STATE OF CALIFORNIA

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July 15, 2013

Ms.
Assessment Manager
San Luis Obispo Assessor's Office
1055 Monterey Street, Suite D360
San Luis Obispo, CA 93408

Re: Supplemental and Escape Assessments
Assignment No. 12-260

Dear Ms. :

This is in response to your letter requesting our opinion as to whether co-owners of California real property who purchase their co-tenants' interest in the property can qualify as bona fide purchasers for value under Revenue and Taxation Code[1] section 531.2. As more fully explained below, it is our opinion that a co-owner of property does not qualify as a bona fide purchaser for value within the meaning of section 531.2. Additionally, you pose several related questions in your correspondence which we also address in this letter.

Facts

Brother 1 and his Wife, and Brother 2 and his Wife, each acquired a 50 percent interest in two parcels of real property (the Property) in 1966, and held title to the Property in their respective family revocable trusts as tenants in common. Brother 2 died in 2000 and the trust's 50 percent ownership interest in the Property was distributed by deed to the Exemption Trust for the benefit of Brother 2's Wife during her life. Brother 2's Wife died in 2007 and the trust passed the properties to the two children of Brother 2 and his Wife (Child 1 and Child 2) on the date of her death. A claim for the parent-child exclusion from a 50 percent change in ownership (CIO) was filed and allowed. On October 17, 2009, Child 2 died (2009 CIO). Child 2's 25- percent interest was transferred to Child 2's beneficiary (Grandchild). While the transfer of the 25-percent interest on the date of Child 2's death was eligible for the parent-child exclusion, a claim form was never filed, nor was a Change in Ownership Statement – Death of Real Property Owner[2] (COS) filed or an Affidavit of Death recorded.

After Child 2's death, Child 1 and Grandchild sought to partition the Property by sale.[3] To avoid paying sizeable capital gains taxes on the sale of their 50 percent interest in the Property, Brother 1 and his Wife purchased the interests owned by Child 1 and Grandchild and recorded a deed transferring title on October 12, 2010 (the Purchase), leaving Brother 1 and his

[1] All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.
[2] Form BOE-502-D provides that "[s]ection 480(b) . . . requires that the personal representative file this statement with the Assessor in each county where the decedent owned property at the time of death."
[3] Your letter states that a partition in kind was not an option because improvements on the Property straddled both parcels of the Property.

Wife with a 100 percent ownership interest in the Property (2010 CIO). The Property is commercial property and the parties agreed upon a sale price of $1,000,000. Brother 1 has been the manager of the Property for many years.

A Notice of Proposed Escape Assessment was mailed December 12, 2011, and a Notice of Enrollment of Escape Assessment was mailed December 30, 2011 as to the 2009 CIO. Likewise, the Notice of Proposed Escape Assessment and Notice of Enrollment of Escape Assessment were also mailed December 12, 2011 and December 30, 2011, respectively, for the 2010 CIO, the same dates the notices were mailed for the 2009 CIO. Afterward, it was discovered that the reassessment for the 2010 CIO had been for a 25 percent interest instead of a 50 percent interest, and a second Notice of Proposed Escape Assessment was mailed February 6, 2012 and Notice of Enrolled Escape Assessment was mailed February 24, 2012. The supplemental tax bills for the 2009 and 2010 events had not been issued at the time of your letter.

The attorney for Brother 1 and his Wife asserts that the supplemental and escape assessments for the 2009 CIO should not be a lien on the Property since, pursuant to section 532.1, the 50 percent interest was transferred to his clients as bona fide purchasers for value on October 12, 2010 – *prior* to the assessment being made on December 30, 2011. The attorney further states that Brother 1 and his Wife had no notice of the escape assessment or the facts and circumstances that gave rise to the escape assessment when they closed escrow on the Property, that his clients negotiated the purchase of the 50 percent interest "at arm's length" and that his clients "gave value" for the 50 percent interest they purchased since the purchase price was $1,000,000. Instead, the attorney believes the assessments should be entered on the unsecured roll in the names of the former owners of the 50 percent interest, Child 1 and Grandchild.

