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James E. Speed
Executive Director

December 31, 2002

**Re: Revenue and Taxation Code Section 69.5
Sale of Original Property
Request Number:**

Dear Mr. _____ :

This letter is in response to your inquiry addressed to the Board of Equalization's Property Taxes Department dated July 23, 2002, requesting our opinion as to whether your proposed transactions would qualify for a base year value transfer under section 69.5.

According to your letter and telephone conversation with Ms. _____, you plan to transfer your current principal residence to your limited liability company (LLC) upon reaching 55 years of age; you would like to have that transaction qualify as a "sale" for the purposes of a base year value transfer pursuant to section 69.5. To reach that result, you asked: (1) Whether your LLC must have a third person member and what percentage ownership interest or investment amount that person needs to have before this transaction would be considered a "sale?" And, (2) whether the property must be reassessed upon the "sale" to your LLC to qualify for the base year value transfer? As a point of further clarification, you made two additional inquiries during our telephone conversation on December 4, 2002: (3) Must you reach 55 years of age before purchasing your replacement dwelling? And, (4) Can you purchase your replacement dwelling from your LLC?

Law and Analysis

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale of their original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration."

To ensure that the transfer of your original property qualifies as a "change in ownership," you and your wife must obtain ownership interests in your LLC that are not proportional to your ownership interests in your original property. Although transfers of property to a legal entity are normally changes in ownership under subdivision (j) of section 61, such is not the result if your ownership interests in the original property before and after the transaction are proportional (i.e., identical). Subdivision (a)(2) of section 62 excludes such transfers from the definition of a "change in ownership." To determine whether a change in ownership has occurred, LLC members' ownership interests are measured by its members' capital and profits interests. If proportionality is maintained, then your original property will *not* have experienced a change in ownership.

If you and your wife own equal interests in your home and transfer the home to your wholly-owned LLC, in which each of you have equal interests, then the proportionality will be maintained before and after the transfer; your property will not be subject to change in ownership. To avoid a proportional transfer, you and your wife must obtain interests in your LLC with a third person—even a fraction of a percent held by a third person will render the transfer nonproportional.

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors that recognition of those transactions for section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, should you and your wife gift deed your original property to your LLC, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold." The basic question is whether you and your wife intend to transfer not only legal title but also beneficial ownership of your property.

Section 60 defines a change in ownership as "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." Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To constitute a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

- (1) It transfers a present interest in real property;
- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Based on the foregoing, a claimant for a section 69.5 base year value transfer must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a LLC, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (LLC) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer.

Although nothing in section 69.5—or in the definition of change in ownership—indicate that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the acquisition of an ownership interest in a legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide transactions.

To be eligible for a base year value pursuant to section 69.5, subdivision (e) of that section provides in part:

[T]his section shall not apply unless the transfer of the original property is change in ownership that either (1) subjects the property to reappraisal at its current fair market value in accordance with Section 110.1 or 5803 or (2) results in a base year value determined in accordance with this section, Section 69, or Section 69.3 because the property qualifies under this section, Section 69, or Section 69.3 as a replacement dwelling or property."

In short, your original property must be reappraised at its fair market value, or your transferee (LLC) must receive a base year value transfer, before you are eligible for your own base year value transfer. Here you propose to transfer your original residence to a newly formed LLC. Unless your original residence is reappraised at its fair market value upon that change in ownership, you will not qualify for a section 69.5 base year value transfer.

While the facts are not entirely clear in regard to the situation you propose, we believe that you would qualify for the section 69.5 base year value transfer if you document the following conditions to the satisfaction of the assessor: 1) that the transfer of your original property to your LLC is a bona fide transfer of your interest in the real property "substantially equivalent in value to the fee interest," 2) that your LLC will give you 99 percent of the LLC's interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that your "sale" to the LLC was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in section 69.5 mandates that claims for base year value transfers are to be granted by assessors only if all the requirements are met. (See Letter To Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide your county assessor with evidence that your original property is actually transferred by you to your LLC, for valuable consideration, within two years of the purchase of your replacement dwelling.

