that the tablet had been seen in the hands of a New York art dealer in 1954. The museum also failed to locate the missing tablet after the reunification of Berlin, an event that, the court noted, would have alleviated any potential political and financial constraints imposed under Soviet rule. Moreover, the museum's delay prejudiced the plaintiffs such that the death of Flamenbaum precluded any means of determining the accurate provenance of the tablet. Based on these findings, which demonstrated a lack of requisite diligence, the museum's claim was barred by the doctrine of laches, despite having established a timely claim under the statute of limitations.

Cassirer v. Kingdom of Spain, 2010 U.S. App. LEXIS 16707 (9th Cir. Cal. Aug. 12, 2010); petition for certiorari filed (U.S. Dec. 10, 2010) (No. 10-786)

Cassirer involved a dispute over the ownership of a Pisarro painting that a Nazi agent allegedly confiscated in Germany. After a series of transfers, the painting was eventually purchased by Baron Hans-Heinrich Thyssen-Bornemisza, who sold his entire art collection to Spain in 1993. The plaintiff initiated an action, naming Spain and the Thyssen-Bornemisza Collection Foundation, an instrumentality of Spain, as defendants. The defendants invoked the FSIA, 28 U.S.C. § 1605, as a defense to the claim. Under the FSIA, foreign states are immune from the jurisdiction of U.S. courts, unless one of the enumerated exceptions to the law applies. One such exception provides that where property has been expropriated in violation of international law, a foreign state will not be immune where the rights to such property are at issue. In *Cassirer*, the court considered for the first time whether this exception should apply where the foreign government involved in the litigation was not the entity that expropriated the property in violation of international law.

The district court determined that the defendants should not be immune from suit, even though Germany, not Spain, was responsible for the looting. The court explained that the FSIA only requires an unlawful taking, but not necessarily by the holder of the property at the time of the suit. The decision was affirmed on appeal to the Ninth Circuit. The appeals court also held that an exhaustion of remedies is not required as a prerequisite to jurisdiction under the FSIA, but left open the possibility that a court could, in its discretion, impose an exhaustion requirement in connection with a determination on the merits. A petition for writ of certiorari to the Supreme Court is pending.

Agudas Chasidei Chabad v. Russian Federation, 2010 U.S. Dist. LEXIS 78552 (D.D.C. July 30, 2010)

Chabad v. Russian Federation is another case that discusses both the expropriation exception and exhaustion under the FSIA. The claimants in *Chabad* sought the return of thousands of religious books, manuscripts, and other materials that had been seized by the Soviet Union from Agudas Chasidei Chabad. The district court held that the expropriation exception precluded the defendant's immunity from suit under the FSIA. The court also held that Chabad was not required to exhaust Russian domestic remedies before bringing the action in the U.S. because the remedy provided under Russian law—the right to purchase the property, instead of restitution of the property—would be inadequate.

The district court's decision allowed the case to proceed in a U.S. court. In a unique turn of events following the district court's decision, Russia announced that it would no longer participate in the lawsuit. Consequently, on July 10, 2010, the district court issued an opinion ordering a default judgment against Russia, essentially reaffirming findings from prior decisions in the case. It is still unclear whether the claimant will be able to enforce a judgment against Russia.

Freund v. Societe Nationale des Chemins de Fer Francais, 2010 U.S. App. LEXIS 18717 (2d Cir. Sept. 7, 2010)

In the third case to tackle the issue of sovereign immunity, Holocaust survivors and their heirs brought suit against the Republic of France, the French national railway, and the French national bank seeking compensation for the expropriation of their personal property during forced railroad deportations to holding camps in France and Nazi concentration camps. The district court held that all of the defendants were immune from suit under the FSIA. The plaintiffs appealed only the lower court's decision as to the French national railway.

On appeal, the Second Circuit affirmed, explaining that whereas the complaint alleged that the national bank was the depository for the funds looted from the Jews, there was no basis for finding that the national railway retained any of this property. Under the FSIA, stolen property or any property exchanged for such property must be owned or operated by the defendant in order for the expropriation exception to apply. 28 U.S.C. § 1605(a)(3). Accordingly the railway was immune from suit under the FSIA.

Alperin v. Vatican Bank, 365 Fed. Appx. 74 (9th Cir. Cal. 2010)

In the fourth case to discuss the FSIA, survivors and descendants of victims of the Holocaust sued the Vatican Bank for allegedly profiting from assets looted by the Nazi-supported Croatian Ustasha Regime. After finding that the Vatican Bank was a foreign sovereign, the district court examined whether one of the FSIA exceptions applied. The district court determined that neither the expropriation exception nor the commercial activity exception applied.

The Ninth Circuit upheld the district court's decision on both grounds. The expropriation exception could not apply because the plaintiffs failed to allege that the property allegedly taken had a jurisdictional nexus to the U.S. at the time of the suit, and that it was presently owned by the Vatican Bank. The commercial activity section could not apply because the acts allegedly carried out by the defendants, including the Vatican Bank's purported trade in the U.S. market of gold that was enhanced by the Ustasha Treasury, were too tangentially related to be considered the basis for the suit.

