OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION
of
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HONORABLE W. W. DUNLOP, EXECUTIVE SECRETARY OF THE STATE BOARD OF EQUALIZATION, has requested an opinion on the following questions pertaining to the assessment of nursery stock, consisting of growing plants and their products which are the subject of the Assessor's Handbook entitled "Assessment of Nursery Stock (AH 567)," adopted in January 1974 by the State Board of Equalization.

1. Does the term "growing crops" found in Article XIII, section 1, of the Constitution of California include all plants that are planted, sowed, or harvested annually, whether or not such plants are classified botanically as annuals?

2. Does the term "growing crops" apply to ornamental plants produced by nurserymen or is it confined to plants which produce food or fiber for human consumption or use?

3. Does the growing crop exemption apply to tomato and other similar plants grown for the purpose of sale to nurserymen or grown by nurserymen for sale to their customers?

4. Does the term "growing crops" include cultivated grasses raised for sale as lawn or the root stock of perennial plants which, as an industry practice, is destroyed annually following removal of its products?

5. Is it correct for tax purposes to classify nursery plants as land or personal property, depending on whether they are grown in the land or in soil placed in a container, regardless of the size of the container?

(a) Would your answer to Question 5, as it relates to containerized plants, be different if the containers were such that the soil in them connects directly with the underlying land; i.e., the containers have sides but no bottoms?

6. Does the inventory exemption contained in Revenue and Taxation Code section 219 apply to plants raised but not sold by nurseries, provided the plants produce a product that is held for sale?

7. When an assessor values land used to grow perennial plants on the basis of a higher and better use, is it appropriate for him to add value because of the presence of the perennials?

The conclusions are:

1. The exemption of "growing crops" provided for in Article XIII, section 1, of the Constitution of California extends to those plants which require an annual planting or sowing, or an annual harvesting. Where a specie of plant must be treated as an annual because of climatic conditions or the physical characteristics of the plant, it is a "growing crop" while growing on the grower's lands even though such plant is technically classified botanically as a perennial.

2. The "growing crops" exemption is not limited to plants which produce food or fiber for human consumption or use but extends to certain ornamental plants. The term "growing crops" does not, however, apply to ornamental plants grown by a nursery for sale as living plants, i.e., for transplanting by the customer. An ornamental may qualify if it is grown for its products, such as cut flowers or seeds, if it is not grown for sale as a living plant and it meets the test described in Conclusion 1.

3. The "growing crops" exemption does not apply to nursery plants grown for sale, even though such plants as tomatoes become exempt in the fields of farmers who buy the plants and grow them for the purpose of harvesting tomatoes.

4. Cultivated turf grasses which are raised for sale as lawn are perennials and, therefore, are not "growing crops" within the meaning of Article XIII, section 1, of the Constitution of California. Section 202.1, Revenue and Taxation Code, is therefore invalid. Such grasses are personal property and should be taxed in the same way as other nursery plants grown for sale and transplanting. The annual destruction of the root stock of perennial grasses or other plants is not the deciding factor in determining whether the plant is an annual or a perennial.

5. As indicated in our answer to Questions 2, 3, and 4, nursery plants grown for sale are personal property whether they are grown in the ground or in raised beds or containers. Plants which are not grown for sale and transplanting but are grown for their products are to be classified as land if grown in the ground or in beds where the soil is in direct contact with or by outward appearance is in contact with the underlying land, whereas plants raised in containers or in beds elevated above the ground are to be classified as personal property for purposes of ad valorem property taxation.

6. The "business inventory" exemption provided for in section 219 and as defined in section 129, Revenue and Taxation Code, does not apply to plants not held for sale, whether annual or perennial. The harvested products thereof are, however, entitled to the exemption. The

exemption is likewise applicable to nursery plants held for sale as living plants by nurseries, which plants are subject to taxation as personal property.

7. Where land used to grow perennial plants is assessed on the basis of a higher and better use, it would be improper to add value because of the presence of perennial plants. If, however, nursery use is the highest and best use of the property, or the property is in a state of transition from nursery farm use to urban. use, then the value of perennial plants may properly be reflected in the value of the land, whether the comparative sales approach or the income approach, or a combination of both, is utilized by the assessor.

ANALYSIS

In January 1974 the State Board of Equalization adopted a new handbook as part of its_ Assessors' Handbook series entitled "Assessment of Nursery Stock (AH 567)." This handbook was. adopted by the Board, after hearings, over objections by one county assessor and several industry representatives. The California Assessors Association also took exception to certain aspects of the publication, but agreed it should be adopted with the understanding that it was subject to change, depending on this office's response to the questions here presented. Basically, the objections and exceptions referred to concern the proper definition of the term "growing crops" found in Article XIII section 1, of the Constitution of California, the Board's recommended classification as personal property of plants grown in raised artificial beds that are so constructed as to prevent the contents from contacting the ground, and the Board's recommendation that root stock held by a nursery for the production of flowers or plants and certain supplies not passed on to the customer are not eligible for the inventory exemption even though the products grown (cut flowers, seeds, etc.) are held for sale. The questions presented are of statewide interest and importance and require definitive answers so that there will be certainty in the assessment of the plants which are the subject of the handbook.