During our telephone conversation on December 4, 2002, you asked whether you may purchase your replacement dwelling prior to reaching 55 years of age and still qualify for the base year value transfer benefit. To answer your question we must consider two separate elements of eligibility found in section 69.5. First, paragraph (5) of subdivision (b) requires that your replacement dwelling be purchased or newly constructed within two years of the sale of your original property:

The original property of the claimant is sold by him or her within two years of the purchase or new construction of the replacement dwelling. For purposes of the this paragraph, the purchase or new construction of the replacement dwelling includes the purchase of that portion of land on which the replacement building, structure, or other shelter constituting a place of abode of the claimant will be situated and that, pursuant to paragraph (3) of subdivision (g), constitutes a part of the replacement dwelling.

As applied to the facts of your situation, you may purchase your replacement dwelling no earlier than two years prior to the sale of your original dwelling. However, that requirement must be considered in concert with paragraph (3) of subdivision (b), which states:

At the time of the sale of the original property, the claimant or the claimant's spouse who resides with the claimant is at least 55 years of age, or is severely and permanently disabled.

Paragraph (3), when analyzed in concert with paragraph (5), would permit you to purchase your replacement dwelling prior to reaching 55 years of age provided that (a) you sell your original property within two years of purchasing your replacement dwelling *and* (b) such sale does not occur until after you have reached 55 years of age.

In closing that telephone conversation, you made one last inquiry: may you obtain a base year value transfer if you purchase your replacement dwelling from your LLC? Nothing in section 69.5 precludes purchasing your replacement dwelling from a legal entity. However, that purchase must qualify as a "change in ownership" to ensure that the sale of your original property occurs within two years of purchasing your replacement dwelling. To that end, the purchase of your replacement dwelling from your LLC must meet the definition of a "change in ownership" contained in section 60 and described on page 2 of this letter.

The views expressed in this letter are advisory in nature; they represent the analysis of the Board of Equalization's Legal staff based on present law and the facts set forth herein, and are not binding on any person or public entity. You may wish to consult with private counsel to ascertain all the possible tax consequences of your transaction.

For additional information on transfers involving legal entities, enclosed is a copy of Property Tax Rule 462.180 and Annotation 220.0375. If you require any additional information regarding your request, please contact me at (916) 322-6083, or write to the address above.

Sincerely,

/s/ Michael Lebeau

Michael Lebeau
Tax Counsel

MTL:eb
Prop/prec/bayrcor/02/11ml.doc

Enclosures [Property Tax Rule 462.180, Annotation 220.0375 (C 4/15/98), Cazadd letters 6/14/95 and 11/20/95]

cc: Mr. David Gau MIC:63 (all w/enclosures)
 Mr. Dean Kinnee MIC:62
 Mr. Mark Nisson MIC:62
 Ms. Glenna Schultz MIC:62



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Controller, Sacramento

BURTON W. OLIVER
Executive Director

June 14, 1995

In Re: Transfer of Base Year Value Where Original Property is Transferred to Family Partnership.

Dear Mr. :

This is in response to your letter of May 9, 1995, to Mr. Richard Ochsner in which you request our opinion as to whether your client, Ms. , can qualify for the benefits of Proposition 60, California Constitution Article XIII A, Section 2 and Revenue & Taxation Code Section 69.5, and transfer the base year value from her original property to a replacement dwelling, where her original residence was transferred to a family partnership without a sale or any monetary consideration.

You have described the following set of facts for purposes of our analysis:

1. Ms. ("Ms. C") deeded her original property (her residence in) to The Family Limited Partnership ("Partnership") on December 21, 1994, in exchange for a 99% interest in Partnership. Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended replacement dwelling, a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year

value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor denied Ms. C's claim for property tax relief (per May 5, 1995 letter by Deputy Assessor attached) on the ground that the 1994 transfer of the original property to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

Your question is whether the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8). For the reasons hereinafter explained, we believe that it is, subject to the following requirements.

LAW AND ANALYSIS

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, had Ms. C gift deeded her original residence to the family Partnership, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold."

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors on questions involving sales of original properties that recognition of the transactions for Section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. The question is basically whether the parties **intended** to transfer not only legal title but also beneficial ownership of the property.

As you are aware, Revenue and Taxation Code Section 60 defines a change in ownership as "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."

Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To be a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

- (1) It transfers a present interest in real property;
- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Also within that definition is the provision of Section 61(i) which includes as a change:

The transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person.

