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January 27, 2001

JAMES E. SPEED
Executive Director

Hon. R. Glenn Barnes
Mono County Assessor
Office of the Assessor
County of Mono
P.O. Box 456
Bridgeport, California 93517

Re: Taxability of Indian Housing Authority

Dear Mr. Barnes:

This is in response to your letter dated November 20, 2000, in which you request our opinion on several matters relating to the property taxation of certain property owned by the Owens Valley Indian Housing Authority in Mono County (the property). On November 24, 1998, we wrote a letter on this topic to Marshal Rudolph, the Mono County Counsel. Subsequently, on August 15, 2000, the Office of the Attorney General issued an opinion on the matter that was consistent with our earlier letter. (83 Op. Atty. Gen. Cal. 190.) The substance of these earlier opinions is summarized below:

1. The property is not exempt from state and local police and taxing powers solely by virtue of its use as a federally assisted low-income housing project for Native Americans.
2. Inasmuch as the property is not "Indian country" – and does not constitute an Indian reservation, Indian allotment, or a "dependent Indian community" – the property does not qualify for exemption from property taxation as "land and improvements held by the federal government in trust for an Indian tribe." (See SBE Annotation 525.0010 4/14/81.)
3. The property is not exempt from property taxation under Rev. & Tax. Code § 202(a)(4) because Indian housing authorities are not owned by public agencies.
4. The property is not exempt under the welfare exemption provided in Cal. Const. Art. XIII, § 4(b) and Rev. & Tax. Code §§ 214, et seq., because the requirements of sections 414(a)(6), 214.01, and 214.8 are not satisfied.
5. The property has not been exempted from property taxation under Rev. & Tax. Code § 237, entitled, "Exemption: Indian Tribal-Owned Low Income Rental Housing."

6. HUD sold the property to the Owens Valley Indian Housing Authority. The deed does not restrict alienation to non-Indians of its use solely for Indian purposes, but does require that the property be used for federally assisted low-income housing for 40 years. (83 Atty. Gen. Code 198, supra.)

In your recent letter you pose several additional questions relating to the taxation of the Owens Valley Indian Housing Authority property. Set forth below are our responses:

1. Is the taxability of this facility all encompassing, a single taxable parcel, or numerous small parcels based on individual occupation and use of individual dwellings?

As I understand the question, you are asking whether or not the property constitutes one appraisal unit or many. The answer to this question depends upon an analysis of all the factual circumstances relating to the property. In discussing adjustments to base year values under "Proposition 13," section 51(d) of the Code of Revenue and Taxation defines "real property" to mean that "appraisal unit that persons in the marketplace commonly buy and sell as a unit, or that is normally valued separately." Pursuant to Board Property Tax Rule 324(b): "An appraisal unit of property is a collection of assets that functions together, and that persons in the marketplace commonly buy and sell as a single unit or that is normally valued in the marketplace separately from other property, or that is specifically designated a such by law." This regulatory definition of the "appraisal unit" was addressed in a letter from the Board staff that is summarized in Property Tax Annotation 845.0001 (C 3/31/95). That letter, a copy of which is attached, contains the following discussion on the determination of the proper appraisal unit for property tax purposes:

In our view ... the definition presents a question of fact for the appeals board and should be approached as any other factual question. Since you have not mentioned any special legal proscriptions, we would suggest that you present to the appeals board all factual evidence that demonstrates how the buildings function separate and apart rather than together and, if discoverable, present comparable sales that demonstrate the unit function rather than comparable value. Our conclusion therefore, is that it is within the purview of the assessment appeals board to decide whether or not an appraisal unit exists, and that the decision should be based on the facts presented by the applicant and the assessor without any specific legal constraint.

The Advanced Appraisal Handbook (Assessors' Handbook Section 502, December 1998) also discusses the appraisal unit at pages 1 through 5 – a portion of which discussion is excerpted below:

Determining the property appraisal unit is a problem to be solved on a case-by-case basis. In most appraisals, the definition of the appraisal unit is straightforward. The value standard in property tax appraisal is market value, and it is the market that determines the appraisal unit. In other words, the appraisal unit is the unit that people typically buy and sell in the relevant market or market segment.

Determination of the proper appraisal unit for multiple-parcel properties is more complex. For example, agricultural properties such as ranches and farms, and commercial properties such as shopping centers, frequently comprise several parcels that could conceivably be sold either individually or as one unit.

Several facts may indicate that multiple parcels should be considered a single appraisal unit. These factors include: (1) the functional and economic integration of the parcels; (2) the attainment of highest and best use when the parcels are analyzed as a single unit; (3) contiguity; (4) common ownership; and, (5) current or prior combined sales of the parcels (i.e., actual transactions in which the parcels transferred as a unit). The final decision as to the appraisal unit is a matter of judgment, and no single factor can be considered controlling. The appraiser's determination of the proper appraisal unit should reflect the unit most likely to be sold in view of these five factors, if the property were exposed to sale in the open market.