In drafting the new handbook, the Board was faced with a number of difficult problems. Among these were the demands of the industry for equitable treatment and the insistence by the assessors that the handbook be consistent with a number of court decisions handed down since 1879, when the "growing crops" exemption was first adopted. These decisions have separately considered some of the problems discussed in this opinion. Accordingly, in the course of this opinion each of these authorities which the protagonists of various points of view have cited in support of their positions or have attached on one ground or another will be considered. In addition, the Legislature has not provided an all-inclusive definition of "growing crops." See§ 202, Rev. & Tax. Code.[1] Rather, it has recently adopted section 202.1 (Stats. 1974, ch. 157; SB 1499, Berryhill) which purports to include "turf grass which is cultivated and harvested for sale and transplanting" as a new category of growing crop. The problem presented to the Board in drafting the handbook and to this office in furnishing an opinion is to attempt to reconcile the cases, prior administrative practice, and section 202.1 so as to come up with conclusions which are as consistent as the authorities permit.

As a matter of terminology, the Board has stated in AH 567 page 1 that:

[1] All section references in this opinion are to the Revenue and Taxation Code, unless otherwise specified.

"For the purpose of this handbook the term 'nursery stock' includes (1) plants that are cultivated and propagated for sales, (2) plants that are cultivated and propagated to produce products which are sold, and (3) products of the producing plants."

I

This section of the opinion will discuss the "growing crops" exemption. Article XIII, section 1, of the Constitution of California exempts "growing crops" from ad valorem property taxation. This exemption was included in the original section in 1879. While section 202 of the Revenue and Taxation Code recognizes the growing crops exemption, the Legislature has not adopted any broad definition of growing crops. Indeed, until Statutes 1974, chapter 157, was enacted on April 4, 1974, as an urgency statute to take effect immediately, there was no definition of growing crops, either in the statute or the Constitution itself. For a discussion of this fact, see 40 Ops.Cal.Atty.Gen. 91 (1962); Stribling's Nurseries, Inc. v. County of Merced, 232 Cal.App.2d 759 (1965), construing former section 30.3 of the Agricultural Code (now section 23 of the Food and Agricultural Code). Because of this situation, a series of cases have over the years sought to define the meaning of the growing crops exemption. Soon after the adoption of the 1879 Constitution, the Supreme Court of California considered the meaning of the term "growing crops" as used in Article XIII, section 1, in the case of Cottle v. Spitzer, 65 Cal. 456 (1884). The decision in that case followed the well-recognized rule that exemptions from taxation are to be strictly construed, which rule was more particularly enunciated in such later cases as Cypress Lawn C. Ass'n. v. San Francisco, 211 Cal. 387, 390 (1931); Cedars of Lebanon Hosp. v. County of L.A., 35 Cal.2d 729, 734 (1950); and Westminster Memorial Park v. County of Orange, 54 Cal.2d 488, 494 (1960). In so doing, the Supreme Court in Cottle adopted the opinions of two judges of the Superior Court in that action. In Judge Spencer's opinion there were quoted several definitions of "crop" as defined in the standard and law dictionaries of the time. See pages 457-458; see also page 461, where Judge Spencer quoted similar dictionary definitions.

In denying the exemption to fruit trees, Judge Spencer pointed out that the word "crop" would include the fruit grown on the trees but that it could not be affirmed, wihout serious contradiction, to include the trees themselves. (id. p. 458.) The court further pointed out that:

" … By the very terms of the Constitution, the exemption of crops from taxation is temporary, and only continues during its growing state…" (Id. p. 459)

and that

"…, 'in relation to the single item of 'growing crop,'… it is not sufficiently tangible to be treated as property; it is in a transitory state, starting with the embryo and ending with the matured product, at no two consecutive points of time in the same condition'…" (Id. p. 460.)

In Judge Belden's concurring opinion, it is clearly established the the term "growing crops" has the meaning that it had at the time it was framed by the constitutional convention and ratified by the people. In concurring in the conclusion that the term did not include growing trees

and vines, he stated that the Legislature then understood the term "crop" to cover "that which in ordinary husbandry was to be severed from the land when utilized." (Id. pp. 461-462.) Judge Belden then stated the oft-cited definition of "growing crops" that has been followed to this day:

> "The term 'growing crops' includes only those crops which require an annual planting or sowing, or an annual harvesting." (Id. p. 463.)

In so concluding, Judge Spencer further stated:

> "'To again extend through the courts and by implication, these exemptions, is to defeat the clearly-expressed will of the people declared in their Constitution, and reinstate the original grievance.'" (Id. p. 464.)[2]

Later, in 1894, Article XIII, section 12 3/4, was added to the Constitution to exempt "Fruit and nut trees under the age of four years from the time of planting in orchard form, and grape vines under the age of three years from the time of planting in vineyard form." See also§§ 105 and 223, Rev. & Tax. Code. Section 223 was added in 1967 to provide for the exemption of fruit trees, nut trees, and grapevines of a grower which are held as personal property on the lien date for subsequent planting in orchard or vineyard form and are planted during the assessment year. Section 223 expressly excludes plant nurseries from this additional exemption of personal property. The Legislature may, of course, exempt any and all kinds of personal property from taxation under the authority of Article XIII, section 14, of the Constitution. It cannot, of course, exempt anything that is real property or extend tax exemptions of real property, which may include plants growing in the earth, beyond the meaning of the Constitution. See 40 Ops.Cal.Atty.Gen. 91, 92, supra, and the authorities there cited.

