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September 25, 2006

Re: *Rebutting the Deed Presumption*

Dear Mr. _____ :

This in response to your July 27, 2006 e-mail message addressed to Senior Tax Counsel Carole Ruwart and our August 7, 2006 telephone conversation. You requested a legal opinion as to whether a deed reflecting the distribution of real property from C _____ H _____ LLC (C _____) to its members may be revised to reflect the proper, intended ownership percentages. As explained in further detail below, subject to the provision of adequate documentary evidence, a corrected deed may be filed in your case.

Factual Background

In your e-mail and during our telephone conversation, you stated that C _____ was held 75 percent by W _____ M _____ (WM) and 25 percent by E _____ L _____ (EL). On June 22, 2005, C _____ transferred real property held by it (the Property) to its two individual members, and then converted to a general partnership. The deed that was recorded indicated that after the transfer, title was held by WM and EL as joint tenants, instead of as tenants-in-common as was intended. Since joint tenants are presumed to hold equal percentages of property, and the County Assessor’s Office (the Assessor) determined that WM and EL held 75 and 25 percent of the property respectively through their ownership interests in C _____ prior to the transfer, the Assessor considered the transfer to be disproportional. As a result, the Assessor determined that the transfer caused a change in ownership. You further stated that it was never the intent of WM and EL to change their respective percentages of ownership and that the deed was marked as joint tenants in error. The partnership tax returns, as well as WM and EL’s individual tax returns, continue to show their respective 75 percent and 25 percent ownership. Further, the property is continuing to be operated with the correct ownership percentages.¹

Legal Analysis

Revenue and Taxation Code² section 60 defines a “change in ownership” as “a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest.” It includes, but is not limited to, “[t]he

¹ No documents, however, have been provided to our office for our review.

² Unless otherwise specified, all further statutory references are to the Revenue and Taxation Code.

transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person.” (Rev. & Tax. Code, § 61, subd. (j).) However, any transfer of real property between individuals and a legal entity that results solely in a change in the method of holding title to the real property in which proportional ownership interests of the individuals and the legal entity remain the same before and after the transfer are excluded from change in ownership. (Rev. & Tax. Code, § 62, subd. (a)(2).) Further, any transfer for the purpose of perfecting title to the property is excluded from change in ownership. (Rev. & Tax. Code, § 62, subd. (b).) Such a transfer does not constitute a change in ownership of the real property because there is no transfer of the beneficial interest as required by section 60.

While the owner of the legal title to property is presumed to be the owner of the full beneficial interest, this presumption may be rebutted by clear and convincing proof. (Evid. Code, § 662.) The courts define “clear and convincing proof” as evidence “so clear as to leave no substantial doubt in the mind of the trier of fact,” and as evidence “sufficiently strong to command the unhesitating assent of every reasonable mind.” (*Tannehill v. Finch* (1986) 188 Cal.App.3d 224, 228; *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320; *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.)

Property Tax Rule³ 462.200, subdivision (b)(2) sets forth the types of documentary proof that may constitute clear and convincing evidence sufficient to rebut the deed presumption, and provides that the best evidence is established by “an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment.” Other documents that may be presented as evidence include written documents such as tax returns, canceled checks, and insurance policies. (Property Tax Rule 462.200, subd. (b)(2).)

In your case, C intended to transfer 75 percent of the Property to WM and 25 percent to EL. But a recording error was made, vesting title in WM and EL as joint tenants. As a non-proportional transfer of real property from a legal entity to its members, a change in ownership occurred. (Rev. & Tax. Code, § 61, subd. (j).) To rebut the presumption that title is held 50 percent each by WM and EL, you must provide evidence showing that the Property remained 75 percent owned by WM and 25 percent owned by EL. If you successfully rebut that presumption, no change in ownership occurs because the transfer was proportional. (Rev. & Tax. Code, § 62, subd. (a)(2).) Pursuant to Property Tax Rule 462.200, subdivision (b), such evidence should consist of declarations made under penalty of perjury that the Property continues to be owned 75 percent and 25 percent by WM and EL, respectively and supported with corroborating evidence such as tax returns, insurance documents, maintenance records, canceled checks, bank statements, or other documents indicating a 75 percent, 25 percent ownership ratio.

You state that the partnership tax returns as well as WM and EL’s individual tax returns have already been provided to the Assessor. You have further stated the Property has continued to be operated with the correct ownership percentages. In our view, if the tax returns and other documents are in fact consistent with a 75 percent 25 percent ownership in the Property by WM and EL, the deed may be corrected to reflect those ownership percentages.

³ All references to Property Tax Rules or Rules are to title 18 of the California Code of Regulations.

In the event that the Assessor determines that you have not provided enough documentation to rebut the deed presumption, you may rescind the June 22, 2005 transaction. The rescission of a transfer of real property "relates back" to its formation and dissolves a transfer as though it had never been made. (*Long v. Newlin* (1956) 144 Cal.App.2d 509.) In the property tax context, however, should the parties resort to a rescission of the transfer, the rescission can only be applied prospectively and no refund of taxes is available to the parties for the period of time under which a deed transfer is treated as a change in ownership. Thus, the rescission of an original transfer will not provide any relief from increases in property tax which have vested and become liens on a property prior to the date of rescission. However, since the purpose of a rescission is to return the parties to their original position prior to the reappraisal of the subject property taking effect, the recording of a rescission deed is not considered a change in ownership. Rather, the rescission deed causes a property to revert back to its previous base year value and it should be enrolled at that value with appropriate inflation factor adjustments.

The views expressed in this letter are only advisory in nature. They represent the analysis of the Board staff based on present law and the facts set forth herein. Therefore, they are not binding on any person or public entity.

Sincerely,



Richard S. Moon
Tax Counsel

RM:eb

Prec/LLC/06/424-rm

Prec/Partnership/06/424-rm

cc: Honorable

County Assessor

Mr. David Gau, MIC:63

Mr. Dean Kinnee, MIC:64

Ms. Mickie Stuckey, MIC:62

Mr. Todd Gilman, MIC:70