Law & Analysis

Article XIII A, section 2 of the California Constitution requires the reassessment of real property upon a "change in ownership." A change in ownership is defined in section 60 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."

Section 480, subdivision (a) provides that whenever there occurs any change in ownership of real property, the transferee shall file a signed change in ownership statement in the county where the real property is located no later than 90 days from the date the change in ownership occurs, except that where the change in ownership has occurred by reason of death the statement shall be filed within 150 days after the date of death. (Rev. & Tax. Code, § 480, subd. (e).)

Escape assessments are explained in Letter to Assessors (LTA) 2002/14 (3/14/2002) on page two as follows:

> An escape assessment is a retroactive assessment intended to rectify an omission or error that caused taxable property to be underassessed (or not assessed at all). In most cases, once such an omission or error occurs, the property escapes assessment *each year* thereafter until the underassessment is discovered and corrected. If property escapes assessment, the assessor is required to value the property upon discovery for the appropriate valuation date, enroll the appropriate value on the roll being prepared, process any necessary corrections to the current

> roll, and process appropriate escape assessments for prior years within the statute of limitations. (Emphasis in original.)

Revenue and Taxation Code section 531.2, subdivision (b), provides, in part, that:

> *If the real property escaped assessment as a result of an unrecorded change in ownership* or change in control for which a change in ownership statement required by Section 480, 480.1, or 480.2, or a preliminary change in ownership report, pursuant to Section 480.3, is not filed, the assessor shall appraise the property as of the date of transfer and enroll the difference in taxable value for each of the subsequent years on the secured roll, with the date of entry specified thereon. However, if prior to the date of the assessment the property has (1) *been transferred or conveyed to a bona fide purchaser for value*, or (2) become subject to a lien of a bona fide encumbrance for value, the escape assessment pursuant to this paragraph shall not create or impose a lien or charge on that real property, but shall be entered on the unsecured roll in the name of the person who would have been the assessee in the year in which it escaped assessment and shall thereafter be treated and collected like other taxes on the roll. (Emphasis added.)

A supplemental assessment is made upon a change in ownership or completion of new construction. The supplemental assessment process was adopted so that reappraisal and reassessment would occur as of the date of a change in ownership or completion of new construction rather than waiting until the next lien date. (Rev. & Tax. Code, § 75.) The supplemental assessment provisions are set forth in sections 75 through 75.80. Section 75.11, subdivision (d) sets forth the times within which a supplemental assessment may be made. It states in relevant part:

> No supplemental assessment authorized by this section shall be valid, or have any force or effect, unless it is placed on the supplemental roll on or before . . .
> (3) The eighth July 1 following the July 1 of the assessment year in which the event giving rise to the supplemental assessment occurred, if the change in ownership was unrecorded and a change in ownership statement required by Section 480 or preliminary change in ownership report, as required by Section 480.3, was not timely filed.

Further, section 75.54 provides in relevant part:

> (a) Taxes on the supplement roll become a lien against the real property on the date of the change in ownership . . . unless by other provisions of law the taxes are not a lien on real property. [¶ . . .¶]
>
> (c) Notwithstanding subdivision (a), in the event there is a subsequent change in ownership following an initial change in ownership . . . that occurs before the mailing of the supplemental tax billing attributable to the initial change in ownership . . . then the lien for supplemental taxes is extinguished and that portion of the supplemental assessment attributable to the assessee from the date of the initial change in ownership . . . to the date of the subsequent change in ownership shall be entered on the unsecured roll or on the supplemental roll as an unsecured assessment in the name of the person[s]

> who would have been the assessee[s] if the additional change in ownership had not occurred, and thereafter that portion of the tax shall be treated and collected like other taxes on the unsecured roll.