The definition of "growing crops" laid down by Cottle v. Spitzer, supra, 65 Cal. 456 (1884), as including only those crops which require an annual planting or sowing, or an annual harvesting, has been followed in a number of cases. In Miller v. County of Kern, 137 Cal. 516 (1902), it was held that alfalfa plants, which are perennials not native to California and which remain in the ground for an indefinite number of years, are not growing crops within the meaning of the constitutional exemption. The court also listed raspberry and blackberry vines, asparagus, and celery as being in the same category.

In Jackson & Perkins Co. v. Stanislaus County Board of Supervisors, 168 Cal.App.2d 559 (1959), the court held that rose bushes raised by a nursery for a period of one or two years for sale as plants are not growing crops, since "there is no annual sowing or reaping, the purpose of planting being that they may later be transplanted." (Id. p. 563.) Following the analogy to trees growing in a nursery discussed in Story v. Christin, 14 Cal.2d 592 (1939), a conversion case involving nursery trees, the court held that nursery stock has the characteristics of personal property which should be taxed as such, the same as the stock of merchants which is assessed annually. Finally, the court pointed out in the Jackson & Perkins case at page 564:

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[2] For a further history of the growing crops exemption, see Stimson, "Exemption From the California Property Tax." 21 Cal. Law Rev. 193 (1933): Report of the Senate Interim Committee on State and Local Taxation, Part 2, A Legal History of Property Taxation in California, Division I, Property Subject to Taxation, pp. 10-13; Division II, Property Exempt From Taxation, pp.66-68 (1951).

"It appears also that according to administrative interpretation nursery stocks have been consistently taxed as personal property and as not being within the exemption of 'growing crops.' The county assessor of Stanislaus County testified that so long as he had been in office, a period ranging back to 1948, he had, in accordance with the directions in the 'Assessor's Handbook' so taxed nursery stock."

In Stribling' s Nurseries, Inc. v. County of Merced, 232 Cal.App.2d 759 (1965), the court reaffirmed the notion that plants produced by nurseries for sale in the ordinary course of business are personal property. The court also stated that the term "growing crops" does not include growing nursery stock unless it meets the Cottle test of annual planting or sowing, or harvesting. Id., p. 762. This case is the only authority which seems to suggest that nursery stock classified as personal property might at the same time constitute a "growing crop" within the meaning of Article XIII, section 1. We will discuss this latter question further in responding to Questions Nos. 2 and 3.

Other cases involving the growing crops exemption include El Tejon Cattle Co. v. County of San Diego, 64 Cal.2d 428 (1966), which held that natural grasses which do not require annual or seasonal planting are not "growing crops" but are more appropriately likened to alfalfa, a perennial plant, which was held to be part of the land in Miller v. County of Kern, supra, 137 Cal. 516 (1902).

The administrative construction of the growing crops exemption by the State Board of Equalization as reflected in the earlier handbook entitled "Taxation of Nursery Stock, AH 038," issued on March 27, 1950, is in accord with the foregoing authorities. With respect to nursery stock, it was concluded at page 5 that the better practice was not to consider such stock as within the growing crops exemption. Like the case authorities herein discussed, the Board's approach has been consistent with the rule requiring strict construction of tax exemptions. Accordingly, the prior handbook indicates at page 7 that the practice has been to treat nursery stock growing in the fields as personal property except for those fruit and nut-bearing and ornamental trees and vines which are defined as improvements in section 105 of the Revenue and Taxation Code. Nursery stock growing in soil removed from the land and placed in pots, boxes, or other receptacles was classified as personal and not real property and, therefore, was taxable as personal property. Packaged seeds, bulbs, garden equipment, and a variety of other things which are not in the category of growing nursery stock were likewise classified as personal property.

In response to Question No. 1, it appears that the courts have not been called upon to consider whether plants which are classified botanically as perennials but which are as an agricultural industry practice treated as if they were annuals are growing crops within the meaning of the Constitution. It has been stated in the Assessors' Handbook AH 567, at page 2, that "when, as an industry practice, a perennial plant is removed annually following the harvest of its crop, the plant should be exempted along with the crop." This view would appear to be correct to the extent that the industry practice demonstrates the necessity for an annual planting or sowing, or an annual harvesting. Where a particular specie of plant must be treated as an annual by California farmers because of climatic conditions or the physical characteristics of the plant itself, we are of the view that it is a "growing crop" while growing on the grower's lands