The Ninth Circuit denied a petition for panel rehearing and rehearing en banc, and further ordered that no additional petitions for rehearing or rehearing en banc be filed.

(story continues on page 6)

De Csepel v. Hungary, Complaint (D.C. July 27, 2010) (No. 1:10-cv-012161)

The most recent restitution case involving the FSIA is *De Csepel v. Hungary*, currently pending before the District Court for the District of Columbia, in which the heirs of Baron Mor Lipot Herzog are seeking the return of more than 40 works of art held by the Hungarian government since the end of World War II.

The heirs allege that, despite years of negotiations and international appeals for the return of the artwork, the Hungarian government has refused to return the items from the Herzog collection. The heirs also allege numerous violations of international customary and treaty law that may preclude the Hungarian government from asserting immunity under FSIA, including: (i) the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, ratified by the U.S. and Hungary, under which the government's seizure of the art collection constitutes an act of genocide; and (ii) the 1947 Treaty of Peace between Hungary and the Allies, which gives the Hungarian government only a custodial interest in the artworks, with ownership rights remaining with the true owner. Among their claims, the heirs have also demanded a full accounting of all the looted art from the Herzog collection held by Hungary, making this the first time a request of this nature has been made in an art restitution suit. The Hungarian government filed a motion to dismiss the case on February 16, 2011.

Netherlands Restitutions Commission, Recommendation RC 1.96

In May 2010, the Dutch Restitution Commission recommended the return of a Jan Brueghel painting to the estate of Dr. Max Stern, a prominent Jewish art gallery owner who was forced to sell his artwork to escape Nazi persecution in Germany. Stern was forced to auction the majority of his collection for a fraction of the works' fair market value, and then use a substantial portion of those funds to pay the escape tax imposed by the Third Reich and obtain an exit visa for his mother. Although Stern was able to set up another gallery in England, he was forbidden to trade in Germany, had no place of business, and had limited capital. After World War II, the Brueghel painting was returned to the Netherlands and was displayed at the Noordbrabants Museum. The Commission determined that, while it was difficult to conclude precisely how Stern lost possession of the painting, the circumstances under which the painting was sold were "so menacing and dangerous" as to be deemed a duress sale.

Netherlands Restitutions Commission, Recommendation RC 1.99

In October 2010, the Dutch Restitution Commission also recommended the return of a Jan van de Velde II painting to the heirs of Curt Glaser, a noted German art historian of Jewish descent who was forced to auction his extensive art and book collection in order to escape Nazi persecution. In recommending the return of the painting, which was housed in the Rijksmuseum as part of the Dutch national art collection, the Commission concluded that Glaser lost possession of the painting involuntarily, because the proceeds from the auction of his artwork were used to fund his flight from Germany to the U.S. The Commission also found that any prior compensation provided to the heirs by the German government was not an impediment to their restitution claim and did not require the heirs to pay the original purchase price of the painting, since the funds were used to escape Nazi persecution.

U.K. Spoliation Advisory Panel Decision, 2009

In contrast to the above cases, the U.K. Spoliation Advisory Panel did not recommend returning eight drawings currently in possession of the Samuel Courtauld Trust to the heirs of Curt Glaser. The drawings were bequeathed to the Courtauld in 1978 by Count Antoine Seilern of Austria, who had purchased the paintings at an auction of Glaser's collection in 1933. The panel found that Glaser sold the collection not only because of Nazi persecution, but also because of the death of his wife. As a result of this finding, the panel determined that Glaser's mixed motivations weakened the moral strength of the restitution claim. The panel also concluded that Glaser was able to sell the works at reasonable market prices and that prior compensation by the German government acted as a further barrier to returning the artwork to the heirs.

Glaser's heirs are currently seeking reconsideration of the panel's recommendation. They have provided supplemental evidence in the form of expert reports that further highlight the extent and severity of Glaser's persecution under the Third Reich. The additional evidence also provides a more detailed analysis of the depressed sales prices from the auction of Glaser's collection and shows that only a minimal portion of the prior compensation by the German government is attributable to the artwork at issue. Moreover, the new evidence indicates that if the drawings are restituted pursuant to German law, the compensation would be returned to the German government. As a result, the heirs allege that the German government's compensation for the collection should not prevent restitution. It remains to be seen whether the new evidence will persuade the panel to alter its initial recommendation.

Conclusion

The cases decided in 2010 demonstrate that although World War II ended more than 65 years ago, to this day the U.S. and Europe are still developing the laws necessary to determine the rights of claimants and possessors of Nazi-looted art.

[1] Herrick, Feinstein LLP represents the plaintiff in this action.

Bartering with Art—Tax Implications[1]

By Michael Kessel and Michael Zargari

With barter transactions and exchanges on the rise, artists now have greater opportunities for bartering their works in return for goods or services. While bartering can be a great form of payment, artists should be aware that when they barter, they are entering into taxable transactions with potential income tax and sales tax consequences.

Bartering Services

Pursuant to federal income tax laws, when an artist receives goods or services in exchange for his services, the fair market value of the goods or services received by the artist is included in his gross income.

