(916) 324-6593

January 16, 1985

J - Transfer of Title
Assessor's Parcel No.

Dear :

This is in reply to Mr. S 's December 13, 1984 letter to Mr. James J. Delaney, Chief Counsel, Board of Equalization regarding the above-captioned matter.

In Mr. S 's letter, he requested that we review the correspondence from Ms. J and advise your office as to whether or not a reversion to the old value is possible. The facts, very briefly restated, are that in December 1983, Ms. J changed the names on the deed of the above-referenced property from herself to her three children. This change was made without the advice of counsel after Ms. J received an unsettling medical diagnosis. In her letter of December 4, 1984, she further indicated that she has continued to live in the house, make all mortgage payments, and the children have continued to live with her. They have not contributed any money toward the mortgage payments.

In her December 4, 1984 letter to your office, Ms. J did not specify if the deed from herself to her three children was given to them or if it was retained in her possession. From her statements, a logical inference would be that the deed was created as a type of estate planning device. This would indicate the donative intent behind such action was testamentary rather than inter vivos in nature.

Section 60 of the Revenue and Taxation Code provides that a change in ownership shall occur upon the "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". In this case, it is quite possible that a present beneficial interest was not transferred from Ms. J to the children and there has been no change in ownership. The standard to be applied would basically consist of whether or not the children received title and were immediately empowered to exercise the full incidents of ownership over the property, i.e., to encumber the property, to lease or rent it and receive rents and profits, to sell the property and receive the proceeds, etc. If the children could not exercise these powers to the exclusion of Ms. J, then you could conclude that a change in ownership between the mother and children did not occur. The determination would, of course, be made by your office based upon the facts. Should such determination be made, Ms. J would be entitled to a refund of all taxes paid as a result of the increase in assessment.

If the deed from Ms. J to her children was a change in ownership, then we are of the opinion that a rescission of the transfer may "relate back" to its formation and dissolve it as though it had never been made. (Long v. Newlin (1956) 144 Cal. App. 2d 509.) Therefore, each party must restore, or offer to restore, to the other all consideration which was received under the contract, upon the condition that the other party do likewise, unless the latter is unable or positively refuses to do so. (Civil Code Section 1691(b).) Upon rescission, the contract becomes a nullity and each of its terms and provisions cease to exist and are not enforceable against the other party. (Holmes v. Steele (1969) 269 Cal. App. 2d 675.)

This would have the result of returning the parties to their original position prior to the reappraisal taking effect. However, it is our opinion that should rescission be resorted to, it can apply only prospectively, and no refund would be available to the parties for the period under which the deed transfer was treated as a change in ownership. This is so since property taxes are determined by the facts as they exist on the lien date. (Doctors General Hospital v. Santa Clara County (1957) 150 Cal. App. 2d 53; Estate of Bakesto (1923) 63 Cal. App. 265; Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157.)

Based on the foregoing, a rescission of the transfer can be effectuated by having the children deed the property back to the mother. Once the deed is rescinded, the parties are then placed in the same position they stood before the deed was executed, since the effect of rescission is to extinguish the deed. No refunds of taxes should be made by the county to

the rescinding party while the transfer was in force. Upon rescission, the real property reverts to its previous base year value and should be enrolled at such value as of the date of the rescission. It would, of course, be factored up per the Proposition 13 limitation.

I trust this is responsive to your inquiry; if I may be of further assistance to you, please do not hesitate to contact me.

Very truly yours,

Gilbert T. Gembacz
Tax Counsel

GTG:fr
3540D

STATE OF CALIFORNIA

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February 20, 2015

Re: Mutual Rescission
Assignment No.: 14-353

Dear Mr. :

This is in response to your email regarding mutual rescission of contracts for the transfer of real property where you set forth an analysis contrary to that published in the Property Tax Annotations.[1] You ask that we consider issuing a Letter to Assessors or consider whether the promulgation of a property tax regulation is necessary to clarify the requirements for and consequences of a rescission in the property tax context.

