



(916) 445-3076

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You requested an opinion on the meaning of Section 66 of the Revenue and Taxation Code relating to retirement benefit plans. As you know, Section 66 excludes from change in ownership certain transactions for the benefit of retirement plans. In our review of this section, we have spoken to those who are responsible for the drafting of the language in order to gain more insight into the intent behind the section.

United States Code Annotated, Title 29, Section 1002 contains the definitions that are referred to in Section 66. The intent of the drafter was to extend to property tax the benefits of the federal income tax for pension plans. The income tax ramifications are embodied in U.S.C.A., Title 26, Section 401 et seq. The sole purpose of Section 66(a) was to eliminate any possibility of a reappraisal whenever a participant or a participant's beneficiary became eligible for benefits. We think the language of Section 66(a) does this without making for a possibility of extending the language much beyond this.

However, Section 66(b) is more unclear in that it excludes "any contribution" of real property to an employee benefit plan." In order to interpret this section, we must know what a "contribution" is and exactly what contributions may be covered. Neither Section 1002 of Title 29 nor Section 401 of Title 26 define "contribution". The definition of this term is found for income tax purposes in Title 26, Section 118. The case law under this section indicates that a "contribution" is a voluntary transfer to the corporation with no consideration involved. See United Grocer's Ltd. v. U.S., 308 F. 2d 634, and Commissioner of Internal Revenue v. Vandavear, 114 F. 2d 719. It is our opinion therefore that the contribution spoken of in Section 66(b) is an original gift to the benefit plan.

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As to which contributions may qualify under Section 66(b) one need look at Section 401 of Title 26. In Section 401 (a) (1), the only contributions that are accorded income tax benefits are contributions to the trust made by an employer, or employees, or both. It is our view that the phrase "any contributions" means only those original contributions of real property made to a pension plan by an employer, a group of employees, or both without any consideration. If the transfer does not meet this criteria, then the principles of change in ownership in Sections 60-65 will determine whether there is a change in ownership.

In the transaction on which you asked for our opinion, G properties was a corporation wholly owned by an employee pension trust and the corporation held fee title to the S and an adjacent office building. Because of the way it operated, G could not qualify as a tax-exempt title-holding company under Title 26, Section 501(c) (2) of U.S.C.A. and California Revenue and Taxation Code Section 23701(h). In order to fit within the framework of these sections, G conveyed title to the real property to the pension trusts and the trusts then immediately conveyed the properties to two newly formed nonprofit corporations.

In our opinion a change in ownership has occurred upon this transaction. Section 66(b) is the issue in this transaction and it doesn't seem to exclude these transfers as outlined above. It is not an original contribution of property to a pension trust, but a mere shifting of property between one corporation and another after the property had been already owned for the benefit of the pension trust. In the absence of the exclusion of Section 66(b), Section 61(i) of the Revenue and Taxation Code indicates that such a transfer is a change in ownership. This section adopts the entity theory for corporations and under this theory any transfer between corporations is a change in ownership. The major exclusion to the entity theory is found in Section 64(b) of the Revenue and Taxation Code and applies when there is a parent corporation which owns 100 percent of the stock of the other corporations. Since the pension trust is not a corporation, it cannot qualify for this exclusion. A corporation also cannot qualify for the exclusion in Section 62(a). This section indicates there is a change in ownership when co-owners divide the property in the same percentage ownership that they previously had. Under the entity theory, a corporation

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owns the real property in severalty (sole ownership) and therefore cannot qualify for an exclusion based on co-ownership. In order to find a corporation eligible for the Section 62(a) exclusion, we must view the shareholders of the corporation as owners of the corporate assets, and this is in direct violation of the entity theory adopted by the Legislature.

Very truly yours,

Robert D. Milan
Tax Counsel

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