STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 323-7713
FAX (916) 323-3387
www.boe.ca.gov

JOHAN KLEHS
First District, Hayward

DEAN ANDAL
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KATHLEEN CONNELL
State Controller, Sacramento

JAMES E. SPEED
Executive Director

October 27, 2000

Re: **<u>REFUNDS FOLLOWING APPEALS BOARD DECISION ON BASE YEAR VALUE</u>**

Dear Mr. :

This is in response to your letter request on June 8, 2000, to Mr. Larry Augusta for our opinion on a property tax refund procedural issue. For the reasons hereinafter explained, it is our opinion that where a local assessment appeals board has rendered a decision establishing the base year value for a property, the assessed values on the roll for subsequent years must be conformed to the board's determination; appropriate refunds should be paid; and, the values should be conformed and the refunds paid without further action by the taxpayer.

The following set of facts submitted by you and by Deputy Santa Barbara County Counsel Craig Smith in the attached letter dated May 12, 2000 is provided for purposes of our analysis.

1. Taxpayer constructed a new industrial facility in 1993. Taxpayer and the assessor agreed prior to the hearing on the base year value appeal that the date of completion of construction was March 1, 1994, and that the 1994 assessed value would establish the base year value. Therefore, 1994 would be the first full base year value for the completed new construction.

2. Taxpayer timely filed applications for reduction of assessment and elected to have the applications serve as claims for refund (per Section 5097(b)) [1]for the years 1993 (on the new construction), 1994, 1995, 1996, 1997, 1998, 1999, and 2000. The four earliest applications (1993 – 1996) were consolidated for hearing, and the appeals board issued its decision in December 1998. The board increased the assessed value for the years 1993, 1994, and 1995, and decreased the value for 1996. The board's method of establishing the1994 base year value is being challenged via a refund action in Superior Court.

3. Following these events, Taxpayer was notified by the tax collector that per the board's determination, escape assessments (payable in installments) were levied for the years, 1993, 1994, and 1995. Taxpayer received a refund for 1996. Taxpayer was also informed that the assessor enrolled the 1999 and 2000 values based on the board-established 1994 base year value; however, the 1997 and 1998 enrolled values are not

[1] All references are to the Revenue and Taxation Code unless otherwise indicated.

based on the board-established 1994 base year value, but are substantially higher than the 1997 and 1998 factored base year values would be.

4. In response to Taxpayer's request to correct the 1997 and 1998 values to reflect the board-established 1994 base year value, Deputy County Counsel Craig Smith stated that the assessor is not obligated to do so. Since these years are still "pending appeal," and the board did not use the 1994 base year value to calculate the values for 1995 and 1996, and the board did not say whether the method used for the 1995 and 1996 values (cost approach less obsolescence) should be used for subsequent years, the assessor is without authority (per Section 4831) to enroll corrections for 1997 and 1998.

In order to avoid further litigation and to resolve this dispute, you request that we address this situation in response to questions from both the taxpayer and the county counsel.

1. Where an appeals board establishes a base year value for a property, the assessed values on the roll for subsequent years must be conformed to the board-determined value.

In our opinion, the law requires that the appeals board-determined base year value be used as the *control figure* in establishing the enrolled values for years subsequent to the year for which the base year was established. Further, while statutory provisions, Board Rules and case law do not specifically so require, we read the statutory scheme to establish a mandatory duty on the part of the assessor to make the appropriate corrections to the roll, for that year *and* the subsequent years, to reflect the value determined by the appeals board.

We believe this result follows clearly from the express language of section 51.5 which provides that such any error or omission in the determination of a base year value *shall* be corrected in any assessment year in which the error or omission is discovered. If the error or omission involves the exercise of an assessor's judgment, the correction must be made within four years of July 1 of the year for which the base year value was first established. The assessor is required to make such a correction, and does not have discretion not to make such a correction. In our view, a change made by an appeals board to a base year value is an *error or omission* in the determination of a base year value within the meaning of section 51.5.

