



STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
TELEPHONE (916) 324-2642
FAX (916) 323-3387
www.boe.ca.gov

JOHAN KLEHS
First District, Hayward

DEAN ANDAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHIANG
Fourth District, Los Angeles

KATHLEEN CONNELL
State Controller, Sacramento

JAMES E. SPEED
Executive Director

January 31, 2002

Re: **Transfer of Legal Title in Timeshare Transactions.**

Dear _____ :

This is in reply to your e-mail dated September 10, 2001 to Assistant Chief Counsel Larry Augusta and your letter dated December 4, 2001 to Supervising Tax Counsel Kristine Cazadd regarding whether the transfer of legal title in a timeshare interval to a not-for-profit corporation in exchange for points is considered a change in ownership of the real property interest transferred. Please excuse the delay in responding, as previously scheduled Board matters have occupied our time. As discussed further below, it is our opinion that the transfer of legal title by the owners of timeshare interests to the not-for-profit corporation would constitute the transfer of bare legal title only and, as such, would not result in a change in ownership of the beneficial interest in the timeshare interval.

Factual Background

As detailed in your letter, the following summarizes the information that you have provided to us. Individual owners of timeshare interests transfer legal title to their timeshare interest into the _____ Owners Association (Association) in exchange for "points." As the result of a transfer, a timeshare owner is considered a "founding member" in the Association. The timeshare owner can then use his "points" to vacation at his or her original timeshare location or at other vacation properties in the Association.

Law and Analysis

Revenue and Taxation Code section 60¹ defines a "change in ownership" 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." Whether or not a particular transaction

¹ Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

involving real property falls within this definition depends upon the facts of the case. To have a change in ownership under section 60, the particular transaction must satisfy the three requirements contained in the definition:

- (1) A transfer of a present interest in real property;
- (2) A transfer of a beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

In interpreting section 60, Property Tax Rule 462.240, subsection (a) states that the transfer of bare legal title does not constitute a change in ownership. The underlying rationale of this rule is that where the beneficial use of property remains unchanged and the transfer is not coupled with the right to immediate use, occupancy, possession, or profits, the transfer is considered to be the transfer of mere legal title to the property and not the transfer of the beneficial use of the property, "the value of which is substantially equal to the value of which is substantially equal to the value of the fee," as elicited by section 60.

This rationale was discussed and applied in the case of *Parkmerced Co. v. City and County of San Francisco* (1983) 149 Cal.App.3d 1091, where the plaintiff was a partnership formed for the purpose of acquiring and operating specified real property, but title to the property was held by one of the partners whose sole purpose was to hold title for the partnership but without any right to use, occupancy, or profits. The court stated that no change in ownership occurs "upon the transfer of bare legal title without a corresponding transfer of the beneficial use thereof," and, since the partner held no more than "bare legal title" to the property, the subsequent transfer to the partnership was not a change in ownership.

As to the transfer of legal title, Evidence Code section 662 provides that "the owner of the legal title is presumed to be the owner of the beneficial title." Evidence Code section 662 further provides that "this presumption may be rebutted only by clear and convincing proof."² Clear and convincing proof has been defined as "clear, explicit and unequivocal . . . so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In Re Jost* (1953) 117 Cal.App.2d 379, 383.) Substantial evidence appears to have been provided in this case.

The transaction that you have described and documented falls within the parameters of Rule 462.240, subdivision (a) and *Parkmerced Co. v. City and County of San Francisco*, in that only bare legal title to the timeshare interests held by the owners of these interests would be transferred as a result of the transfer of title in the property to the Association. Upon review of the documents sent to us, the timeshare owners retain the same right to use, occupancy, and possession of the particular timeshare property that they maintained prior to the transfer of title

² Property Tax Rule 462.200, subsection (b) provides that to overcome the deed presumption "consideration may be given to, but not limited to, the following factors:

- (1) The 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.
- (2) The monetary contribution of each party. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns."

to the Association. For example, the Purchase Agreement, the vehicle used for the transfer of title to the Association in exchange for a membership in the Association and the receipt of "points," states

2. Your Basic Rights and Duties. . . .

A. Use Rights. Each year, you will have the right to receive the number of home club points shown on the page one of this agreement. You may use them to reserve and use a home club unit to reserve and use a home club unit. To do so, you must follow the rules contained in the home club documents. If you are a founding member, you have a special right to request a reservation for a unit included in your home plan. You may do so during the home plan reservation period that is a time set aside for founding members³ to request reservations if they wish to return to their home plan. . . .

* * *

13. Your Promises and Statements. You understand and agree that:

A. Membership. This agreement is evidence that you own a membership. Your membership gives you the right to use and occupy the vacation property on the terms contained in this agreement and in the home club documents. "*Vacation property*" means the property included in the home club program. The association in which you are a member, and not you owns or has the legal right to use all of the vacation property.

* * *

The transferor's/owner's interest or right represented by the points acquired in the "home club"/"home plan" constitutes a special reservation right at a particular time period and allows for the transferor/owner to trade in his or her points to vacation at a different location. We note the following definitions in Chapter 7, Section 7.2 of the Bylaws:

F. "HOME PLAN" is the independent vacation plan in which a founding member owned a vacation interest before trading it in for a membership in a Club. . . .