There is also at least one Board rule that addresses situations in which a single parcel of real estate is deemed to include more than one appraisal unit. Rule 461(e) provides that: "Land and improvements constitute an appraisal unit except when measuring declines in value caused by disaster, in which case land shall constitute a separate unit. For purposes of this subsection fixtures and other machinery and equipment classified as improvements constitute a separate appraisal unit."

The Owens Valley Indian Housing Authority facility site occupies some 80 acres containing between 35 to 40 individual dwelling units and garages. As you state, "Less than half of the dwellings are occupied and appear to be in a state of severe deferred maintenance." Pursuant to our telephone conversation, however, the site consists of only one legal parcel. Generally speaking, property that occupies one parcel normally will constitute only one appraisal unit. But, as indicated above, this is not a hard and fast rule. Given the proper factual circumstances, there is no absolute bar against considering one parcel to contain more than one appraisal unit. The stated facts, however, do not seem conducive to such a finding in this case. Not only are the dwellings combined in common ownership, but they also are functionally and economically integrated as a public housing facility. Furthermore, there is a deed restriction mandating such use for assisted public housing for a 40-year period. Nevertheless, the final decision as to the appraisal unit is a matter of judgment, and no single factor can be considered controlling. Ultimately, the assessor's determination of the proper appraisal unit should reflect the unit most likely to be sold if the property were exposed to sale in the open market.¹

2. Would the fact that the Indian tenants themselves are not taxable have any effect on the method used to parcel out the property that is taxable to Owens Valley Indian Housing Authority?

No. The general rule is that – absent express law to the contrary – Indians going beyond reservation boundaries are subject to non-discriminatory state laws, including tax laws that would be applicable to all citizens of the state. (*Mescalero Apache Tribe v. Jones* 411 U.S. 145 (1973); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation* 502 U.S. 251 (1992)) Thus, off-reservation, nonexempt rental housing units should not be valued or taxed differently merely because of the presence of Native American tenants.

¹ Since the property is not held in trust by the federal government – and, thus, is not tax-exempt – there is no need to consider whether or not a taxable possessory interest might arise with respect to the occupants. (But see *John Tennant Memorial Homes, Inc. v. City of Pacific Grove* (1972) 27 Cal.App.3d 372; *English v. County of Alameda* (1977) 70 Cal.App.3d 226.)

3. Are the roads, water lines, gas lines, sewage lines all taxable components of value or, would part of these items be considered to be dedicated to the public at large?

For purposes of property taxation, the definition of “property” includes “all matters and things, real, personal, and mixed, capable of private ownership.” (Rev. & Tax. Code § 103.) The category of “taxable property” also is defined very broadly and includes easements, rights of way, pipes, and improvements to land. (Rev. & Tax. Code § 201; Ehrman & Flavin 1 Taxing California Property, 3rd Ed., § 3.01, p. 2 (CBC 1992).) Accordingly, the items you mention – road improvements, water lines, gas lines, and sewage lines – all should be included in the appraisal unit unless they have been transferred to a nontaxable government entity or otherwise become exempt or immune from property taxation. (Cal. Const. article XIII §3(a) and (b).)

You have indicated that the instant facility was transferred directly from the United States to the Indian housing authority. Thus, it is possible that the housing authority privately owns the roads and utility lines located within the parcel. If that is the case, then those items are part of the assessable appraisal unit.

4. Are there any components in a facility of this type that would be considered non-taxable?

Given that it has not been demonstrated that the property qualifies for a property tax exemption or has become immune to such taxation, the mere fact that portions of the property are occupied by Native American tenants does not give rise to any specific exemptions for any of the property’s “components.” As indicated above, however, any portions of the development that are owned by the state or a local government entity generally will be exempt from property taxation.

5. Is this facility to be valued at market value or should it be valued under enforceable restrictions?

Subject to the restrictions of “Proposition 13,” the property must be assessed at its fair market value. This means that the property must be valued at its highest and best use in view of all the purposes to which it is naturally adapted. (Ehrman & Flavin, *supra* at § 17.06; Assessors’ Handbook 501, Basic Appraisal, p.46-53). The property’s highest and best use, however, generally must be a use that is legally permitted. Pursuant to section 402.1 of the Code of Revenue and Taxation, the assessor shall consider the effect upon value of any “enforceable restrictions,” such as those found in zoning laws, government land use permits, government development controls, and government environmental restrictions. Section 402.1, however, does not encompass private land use restrictions such as those set forth in a deed, articles of incorporation, contract, or covenants, conditions, and restrictions. (*Carlson v. Assessment Appeals Board* (1985) 167 Cal.App.3d 1004; Ehrman & Flavin, *supra* at § 17.06.)

