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## **RECENT DEVELOPMENTS IN CALIFORNIA PROPERTY TAX LAW AND STRATEGIES FOR A DECLINING ECONOMY**

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By Dibby Allan Green

R&T = California Revenue & Taxation Code  
BOE = State Board of Equalization  
LTA = Letter to Assessors  
PCOR = Preliminary Change in Ownership Report  
AB = Assembly Bill  
SB = Senate Bill

*Attachment pages are numbered at bottom.*

### **I. RECENT DEVELOPMENTS**

#### **A. 2008 Legislation.**

1. **Attached LTA 2008/061** dated November 12, 2008 (*page 19*) summarizes the 2008 property tax legislation. Note the following:
  - a. **AB 2411**, Chapter 329, effective January 1, 2009 (*page 20*) – **Claims for Refund**: Revises statute of limitations for filing a claim, and revises method for calculating interest paid on a refund.
    - (1) Although in reality Counties frequently process refunds once a matter has been resolved without a claim, R&T §5097 requires the filing of a Claim for Refund. *Sea World v. County of San Diego* (1994) 27 Cal.App.4th 1390; *Mission Housing Development v. San Francisco* (1997) 59 Cal.App.4th 55 [time not extended during appeal, but revised by AB 2411]; *Metropolitan Culinary Services v. County of Los Angeles* (1998) 61 Cal.App.4th 935; *Plaza Hollister LP v. County of San Benito* (1999) 72 Cal.App.4th 1, Rev. Denied [court cannot order refund if claim is not filed; distinct process from reducing assessments]; *Geneva Towers*

*Limited Partnership v City and County of San Francisco* (2003) 29 C.4th 769.

- (2) An assessment appeal can constitute a claim for refund if you so designate it R&T §5097(b); however, (a) if the appeal is later withdrawn, so is the claim, and (b) the appeal will constitute a claim only as to amounts paid as reflected in the appeal, later property tax payments while the appeal is pending will not be covered.
  - (3) Otherwise a separate claim must be filed. I have yet to find a county that has a printed form for assessment refunds, so it must be typed to meet statute requirements.
  - (4) Previously R&T §5097 mandated that a claim must be filed within four years of the date of payment of the tax. See attached (*page 23*) LTA 2009/016 listing the new filing time periods.
- b. **SB 1233**, Chapter 349, effective January 1, 2009 (*page 21*) – **Parent/Child and Grandparent/Grandchild Claim Processing Fee.** Allows a county board of supervisors to authorize a processing fee of up to \$175 to recover administrative costs to reverse a reassessment of a property ultimately eligible for the exclusion if the owner was previously notified twice, as specified, of the availability of the exclusion and the need to file a claim.
- (1) See attached (*page 25*) LTA 2009/004 explaining the statute.
  - (2) Santa Barbara County has not yet adopted this fee.
  - (3) Note that some counties, including San Luis Obispo, have for years been charging a different processing fee if the claim form is not delivered to the recorder with the deed and PCOR.
2. See our firm's March 2009 Letter attached at bottom of Page 5 (*page 14 of attachments*) relating that the state budget negotiations nixed both the **FTB property tax assistance program** and the **State Controller's program for property tax postponement**, both programs for seniors over 62 and blind and disabled persons.

**B. Introduced 2009 Legislation.**

1. **AB 103** – would provide an exclusion where two individuals owned together (either as joint tenants or tenants in common) a principal residence (which was the principle residence of both tenant) and upon the death of one tenant ownership transfers 100% to the remaining tenant. Attached (*page 28*) is a draft analysis by BOE staff with an interesting history on pages 4 and 5 of exclusions added, or attempted to be added, since Prop. 13 was adopted
2. **AB 321** – **would allow spouses to make separate claims for the over-55 base year value transfer.** (Currently spouses must make the claim together, and so have one combined claim for both lives, whereas unmarried persons each have one claim for each life.) As introduced, would have no effect on previously-filed claims by married persons (both spouses would remain on record as the claimants who have used this lifetime benefit), but would only apply to newly-filed claims.

3. **AB 824** – Assessment Appeals Board conflict of interest issues; would allow a Board in another county to hear certain appeals where a conflict exists.
4. **AB 50** – pertaining to disaster relief from the Tea fire. No doubt there will be a new bill introduced for the Jesuita fire.
5. **AB 1387** – would add provisions to the Evidence Code and the Government Code to have a shifting of the burden of proof to BOE or FTB roughly analogous (but more broad) than the federal provisions adopted in the IRS Restructuring and Reform Act of 1998.
6. **SB 824** sponsored by BOE – several technical amendment, but also includes separating land from improvements as separate units for determining whether requirements for disaster relief have been met, and removing from statute the details of the PCOR forms but instead authorizing BOE to prescribe the form.

**C. Property Tax Appeals.**

1. Filing deadlines for all counties are not the same, and the date may change each year. The 2009 list for the State is attached (*page 36*), which is from LTA 2009/021.
2. The filing period for appeals pertaining to regular assessments (i.e., for January 1, 2009, lien date, which means July 1, 2009, to June 30, 2010, tax year) in **Santa Barbara County is between July 2, 2009, and November 30, 2009.**
3. The deadline for appealing a supplemental and escape assessments is **60 days from the date of mailing – keep the postmarked envelope!** – of the notice of supplemental or escape assessment.
  - a. **An escape assessment on any assessable item** (e.g., land) **extends the time to file appeal for all assessable items** (e.g., business property).  
*County of Los Angeles v. Raytheon*, Second Dist. (1/1/08) \_\_ Cal.App.4th \_\_\_\_.
4. May also appeal a new base year value during the period of regular assessment or any three succeeding years (gives prospective relief only). R&T §80. And there are other means (too many to list!) of seeking to reverse an assessment.
5. See attached (*page 37*) LTA 2009/005 dated January 22, 2009, regarding BOE efforts to provide greater information regarding the appeals process, **including a new video.**

**D. Ventura County Assessment Practices Survey, December 2008.**

1. Between July 1, 2002, and June 30, 2007 (five fiscal years) the assessment roll value increased 45.7% – from \$65.8 billion to \$95.8 billion.
2. There are approximately 53,000 recorded documents annually, all revised by the Assessor, and of these approximately 23, 500 evidence a change in ownership triggering reassessment.
3. Approximately 1,700 parent/child claims and filed annually, and approximately 250 requests for transfer of base year values for persons over 55 years old.
4. BOE notified the County of only 8 changes in ownership for legal entities. (Time frame? All five years?)
5. Regarding new construction, annually about 32,000 permits are issued with about 18,000 resulting in increased assessment.

6. Requests for revised assessments due to declines in market values for 2003-2004 were 8,838 resulting in a total decrease in assessed value of \$352 million. The number of requests decreased as the market got stronger so that for 2006-2006 there were 4,877 requests resulting in a total decrease of only \$23 million. (Obviously that will change for 2008-2009!)
7. Just under 128,800 acres are in the Ag. preserve program, with just under 3,000 acres electing non-renewal each year.
8. They process approximately 18,500 business property statements annually.
9. BOE had 10 recommended changes for how the Ventura Assessor operates, and the county agreed with all of them except for part of one. In broad terms, six items would likely result in increased revenues, one (correction to ag preserve calculation methodology) would result in decreased assessment, and the remaining three were predominantly procedural.

**E. *Steinhart v. County of Los Angeles* pending before CA Supreme Court (No. S158007).**

1. Second District case from September 2007 (155 Cal.App.4th 1082) which held that the creation of a life estate (through the vehicle of a trust) is not a change in ownership, does not meet the test of R&T §60 because a life estate is not “substantially equal to the fee.” See attached (*page 8*) explanation of R&T §60.
  - a. One implication: ABQTIP Trust, second spouse dies and children become beneficiaries of the trust for their life. Because they only have a life interest, if the Second District ruling is upheld, then this would not be a transfer that (absent a parent/child claim) would be a change in ownership under R&T §60.
2. The case is anticipated to interpret the Supreme Court’s dicta in *Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155 when, in the context of a case pertaining to a sale and lease back of real property, the Court illustrated property tax provisions pertaining to leasehold estates with provisions pertaining to life estates and transfers of such estates (*estate pur autre vie*) and says an estate subject to defeasance at any time is worth very little. This dicta has been dismissed in *Leckie v. County of Orange* (1998) 65 Cal.App.4th 334, followed in *Auerbach v. AAB of County of Los Angeles* [Northern Trust Bank] (2006) 39 Cal.4th 153, and distinguished in *Reilly v. City and County of San Francisco* (2006) 142 Cal.App.4th 480.
3. Positions:
  - a. Steinhart’s initial position was that creation of a life estate was never a change in ownership. The Assessor’s position is that it always is. Steinhart’s Answer Brief suggests a third option: creation of a life estate may sometimes be a change in ownership, and sometimes not be, depending on whether the life expectancy would anticipate a value substantially equal to the fee. (The Steinhart life beneficiary of the trust was 73 at the time of the creation of the life interest.) The Brief illustrates the latter point by present procedures pertaining to a court’s valuation of a life tenant’s interest for purposes of partition or eminent domain proceedings.

- b. Amicus Brief filed by Stephen Bennett suggests there is no change in ownership if a pure life estate is granted, but could be a change in ownership if other rights are granted, such as a right to sell the property.
  - (1) But *Reilly v. City and County of San Francisco* (2006) 142 Cal.App. 480, rehearing denied, says the analysis turns not on who possesses the incidents of ownership but on the value of the property interest.
- c. Amicus Brief filed by the LA Assessor asserts that because the prior “primary owner” (the trustor of the trust, the creator of the life estate in her sister) died, that necessarily there was a transfer and the question is to whom the primary ownership transferred.
  - (1) This reasoning is inconsistent with the text of R&T §60 which first seeks to find an interest meeting the three-part test and then also requires that such an interest be transferred. See attached (*page 8*) explanation of R&T §60.
- d. Amicus Brief filed by Howard Jarvis Taxpayers Association (upon request by the Supreme Court), takes the position that creation of a life estate is never a change in ownership. The brief points out that when a life estate is created by deed or will it conveys to the life tenant both legal and equitable title for the duration of his life (per Civil C. §766), but with a trust, the legal and equitable title are split with the beneficiaries only receiving equitable title. (Consistent with *Allen v. Sutter County* (1983) 139 Cal.App.3d.) It states that it is a misnomer to refer to an equitable life interest under a trust as a “life estate” since the life tenant does not receive an estate in that title remains in the trustee. The brief points to other incidents of ownership that a life tenant of trust property lacks (ability to transfer, to sell, to encumber, etc.). (But see comment re *Reilly*, above.) “More than anything, however, uncertainty as to the duration of the interest make it not ‘substantially equal’ to the value of a fee estate” inasmuch as any life estate could end the following date. (This was exactly the point of the discussion in *Pacific Southwest*.)

## II. COMMON ERRORS IN PROPERTY TAX CHANGE IN OWNERSHIP ISSUES

- A. **Misunderstanding the proportional interest exclusion.** That is, thinking that transfer of assets to a legal entity where the total economic interests of the partners/owners are proportional satisfies the requirements of the proportional ownership interest exclusion of R&T §62(a)(2). It does not. Each partner/owner must maintain the exact same proportional ownership interest in each and every piece of real property. Failure to meet the exact test of §62(a)(2) results in reassessment of 100% of the property.
- B. **Assuming a legal entity transfer saved from reassessment has no other effect.** That is, thinking that if property is transferred in to or among legal entities and the proportional ownership interest exclusion (R&T 62(a)(2)) is used such that there is no reassessment, that everything is fine. Usually the use of the proportional interest exclusion when dealing with legal entities brings the property into the ambit of R&T 64(d) cumulative

count rule, meaning that future reassessment is based on when cumulative transfers of interests in the entity exceed cumulatively 50%, meaning you have created an almost inevitable future reassessment. See chart at attached *page 18* showing the two rules (R&T §64(c) and (d)) applicable to a change in ownership of legal entities [other than a corporate reorganization]. Sometimes this result can be entirely avoided.

- C. **Incorrect assumptions about record title.** For example, thinking that property is not owned by a partnership if title is in the names of the individual partners. Although under current law it makes better sense usually to have titles in the partnership name, this has not been and is not required under either California partnership law or the Property Tax Rules. Uncovering true facts concerning partnership ownership can sometimes prevent a reassessment or prevent application of R&T 64(d) cumulative count rule.
- D. **Assuming that reassessment of property subject to a Williamson Act (Ag. Preserve) contract will have no increased tax result.** Reassessment still matters because (a) the value of non-living improvements (buildings), assessed per Prop. 13, will be reassessed (presumably higher), and (b) when the property comes out of the contract the Prop. 13 factored base year value will be subject to the reassessment (presumably higher). But most importantly, (c) each year the Ag. Preserve economic value is compared with both the Prop. 13 factored base year value (FBYV) and the current full cash value (= FMV), and the final tax amount is the lowest of the three numbers. As time goes on, many properties that have been under the Williamson Act for 30+ years find that the FBYV of Prop. 13 comes to have a lower assessed value than the Ag. Preserve economic calculations. Reassessment would increase the FBYV “cap” resulting in use of Ag. Preserve economic calculation which are then higher than what the FBYV would be without the reassessment.
- E. **Neglecting to report a change in ownership, particularly if the transfer is not based on a recorded instrument.** The taxpayer has the burden of reporting (within 45 days) a change in ownership due to an event not reflected in a recorded instrument (e.g., a transfer of an interest in a legal entity or a change of beneficiaries of a trust, birth of new child into eligible class). Where the change in ownership has not been reported to the assessor, **the statute does not begin to start running until the change in ownership report form is filed.** This means that the time for the assessor is basically unlimited until you disclose it or they find out otherwise. Worse, the penalty for willfully concealing and not disclosing is a whopping **75% of the additional assessed value** (meaning the amount the new fair market value is in excess of the current assessed amount). **In addition, interest can apply.**

### III. STRATEGIES FOR A DECLINING ECONOMY

- A. See if BOE “Economic Perspective” attached at *page 39* for the February 2009 issue showing trends in county home prices (although the economic date is current only through November of 2008). Santa Barbara County’s most recent peak of home prices was May of 2007, and from May 2007 through November 2008 the median county home

price fell 66.6%. Also see May 2009 issue at *page 43* showing steep decline in residential building permits (2008 was the smallest total permits issued since 1954!).

B. See our March 2009 letter, attached at *page 10*.

1. **Difference between a (temporary) adjustment (old Prop. 8) which the Assessor each year must review and return to the FBV as the market returns, versus a reassessment making a permanent reduction in value that then limits future increases to the 2% cap.** Example numbers to illustrate:

Year	2000 Base Year	2005 Market with New BYV	2005 Market with Prop. 8 Adj.	Notes for Prop. 8 Adjustment
2000	\$ 100,000			
2001	\$ 102,000			
2002	\$ 104,040			
2003	\$ 106,121			
2004	\$ 108,243			
2005	\$ 110,408	\$ 90,000	\$ 90,000	<b>2005 market is \$90,000.</b>
2006	\$ 112,616	\$ 91,800	\$ 95,000	Market increases more than 2%, but still not as high as FBV
2007	\$ 114,869	\$ 93,636	\$ 110,000	Ditto
2008	\$ <b>117,166</b>	\$ 95,509	\$ <b>117,166</b>	<b>Market is now \$120</b> but assessment is limited by 2000 FBV
2009	\$ 119,509	\$ 97,419	\$ 119,509	Because market has turned around, assessment returns to the 2000 FBV. Triggering reassessment in 2005 would have limited future increases to no more than 2% each year since 2005.
2010	\$ 121,899	\$ 99,367	\$ 121,899	

2. Deliberately triggering a reassessment is a real transfer, so there will be related consequences (new owner, gift taxes, capital gains, perhaps other income tax consequences).
  - a. The strategy therefore is to have a transaction that has minimal “other” consequences but creates maximum percentage of reassessment. See asterisks on chart attached at *pages 16 and 17* – e.g., non-proportional transfer to or from a legal entity (can also be used to remove application of R&T 64(d) cumulative count rule); or long-term lease for more than 35 years including options (but need to plan around future reassessment).
3. See also a checklist of exemptions and exclusions on Pages 3-5 of March 2009 letter.
4. More property tax information and articles on our website: [www.taxlawsb.com/resources](http://www.taxlawsb.com/resources).

## CA REVENUE & TAXATION CODE SECTION 60

Property tax change in ownership analysis (i.e., determining whether a reassessment will occur) must answer:

- Is there a transfer of an interest in real property?
- Did the interest received by the transferee meet the three-part test of R&T §60?
- Who is the transferor?
- Who is the transferee?
- What is the applicable date of transfer?
- Are there any applicable exclusions?

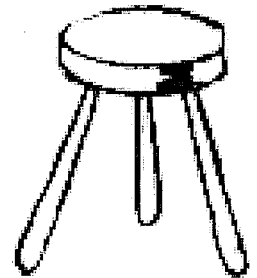
### Section 60 – Definition of a “change in ownership” (what triggers reassessment):

**A “change in ownership” means a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest.**

All statutes and rules are subject to this test. *Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155; *Auerbach v. AAB of County of Los Angeles* [Northern Trust Bank] (2006) 39 Cal.4th 153.

#### Three-part test:

- (a) a **present interest** in real property –
  - Future, contingent and remainder interests are ignored.
  - Broadly interpreted by BOE to include any possibility that someone might possibly have an interest (e.g., trust sprinkling powers).
- (b) including the **beneficial use** thereof –
  - An income interest alone (without right to principal or any control of principal), or use of property alone, is sufficient to meet the test of beneficial use. *Reilly v. City and County of San Francisco* (2006) 142 Cal.App. 480, rehearing denied [analysis turns not on who possesses the incidents of ownership but on the value of the property interest; applies even if income beneficiary never actually receives income].
  - A partner’s interest in a partnership constitutes beneficial use. *Munkdale v. Giannini* (1995) 35 Cal.App.4th 1104 [disproportionate partnership distribution].
- (c) the value of which is **substantially equal to the value of the fee** interest –
  - Lease term, including options, of more than 35 years is, less than 35 years is not. R&T §61(c) and §62(g).
  - Estate for years of more than 35 years is, less than 35 years is not. Rule 462.060.
  - *Steinhart* case – whether the creation of a life estate, subject to disfeasance at any time, is substantially equal to the fee.
  - BOE recent letter opinions hold that a life tenant’s transfer of any interest in his life estate (which they call a life estate but it can never be more than an estate *pur autre vie*) is a transfer under R&T §60 – even though *Pacific Southwest* says an estate *pur autre vie* is worth very little.



**Dibby’s Fourth Leg:** There must be a **transfer** of an interest that meets the three-part test. If the interest the transferee receives does not meet the three-part test, then there has not yet been a transfer. The transferor may have died; but if there is no transfer of an interest meeting the three-part test, then there is no change in ownership (hence, no need to file a parent/child claim, etc.). If trust gives property to Child A for 6 years, Child B for 6 years, and then to Child C outright, there is no transfer for the first 12 years because Child C is the first to receive an interest meeting the three-part test of §60. The thinking paradigm is not on what the transferor conveys but on what the transferee receives.

- So transfer of bare legal title to someone who already has the beneficial use is no transfer, no change in ownership. *Parkmerced v. San Francisco* (1983) 149 Cal.App.3d 1091 [corporate merger]; *Allen v. Sutter County* (1983) 139 Cal.App.3d 887 [termination of irrevocable trust and distribution to trust beneficiary].