even though such plant is technically classified botanically as a perennial. For example, tomato vines are classified botanically as perennials and are so treated in other countries, but are regarded as annuals in California because of climatic conditions. Tomatoes are planted or sown annually and are destroyed at the end of the growing season since they do not last beyond the first hard frost in the fall. Moreover, such plants are usually physically spent after one season and must be destroyed in order that a new crop may be planted the following year. This reasoning does not apply, however, to plants which are not grown for harvesting at all but are grown for sale by nurseries as living plants for transplanting. Nor would it apply to perennial plants not grown for sale as living plants which are for convenience or economic reasons destroyed at the end of the season. The fact that there may be an industry practice to destroy the remaining plants and root stock, either because they were not seasonably sold or because the grower can more profitably start new plants from bulbs, seeds, or cuttings, which plants will be sold during the following year, would not serve to make the plants "growing crops" within the meaning of the Constitution. This is particularly true where there is no element of harvesting, or the plants are personal property held for sale as living plants, as discussed in our answer to Question No. 2, or there is no necessity for destroying the plant other than the fact that it is no longer readily salable. In other words, just because the nursery industry finds it convenient or profitable to destroy a perennial plant at the end of the growing season does not mean that they have met the Cottle v. Spitzer test.

This is not to say that the consistent practice of the California agricultural industry as a whole should not be examined in a particular case. Such practice may evidence the fact that a particular specie of plant must be treated as an annual because of its nature or because the environment requires an annual planting, sowing, or harvesting. If this is so, such plant should be exempted as a "growing crop" while growing on the grower's lands even though it may be botanically classified as a perennial.

Question No. 2 arises because at least one assessor does not believe that ornamental plants can ever be "growing crops." There is no doubt, however, that nursery farms are and always have been a part of the agricultural industry. See§§ 22, 23, and 24, Food and Agricultural Code. While these sections do not confer tax exemption (40 Ops.Cal.Atty.Gen. 91, supra; Stribling's Nurseries Inc. v. County of Merced, supra, 232 Cal.App.2d 759 (1965)), the nursery farms which grow ornamental plants are subject to at least some of the same hazards as other farms. Information provided by the Department of Food and Agriculture shows that nursery farmers account for about five percent of the total agricultural receipts of this state. Much of this nursery business is from annual plants which are sold for the value of the plant itself.

It has been argued that the "growing crops" exemption is limited to annual plants which produce food or fiber for human consumption or use. We find nothing in the language of Article XIII, section 1, of the Constitution, or the authorities which construe it, that would limit "growing crops" to such plants. It is apparent that all plants are given some use by humans, even if that use is purely ornamental. On the other hand, we cannot ignore the past administrative practice and judicial authority by extending the exemption to all ornamental plants produced by nurseries. "Nursery stock" grown for sale as living plants for many years has been regarded as personal property not within the exemption of growing crops. Jackson & Perkins Co. v. Stanislaus County Board of Supervisors, supra, 168 Cal.App.2d 559, 564 (1959); Assessors'

Handbook AH 030, supra, p. 5. It seems clear that ornamental plants raised by nurseries for sale as living plants are never "harvested" within the criteria set forth in Cottle v. Spitzer, supra, but rather are sold for transplanting. The fact that the nursery may plant or sow new nursery plants every year or may sell off certain plants every year does not mean that such plants are growing crops within the meaning of the Constitution. In Black's Law Dictionary, Fourth Edition, harvesting is defined as "The gathering of crops of any kind" citing Cooke v. Massey, 38 Idaho 264, 220 P. 1088, 1091 (1923). The Random House Dictionary of the English Language (1966) defines harvest as "l. the gathering of crops. 2. the season when ripened crops are gathered. 3. a crop or yield of one growing season. 4. a supply of anything gathered at maturity and stored: a harvest of nuts, …--v.1. 10. to gather a crop; reap. …" Webster's Third New International Dictionary defines harvest as "l: the season for gathering in agricultural crops… 2a: the act or process of gathering in a crop (the hay-) … 3a: a mature crop of grain or fruit … b: the quantity of any natural product gathered usu. from a single area within a single season, … vb. la to gather in (a crop): REAP … v.i. to gather in a food crop … " Moreover, in Cooke v. Massey, supra, after quoting additional authority as to harvest, the court said:

> "'Agricultural pursuit may therefore properly include every process and step taken and necessary to the completion of a finished farm product.
>
> "The courts may take judicial notice in a general way of the time or season for the sowing or planting, maturity, and the harvesting or gathering of crops. 23 C. J. 156. Harvesting is the time when crops of grain or grass are gathered, also the gathering of crops of any kind. 29 C. J. 214. … " (220 P. at 1091.)

In considering the treatment to be given ornamental plants, particularly nursery plants grown for resale as living plants, consideration should be given to the past administrative and judicial construction of the growing crops exemption to ornamental plants. As pointed out by the Supreme Court of California in County of Sacramento v. Hickman, 66 Cal.2d 841, 851 (1967):

> "… When for more than 60 years a statute has been construed in a consistent manner by the administrative agencies charged with its enforcement, and the practice has been consistently acquiesced in by the Legislature and recognized by the courts, its language comes to the Constitution clothed in that special meaning. It is too late to return, as respondent urges, to the literal sense of the words used; to strip them of their acquired connotation at this late date would be arbitrarily to deny the experience of all the preceding years."

