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Executive Secretar.

June 5, 1986

Dear

This is in response to your May 21, 1986, note to Mr. Richard Ochsner wherein you attached a copy of an October 5, 1983, Order in Cal-American Income Property Fund VII et al. v. Brown Development Corporation et al., Orange County Superior Court No. 342623, implementing the District Court of Appeal's Decision at 138 Cal.App.3d 268 in the matter and declaring that certain grant deeds pertaining to a shopping center property from a court-appointed receiver to a purchaser to another were "void, of no force and effect, and a nullity", and you asked whether real property taxes paid for fiscal years between the 1981 sale and the 1983 Order are refundable in light of above-quoted language in the Order.

For the reasons hereinafter set forth, we do not believe that the taxes are refundable.

Initially, Code of Civil Procedure Section 568.5 authorizes receivers to sell real property and provides that sales are not final until confirmed by the Court. 55 Cal.Jur. III, Receivers, Section 74 describes the manner of sale and states, in part:

"...Title passes to the purchaser on the court's confirmation of the sale. Generally speaking, if no good reason appears for refusing to confirm a receiver's sale, the sale should be confirmed. The order of confirmation gives the judicial sanction of the court, and when made, it relates back to the time of sale...The matter of confirmation rests in the sound discretion of the court...."

Copies of Section 568.5 and Section 74 are enclosed for your review.

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June 5, 1986

Thus, upon the Superior Court's confirmation of the sale in 1981, title to the property passed to the purchaser as of the time of the sale. And until such time as the sale was revoked, cancelled, corrected, etc., the change in ownership which occurred as the result thereof continued in effect.

Section 568.5, Section 74 and related sections are silent as to what occurs when a Superior Court's confirmation of a sale is reversed upon appeal. However, 2 Clark, The Law and Practice of Receivers (3d Ed. 1959), cited by the District Court of Appeal in 138 Cal.App.3d 268 and in other District Courts' of Appeal decisions, recognizes in Section 493 at page 807 that the court which makes a sale may commit error in doing so, which error may be corrected by a reviewing court. While it does not continue on to state whether upon "correction" the sale should be regarded as having never occurred or as having been in effect until corrected, the section does proceed to state that an innocent party purchaser, not a party to a "correction" action and who has purchased property on the faith of a court order before the matter can be decided by a reviewing court, should be able to retain the property, thus suggesting that the sale is regarded as having been in effect until "corrected". A copy of Section 493 is also enclosed for your information and review.

In a similar situation*, we have been of the opinion that 1983-84 property taxes are not refundable where:

1. In August of 1982, seller conveyed real property to buyer pursuant to a contract for sale of same.
2. The Assessor treated the transfer as a change in ownership and reappraised the property for the 1983-84 tax year.
3. In 1984, the Superior Court issued a judgment rescinding the contract of sale and directing the buyer to reconvey the property to the seller.

This is because of our view that "property taxes are determined by the facts as they exist on lien date". See in this regard the July 26, 1983, memorandum from Mr. Lawrence Augusta to Mr. Verne Walton and the February 17, 1984, letter from Mr. Augusta to Mr. Jon Lieberg, copies also enclosed. Per the latter:

* See the August 21, 1984, letter from Mr. Eric Eisenlauer to
copy also enclosed.

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"My position is based on my understanding of case law in California on this issue. In the case of Long v. Newlin (1956) 144 Cal.App.2d 509, involving a partnership agreement which was rescinded, the court held that the partners were not excused from liability for debts of the partnership which were incurred during the existence of the partnership. Further, in Scollan v. Government Employees Insurance Company (1963) 222 Cal.App.2d 181, involving the rescission of a sale of a car to a minor where the minor was involved in an accident after the sale but before the rescission, the court said that while the contract was later rescinded, it was valid at the time of the accident and the liabilities were established as of that time.

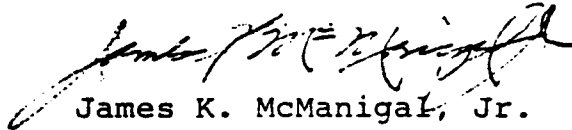
"Liability for property taxes is determined by the facts as they exist on the lien date. Doctors General Hospital v. Santa Clara (1957) 158 Cal.App.2d 53, Estate of Backesto (1923) 63 Cal.App. 65, Parr-Richmond Industrial Corporation v. Boyd (1954) 43 Cal.2d 157. Since the facts on the lien date in question indicated a change in ownership occurred since the prior lien date, property tax liabilities were determined as of that time and reflecting those facts. The fact that the transaction was later rescinded and parties were restored to their position prior to the transaction does not change the liabilities established while the contract was in existence."