Based on the foregoing, a claimant for the Section 69.5 benefits must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a partnership, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (Partnership) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer. While there is nothing in Section 69.5 or in the definition of change in ownership indicating that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of an ownership interest in a partnership or other legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide and not subject to the application of an exclusion from change in ownership.

While the facts are not entirely clear in regard to the situation you describe, we believe that Ms. C would qualify for the Section 69.5 benefits if the following conditions are documented to the satisfaction of the assessor: 1) that the

June 14, 1995

transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," 2) that Partnership gave to Ms. C 99% of the Partnership interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in Section 69.5 mandates that claims for base year value transfer benefits are to be granted by assessors only if all the requirements are met. (See Letter to Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide the Marin County Assessor with evidence that Ms. C's original property was actually transferred by her to Partnership for valuable consideration (Partnership interest) within two years of the purchase of her replacement dwelling.

The views expressed in this letter are, of course, advisory only and are not binding upon the Marin County Assessor or the assessor of any county.

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd
Tax Counsel

Enclosure

cc: The Honorable Joan C. Thayer
Marin County Assessor

Mr. John W. Hagerty, MIC:63
Mr. Richard Johnson, MIC:64
Ms. Jennifer Willis, MIC:70



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Controller, Sacramento

November 20, 1995

BURTON W. OLIVER
Executive Director

Office of the Marin County Assessor-Recorder
Civic Center, P.O. Box C
San Rafael, CA 94913

In Re: **Transfer of Base Year Value - "Consideration" Upon Sale,
Documentary Transfer Tax.**

Dear Ms. :

This is in response to your letter of June 21, 1995, in which you request our opinion as to whether, in light of newly discovered information on the grant deed from Ms. ("Ms. C") to the Family Limited Partnership ("Partnership"), our conclusion in the attached June 14, 1995 letter to Mr. regarding Ms. C's qualification for the Proposition 60 benefits would change.

For purposes of this analysis, the following set of facts as described in our June 14 letter, in addition to the new facts provided in your June 21 letter are summarized below:

1. Ms. C deeded her "original property" (her residence in) to the Partnership on December 21, 1994, in exchange for a 99% interest in Partnership. Ms. C's attorney asserted that the Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended "replacement dwelling," a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor's office denied Ms. C's claim for property tax relief (May 5, 1995 letter) on the ground that the 1994 transfer of the original residence to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

4. Per our June 14, 1995 letter, we concluded that Ms. C would qualify for the Section 69.5 benefits, **providing that** the following conditions were documented to the satisfaction of the Assessor: (1) that the transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," (2) that Partnership gave to Ms. C 99% of the Partnership interests which were of substantial (but not necessarily equivalent) "value" in return for the property, and (3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

5. Upon review of our June 14, 1995 letter, the assessor's office observed that the grant deed (94-06151, recorded on December 21, 1994) for the sale of the original property from Ms. C to Partnership on its face exhibits the words, "NO SALE" in the space next to "Documentary Transfer Tax," and that no documentary transfer tax was ever paid.

Your question is whether in light of this newly discovered information, the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is bona fide "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8).

LAW AND ANALYSIS

As previously discussed in our June 14 letter, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." The term "consideration" as found in the context of "any change in ownership...for consideration," depends on whether the subject transfers, for Section 69.5 purposes, were bona fide changes in ownership. Consequently,

we take the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property."

Based on the "NO SALE" notation on the deed and the fact that no documentary transfer tax was paid, you question whether Ms. C's transfer of her original residence to the Partnership was made without consideration, hence, precluding the transfer of base year value to the replacement dwelling. The issue is essentially whether this information on the deed constitutes a basis for finding that all of the requirements pertaining to Section 69.5 claims for have not been met.

The Documentary Transfer Tax Act is locally imposed and administered as authorized in Revenue and Taxation Code Sections 11901 - 11934. There are no provisions in the Act which provide exemptions from the tax for transfers of real property from an individual to a family limited partnership. However, the Board of Supervisors of any county and/or the City Council of any city may adopt an ordinance imposing on each deed or instrument by which real property is transferred the tax due to such county or city and excluding therefrom certain types of transfers which meet specified criteria.

The Act authorizes any county and/or city to impose by ordinance the documentary transfer tax **on any deed by which real property is sold**. Specifically, Section 11911, subdivision (a) authorizes the board of supervisors of any county or city and county to impose "on each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars (\$100) a tax at the rate of fifty-five cents (\$0.55) for each five hundred dollars (\$500) or fractional part thereof."