We conclude, therefore, as did the court in Jackson & Perkins that nursery plants grown for resale which are ornamental in nature are not within the growing crops exemption. On the other hand, those annual plants (or those which are required to be treated as annuals) which are not grown for sale but which are raised for the products they produce, which may range from cut flowers to seeds and bulbs and other derived products, are growing crops while growing on the lands of the grower even though they may technically be classified as personal property due to their being grown in containers or beds raised above the ground. In this regard, see section II, infra, in which the classification of plants as land or personal property is discussed.

As pointed out in Stribling's Nurseries, Inc. v. County of Merced, supra, 232 Cal.App.2d 759 (19b5) at page 760, the Legislature could no doubt exempt from taxation plants produced for sale by nurseries under its general authority to exempt personal property from taxation (art. XIII, § 14, Const. of Calif.). But this does not mean that nursery stock held for sale as living plants is a "growing crop within the meaning of Article XIII, section 1. We will discuss the application of the Legislature's power under Article XIII, section 14, somewhat further in connection with Question No. 4 relating to cultivated turf grass and Question No. 6 relating to the business inventory exemption.

The third question poses a difficult problem for two reasons. First, there is the dicta referred to above in the Stribling's Nurseries case, appearing at 232 Cal.App.2d, p. 762, which suggests that "growing crops" does not include nursery stock "unless it meets the Cottle test of annual planting or sowing or an annual harvesting. Second, there is the problem raised by the fact that the same plant once sold and planted by a farmer who intends to harvest a crop of tomatoes or other fruits or vegetables is exempt as a "growing crop," whereas the Assessors Handbook, AH 567, page 4, excludes plants which are grown for sale as a plant by the nursery grower when it is in his hands on the lien date.

We do not believe that the dicta referred to above in the Stribling's Nurseries case can be taken as authority for exempting such nursery plants as tomatoes and other similar fruits and vegetables grown for the purpose of sale by nursery growers to their customers. The actual holding of the Stribling's Nurseries case is that former section 30.3, Agricultural Code (now section 23, Food and Agricultural Code), did not serve to extend, by implication, the meaning of the term "growing crops" found in the Constitution and in section 202, Revenue and Taxation Code. That decision refers to and affirms the prior opinion of this office, No. 62/168, published in 40 Ops.Cal.Atty.Gen. 91 (1962), supra. The language of the Stribling's Nurseries case cannot be extended by implication to exempt nursery plants which are grown for sale, in view of the holding that they are not crops in Jackson & Perkins Co. v. Stanislaus County Board of Supervisors, supra, l68 Cal.App.2d 559. As indicated above, we do not mean to imply that a growing crop can never be personal property in the hands of the grower. What we are saying is that when nursery plants are in the hands of the grower, held for sale by him for transplanting as living plants, they are not growing crops but are personal property which falls outside the "growing crops" exemption. Indeed, as personal property these plants become subject to the business inventory exemption (§§ 129 and 219, Rev. & Tax. Code, discussed infra, in response to Question No. 5). While it has been argued that nurserymen are subject to many of the same problems as ordinary farmers, i.e., plant diseases, blights, drought, etc., we think that there is a reasonable basis for different classifications between them where the business of a nursery is raising the plants for sale, whereas the business of farmers and other growers is to plant, raise, and harvest the crops produced from the plants. In our view it is for this reason that section 219 includes the stock in trade of nurseryman as "business inventories," whereas there is no reason to further exempt growing crops in the hands of the farmer since they are not taxable at all prior to harvest. While the language of sections 129 and 219 is not without ambiguity, the inclusion of "animals and crops held primarily for sale or lease" in section 129, which defines the term "business inventory," suggests that the business inventory exemption was intended to cover items of personal property not already covered by the growing crops exemption. We see no intent on the part of the Legislature to further exempt property that is already exempt, but we do

see a clear intent to grant a partial tax benefit to the businessman who would otherwise enjoy no exemption. Rule 133 (18 Cal.Adm. Code, Rule 133) bears out this intent and, as a contemporaneous administrative construction of sections 129 and 219, is entitled to great weight. Coca Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921 (1945); L.A.J., Inc. v. State Board of Equalization, 38 Cal.App.3d 549, 552-554 (1974).

> "… if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body."

Rible v. Hughes, 24 Cal.2d 437, 445 (1944); see also: Henry's Restaurants of Pomona, Inc. v. State Board of Equalization, 30 Cal.App.3d 1009 (1973); General Electric Co. v. State Board of Equalization, 111 Cal.App.2d 180, 188 (1952).

Question No. 4 requires consideration of the validity of section 202.1, Revenue and Taxation Code, as added by Statutes 1974, chapter 157 (also known as SB 1499, Berryhill, 1973-74 Legislative Session). While section 202.1 was not enacted at the time of the opinion request, it became law on April 4, 1974, pursuant to an urgency clause and it purports to be applicable to the 1974-75 assessment roll. Thus, there is no way to avoid construing section .202.1 and passing on its constitutionality under Article XIII, section 1 of the Constitution.