As to the "void, of no force and effect, and a nullity" language in the Order, a deed lacking a grantor, grantee, or thing granted (Trout v. Taylor, 220 Cal. 652), or a forged deed (Civil Code Section 1227) is void, but all presumptions are in favor of the validity of a deed when it is regular on its face and recorded or acknowledged (Rozelle v. Gunn, 134 Cal.App.2d 589) and thus, deeds are typically voidable rather than void. And deeds that are voidable for some reason, but not void, are fully operative until set aside. (Frink v. Roe, 70 Cal. 296; Long Construction Co. v. Empire Drive-In Theatres Inc., 208 Cal.App.2d 726). Since the deeds in question were voidable and not void, and since

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neither the District Court of Appeal nor the Superior Court specifically concluded that the deeds were of a kind which have been historically recognized as void or attempted to set forth any reason or rationale as to why the deeds should be viewed as having never been made/never existed, it seems clear that in using the "void, of no force and effect, and a nullity" language in the Order, the Judge was merely cancelling the deeds/"correcting" the sale and returning the parties to their initial positions before the deeds were executed.

Very truly yours,



James K. McManigal, Jr.
Tax Counsel

JKM:fr

Enclosures

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Controller, Sacramento

DOUGLAS D. BE
Executive Secretary

January 23, 1987

Dear

Re: Kishi Brothers Partnership

This is to reply to your letter of December 23, 1986 in which you contend that the transfer of real property to the Kishi Brothers Limited Partnership on June 10, 1985 was not a change in ownership because the proportionate ownership in the real property remained the same after the transfer.

In our letter to Mr. _____ dated August 22, 1986, we advised him essentially that even though all the partnership units were distributed equally to the two transferor general partners there was nevertheless a change in ownership because their ownership interests did not remain the same after the transfer. We cited two reasons for this. First, citing Corp. Code section 15510(2) and Fretz v. Burke (1967) 247 Cal.App.2d 741 we said that as a matter of law the limited partners were entitled to receive a share of the profits. Second, we in effect said that the general and limited partners were estopped to deny the existence of a limited partnership which they themselves formed by their written agreement. Since a limited partnership contemplates that at some time the limited partners will have an interest in the capital or profits or both (that intention is clearly expressed in the Agreement), it necessarily follows that the limited partners in this case although having as yet received no partnership units nevertheless have a future interest in the profits and capital of the partnership. When viewed in this way, the proportionate ownership interests of the transferors did not remain the same after the transfer despite the fact that the transferors still own all the partnership units.

You have correctly pointed out that Corp. Code section 15510(2) is not applicable to the transaction in question. That does

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January 23, 1987

not change our opinion, however, which while supported by the estoppel theory discussed above and in my letter of August 22 is also consistent with two prior opinions which are enclosed for your information. letter dated October 28, 1981 is particularly on point.

Although we believe a change in ownership occurred as a result of the transfer to the Kishi Brothers Limited Partnership, considerable tax relief may be available if the parties agree to rescind the transaction. In the past we have taken the position that if all parties to a transfer of property wish to undo the transfer and are willing to restore to each other all consideration received, a transfer of property can be rescinded. The effect of such a rescission, which voids the initial transfer ab initio, would be to restore the parties to the positions they held before entering into the transaction, including restoration of the original base-year value of the property before the transfer.

However, under the theory of rescission, liabilities based on the facts of the situation while the transfer was in full force and effect are valid regardless of a subsequent rescission of that transfer. (Long v. Newlin (1956) 144 Cal.App.2d 509 [301 P.2d 271]; Scollan v. Government Employees Insurance Co. (1963) 222 Cal.App.2d 181 [35 Cal.Rptr. 40]). Parties remain liable for any valid debts incurred during the period before the parties rescinded their transfer.

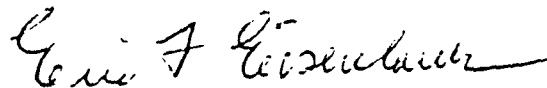
Therefore, placing the parties in the position they held before the transfer does not include refund of the increase in taxes based on the change in ownership caused by the transfer. Property taxes are determined by the facts as they exist on the lien date of March 1 for the regular roll, or the date of change in ownership for the supplemental roll; and, therefore, the assessments reflecting a change in ownership are valid (Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal.2d 157 [272 P.2d 16]; Doctors General Hospital v. Santa Clara (1957) 150 Cal.App.2d 53 [309 P.2d 501]). Thus, rescission of the original transfer will not provide relief from any property tax increases which vested and became liens prior to the date of rescission.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor of any county. You may wish to consult with the assessor of Merced County before effecting a rescission in order to confirm

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that such an action would be treated in a manner consistent with the conclusions stated above.

Very truly yours,



Eric F. Eisenlauer
Tax Counsel

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Attachment

cc:



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Controller, Sacramento

DOUGLAS D. BELL
Executive Secretary

August 14, 1987

Dear Mr.