This has long been our position. As stated in Letter to Assessors No. 89/34, dated April 7, 1989: " . . . the base year value must be looked upon as a *control figure* which, after factoring, sets a maximum limit or cap on the total amount of the assessed value. Accordingly, when Section 51.5 mandates the correction of an error or omission in the base year value, it requires a correction of this control figure as of the time the error or omission occurred. This implies, of course, that subsequent factored base-year values will be changed to reflect this correction. (Italics added)"

That our position is correct is confirmed by a careful reading of the applicable law and its apparent legislative purpose as well as the rules and regulations of the Board. As provided in section 110.1, by constitutional definition, a *base year value* is "the 'full cash value' … as shown on the 1975-76 tax bill under full cash value or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. (California Constitution, Article XIII A, Section 2(a).)[2] Accordingly, there are only four possible statutory *dates* when the base year value of any property may be *established* or *changed*.

The *first date* the base year value can be established is the lien date in 1975, as that is the date on which the value on the 1975-76 tax bill is determined. After 1975, the base year value is established on the date of the purchase, completion of new construction, or change in ownership.

The *second* possible date is provided under Section 75.10 which requires that any portion of property that is newly constructed or changes ownership shall be reappraised at its full cash value on the date the event occurs. The value so determined is the new "base year value" for that property.

The *third* possible date is provided under Section 51.5 which requires an assessor to correct and *change* on discovery, any base year value (or error in base year value) not involving the exercise of the assessor's value judgment. (Where the error resulted from the assessor's judgment as to value, any correction must be made within four years.)

The *fourth* possible date is under Section 80 and/or Section 1605, which provide that the taxpayer may apply for a reduction in the base year value. The assessment appeals board may correct any errors and *change* the base year value, thereby substituting its judgment for that of the assessor.

The Board recently amended Property Tax Rule 305.5, which describes quite clearly in subdivisions (c), (d) and (e), the coordination between base year value determinations made by the assessor and, upon the taxpayer's appeal, the determination made by an appeals board:

> ". . .
>
> (c) The full cash value determined for property that is purchased, is newly constructed, or changes ownership after the 1975 lien date, shall be conclusively presumed to be the base year value, unless an application for equalization is filed:
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> > . . .
> >
> > (2) **During** the regular equalization period provided for in section 1603 of the Revenue and Taxation Code for the year in which the assessment is placed on the assessment roll, or is filed during the regular equalization

[2] Proposition 13 also limited the full cash value of real property to *the lower of* fair market value or the property's 'base year value.' (Article XIII A, Section 2(b); section 51.)

> period in any of the three succeeding years. *Any determination of full cash value by a local board of equalization, an assessment appeals board, or by a court of law resulting from such filing shall be conclusively presumed to be the base year value beginning with the lien date of the assessment year in which the appeal is filed* (italics added*);* or

> (d) Any base year value determined pursuant to section 51.5 of the Revenue and Taxation Code shall be conclusively presumed to be the base year value unless an application is filed during the regular equalization period in the year in which the error was corrected or during the regular equalization period in any of the three succeeding years. *Once an application is filed, the base year value determined pursuant to that application shall be conclusively presumed to be the base year value for that assessment event."* [Italics added.]
> (e) An application for equalization made pursuant to sections 1603 or 1605 of the Revenue and Taxation Code, when determined*, shall be conclusively presumed to be the base year value for that assessment event*. (Italics added)"

This principle is also reflected in the provisions of Section 80, subdivisions (a)(3), (4), and (5), as follows:

> " . . .
> (3) The base year value determined pursuant to paragraph (2) of subdivision (a) of Section 110.1 shall be conclusively presumed to be the base year value, unless an application for equalization is filed during the regular equalization period for the year in which the assessment is placed on the assessment roll or in any of the three succeeding years. Once an application is filed, the base year value determined pursuant to that application shall be conclusively presumed to be the base year value for that assessment.
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> (4) The base year value determined pursuant to section 51.5 shall be conclusively presumed to be the base year value unless an application for equalization is filed during the regular equalization period for the year in which the error is corrected or in any of the three succeeding years. Once an application is filed, the base year value determined pursuant to that application shall be conclusively presumed to be the base year value for that assessment.
>
> (5) Any reduction in assessment made as the result of an appeal under this section shall apply for the assessment year in which the appeal is taken and prospectively thereafter."

Subdivision (c) of Section 80 is almost identical to Rule 305.5(e), and states: "An application for equalization made pursuant to Section 620 or Section 1605 when determined, shall be conclusively presumed to be the base year value in the same manner as provided herein."