The Act, therefore, conditions the transfer tax on the term "sold" and a finding that the sale must be for consideration which exceeds the amount of \$100. Since apparently, your office staff, which administers this tax, wrote "NO SALE" on the deed, it seems logical to presume that the staff was not aware that the purchase price of Ms. C's original property was \$925,000. Thus, we understand your concern that perhaps information was provided indicating that the transfer was made either as a gift

November 20, 1995

to the Partnership or for consideration less than \$100, thereby leading to the conclusion that there was no bona fide sale of Ms. C's original property for consideration.

However, there may be other reasons why your office staff made the foregoing notation and did not impose the tax. If, for example, the local ordinance which applied to this particular transaction contained some provision(s) stating that certain types of transfers did not constitute "a sale" subject to the tax, or that certain conveyances were exempt from this tax, the staff could have made the same type of notation and not imposed the tax. Certainly, these are questions which are appropriately addressed to the staff. Moreover, since the documentary transfer tax is administered and collected **solely** by that staff at the time of the transfer, that staff determine how the documentary transfer tax was administered, and only it can provide an appropriate explanation.

Notwithstanding the your office staff's determination, we advised Ms. C's attorney in our June 14 letter that a claimant for the Section 69.5 benefits must establish **to the satisfaction of the assessor** that the transfer of the original property and the payment of "consideration" are bona fide and are not subject to the application of an exclusion from change in ownership. Therefore, if you are not satisfied that Ms. C's transfer to Partnership was "for consideration" (e.g., more than mere nominal value), you have statutory authority to require that further documentation be provided or to deny the claim. Since the term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of ownership interests in a partnership or other legal entity, you may wish to request certified copies of the Certificate of Limited Partnership filed with the Secretary of State, partnership tax returns, canceled checks, etc., so that you are fully satisfied that the claim will be properly documented and duly granted.

The views expressed in this letter are, of course, advisory only and are not binding upon the office of the Marin County Assessor or the assessor of any county.



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December 31, 2002

**Re: Revenue and Taxation Code Section 69.5
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According to your letter and telephone conversation with Ms. _____, you plan to transfer your current principal residence to your limited liability company (LLC) upon reaching 55 years of age; you would like to have that transaction qualify as a "sale" for the purposes of a base year value transfer pursuant to section 69.5. To reach that result, you asked: (1) Whether your LLC must have a third person member and what percentage ownership interest or investment amount that person needs to have before this transaction would be considered a "sale?" And, (2) whether the property must be reassessed upon the "sale" to your LLC to qualify for the base year value transfer? As a point of further clarification, you made two additional inquiries during our telephone conversation on December 4, 2002: (3) Must you reach 55 years of age before purchasing your replacement dwelling? And, (4) Can you purchase your replacement dwelling from your LLC?

Law and Analysis

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If you and your wife own equal interests in your home and transfer the home to your wholly-owned LLC, in which each of you have equal interests, then the proportionality will be maintained before and after the transfer; your property will not be subject to change in ownership. To avoid a proportional transfer, you and your wife must obtain interests in your LLC with a third person—even a fraction of a percent held by a third person will render the transfer nonproportional.

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Although nothing in section 69.5—or in the definition of change in ownership—indicate that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the acquisition of an ownership interest in a legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide transactions.

To be eligible for a base year value pursuant to section 69.5, subdivision (e) of that section provides in part:

[T]his section shall not apply unless the transfer of the original property is change in ownership that either (1) subjects the property to reappraisal at its current fair market value in accordance with Section 110.1 or 5803 or (2) results in a base year value determined in accordance with this section, Section 69, or Section 69.3 because the property qualifies under this section, Section 69, or Section 69.3 as a replacement dwelling or property."

In short, your original property must be reappraised at its fair market value, or your transferee (LLC) must receive a base year value transfer, before you are eligible for your own base year value transfer. Here you propose to transfer your original residence to a newly formed LLC. Unless your original residence is reappraised at its fair market value upon that change in ownership, you will not qualify for a section 69.5 base year value transfer.