Example:

A painter agrees to give painting lessons to an accountant in exchange for tax return preparation. The income tax law treats the transaction as: (1) the performance of painting lessons by the artist for a fee (the fair market value of the tax return preparation services); and (2) the performance of tax return preparation services by the accountant for a fee (the fair market value of the painting lessons). As such, the fair market value of the painting lessons is taxable to the accountant, and the fair market value of the tax return preparation is taxable to the painter.

{ While bartering may be a great form of payment, artists should be mindful that they are entering into taxable transactions. (Phoenicians Bartering with Early Britons, copy of a painting by Frederic Leighton in the Royal Exchange (1895)) }

The fair market value of services that the artist receives in a barter transaction is the price typically charged by the party performing such services. Generally, the value of those services is included in the artist's gross income when performed.

Bartering Artwork

Pursuant to federal income tax laws, when an artist receives goods or services in exchange for his artistic creations, the fair market value of the goods or services received by the artist is included in his gross income.

Example:

An auto mechanic acquired a painting created by an artist in return for providing the artist with auto repairs. The painting and the auto repairs are each worth $500. The income tax law treats the transaction as two sales: (1) the sale of artwork by the artist for $500; and (2) the provision of auto repairs by the mechanic for $500. The fair market value of the auto repairs is taxable to the artist, and the fair market value of the painting is taxable to the mechanic.

If the painting were instead worth $600, then the auto mechanic would be treated as having received $600 for the auto repairs and the artist would be treated as having received $500 for the painting.

As stated above, the fair market value of goods or services received by an artist in a barter transaction is the price typically charged by the party performing such services. Therefore, the artist's taxable gain on the deemed sale of the artwork is determined by subtracting the artist's adjusted tax basis in the object bartered from the fair market value of the goods or services received by the artist in the exchange. The artist's adjusted tax basis in such object is likely a minimal amount (e.g., the cost of canvas, paints, paper and other supplies to the extent not already deducted as a business expense), so the artist's taxable gain will often be equal or close to the fair market value of the goods or services received.

Sales Tax

The barter of goods or services may also be subject to state and local sales tax.[2] While each state may have different rules, such as exemptions for certain occasional sales and non-taxable services, in general, sales tax liability for barter exchanges is calculated on the value of the goods or services given in trade.

In New York, for example, if an artist trades a painting with a fair market value of $500 to an auto mechanic in exchange for auto repairs valued at $500, the painter is treated as a purchaser of the auto repairs and owes sales tax on the receipt of the auto repairs based on the value of the painting provided to the mechanic as payment. The painter is also treated as having sold the painting and, as the seller, must collect sales tax from the mechanic based on the value of the auto repairs received from the mechanic.

[1] To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, 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.

[2] This article serves as a general introduction to the sales tax imposed by New York on barter exchanges of artwork. To determine your specific exposure to a particular jurisdiction's sales tax liability, you should consult with an adviser familiar with such jurisdiction's rules and your particular circumstances.

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Art Law Events

Herrick in the News

November 15, 2010
Larry Kaye received the Distinguished Alumnus Award from the International Law Society of St. John's University in recognition of his outstanding work in international law and art litigation.

November 18, 2010
Bay Area Reporter. Larry Kaye was quoted in "Reclaimed: Paintings from the Collection of Jacques Goudstikker at the CJM," which also notes our representation of the heirs of Jacques Goudstikker.

Fall/Winter 2010
Cultural Heritage & Arts Review. An article adapted from Howard Spiegler and Yael Weitz's article "The Ancient World Meets the Modern World: A Primer on the Restitution of Looted Antiquities" was published.

December 1, 2010
The New York Times. A letter by Howard Spiegler and Larry Kaye to the editor of the travel section was published. They commented that as lawyers who have spent more than 10 years helping the families of Holocaust victims recover Nazi-looted art, they welcomed the article "In Paris, on the Trail of Art Looted by Nazis" that ran in the November 21, 2010, issue, but were surprised that it did not mention that there is still an enormous number of artworks that have not been returned to their rightful owners.

February 13, 2011
The New York Times. A letter by Charles Goldstein, Herrick attorney and Counsel to Commission for Art Recovery, to the editor was published. Charles commented on an article regarding Russia's announcement that it will withhold temporary art loans to American museums because the art might be seized to enforce a U.S. district court's Holocaust restitution judgment. He states that this is a ploy to use art loans as diplomatic weapons against our country, and that Russia should not blame Holocaust victims seeking to recover Nazi loot for Russia's predicament.

Recent Herrick Events Involving Herrick's Art Law Group

November 19, 2010
Larry Kaye and Howard Spiegler spoke at the New York County Lawyer's Association's Third Annual Art Litigation and Dispute Resolution Institute.

December 2, 2010
Herrick and Royal Bank of Canada co-sponsored a series of events at the Miami Basel Art Fair, at which Larry Kaye and Howard Spiegler spoke.

January 24, 2011
Howard Spiegler spoke on a panel entitled "Holocaust-Looted Art—Recent Case Developments" at the annual meeting of the Entertainment, Arts and Sports Law Section of the New York State Bar Association.

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

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