Since both the statute and the rule expressly provide that "any *reduction* in assessment made as a result of an appeal under [section 80] shall apply for the assessment year in which the appeal is taken and prospectively thereafter," it is absolutely clear in the instant case, that to the extent the board established the 1994 base year value, that base year value applies to the property for 1994 and for each subsequent year thereafter.[3] See also *Assessment Appeals Manual*, page 92, which states, "The decision of the board upon application is final. … The value established by the board is conclusively presumed to be the taxable value of the property until such time as a reassessable event occurs, e.g., a change in ownership."

Thus, the Legislature has made it clear that the control figure characteristic of the base year value applies at the date any base year value is established. When the assessor corrects an error or omission in the base year value, or the taxpayer challenges a base year value and the appeals board makes the correction, all subsequent factored base year values will be changed to reflect that correction. (*Letter to Assessors No. 89/34*, p. 1.) Thus, the appeals board has the final say in the determination of a base year value, which value may not be altered except by a court.[4]

Some have suggested that the pendancy of a court action challenging the board-determined base year value serves to suspend the requirement of section 51.5 that the assessor must enroll corrections when discovered. In our view, the fact that the assessee has challenged, through court action, the accuracy of the base year value determined by the board does not alter the requirement that the board established value must be enrolled.

There are no statutory or regulatory exceptions to the foregoing requirements due to the pendency of litigation on the board-established base year value. (*Plaza Hollister Limited Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1.) Once the assessment appeals board determines the base year value, it is conclusively presumed to be the base year value for the year of that assessment event which is the subject of the appeal.[5] If it later appears that the board made an error in applying the law, a court may not vacate that base year value, but may by remand it back to the board to allow the board to carry out its constitutional charge to determine the value again. (*Plaza Hollister, supra; Prudential Ins. Co. v. City and County of San Francisco* (1987) 191 Cal.App.3d 1142.)

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[3] See also the refund case of *Osco Drug, Inc. v. County of Orange* (1990) 221 Cal.App.3d 189, in which the court concluded that under Section 80(a)(5), any reduction in base year value as the result of an assessment appeal applied prospectively from the assessment year in which the appeal was taken and *each year thereafter*.

[4] This statutory scheme was explained in the legislative history of Section 51.5 and amendments to Section 80, under Senate Bill 587 (Stats. 1987, Ch. 537). Then Assistant Chief Counsel Richard Ochsner who drafted some of the Board-sponsored legislation, stated in the SBOE Legislative Analysis, 3/26/87, p.2, "The adjusted base year value places a limit or cap on the valuation standard applied under Proposition 13. When, after applying this standard, it is determined that property has been over or underassessed, then appropriate *tax refunds* or *escape assessments* can be made in the same manner as prior to Proposition 13."

[5] A conclusive presumption is an evidentiary concept which means that once foundational facts upon which such a presumption is based are established, the assumed facts may not be controverted by contrary evidence. (Evidence Code Sections 600, 601, 621.)

For this reason, we do not agree with the assumption that the appeals board in the instant case "*intended to retain their jurisdiction over setting the values for 1997 and 1998*." (Smith letter, June 12, 2000, p.2.) A board does not *retain its jurisdiction* to establish base year values for future years; it only sets the value for the year or years appealed.[6] Just as the assessor enrolled this property at its adjusted base year values for 1999 and 2000 based on its 1994 base year value, (apparently using an appropriate method for determining that they were lower than fair market value), so too, the adjusted base year values must also be enrolled for 1997 and 1998 based on the property's 1994 base year value, if they are less than fair market values.

Pending litigation acts as a deterrent only when the appeals board hearing has not determined the base year value, per Rule 309 (c).[7] This provision does not apply to the facts here because the appeals board heard the appeal and determined the 1994 base year value, establishing it as the proper base year value for the completed new construction. Thereafter, the taxpayer filed a refund action in the local superior court. This is analogous to *Plaza Hollister*, in which the court held that where the county board of equalization determined the base year value, and a refund action by the taxpayer was subsequently filed, the conclusive presumption in Section 80(a)(3) precluded anyone, including the board of supervisors or a court, from changing that base year value.