This is in response to your June 25, 1987, letter to wherein you forwarded a copy of a February 27, 1987, Judgment in Gold Strike, Ltd. et al. v. Karl Burger, et al., Calaveras County Superior Court No. 12045, pertaining to a transfer of real property commonly known as the "Goldstrike Mobile Home Park," and you asked several questions concerning the Judgment and its effect upon possible property tax reassessments, past, present and future.

Per the Judgment, in pertinent part:

"* * *

"2. The sale of the Property from Burger to plaintiffs on or about October 9, 1981, is hereby voided on the terms and conditions set forth in this judgment....

"3. Title to the Property is hereby adjudged, ordered, and decreed vested in Burger, a single man. No further instrument or conveyance is needed or necessary to establish or declare such title in Burger....

"4. On February 1, 1987, Burger shall cancel the Burger note, reconvey the Burger Deed of Trust, and execute, acknowledge and deliver to Gold Strike a deed of trust in the form of Exhibit 'D' attached hereto and incorporated herein by this reference and a promissory note to Gold Strike in the form of Exhibit 'C' attached hereto and incorporated herein by this reference (hereinafter referred to as the 'Gold Strike Note'),...

* * *

"5. Said trust deed to Gold Strike securing the Gold Strike Note shall be junior in title only to the Underlying Deeds of Trust, real property taxes and such clouds, liens

and encumbrances that existed when the Property was conveyed by Burger on or about October 9, 1981.

"6. Gold Strike shall be responsible for all costs and expenses of the ownership and operation of the Property, other than real property taxes, through January 31, 1986, and be entitled to all income, if any, therefrom through January 31, 1986. On March 1, 1987, Burger shall pay all past, present, and future real property taxes. Burger shall be entitled to the net income, if any, from the ownership or operation of the Property commencing February 1, 1986, after the payment of all costs and expenses of ownership or operation of the Property including, without limitation, real property taxes, and be responsible for expenses, if any, that exceed income.

"7. Each party shall execute (and acknowledge if said instrument or document is to be recorded) and deliver to the other party such instruments and documents as reasonably necessary or required to carry out the terms of this judgment.

* * *

Turning to your questions then:

1. Does this Judgment effectively convey title to the property to Burger?

Answer: Yes. As indicated in paragraphs 2 and 3 of the Judgment, upon the Court's voiding of the October 9, 1981, sale of the property, title to the property vested in Burger, the former owner, and no further instrument or conveyance is needed or necessary to establish such title in Burger.

2. Should the Judgment be recorded?

Answer: For property tax assessment purposes, whether or not the Judgment is recorded is not relevant. As you not only have notice of the Judgment/transfer of title but a copy of the Judgment, itself, you have sufficient information upon which to base and prepare regular roll assessment(s).

As the new owner of the property, Burger may wish to record the Judgment, thereby establishing the February 27, 1987, transfer of title date against "all the world". Or, he may not wish to record the Judgment. As indicated, paragraph 3 of the Judgment states, in part, that no further instrument or conveyance is needed or necessary to establish title in Burger, but paragraph 7 thereof states that each party shall execute and deliver to

August 14, 1987

the other any instruments and documents necessary or required to carry out the terms of the Judgment. If Burger were to obtain a deed to the property from Gold Strike, Ltd., he might choose to record such deed rather than the Judgment. Or, he might choose to record nothing. Such is within Burger's discretion, absent any statutory or regulatory authority requiring recordation.

3. Do we reestablish the base year value adjusted?

Answer: Yes. As indicated in a December 9, 1983, letter, copy enclosed, we have been of the opinion that where courts cancel or void a deed, upon the deed being rendered ineffective and the conveyance of title, the property reverts back to its previous base year value and should be enrolled at such value plus appropriate inflation adjustments. Thus, as of the March 1, 1987, lien date of the 1987-88 fiscal year, the base year value would be the base year value plus inflation adjustments, the base year value plus inflation adjustments on the roll for the 1981-82 fiscal year plus the appropriate inflation adjustments for the 1982-83 through 1986-87 fiscal years.


4. Do we recalculate values for previous years (1982-83 through 1986-87 fiscal years)?

Answer: No. As also indicated in the December 9, 1983, letter, it is our opinion that during the period between the execution of a deed and the date the deed is cancelled or voided by a judgment, the deed is effective. See also our January 16, 1985, letter in this regard, copy also enclosed. As indicated therein, no refunds of taxes should be made for the period during which the deed is effective.

5. If we should recalculate values for previous years, does the statute of limitations apply?

Answer: As indicated in 4, above, you should not recalculate such values.

Very truly yours,


James K. McManigal, Jr.
Tax Counsel

JKM/rz
Enclosures
cc: