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September 22, 1987

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Honorable David A. Cardella  
Merced County Assessor  
2222 M Street  
Merced, CA 95340

Attention: Mr. Bill W. Smith

Dear Mr. Cardella:

This letter relates to the advice provided to you in our letter of June 23, 1987, from Ms. [redacted] regarding the sale and leaseback of certain real property by Merced County. Based upon our conclusion that the subject transaction was, in reality, a financing arrangement, we advised that the contractor, B. [redacted] and B. [redacted] Inc., did not acquire a sufficient interest in the property to make it the owner for property tax purposes. While this advice was based upon current Proposition 13 change in ownership principles, we acknowledged that prior case law would appear to support a different result.

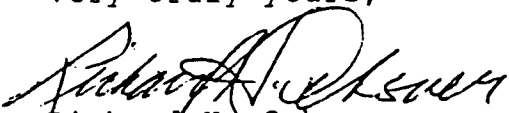
We have recently reexamined our advice in connection with a review of some related issues and have concluded that our original position should be modified. In our view, the sale and leaseback of the Merced County land should continue to be viewed as a financial transaction in which the county retained beneficial ownership of the 12-acre site. Thus, the land remained tax-exempt county property. The effect of the transaction, however, was to grant B. [redacted] B. [redacted] Inc. a right to possess and use the land to construct improvements in which the contractor would retain an equity interest for a period of up to 12 years. Thus, B. [redacted] B. [redacted] Inc. has a possessory interest in exempt county land and is in a situation quite similar to the contractor in the case of City of Desert Hot Springs v. County of Riverside (1979) 91 Cal.App.3d 441, which is discussed in our previous letter. In that case, the city leased land to the builder for purposes of constructing a city hall under a lease-leaseback agreement. Thus, in that case the city retained ownership of the land in which the builder was given the right to possess and use for purposes of constructing improvements and leasing them back to the city. In light of the factual similarities, it appears that this appellate decision should be considered controlling. Since Berry and Berry, Inc. is a for-profit construction company, like the builder in the Desert Hot Springs case, and cannot qualify under Revenue and Taxation Code section 231 for the welfare exemption, we conclude that the firm has acquired a taxable possessory interest.

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While the foregoing analysis represents our best judgment, based upon existing authorities, we hasten to acknowledge that this has been a very difficult problem. Thus, we freely admit that our conclusion is not necessarily free of doubt. It appears that certainty in this area of the law must await further legislative or judicial clarification.

We sincerely regret any inconvenience our prior communication may have caused you, and we hope that the advice provided herein will assist you in resolving that difficult assessment problem.

Very truly yours,

  
Richard H. Ochsner  
Assistant Chief Counsel

cc: Mr. James J. Delaney  
Mr. Gordon P. Adelman  
Mr. Robert Gustafson  
Ms. Michele Hicks