1) "HOME PLAN VACATION INTEREST" means the vacation interest traded in by a founding member for a membership in a Club.

2) "HOME PLAN USE RIGHT" means the use rights that go with the home plan vacation interest of a founding member. If the home plan vacation interest includes the right to use a specific week, the "home plan use right" means that very week. Otherwise, it means the right of the vacation owner to reserve and then use a week or other time period according to the documents governing the home plan.

³ A "founding member" is defined on Page 11 of the Final Subdivision Public Report as "people who trade in a time share interest in another time share plan (their "home plan") for a membership in the Association."

Chapter 7, Section 7.7 and Chapter 10, Section 10.2 of the Bylaws state the following regarding members reservation rights:

7.7 RESERVATION RULES. . . .

C. RESERVATION WINDOWS. . . .

1) HOME PLAN RESERVATION PERIOD. During the home plan reservation period, founding members may reserve their home plan use right.⁴ Premier members do not have a home plan use right and so they cannot request a reservation during the home plan reservation period. . . .

* * *

10.2 RIGHTS DURING A MEMBER'S VACATION PERIOD. During a member's vacation period, the member has the exclusive right to occupy and use his or her assigned unit and to use the furnishings in it. . . .

Page 14 of the Final Subdivision Public Report further elaborates that

You will be a founding member if you trade in a time-share interest in another vacation plan (your 'home plan') for your membership in the Home Club. As a founding members [*sic*] you may choose to return to your home plan and use the rights for your old time share interest (your 'home plan use rights'). A time period has been set aside called the 'home plan reservation period,' when only founding members may request a reservation in their home plan. . . .

Because premier members do not trade in a time-share interest, they do not have a home plan use right and, of course; they cannot request a reservation during the home plan reservation period.

As a result of these provisions, founding members can use their original timeshare interests just as they had prior to the transfer of title to the Association. The beneficial ownership interest is not lost when a founding member chooses to use his or her points at a different location in a particular year. The right to possess the property is again there during a specific time interval the following year and the years thereafter.⁵ As such, a founding member's right to use, occupancy, and possession of his or her original timeshare interest in unaffected by the transfer of legal title to the Association and, therefore, such transfer is not a change in ownership of the beneficial interest in the timeshare interval.

In your letter, you stated the transfer of the timeshare interests should also qualify for exclusion from change in ownership by the characterization of the transaction as a holding agreement. Rule 462.200, subsection (c) implements the definition of change in ownership in

⁴ Page 16 of the Final Subdivision Public Report defines "home plan use rights" as "[i]f you are a founding member, then during the home plan reservation period, you may request a reservation in your home plan (and only in your home plan). . . ."

⁵ You have confirmed such return rights in the January 16, 2002 e-mail from S of Vacations to Mr.

section 60 by describing the exception for transfers under holding agreements. The rule makes it clear that a transfer of property from the owner to an entity holding title pursuant to a holding agreement or from the entity holding title back to the owner is not a change in ownership, where the terms of the holding agreement establish a principal-agency or a nominee relationship between the owner and the entity. Subsection (c) states:

Holding agreements. A holding agreement is an agreement between an owner of the 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 no 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.

- (1) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.
- (2) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal.

Unfortunately, unlike the holding agreements described in Rule 462.200, subsection (c) above, the transfer of the timeshare interest via the Purchase Agreement to the Association is a permanent transfer of legal title by the owner of the timeshare interest. Once the transfer has been made, unlike the concept of a holding agreement, there will be no future conveyance of legal title back to the timeshare owner. As such, the application of Rule 462.200, subsection (c) in this instance is inappropriate.

Finally, with regard to your question as to whether the transfers would be subject to documentary transfer tax, we must advise you that the State Board of Equalization and its staff have no authority, express or implied, to interpret or administer the Documentary Transfer Tax Act (Act)⁶ or any local ordinance adopted pursuant to the Act. The Act is entirely a local matter, adopted at the discretion of the local legislative body and there is no state agency that is charged with the responsibility of overseeing the implementation of the Act or interpreting its terms. We would recommend that you review the provisions of the local ordinance imposing the tax in the specific jurisdiction where the property is located and, since the documentary transfer tax is administered and collected by the county recorder at the time of the transfer, that you should direct your question regarding the applicability of the documentary transfer tax to the county recorder. In addition, we note that the exemption language adopted by the Legislature in 1999 and codified in section 11925, subdivision (d) exactly parallels the property tax exclusion found in section 62, subdivision (a)(2) and may be applicable in these circumstances.

The views expressed in this letter are advisory in nature only; 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. You may wish to contact the Assessor's Office for the

⁶ Part 6.7 (commencing with section 11901) of Division 2 of the Revenue and Taxation Code.

Mr.

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January 31, 2002

County of
set forth herein.

to ascertain whether it is in agreement with the analysis and conclusions

Very truly yours,

/s/ Anthony S. Epolite

Anthony S. Epolite
Tax Counsel

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cc:

Mr. David Gau, MIC:63
Chief, PPSD, MIC:64
Mr. Charlie Knudsen, MIC:62
Ms. Jennifer Willis, MIC:70