While the facts are not entirely clear in regard to the situation you propose, we believe that you would qualify for the section 69.5 base year value transfer if you document the following conditions to the satisfaction of the assessor: 1) that the transfer of your original property to your LLC is a bona fide transfer of your interest in the real property "substantially equivalent in value to the fee interest," 2) that your LLC will give you 99 percent of the LLC's interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that your "sale" to the LLC was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in section 69.5 mandates that claims for base year value transfers are to be granted by assessors only if all the requirements are met. (See Letter To Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide your county assessor with evidence that your original property is actually transferred by you to your LLC, for valuable consideration, within two years of the purchase of your replacement dwelling.

During our telephone conversation on December 4, 2002, you asked whether you may purchase your replacement dwelling prior to reaching 55 years of age and still qualify for the base year value transfer benefit. To answer your question we must consider two separate elements of eligibility found in section 69.5. First, paragraph (5) of subdivision (b) requires that your replacement dwelling be purchased or newly constructed within two years of the sale of your original property:

The original property of the claimant is sold by him or her within two years of the purchase or new construction of the replacement dwelling. For purposes of the this paragraph, the purchase or new construction of the replacement dwelling includes the purchase of that portion of land on which the replacement building, structure, or other shelter constituting a place of abode of the claimant will be situated and that, pursuant to paragraph (3) of subdivision (g), constitutes a part of the replacement dwelling.

As applied to the facts of your situation, you may purchase your replacement dwelling no earlier than two years prior to the sale of your original dwelling. However, that requirement must be considered in concert with paragraph (3) of subdivision (b), which states:

At the time of the sale of the original property, the claimant or the claimant's spouse who resides with the claimant is at least 55 years of age, or is severely and permanently disabled.

Paragraph (3), when analyzed in concert with paragraph (5), would permit you to purchase your replacement dwelling prior to reaching 55 years of age provided that (a) you sell your original property within two years of purchasing your replacement dwelling *and* (b) such sale does not occur until after you have reached 55 years of age.

In closing that telephone conversation, you made one last inquiry: may you obtain a base year value transfer if you purchase your replacement dwelling from your LLC? Nothing in section 69.5 precludes purchasing your replacement dwelling from a legal entity. However, that purchase must qualify as a "change in ownership" to ensure that the sale of your original property occurs within two years of purchasing your replacement dwelling. To that end, the purchase of your replacement dwelling from your LLC must meet the definition of a "change in ownership" contained in section 60 and described on page 2 of this letter.



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Executive Director

December 31, 2002

**Re: Revenue and Taxation Code Section 69.5
Sale of Original Property
Request Number:**

Dear Mr. _____ :

This letter is in response to your inquiry addressed to the Board of Equalization's Property Taxes Department dated July 23, 2002, requesting our opinion as to whether your proposed transactions would qualify for a base year value transfer under section 69.5.

According to your letter and telephone conversation with Ms. _____, you plan to transfer your current principal residence to your limited liability company (LLC) upon reaching 55 years of age; you would like to have that transaction qualify as a "sale" for the purposes of a base year value transfer pursuant to section 69.5. To reach that result, you asked: (1) Whether your LLC must have a third person member and what percentage ownership interest or investment amount that person needs to have before this transaction would be considered a "sale?" And, (2) whether the property must be reassessed upon the "sale" to your LLC to qualify for the base year value transfer? As a point of further clarification, you made two additional inquiries during our telephone conversation on December 4, 2002: (3) Must you reach 55 years of age before purchasing your replacement dwelling? And, (4) Can you purchase your replacement dwelling from your LLC?

Law and Analysis

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale of their original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration."

To ensure that the transfer of your original property qualifies as a "change in ownership," you and your wife must obtain ownership interests in your LLC that are not proportional to your ownership interests in your original property. Although transfers of property to a legal entity are normally changes in ownership under subdivision (j) of section 61, such is not the result if your ownership interests in the original property before and after the transaction are proportional (i.e., identical). Subdivision (a)(2) of section 62 excludes such transfers from the definition of a "change in ownership." To determine whether a change in ownership has occurred, LLC members' ownership interests are measured by its members' capital and profits interests. If proportionality is maintained, then your original property will *not* have experienced a change in ownership.

If you and your wife own equal interests in your home and transfer the home to your wholly-owned LLC, in which each of you have equal interests, then the proportionality will be maintained before and after the transfer; your property will not be subject to change in ownership. To avoid a proportional transfer, you and your wife must obtain interests in your LLC with a third person—even a fraction of a percent held by a third person will render the transfer nonproportional.