2. Where a local assessment appeals board has rendered a decision establishing the base year value for a property, the assessed values on the roll for subsequent years must be conformed to the board's determination and appropriate refunds should be paid without further action on the part of the taxpayer.

We are offering our advice on this question; however, we hasten to note that the issue of whether refunds should be made is a matter for the county tax collector or the county auditor, not the county assessor. While the Board advises county assessors, it is the State Controller's Office that advises county tax collectors and county auditors. For that reason, you may wish to address a similar inquiry on this issue to the State Controller.

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[6] If there are applications for reduced assessment under Proposition 8 still open for any of the years, then the board does have jurisdiction to consider these after the conclusion of the litigation.

[7] In interpreting Section 1604(c), Rule 309(c) states:

> "If the hearing is not held and a determination is not made within the time specified in part (b) of this section, the applicant's opinion of value stated in the application shall be conclusively determined by the board to be the basis upon which property taxes are to be levied, except when:
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> * * *
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> (4) Controlling litigation is pending. 'Controlling litigation' is litigation which is:
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> (A) pending in a state or federal court whose jurisdiction includes the county in which the application is filed; and
> (B) directly related to an issue involved in the application, the court's resolution of which would control the resolution of such issue at the hearing."

In our view, once the decision on the 1994 base year value was made, the taxpayer was entitled to obtain refunds under Section 5097.2(e). Section 5097.2 states:

> "Notwithstanding Sections 5096 and 5097, any taxes paid before or after delinquency may be refunded by the county tax collector or the county auditor, within four years after the date of payment, if:
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> . . .
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> (e) The amount paid exceeds the amount due on the property as the result of a reduction attributable to a hearing before an assessment appeals board or an assessment hearing officer."

The issue to be decided here is whether the tax collector and/or the auditor have an affirmative duty to make the refunds, just as the assessor has the duty to make the roll corrections, without further action by the taxpayer. The issue arises because of the use of the permissive word "may" in section 5097.2: "… any taxes paid before or after delinquency *may* be refunded . . ." In our opinion, the proper interpretation of the statutory scheme is that the tax collector and/or auditor have such an affirmative duty.

In reaching our opinion, we have taken into account the general rule enunciated by the courts regarding when statutes using the word 'may' could be considered mandatory. The general rule is stated in 58 *California Jurisprudence* 3d, Statutes §47 at p. 544 as follows:

> "Although 'may' is ordinarily permissive, it may be construed to be mandatory where the object to be obtained is necessary to give effect to the legislative intent or policy as required by the context. Thus where rights are dependent on the exercise of a power conferred, and the public or third persons have a claim *de jure* to have the power exercised, 'may' may take on a mandatory meaning."

Our reading of the cases, though none are precisely on point on the issue before us, is to the effect that whether a particular statutory provision is to be considered mandatory is a question of legislative intent. "In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose . . ." (*Pulcifer v. County of Alameda* (1946) 29 Cal.2d 258, 262; see also *Morris v. County of Marin* (1977) 901, 910; *Shell Western v. County of Lake* (1990) 224 Cal.App.3d 974)

Applying these principles to the issue here, we conclude that the clear purpose of section 5097.2 is to facilitate the making of refunds where the law requires them. That being the case, we can only conclude that there is a mandatory duty to make the refunds without requiring the taxpayer to take any further action. In this case, the taxpayer has already filed applications for reduction which they designated as claims for refund.

Quite obviously, the Legislature has expressly stated that one of the grounds for the tax collector or auditor to make such refunds without further procedural steps is when "the amount paid exceeds the amount due on the property *as the result of a reduction attributable to a hearing before an assessment appeals board* or an assessment hearing officer."

Section 5097.2 was originally added in 1965 by the passage of AB 2856 of that year. It was preceded, and apparently copied from, Section 5097.1, which had been adopted 16 years earlier (in 1949) as a result of the legislative passage of AB 2604. (Waters-949.) Section 5097.1 was introduced at the request of the County Tax Collector's Association in order to promote the "efficient and expeditious handling of refunds" according to a Contra Costa Auditor who supported the Bill. The County Supervisor's Association of California recommended the Bill explaining, "This bill will save time and administrative expense in the tax collector's office. It will make for better relations with the taxpayer by cutting out the annoying red tape which now confronts those who inadvertently over-pay or pay twice."

