

From: Matt Clausen [mailto:matt.clausen@adlercolvin.com]
Sent: Friday, August 26, 2016 2:12 PM
To: Lumsden, Patricia
Cc: michele@neolawgroup.com; Jorge Lopez; Bagood, Bryan
Subject: EO Committee comments on LTA 2016/028

Dear Ms. Patricia Lumsden,

On behalf of the Exempt Organizations Committee of the Taxation Section of the State Bar of California, we have attached comments to Letter to Assessors 2016/028. Please feel free to contact us with any questions or comments.

Best regards,

Matthew Clausen, Adler & Colvin

Michele Berger, NEO Law Group

Jorge Lopez, Adler & Colvin

**EXEMPT ORGANIZATIONS COMMITTEE
TAXATION SECTION OF THE STATE BAR OF CALIFORNIA**

**COMMENTS IN RESPONSE TO
STATE BOARD OF EQUALIZATION
LETTER TO ASSESSORS 2016/028**

August 26, 2016

The Exempt Organizations Committee of the Taxation Section of the State Bar of California (the “Committee”) is pleased to submit the following comments to the State Board of Equalization (the “Board”) in response to the proposed forms and instructions in Letter to Assessors 2016/028. Matthew Clausen, Michele Berger, and Jorge Lopez drafted these comments. These comments do not necessarily reflect the position of the State Bar of California. Although the contributors to these comments have clients that could be affected by the principles addressed by these comments, no contributor or firm or organization to which any contributor belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

GENERAL COMMENTS

The Committee appreciates the time and effort the Board has taken to develop the proposed forms, and welcomes the opportunity to comment on them.

In the Committee’s experience, charitable organizations spend too much of their resources each year applying for and maintaining the welfare exemption for property that clearly qualifies. The statutes and rules applicable to the exemption, and especially around the application process, are complex and difficult for exempt organizations -- many of which are run by volunteers and overworked staff -- to understand. These organizations often resort to paying counsel to complete the forms, or to correct errors after volunteers and paid staff have attempted to file on their own. There is a real opportunity to make this process simpler and less costly for charitable organizations, and thus allow these organizations to use more of their resources providing charitable benefits rather than spending them on professional fees.

The proposed changes to the forms are a good initial effort to address the holding of the *Jewish Community Centers Development Corporation* case.¹ That case held that the lessee or other “operator” of property owned by a charitable organization has no taxable interest in the property, and therefore no need for an exemption from property tax. The proposed changes eliminate any requirement that a non-owner operator apply to the Board for an Organizational Clearance Certificate or file welfare exemption claims with the County Assessor. As we describe below, we believe there are a few points where the proposed forms and instructions could be clearer and simpler for the claimant.

¹ *Jewish Cmty. Ctrs. Dev. Corp. v. County of Los Angeles*, 243 Cal. App. 4th 700 (2016).

SPECIFIC COMMENTS

A. Proposed Form 267, Form 267-A, and Instructions

First, we note that the instructions to the proposed Form 267 do not coordinate to the numbered sections on the proposed form in several ways:

- The instructions refer to Section 2(b)(1), 2(b)(2), 2(c)(1), and 2(c)(2), but the form does not break Sections 2(b) and 2(c) into sub-questions (1) and (2).
- The instructions do not refer to Section 2(e), where the new Form 267-O is mentioned. It appears that these instructions have been misplaced in Section 5 of the instructions.
- Section 5 of the instructions contains instructions for how to disclose the necessary information about an operator, which does not correspond to Section 5 of the proposed Form 267.

Section 1 of the proposed form requires the claimant to check boxes for the type of property; which boxes are checked then determine whether the claimant must complete Sections 2, 3, and/or 4 of the form. The Committee believes this portion of the form could be clearer. Specifically, it is not clear from the form or the instructions that an organization with a taxable possessory interest in real property should check *both* the boxes for real property and taxable possessory interest, and therefore must complete *both* Sections 2 and 4. The Committee suggests including an example in the instructions demonstrating that an organization may have to check any combination of these three boxes, and may have to complete all of Sections 2, 3, and 4 in some cases.

We also recommend including more information about when the claimant should check the box to apply for exemption for personal property. The instructions could include a statement that if the claimant owns any personal property (and provide some common examples, such as furniture, equipment, and computers) that is used exclusively for the exempt activity occurring on the real property, they should check this box in addition to the real property box. Another -- and possibly simpler -- solution would be to have the form treat any claim for welfare exemption on real property (whether or not a taxable possessory interest) as an automatic claim for exemption on any personal property located at that real property and used exclusively in the same exempt activity.

It is not clear on the face of the Form 267 that the claimant must submit a copy of the tax-exempt status letter of each organizational “user.” In our experience, it is common for people filling out forms to focus on the face of the form and not read the instructions carefully, so stating this requirement clearly on the face of the form will likely reduce the number of incomplete claims submitted.

Another area where both the proposed Form 267 and 267-A and their instructions could be clearer is in the discussion of operators and users. The instructions contain the words “operate” and “use,” but neither is defined. If the Board is using these two words interchangeably, then the Committee recommends using only one of them consistently

throughout the forms and instructions. If the Board intends for these words to have different meanings, then each should be clearly defined in the instructions.

Finally, neither form's instructions include any definition of what qualifies as "living quarters." The Committee recommends including an example or other description in the instructions to both forms, to assist claimants in filling out the relevant sections.

B. Proposed Form 267-O and Instructions

According to the instructions to the proposed forms, an organization other than the owner operating or using the property more than once a week triggers the Form 267-O filing. If an organization uses the property once a week or less, the claimant must attach a description of that portion of the property, its use, the amount received by the claimant (if any), a copy of the lease or agreement, and a copy of the organization's tax-exempt status letter. Thus, the proposed forms require the same information whether or not the claimant is required to complete Form 267-O. It is not clear to the Committee why the forms treat the two sets of users (more-than-weekly users and weekly-or-less users), particularly since the same information and materials must be submitted to the Assessor for all users.

It is not clear on the face of Form 267-O that the claimant must submit a copy of the tax-exempt status letter of each operator. In our experience, it is common for lay people filling out forms to focus on the face of the form and not read the instructions carefully. The Committee believes that stating this requirement clearly on the face of the form will reduce the number of incomplete claims submitted to Assessors.

More generally, the Committee feels that County Assessors are not in the best position to determine whether an organization qualifies for exemption. The proposed forms appear to expect an Assessor to make that determination with respect to operators based solely on whether the operator has a determination letter from the IRS or FTB. This process risks being both over- and under-inclusive of the requirements for welfare exemption. On the one hand, there may be organizations that can produce an IRS determination letter, perhaps having filed the new IRS Form 1023-EZ, that nevertheless may not qualify for exemption at all. On the other hand, there may be organizations using property as part of an owner's exempt activity -- members of the charitable class or others served by the charitable program, for example -- which do not have determination letters. In these cases, if the property is being used exclusively for the owner's exempt purposes, it may qualify for the welfare exemption despite the user's lack of determination letter.

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Thank you for considering these comments. The Committee would be pleased to meet with the Board to discuss the proposed forms and instructions in more detail. Please contact Matthew Clausen at (415) 421-7555 or matt.clausen@adlercolvin.com with any questions regarding these comments.