Section 202.1 provides:

"For purposes of the exemption from taxation specified in Section 1 of Article XIII of the Constitution and Section 202, 'growing crops' includes turf grass which is cultivated and harvested for sale and transplanting."

Without doubt, the legislative construction of a constitutional provision must be given due weight in light of the available authorities and precedents. However, as pointed out in 40 Ops.Cal.Atty.Gen. 91, 92, supra, the Legislature is without power to extend tax exemptions to real property, which would include certain plants growing in the earth, beyond the meaning of the Constitution. See Pasadena University v. County of Los Angeles, 190 Ca. 786, 788 (1923); Foster Shipbuilding Co. v. County of Los Angeles, 54 Cal.2d 450, 456 (1960); 8 Ops.Cal.Atty.Gen. 72 (1946); 31 Ops.Cal.Atty.Gen. 17 (1958). We must, therefore, determine whether "turf grass which is cultivated and harvest for sale and transplanting" is real property, whether it is a "growing crop," or whether it is personal property grown for sales and transplanting.

Turf grasses, with a few exceptions, are perennials. Assessors' Handbook, Assessment of Nursery Stock, AH 567, pp. 30-31. Turf grass which is cultivated and harvested for sale and transplanting directly to lawns is grown in fields especially prepared for the purpose and, at the time of transplanting, the vegetative portion of the grass and about one inch of the soil are removed by means of a machine that cuts or peels off a layer of grass, root stock, and earth, following which it is cut in sections, rolled up and transported to the customer for prompt transplanting before the exposed roots die from exposure to the air or from drying out. See photograph in the Sacramento Union, page 1, June 27, 1974. While there is a shade of distinction between nursery plants grown by nurseries for sale and transplanting and turf grass which is

grown for sale and transplanting, the distinction is in law without a difference. A turf grower is simply another kind of nursery grower. This is a relatively new industry, but we see no legal difference between a turf grower and a nursery grower. We are, therefore, of the opinion that turf grasses raised for such purpose cannot properly be regarded as a "growing crop" for two reasons. First, perennial plants which do not require an annual sowing or planting, or an annual harvesting, are not growing crops. Secondly, as hereinbefore discussed, plants which are grown for sale and transplanting are personal property and are taxable as such. It follows that section 202.l cannot be given any effect since it purports to extend the "growing crops" exemption to something that is not a growing crop. If the Legislature desires to exempt turf grass as personal property under the authority conferred on it by Article XIII, section 14, of the California Constitution, it will have to do so in a more specific manner. In the meantime, it appears that such turf grasses would be entitled to the business inventory exemption, the same as nursery plants grown for sale as living plants.

In view of our answer to Question No. 1, the annual destruction of the root stock of perennial grasses by the turf grass farmer is not the deciding factor in determining whether the plant is an annual or a perennial. As stated above, we are of the opinion that turf grass is a perennial, both in the hands of the grower and in the hands of his customer who buys it and transplants it to make a lawn. Indeed, if the purchaser of turf grass were to find that his lawn was an annual when he expected to have a permanent lawn, his disappointment would be great. The foregoing does not, of course, apply to certain annual grasses which are in any event annually sown, such as poa annua, which dies out completely in the wintertime and is regrown in the following season from seed.

II

This section of the opinion will discuss the classification of nursery plants as land, improvements, or personal property for purposes of valuation.

Article XIII, section 2, of the Constitution of California provides:

> "Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value." [Original section, Constitution of 1879.]

In this regard, sections 104, 105, and 106, Revenue and Taxation Code, provide:

104. "'Real estate' or 'real property' includes:

> "(a) The possession of, claim to, ownership of, or right to possession of land.
>
> "(b) All mines, minerals, and quarries in the land, and all rights and privileges appertaining thereto.
>
> "(c) Improvements."

105. "'Improvements' includes:

> "(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.
>
> "(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age."

106. "'Personal property' includes all property except real estate."

Under the above definitions the classification of nursery plants as land, improvements, or personal property will depend on how they are grown and the type of plant involved. For example, it has been held that a strawberry plant, which is a perennial, is land when grown in the ground by a farmer and is not a "vine" within the definition of improvements contained in section 105, subdivision (b). County of Monterey v. Madolora, 171 Cal.App.2d 840 (1959). We have previously adverted to other cases holding that such things as alfalfa plants grown in the ground by a farmer are not "growing crops" but are simply part of the land. Miller v. County of Kern, supra, 137 Cal. 516 (1902). The Board has followed the theory of these cases, concluding that "nursery stock meeting all of the following criteria is to be classified as land and is neither stock-in-trade nor a 'growing crop':

> "1. The plants may be growing in the open or under cover of structures such as greenhouses or shadehouses either in the ground or in a raised bed. The raised bed may or may not have side boards, but the soil in the bed must connect directly with the ground or have all the outward appearances of being so connected.
>
> "2. The plants must not be intended for sales; however, their crops, such as cut flowers, seeds, cuttings, or other products, may be.
>
> "3. The plants must be perennials by nature and by usages." AH 567, p. 5.