The legislative history of AB 2865 is consistent with that relating to AB 2604. The author, Assemblyman Nicholas Petris, described the Bill in his letter to the Governor as follows: "With present law, the county auditor is not authorized to refund property taxes. This makes the refund process more complicated, lengthy and troublesome for the taxpayer... I carried this Bill at the request of the Tax Collector's Association to improve the refund procedure for the taxpayers and respectfully urge you to sign it." Alameda County's letter to the Governor describes the rationale behind the Bill as follows:

> "AB 2056 would permit the county auditor to make refunds in these cases where refunds become due as a result of matters already heard by the Board and ordered by it and approved in writing by the District Attorney, without the necessity of the taxpayer filing an additional verified claim and the further necessity of a redetermination by the Board of Supervisors and District Attorney of matters which they have already considered and approved... In short, the purpose of the proposed legislation is to expedite and make economies in the procedure required for a taxpayer to obtain a refund of taxes to which he is clearly entitled."[8]

The purpose of Section 5097.2 is, therefore, to simplify and expedite the payment of refunds where an appeals board has already made the factual determination of a base year value with respect to an application. The fact that a board's determination of a base year value applies to subsequent years is firmly and established by statute, as previously

[8] The Legislature did not ultimately require the assent of the District Attorney or County Counsel as a condition to making the refund.

discussed. *Revenue and Taxation Code section* 80(a)(5). The requirements of 5097.2(e) are satisfied where an assessment appeals board has made a base year value determination which, when applied prospectively as required by law, would require substantial refunds for some years.

The issue of whether the taxpayer must undertake some additional procedural step or satisfy other conditions to obtain a refund of property taxes pursuant to *Revenue and Taxation Code* Section 5097.2(e) was addressed by State Controller Kathleen Connell in a memorandum to County Auditors dated July 10, 1996, copy attached. The Controller concludes that no separate procedure must be initiated by a taxpayer once an appeals board has determined that a reduction in value is appropriate:

> "Clearly the language of Section 5097.2 eliminates, for the circumstances described in (a) through (e) above, the Section 5097 requirement that a taxpayer must file a separate claim for refund before the refund may be issued. The use of the word 'may' in Section 5097.2 means that the county continues to have reasonable discretion for verifying the issuance of a refund is appropriate under Section 5097.2 circumstances. Certainly in many cases there are legitimate reasons to withhold refunds pending verification of issues. However, in most cases when a assessment appeals board has ordered an assessment reduction that translates into excessive taxes paid, there is no good reason to require the taxpayer to file an additional form to receive the refund that is rightfully due. ***Instead, it is in the interest of good government to refund excess taxes paid promptly and with minimum inconvenience to the taxpayer.*** Emphasis added.
>
> It is our understanding that many, if not most, counties currently issue refunds without requiring applications under the circumstances described by Section 5097.2. The Controller's Office encourages all counties to implement the provisions of Section 5097.2, so that whenever possible, taxpayers receive their refunds promptly."

Just as the assessor would have a duty to levy escape assessments per Sections 533-534 if the board's determination resulted in the base year value that exceeded current value, so do auditors or tax collectors have a duty under Section 5097.2(e) to make refunds where the board's determination resulted in the base year value, adjusted for 1997 and 1998, was less than current value. That duty arises "If the amount of taxes paid on the property exceeds the amount due, as the result of a reduction attributable to a hearing before an assessment appeals board or an assessment hearing officer." (Section 5097.2(e).)[9]

[9] See also *County Tax Collectors' Reference Manual,* 1999, California State Controller, page 82, which paraphrases the statue and states that tax collectors and auditors have authorization to make refunds under these conditions.

The views expressed in this letter are of course advisory 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.

Very truly yours,

/s/ Kristine Cazadd

Kristine Cazadd
Senior Tax Counsel

KEC:tr
prop/prec/bayrcors/00/01kec

Attachments (LTA 89/34, State Controller Letter to County Auditors dated 7/10/96)

cc: Honorable Kenneth A. Pettit
Santa Barbara County Assessor

Mr. Craig Smith
Deputy County Counsel

Mr. Dick Johnson, MIC:63
Mr. David Gau, MIC:64
Mr. Charlie Knudsen, MIC:64
Ms. Jennifer Willis, MIC:70