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August 16, 2001

Honorable Joseph F. Pitta  
Monterey County Assessor  
P.O. Box 570, Courthouse  
Salinas, CA 93902

**RE: *Change in Ownership Under a 1031 Exchange/Holding Agreement***

Dear Mr. Pitta,

This is in response to your letter dated July 18, 2001, addressed to Assistant Chief Counsel Larry Augusta requesting our opinion concerning a transfer of real property as part of an exchange within the meaning of section 1031 of the Internal Revenue Code. The transaction was effected by means of a reverse exchange in which the subject property was first transferred to a third party with instructions to sell the property when a buyer became available. The transaction was not consummated within the six month safe harbor period required by section 1031 and, therefore, the property was reconveyed to the taxpayer by means of a deed in lieu of foreclosure. You have enclosed a copy of a letter from the property owner in which he requests an opinion as to whether the transfer and reconveyance resulted in changes in ownership of the property.

For the reasons set forth below, neither the conveyance nor the reconveyance resulted in a change in ownership because each of those transfers involved only the transfer of legal title, and not the beneficial interest in the property which is a required element of change in ownership.

**Facts Presented**

Under the terms of a Real Estate Acquisition and Exchange Accomodation Agreement (“Agreement”) dated June 2, 2000, entered into between (“Exchangor”) and , Inc. (“Buyer”), Exchangor transferred the subject real property to Buyer by grant deed dated June 9, 2000. The Agreement recites that Exchangor presently owns and uses in its business the subject real property and desires to transfer the property through Services, Inc. (“Intermediary”) for the purpose of effecting a like-kind exchange pursuant to section 1031 of the Internal Revenue Code for certain replacement real property described therein. Under the Agreement, , as Buyer, acquired the subject property from Exchangor and was obligated to sell it at a later date to a buyer which Exchangor would find. Although a

suitable replacement property was located and Exchangor entered into a sales agreement on March 26, 2000, Exchangor was unable to find a buyer for the subject property within the six month safe harbor period required by section 1031. Therefore, the subject property was reconveyed by Buyer to Exchangor by means of a deed in lieu of foreclosure dated March 13, 2001.

### **Law and Analysis**

Section 60 sets forth three required elements for a change in ownership as follows: (1) a transfer of a present interest in real property, (2) including the beneficial interest in the property, and (3) the value of the interest is substantially equal to the value of the fee interest. Accordingly, a transfer of only legal title does not satisfy one of those elements because section 60 expressly requires the transfer of the beneficial interest in the property. In this regard, Property Tax Rule 462.200, subsection (c) interprets that provision by describing a transaction, substantially similar to the facts presented, involving the transfer of bare legal title which does not result in a change in ownership. That subsection provides in relevant part that

(c) A holding agreement is an agreement between an owner of property, hereinafter called a principal, and another entity usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.

Under the facts presented, the Agreement constitutes a holding agreement by which only legal title to the subject property was conveyed to Buyer. Under the terms of the Agreement, Exchangor agreed to convey legal title and ownership of the property to Buyer as part of an Internal Revenue Code section 1031 like-kind exchange. The transaction was structured as a “reverse tax-free exchange” in that Buyer agreed to assist in completing the exchange by acquiring the property and selling it at a later date to a third-party buyer. Exchangor had previously located and agreed to purchase a replacement property. Buyer had certain discretionary duties but was required to dispose of the property in conformity with the procedures outlined in the Agreement. Additionally, Exchangor retained an option right to repurchase the property from Buyer, if beneficial ownership could not be transferred to a third-party buyer within the required time period.

The Agreement clearly contemplates that Buyer held title for the purpose of eventually conveying full fee title to a third-party buyer. Buyer was bound by the Agreement to sell the property to a third-party, to reconvey the property to Exchangor or to follow the “Termination Sale Procedures” for disposition of the property. Thus, pursuant to Rule 462.200, subsection (c) the Agreement, as a holding agreement,

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conveyed only legal title to Buyer which did not result in a change in ownership. Furthermore, the reconveyance to Exchangor did not result in a change in ownership because the deed in lieu of foreclosure from Buyer passed only legal title back to Exchangor.

A legal presumption of a transfer of full fee title attaches to the deed conveyance and reconveyance between Exchangor and Buyer. Civil Code section 1105 provides that “fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.” Evidence Code section 662 provides that “[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.” Subsection (b) of Rule 462.200 interprets those provisions and provides examples of types of evidence which may be presented and considered in order to rebut the presumption. Subparagraph (1) provides that consideration may be given to “[t]he existence of a written document executed prior to or at the time of the conveyance in which all parties agree that one or more of the parties do not have equitable ownership interests.” In this case, the assessor may consider the Agreement as a written document executed prior to or at the time of the conveyance in which Exchangor and Buyer agreed that Buyer would hold legal title but had no equitable ownership interest.

We have consistently advised that taxpayers claiming the benefit of an exception to change in ownership have the burden of establishing to the satisfaction of the assessor that they qualify for such treatment. Therefore, it is within the assessor’s discretion to determine whether the Agreement constitutes clear and convincing evidence that the deeds were not intended to transfer the full fee interest in the property. Although this is ultimately a factual determination to be made by the assessor, since you have requested our opinion, we conclude that the evidence provided is sufficient to rebut the deed presumption.

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

Very truly yours,

/s/ Lou Ambrose

Lou Ambrose  
Senior Tax Counsel

LA:tr

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cc: Mr. Dick Johnson, MIC:63  
Mr. David Gau, MIC:64  
Ms. Jennifer Willis, MIC:70