Turning to the facts of this case, it appears that the property is subject to a private deed restriction. Pursuant to the Attorney General’s opinion, the deed from HUD mandates that the property be used for federally assisted low-income housing for 40 years. (83 Op. Atty. Gen. Cal. 190, *supra*). If that condition is met, then all restrictions on use of the property will terminate, and it will not revert to the federal government.

These types of deed restrictions are discussed in the Assessor’s Handbook, Section 501 (September 1997) at pages 68 to 49:

Deed restrictions that restrict the uses of a property are not the same thing as governmentally-imposed restrictions discussed above. Deed restriction are rights

reserved by private persons as opposed to limitations imposed by government. In most cases, the property tax appraiser should not recognize deed restrictions when analyzing highest and best use. The rights to be assessed are the fee simple rights without encumbrances, subject only to the limitations imposed by government. A division of the fee simple rights would require a separate assessment on each portion, and the assessment of only one portion of the rights would result in the illegal exemption of the balance.

In general, private parties cannot reduce the taxable value of their property by imposing their own restrictions upon it. Exceptions to this general rule are discussed below.

When a lease between two or more private parties restricts the use of a property, the property is nevertheless appraised on the basis of its highest and best use, with the restricted use considered as one of the possible uses.

As indicated above, the facility should be valued in accordance with its full cash value at its highest and best use subject only to those enforceable governmental restrictions set forth in section 402.1. Nevertheless, the fact that the owner is privately obligated to operate the facility as a low-income housing authority may be taken into consideration in determining its highest and best use to the extent that the property is subject to the same county ordinances, land use permits, building restrictions, and health and sanitation requirements that apply to other low-income or assisted housing projects in the county.

6. Wasn't it the intent of the Section 237 exemption that it be applied to an apartment-type complex and not an individual single family dwelling?

Section 237 of the Code of Revenue and Taxation provides a property tax exemption for qualifying Indian Tribal owned low-income rental properties. Among the requirements for such an exemption are the following: (1) the property must be owned and operated by a federally designated Indian tribe or its housing entity; (2) the property must be exclusively used for the charitable purpose of providing rental housing to low income tenants; (3) the housing entity must be nonprofit; (4) no part of the net earnings can inure to the benefit of a private shareholder or individual; and (5) the Indian tribe or housing entity must provide the assessor with documents establishing that (i) there is a deed restriction, agreement, or other legally binding document restricting the property's use to low-income housing and (ii) the rents will not exceed certain prescribed amounts. In this case, the Owens Valley Indian Housing Authority facility has not – at least as of the present date – become qualified for the property tax exemption provided by section 237.

Turning to your specific question, we do not see anything in section 237 that would lead us to conclude that it could not properly be applied to detached single family residences. Certainly, section 237 does not on its face preclude the exemption of otherwise qualified Indian Tribal owned low-income rental properties merely because they are not “apartment-type complexes.” Even the Health and Safety Code includes a broad definition of a “residential structure” for purposes of assisted housing: “‘Residential structure’ for the purpose of the California Housing Finance Agency, means any existing structure of one to four units ... for the provision of housing financed pursuant to the provisions of this division for the primary purpose of providing decent, safe, and sanitary housing for persons and families of low or moderate income.” (Health & Safety Code §

50099.5; see also § 50073, et seq.) Thus, based upon our review of the applicable statutes, we conclude that -- while the property may be comprised of detached single family dwellings -- it is not thereby disqualified from the application of the section 237 exemption.

7. For 237 to work, isn't it a requirement that the Tribe or the Low Income Housing Authority be federally recognized. Per my discussion with Olin Jones of the Indian Affairs Branch of the Attorney General's Office, they are not federally recognized.

As indicated above, section 237 expressly requires that, in order for an Indian Tribal owned low-income property to qualify for the property tax exemption, the property must be owned and operated by a federally designated Indian tribe or its housing entity. Thus, if the Owens Valley Indian Housing Authority does not so qualify, it does not qualify for the tax exemption provided by section 237.

It is the responsibility of the taxpayer claiming an exemption to provide documentation that the specific requirements for that exemption have been met. (Rev. & Tax. Code § 237 (c).)

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. If you have any questions, please call me at (916) 324-6593.

Sincerely,

/s/ Robert W. Lambert

Robert W. Lambert
Senior Tax Counsel

RWL:eb

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Attachments [Annotation 848.0001 (C 3/31/95)]

cc: Mr. Dick Johnson, MIC:63
Mr. David Gau, MIC:64
Mr. Charlie Knudsen, MIC:62
Mr. Larry Augusta, MIC:82