On the other hand, following Jackson & Perkins Co. v. Stanislaus County Board of Supervisors, supra, 168 Cal.App.2d 559, the Board has concluded AH 567, pp. 5-6):

> "… that all nursery-grown plants which are intended to be sold in the ordinary course of business as living plants should be classified as personal property."[3]

In addition, the Board has stated that "nursery plants which are not intended for sale but are grown to produce crops such as cut flowers, seeds, etc., must be classified as personal property if they are grown for a period in excess of one year and are grown in any type or size of container which is severed from the ground or in raised beds whose outward appearance discloses that they are not connected to the ground. The fact that the containers may be of a size

[3] An exception would be those few instances where a nursery has annual vegetable plants grown for the purpose of harvesting (severing from the soil) and selling the mature vegetable. Those qualify as a 'growing crop.'" [Footnote by the Board.]

and weight sufficient to make movement difficult does not exclude the plants and containers from the personal property category." (AH 567, p. 6; emphasis added.)

This office agrees with these conclusions. They are in harmony with the court decisions cited above and with Rules nos. 121-124 (18 Cal.Adm. Code, Rules Nos. 121-124) which further define land, improvements, and personal property. Rule 121, adopted December 12, 1967, effective January 18, 1968, provides:

> "Land consists of the possession of, claim to, ownership of, or right to possession of land; mines, quarries, and unextracted mineral products; unsevered vegetation of natural growth; standing timber, whether planted or of natural growth; and other perennial vegetation that is not an improvement (See section 122). Where there is a reshaping of land or an adding to land itself, that portion of the property relating to the reshaping or adding to the land is land. However, where a substantial amount of other materials, such as concrete, is added to an excavation, both the excavation and the added materials are improvements, except that whenever the addition of other materials is solely for the drainage of land to render it arable or for the drainage or reinforcement of land to render it amenable to being built upon, the land, together with the added materials; remains land. In the case of property owned by a county, municipal corporation, or a public district, however, fill that is added to taxable land is an improvement."

In addition, Rule 122 and 123 (Title 18, Cal.Adm. Code, Rule 122 and 123), which were adopted at the same time, provide:

> "Rule No. 122. Improvements
>
> "Improvements consist of buildings, structures, fixtures, and fences erected on or affixed to land; planted fruit and nut trees and vines that are taxable, other than date palms between four and eight years of age; and planted ornamental trees and vines. Where a substantial amount of materials other than land, such as concrete, is added to an excavation, both the excavation and the added materials are improvements, except that whenever the addition of other materials is solely for the drainage of land to render it arable or for the drainage or reinforcement to land to render it amenable to being ,built upon, the land, together with the added materials, remains land. In the case of property owned by a county, municipal corporation or a public district, fill that is added to taxable land is an improvement.
>
> "Rule No. 123. Tangible Personal Property
>
> "All property that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses, except land and improvements, is tangible personal property."

The fact that a raised bed has sides but no bottom, where the soil in the planter is in direct contact with the ground or by outward appearance rests on the ground, would not make the plants therein any of the less land. See Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, at 397 (1946), indicating that the assessor is entitled to rely on the intent that is manifested by outward appearances. On the other hand, if the bed or container is raised above ground level so that the soil therein does not rest on the ground or appear to do so, the plants therein must be classified as personal property, there being no way the plants could be classified as land or improvements (unless the plants are fruit bearing or ornamental trees or vines, not of natural growth, within the meaning section 105, subdivision (b)).

III

This section will consider the application of the inventory exemption to plants raised but not sold by nurseries.

The inventory exemption from taxation is found in section 219, Revenue and Taxation Code, which provides in pertinent part:

> "Business inventories shall be assessed for taxation at the same ratio of assessed to full cash value as the ratio specified in Section 401. … For 1974-1975 fiscal year and fiscal years thereafter, 50 percent of the assessed value of such property shall be exempt from taxation, and such exemption shall be indicated on the assessment roll. … The board shall prescribe all procedures and forms required to carry this exemption into effect and to insure accurate data for reimbursement calculations."

The term "business inventories" is defined in section 129, Revenue and Taxation Code, as follows:

> "Business inventories' shall include goods intended for sale or lease in the ordinary course of business and shall include raw materials and work in process with respect to such goods. 'Business inventories' shall also include animals and crops held primarily for sale or lease, or animals used in the production of food or fiber and feed for such animals.
>
> "'Business inventories' shall not include any goods actually leased or rented on the lien date nor shall 'business inventories' include business machinery or equipment or office furniture, machines or equipment, except when such property is held for sale or lease in the ordinary course of business. 'Business inventories' shall not include any item held for lease which has been or is intended to be used by the lessor prior to or subsequent to the lease." (Emphasis added.)