Co-tenancy is the legal term commonly used to designate ownership by several persons of undivided interests in real property. Cotenants own property by one joint title and in one right, and thus have one common freehold. (5 Miller & Starr, *supra*, § 12:1, p. 12-5.) The assessor is required to assess all real property *to the persons owning it* on the lien date. (Rev. & Tax. Code, § 405.) The assessor is *not* required to separately assess each undivided interest of a tenant in common in real property, and a tenant in common does not have the right to compel separate assessment of his undivided interest. (37 Ops. Cal. Atty. Gen. 223 (1961).) While fractional ownership interests must be tracked by county assessors for base year value purposes, the separate assessment of fractional interests is not required. (Letter to Assessors (LTA) 1985 1985/085.)

If a property has escaped assessment, the assessor must assess the property upon discovery at its value on the lien date for the year it escaped assessment. (Rev. & Tax. Code, § 531.) The assessor must then immediately add the escape assessment to the roll being prepared, process corrections to the current roll and process escape assessments for prior years within the statute of limitations. (Assessors' Handbook Section 201, *Assessment Roll Procedures* (June 1985), p. 25; LTA 2002/14 (3/14/2002), p.2.) Escape assessments on real property are enrolled on the secured roll thus creating a lien or charge on such real property unless the conditions in section 531.2, subdivision (b)(2) are met. Every tax on real property is a lien against the property assessed, and every tax declared to be a lien on real property has priority over all other liens on the property, regardless of the time of their creation. (Rev. & Tax. Code, §§ 2187, 2192.1.)

In the present case, a COS was not filed as required, and an Affidavit of Death not recorded, leaving the assessor without notice that a 25 percent CIO of the Property had occurred in 2009. (Rev. & Tax. Code, § 480, subd. (e).) Thus, the Property escaped assessment as the result of the unrecorded change in ownership, and the escape assessments will remain secured by the Property unless the Property is purchased by a bona fide purchaser for value prior to the date of the assessment of the property. (Rev. & Tax. Code, § 531.2, subd. (b).) In such a case, the escape assessments would be entered on the unsecured roll in the name of the person who was the assessee in the year in which it escaped assessment.

Brother 1 and his Wife purchased Child 1's and Grandchild's interests on October 12, 2010. They claim to be bona fide purchasers for value. However, when the Property escaped assessment in 2009, Brother 1 and his Wife, as owners of fractional interests in the undivided property, were proper assessees of the entire Property along with Child 1 and Grandchild. (See Rev. & Tax. Code, § 405.) Although Brother 1 and his Wife owned only a 50 percent interest in the Property prior to the Purchase, it was an undivided interest in the *whole* Property, which was assessed as an undivided whole. "In proportion to their interests all tenants in common are in duty bound to pay taxes, which in this state are a lien upon real property and their nonpayment subjects the land to sale in satisfaction of them." (*Willmon v. Koyer* (1914) 168 Cal. 369, 374.) Any cotenant may pay the taxes assessed against the whole, and such payment inures to the benefit of the nonpaying cotenants and discharges the lien against the entire property for the common benefit. In the absence of an agreement to the contrary, a cotenant who pays the taxes assessed against the property is entitled to a ratable contribution from the other cotenants

although the payment was made without their consent and even over their objections. (5 Miller & Starr, *supra*, § 12:10, p. 12-22; *Willmon v. Koyer*, *supra*, p. 374.) Thus, nonpayment of a co-owner's share of property taxes subjects the land to sale in satisfaction of the taxes. Accordingly, in our view, the escape assessments resulting from the 2009 CIO are rightly assessed to the persons owning the Property on the lien date, namely Brother 1 and his Wife, along with Child 1 and Grandchild. (Rev. & Tax. Code, § 405; 33 Ops. Cal. Atty. Gen. 179 (1959).)

