



## STATE BOARD OF EQUALIZATION

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June 29, 2010

The Honorable Norma J. Torres  
 Assemblymember, 61<sup>st</sup> District

Attn:

State Capitol

P.O. Box 942849

Sacramento, CA 94249-0061

**Re: *Taxability of Public Housing Leases to Tenants as Possessory Interests  
 Assignment No. 10-086***

Dear Assemblymember Torres:

This is in response to an e-mail dated May 24, 2010, written by \_\_\_\_\_, a consultant to the Assembly Housing and Community Development Committee (Committee), to Ms. \_\_\_\_\_ of the Legislative Division of the State Board of Equalization (Board). In her e-mail, Ms. L \_\_\_\_\_ requested, on your behalf, a legal opinion as to whether or not a possessory interest tax may be assessed against low-income tenants who reside in publicly owned low-income housing.

The Legal Department has previously opined in a legal opinion dated March 7, 1995 (March 7, 1995, Opinion), that low-income tenants residing in public housing projects should not be considered to hold a taxable possessory interest in their leaseholds under California Revenue and Taxation Code<sup>1</sup> section 107 on the grounds that the imposition of such a tax would frustrate the State's interest in providing affordable and low-cost public housing.<sup>2</sup> This continues to be the Legal Department's position.

As you know, property owned by the state or a local government entity is exempt from real property taxation.<sup>3</sup> When a local government or a state agency owns real property, the ultimate title rests in the state itself. Thus, to tax such property would result effectively in the state taxing itself.<sup>4</sup> As a result, even though provisions exempting private property from taxation are to be strictly construed, because taxation of public property may occur only if there is express authority to do so, the exemption for public property is to be liberally construed.<sup>5</sup> However, while real property owned by the state or local government within its jurisdictional boundaries is not subject to property taxation, a private leasehold or other private possessory interest in such property may be taxable as a "possessory interest."<sup>6</sup>

<sup>1</sup> All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

<sup>2</sup> A copy of the March 7, 1995, Opinion is attached for your reference. As you will see, the March 7, 1995, Opinion focuses specifically on sites for mobile homes owned by local government-run housing authorities, but its conclusion extends to any other kind of government-operated low-income housing.

<sup>3</sup> Cal. Const., art. XIII, § 3, subds. (a) and (b).

<sup>4</sup> *Sacramento Mun. Utility Dist. v. County of Sonoma* (1991) 235 Cal.App.3d 726, 732.

<sup>5</sup> *L&B Real Estate v. Housing Authority of County of Los Angeles* (2007) 149 Cal.App.4th 950, 956.

<sup>6</sup> Rev. & Tax. Code, §107.

The March 7, 1995, Opinion has already concluded that low-income tenancies in government-owned housing should not be treated as taxable possessory interests under section 107, subdivision (a), noting that courts have generally not found taxable interests in the leaseholds of residents in property that is used for low-income housing and other exempt purposes. For example, in *Housing Authority of the County of Los Angeles v. Dockweiler*,<sup>7</sup> the California Supreme Court concluded that statutes encouraging the construction of public housing projects for low-income families were constitutional because they enhanced the public welfare. In other cases dealing with the welfare exemption, courts have extended this analysis to find that taxing the leaseholds of tenants in welfare and college-exempt housing is inappropriate.<sup>8</sup> For these reasons, the March 7, 1995, Opinion concluded that ". . . possessory interest assessments should not be made against the occupants of such projects, since to do so would defeat the purpose of public housing to provide affordable low-cost housing."<sup>9</sup>

Having examined the law in depth since the issuance of March 7, 1995, Opinion, we are unaware of any statutory changes or judicial opinions issued since the writing of the March 7, 1995, Opinion that would subject low-income housing tenants in government projects to a possessory interest tax on their leaseholds.

In support of this conclusion, we also note that the Legislature has consistently encouraged the creation of local housing authorities to build and operate housing for low-income residents.<sup>10</sup> As Health and Safety Code section 34400 states, in relevant part:

It has been found and declared in the Housing Authorities Law and the Housing Cooperation Law (a) that there exist in the State housing conditions which constitute a menace to the health, safety, morals and welfare of the residents of the State; (b) that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident prevention, and other public services and facilities; (c) that the public interest requires the remedying of these conditions by the creation of housing authorities to undertake projects for slum clearance and for providing safe and sanitary dwelling accommodations for persons who lack sufficient income to enable them to live in decent, safe and sanitary dwellings without overcrowding; and (d) that such housing projects are for public uses and purposes and are governmental functions of state concern. As a matter of legislative determination, it is hereby found and declared that the property and bonds of a housing authority are of such character as shall be exempt from taxation.<sup>11</sup> (Emphasis added.)

Likewise, Health and Safety Code section 34322, subdivision (a) provides that public housing authorities shall "[r]ent or lease the dwelling accommodations only to persons of low income and

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<sup>7</sup> (1939) 14 Cal.2d 437, 455.

<sup>8</sup> See *John Tenant Memorial Homes, Inc. v. City of Pacific Grove* (1972) 27 Cal.App.3d 372, 383 (residents of a welfare-exempt retirement home should not be subject to city's excise tax on their leaseholds); *English v. County of Alameda* (1977) 70 Cal. App. 3d 226, 244 (" . . . [P]olicy reasons that have been spelled out with regard to the taxability of possessory interests in welfare exempt property ought to be deemed equally applicable to possessory rights existing in college exempt property.").

<sup>9</sup> March 7, 1995, Opinion, p. 4.

<sup>10</sup> See Gov. Code, § 65580, subs. (c) and (e) and § 65581.

<sup>11</sup> It should be noted that Health and Safe Code section 34400 has not been amended since its initial passage in 1953 (Stats 1953 ch 93 § 1.) and that its predecessor statute was first enacted in 1938 (Stats Ex Sess 1938 ch 1 § 1 p 1).

only at rentals within their financial reach." As the March 7, 1995, Opinion asserts, it would be antithetical to such Legislative enactments to impose a tax on the leaseholds of low-income individuals and families living in government-run housing.

The opinions expressed in this letter are only advisory and represent the analysis of the legal staff of the Board based on current law and the facts set forth herein. These opinions are not binding on any person, office, or entity.

Sincerely,

/s/ Andrew Jacobson

Andrew Jacobson  
Tax Counsel

AJ:yg

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