It is apparent that in enacting this exemption, the Legislature by limiting the exemption to "goods intended for sale in the ordinary course of business," including raw materials and work in process, intended to partially exempt only those items of personal property held for sale by manufacturers, wholesalers, and retailers. This it may do under the express provisions of Article

XIII, section 14, paragraph 4, of the Constitution of California. By including crops held for sale or lease, we must assume that the Legislature did not intend to include "growing crops" not yet severed from the soil which are 100 percent exempt. In construing this exemption, the Board in Rule 133 (1.3 Cal. Adm. Code Rule No. 133) has limited the exemption to "tangible personal property, whether raw materials, work in process or finished goods, which will become a part of or are themselves items of personalty held for sale or lease in the ordinary course of business." "Goods intended for sale or lease'" is further defined as meaning "property acquired, manufactured, produced, processed, raised or grown which is already the subject of a contract of sale or which is held and openly offered for sale or lease or will be so held and offered for sale or lease at the time it becomes a marketable product." Under these definitions, a crop which has been severed from the ground and is being offered for sale would qualify as "business inventory" held for sale. Indeed, subdivision (F)(2) of Rule 133 provides:

> "(2) The term 'crops' means all products grown, harvested, and held primarily for sale, including seeds held for sale or seeds to be used in the production of a crop which is to be held primarily for sale. It does not include growing crops exempted pursuant to Article XIII, section 1, of the California Constitution or fruit trees, nut trees, and grapevines exempted by section 223 of the Revenue and Taxation Code." (Emphasis added.)

In the context of the statute and the regulation, it is apparent that Question No. 6 must be answered in the negative: the business inventory exemption does not apply to plants raised but not sold by nurseries, even though the products of those plants when harvested may be entitled to the exemption. Any other approach would result in exempting a number of plants which must be classified as land. Until harvesting occurs, there is no basis for applying the exemption.

IV

In this section of the opinion, there is presented the question of valuation of land used to grow perennials.

In considering the problem raised in Question No. 7, the State Board of Equalization has taken the following approaches in the Assessors' Handbook, "Assessment of Nursery Stock, AH 567," at pages 20-21:

> "a. Sales Approach
>
> > "If sales of land planted to perennials are available, these should be considered after adjusting each price for the value of any exempt growing crop that may be a part of the sale. On the other hand, when the best comparable sales relate to land that contains no perennial root stock, the appraiser must decide whether the appraisal subject's best immediate and long-term usage is for growing nursery stock. If it is concluded that nursery use is the highest and best use, the perennial root stock adds to the value of the bare land an amount approximating the cost of establishing the root system less any depreciation

occasioned by the aging of the system or by the imminence of conversion to another use.

"b. Income Approach

"If sales data are unavailable, the income derived from the land and the perennials should be considered. The appraiser must be careful to capitalize only the return attributable to the land and the perennials excluding the growing crops. The rental income derived from comparable leased land planted to perennials may be an indication of the income to be capitalized.

"In many areas of California the land used for flower production is in a stage of transition from rural to suburban and suburban to urban use. This transition may create land values far in excess of what the income approach indicates for the land planted to perennial flower producers. Any value contributed by the perennials arises from interim use. As the transition progresses to the point where the proper long-term use of the land is clearly discernible, the value contributed by the perennials declines to zero."

The Board has made it clear that the foregoing applies to the valuation of land on which the growing plants are classified as part of the land, recommending appraisal procedures that are also used in valuing other cultivated land producing an exempt growing crop from a perennial plant.

The standard of valuation prescribed by the Legislature is that all property subject to general property taxation shall be assessed at 25 percent of its full cash value. § 401, Rev. & Tax. Code. "Full cash value," as defined in section 110, "means the amount of cash or its equivalent which property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other and both with knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions upon those uses and purposes."[4] As pointed out by then Justice Traynor in his opinion for the Supreme Court of California in DeLuz Homes Inc. v. County of San Diego, 45 Cal.2d 546 (1955), at pages 561-564, the standard is the market value of the property, which may be estimated by analyzing market data or sales of similar property, replacement costs and income from the property, and since no one of these methods alone can be used to estimate the value of all property, the assessor, subject to requirements of fairness and uniformity, may exercise his discretion in using one or more of them. It might be added that the assessor's discretion in assessing property is also subject to compliance to the uniform rules and regulations promulgated by the State Board of Equalization under its authority contained in section 15606, Government Code. See 56 Ops.Cal.Atty.Gen. 172 (1973).

[4] See the modification of the definitions of sections 401 and 110 found in Stats. 1974, ch. 311, which will become operative on January 1, 1975, by virtue of the passage of Assembly Constitutional Amendment No. 32, Res. Ch. 70, Stats. 1974 (Proposition No. 8) at November 5, 1974, General Election.

Question No. 7 assumes that the land in question, which is being used for growing perennials, has a higher and better use. Under the quoted language from the Assessor's Handbook, supra, the assessor may not under those circumstances value land at its highest and best use and then add to it the value of the perennial growth. See County of Monterey v. Madolora, 171 Cal.App.2d 840, 842 (1959). To add such value to land already valued at its highest and best use would result in an excessive assessment, which would be clearly improper under the principles and authorities cited in the DeLuz Home case. However, if nursery use is the highest and best use of the land or the land is in a state of transition from farmland to urban development, then the value of the perennial plants may properly be reflected in the value of the land, whether the comparative sales approach or the income approach is utilized by the assessor.

We are of the opinion that the statement in the Assessors' Handbook quoted above is in accord with the views herein expressed and should, accordingly, be followed by the assessors and local boards of equalization in valuing such property.