Therefore, *even if* Brother 1 and his Wife were bona fide purchasers for value, the escape assessments could be entered in *their* names on the unsecured roll pursuant to section 531.2, subdivision (b). However, we do not believe that such a result is intended by that section. Rather, we believe that a co-owner who has an ownership interest in a property both before and after the purchase of a fractional interest in that property does not qualify as a bona fide purchaser for value under section 531.2, subdivision (b).

A bona fide purchaser for value is a person who acquires an interest in real property in good faith and for value without knowledge or notice of a prior interest and who has parted with value in consideration for the interest. (5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 11:50, p. 11-170; *Walters v. Calderon* (1972) 25 Cal.App.3d 863, 876.) The burden is on the person claiming to be a bona fide purchaser for value to show that he or she received the interest in good faith, for value, and without notice of the prior interest. (5 Miller & Starr, *supra*, § 11:51, at p. 11-179.) Actual notice consists of express information of a fact, while constructive notice is imputed by law. (Civ. Code, § 18.) Actual notice means that which a person actually knows or could discover by making a reasonable investigation. (5 Miller & Starr, *supra*, § 11:59, p. 11-191.) Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself if he or she might have learned such fact by making the inquiry. (Civ. Code, § 19.)

Notice may also be implied from circumstances, as provided below:

> **Rule of implied notice**. When a person receiving an interest in real property has knowledge of facts or circumstances that would prompt a reasonable and prudent person to investigate a possible prior interest in the same property, it is presumed that he or she has made an inquiry and the law implies notice as to all information that would have been discovered by a reasonable investigation. A person generally has "notice" of a particular fact if that person has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact. When a party has knowledge of facts, he or she also is charged with knowledge of the legal significance of those facts . . . . A person having knowledge of facts that would cause a reasonable person to investigate should not be accorded the bona fide status if he or she negligently fails to pursue an inquiry. [Citations omitted.]

(5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 11:81, p. 11-245.)

In this case, Brother 1 and his Wife cannot be bona fide purchasers for value for purposes of section 531.2, subdivision (b) since they were owners and proper assessees of the Property at the time it escaped assessment in 2009. We believe this is especially true since Brother 1 was the manager of the Property for many years, and reasonable inquiry would have revealed that a change in ownership occurred upon Grandchild's acquisition of a 25 percent tenancy-in-common interest in the Property.

Additionally, you ask whether the supplemental assessment for the 2009 event should be secured or unsecured and under what code section. Taxes on the supplemental roll become a lien against the real property on the date of the change in ownership unless by other provisions of law the taxes are not a lien on real property. (Rev. & Tax. Code, § 75.54, subd. (a).) The statutory language further provides that, where a subsequent change in ownership occurs before the mailing of the supplemental tax bill for the initial change in ownership, the lien for the initial change in ownership is extinguished and:

> that portion of the supplemental assessment attributable to the assessee from the date of the initial change in ownership to the date of the subsequent change in ownership shall be entered on the unsecured roll or on the supplemental roll as an unsecured assessment in the name of the person who would have been the assessee if the additional change in ownership had not occurred.

(Rev. & Tax. Code, § 75.54, subd. (c).)

In the present case, a subsequent change in ownership (2010 CIO) occurred after an initial change in ownership (2009 CIO) and before the mailing of the supplemental tax bill for the 2009 CIO. Thus, the lien related to the 2009 supplemental assessment is extinguished and the supplemental assessment should be entered on the unsecured roll or on the supplemental roll as an unsecured assessment in the name of the person who would have been the assessee if the additional change in ownership had not occurred. We note that unlike section 531.2, there is no requirement that a subsequent purchaser be a bona fide purchaser for value for the lien to be extinguished. Thus, the unsecured supplemental assessment would be entered in the name of Grandchild, Child 2's beneficiary, since Grandchild would have been the assessee had the subsequent change in ownership (the 2010 CIO) not occurred.

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. Should you have any additional questions, please feel free to contact me.

Sincerely,

/s/ Susan Galbraith

Susan Galbraith
Tax Counsel

SG:yg
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cc: Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
Mr. Todd Gilman MIC:70