As you know, Property Tax Annotation (Annotation) 220.0597 is the Legal Department's position on the property tax consequences of a mutual rescission of a contract for the transfer of property. That annotation states that a transfer of property may be rescinded if all parties to the transfer agree to rescind it and restore to each other all consideration received.[2] Once a transfer of real property is rescinded and the parties are placed in the same position they were in before the contract was executed, the value of the real property reverts to its previous adjusted base year value prior to the transfer.[3] However, the liabilities established while the contract was in existence are not extinguished. Therefore, placing the parties in the position they held before the transfer will not result in a refund of taxes paid while the contract was in effect.[4]

You state, however, that a mutual rescission does not require a restoration of consideration received (i.e., a return to the status quo) by the parties that entered the contract and that a rescission of a transfer of property should give rise to property tax refunds since the transfer that triggered the change in ownership causing the increased property taxes is no longer effective. For the reasons explained below, we disagree with your analysis.

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[1] Property tax annotations are summaries of the conclusions reached in selected legal rulings of State Board of Equalization counsel published in the State Board of Equalization's Property Tax Law Guide. (See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.)
[2] See January 23, 1987 Back-up Letter to Annotation 220.0597 (June 5, 1986), at p. 2.
[3] Annotation 220.0595 (January 16, 1985).
[4] January 23, 1987 Back-up Letter to Annotation 220.0597 (June 5, 1986).

Civil Code section 1688 provides that a contract is extinguished by its rescission.[5] A contract may be rescinded mutually if all the parties consent,[6] or unilaterally based on a variety of grounds, for example, fraud, mistake or duress.[7] Upon rescission, "the contract becomes a nullity; it and each of its terms and provisions cease to be subsisting or enforceable against the other party."[8]

Civil Code section 1691 explicitly requires the restoration of the parties to the status quo for unilateral rescission. Although the Civil Code contains no similar explicit requirement for mutual rescission, we believe that case law is supportive of a requirement to return the parties to the status quo for mutual rescission. For example, in *Green v. Darling* (1925) 73 Cal.App. 700, a fully executed contract for the sale of goods was rescinded. In explaining why it was unnecessary for the plaintiff to allege the terms of the mutual rescission agreement, the Court stated:

> If the minds of the parties met on the proposition that they would rescind, it was not necessary that the defendant stipulate to return to the plaintiff the money which he had received, for the law requires him to do this as a consequence of having agreed that the contract be abrogated.[9]

(See also *Dugan v. Phillips* (1926) 77 Cal.App. 268, 278 ["upon a mutual rescission of a contract the law requires each party to restore whatever he has received under it"]; *Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 503 ["without rescission, and restoration of benefits received, a party may not avoid such a contract"]).

Also, since a mutual rescission has the effect of nullifying the contract (i.e., the contract is *void ab initio*), it necessarily follows that the parties in an executed contract should return each other to the position they were in prior to the execution of that contract.[10] A rescission of an executed contract would simply have no meaning without a restoration to the status quo since then the parties would have "rescinded" the contract while, at the same time, kept the bargained-for elements of the contract.

We also note that your positions are somewhat inconsistent. If there is no return to the status quo, then there can be no refund of property tax since there is no return of the property upon which an assessor can base his restoration of the property's old adjusted base year value. A return to the status quo is required for the change in ownership consequences of a transfer to be "undone" because an assessor is required to assess property to the person owning, possessing, claiming, or controlling it. (See Rev. & Tax. Code, § 405.) If there was no return to the status quo, the assessor would be required to continue to assess the property to its new owner with the attendant change in ownership consequence.

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[5] Civ. Code, § 1688.
[6] Civ. Code, § 1689, subd. (a)
[7] Civ. Code, § 1689, subd. (b).
[8] *Scollan v. Government Employees Ins. Co*. (1963) 222 Cal.App.2d 181, 183.
[9] *Green v. Darling* (1925) 73 Cal.App. 700, 704.
[10] We recognize that a return to the status quo may not be required if the rescinded contract was an executory contract, in which case, a mutual rescission may be treated as abandonment of the contract with no requirement to return to the status quo. (See 3 California Affirmative Defenses (2010 ed.) § 61:1) However, we do not believe this is relevant in the property tax context, where rescission arises on fully executed contracts.

Furthermore, if the rescission agreement includes terms different from a return to the status quo, a question may arise as to whether a rescission or a new contract was effected. (See *Young v. New Pedrara Onyx Co.* (1920) 48 Cal.App. 1 [an agreement to rescind a stock transfer that included terms in addition to the return of the status quo is not a valid rescission, but rather a new contract]; *Stinnett v. Damson Oil Corp*. (9th Cir. Cal. 1981) 648 F.2d 576, 581-582 [where the contract parties later agreed to terms different from those under the original contract, the later agreement is not a rescission as there is no restoration of the status quo, but instead is a modification of the original agreement].) If a new contract was effected, a second change in ownership would occur upon the reconveyance of the property to the original seller instead of a restoration of the property's old adjusted base year value.

Although the rescission of a contract voids it *ab initio*, rescission does not change the consequence of actions taken during the existence of the contract, as illustrated in *Scollan v. Government Employees Ins. Co.* (1963) 222 Cal.App.2d 181 (*Scollan*).[11] In *Scollan*, a minor disaffirmed a contract of sale of an automobile after he was involved in a collision. The disaffirmance had the effect of rescinding the sale. At issue before the Court was whether the rescission made the seller the owner of the automobile during the time it was registered under and driven by the minor. The minor would then have been driving the automobile with the seller's permission resulting in the liability of the seller's automobile insurance carrier for damage to the automobile. The Court held that although the contract was rescinded, it did not alter the fact that the minor was the registered owner of the automobile at the time of the accident. It stated:

> In truth and in fact at the time of the accident, Fuerst [the seller] was not the owner of the automobile and did not, and could not, give permission to anyone to operate it. These things were proven factually. The theory presented in support of the judgment relies upon legal fiction to disprove fact, and for that fiction will not serve under the circumstances here. [¶] . . . [¶] The fiction of relation, while proper enough in its sphere, cannot be used to make that happen which did not happen, to raise permission where none was given, and within the statutory frame of reference could not have been given.[12]

Likewise, in the property tax context, an assessor assesses property based on the facts in existence on the lien date, and such taxability as attached on the lien date is not affected by subsequent events. (See *Doctors General Hospital v. County of Santa Clara* (1957) 150 Cal.App.2d 53 [the right to the ad valorem property taxes vests on the lien date, and a subsequent law revision enacted after the lien date cannot grant retroactively and substantively an exemption where none had existed prior thereto]; *City of Santa Monica v. Los Angeles County* (1911) 15 Cal.App. 710, 712 [property taxable on the lien date was not made exempt by the City's acquisition of it after the lien date but prior to the levy and assessment, as "a lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement"]; *County of San Diego v. County of Riverside* (1899) 125 Cal. 495 [property tax unpaid upon the division of a county after the lien date, is payable to the county in which the roadbed was included at the time when the lien attached]). Therefore, within the context of the

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[11] See also *Long v. Newlin* (1956) 144 Cal.App.2d 509, 512 (the effect of rescission is that, as between the parties there has never existed any contract, but rescission does not excuse a contract party from liability incurred during the existence of the contract to third-party creditors).

[12] *Scollan v. Government Employees Ins. Co.* (1963) 222 Cal.App.2d 181, 185-186.

rescission of a contract for the transfer of property, an assessor must assess the property taking into account the change in ownership caused by the transfer during the time period the contract was in effect. The contract's rescission affects the property's taxable value only on a prospective basis.

As our conclusions are consistent with the positions stated in various annotations, we believe it is unnecessary to issue a clarifying Letter to Assessors or to consider rulemaking at this time.

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.

Sincerely,

/s/ Mengjun He

Mengjun He
Tax Counsel III (Specialist)

MH: yg
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cc: Honorable Marc C. Tonnesen
President, California Assessors' Association
Solano County Assessor/Recorder

Mr. Dean Kinnee MIC:64
Mr. Benjamin Tang MIC:64
Mr. Todd Gilman MIC:70