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors that recognition of those transactions for section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, should you and your wife gift deed your original property to your LLC, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold." The basic question is whether you and your wife intend to transfer not only legal title but also beneficial ownership of your property.

Section 60 defines a change in ownership as "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." Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To constitute a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

- (1) It transfers a present interest in real property;
- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Based on the foregoing, a claimant for a section 69.5 base year value transfer must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a LLC, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (LLC) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer.

Although nothing in section 69.5—or in the definition of change in ownership—indicate that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the acquisition of an ownership interest in a legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide transactions.

To be eligible for a base year value pursuant to section 69.5, subdivision (e) of that section provides in part:

[T]his section shall not apply unless the transfer of the original property is change in ownership that either (1) subjects the property to reappraisal at its current fair market value in accordance with Section 110.1 or 5803 or (2) results in a base year value determined in accordance with this section, Section 69, or Section 69.3 because the property qualifies under this section, Section 69, or Section 69.3 as a replacement dwelling or property."

In short, your original property must be reappraised at its fair market value, or your transferee (LLC) must receive a base year value transfer, before you are eligible for your own base year value transfer. Here you propose to transfer your original residence to a newly formed LLC. Unless your original residence is reappraised at its fair market value upon that change in ownership, you will not qualify for a section 69.5 base year value transfer.

While the facts are not entirely clear in regard to the situation you propose, we believe that you would qualify for the section 69.5 base year value transfer if you document the following conditions to the satisfaction of the assessor: 1) that the transfer of your original property to your LLC is a bona fide transfer of your interest in the real property "substantially equivalent in value to the fee interest," 2) that your LLC will give you 99 percent of the LLC's interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that your "sale" to the LLC was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in section 69.5 mandates that claims for base year value transfers are to be granted by assessors only if all the requirements are met. (See Letter To Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide your county assessor with evidence that your original property is actually transferred by you to your LLC, for valuable consideration, within two years of the purchase of your replacement dwelling.

During our telephone conversation on December 4, 2002, you asked whether you may purchase your replacement dwelling prior to reaching 55 years of age and still qualify for the base year value transfer benefit. To answer your question we must consider two separate elements of eligibility found in section 69.5. First, paragraph (5) of subdivision (b) requires that your replacement dwelling be purchased or newly constructed within two years of the sale of your original property:

The original property of the claimant is sold by him or her within two years of the purchase or new construction of the replacement dwelling. For purposes of the this paragraph, the purchase or new construction of the replacement dwelling includes the purchase of that portion of land on which the replacement building, structure, or other shelter constituting a place of abode of the claimant will be situated and that, pursuant to paragraph (3) of subdivision (g), constitutes a part of the replacement dwelling.

As applied to the facts of your situation, you may purchase your replacement dwelling no earlier than two years prior to the sale of your original dwelling. However, that requirement must be considered in concert with paragraph (3) of subdivision (b), which states:

At the time of the sale of the original property, the claimant or the claimant's spouse who resides with the claimant is at least 55 years of age, or is severely and permanently disabled.

Paragraph (3), when analyzed in concert with paragraph (5), would permit you to purchase your replacement dwelling prior to reaching 55 years of age provided that (a) you sell your original property within two years of purchasing your replacement dwelling *and* (b) such sale does not occur until after you have reached 55 years of age.

In closing that telephone conversation, you made one last inquiry: may you obtain a base year value transfer if you purchase your replacement dwelling from your LLC? Nothing in section 69.5 precludes purchasing your replacement dwelling from a legal entity. However, that purchase must qualify as a "change in ownership" to ensure that the sale of your original property occurs within two years of purchasing your replacement dwelling. To that end, the purchase of your replacement dwelling from your LLC must meet the definition of a "change in ownership" contained in section 60 and described on page 2 of this letter.

The views expressed in this letter are advisory in nature; they represent the analysis of the Board of Equalization's Legal staff based on present law and the facts set forth herein, and are not binding on any person or public entity. You may wish to consult with private counsel to ascertain all the possible tax consequences of your transaction.

For additional information on transfers involving legal entities, enclosed is a copy of Property Tax Rule 462.180 and Annotation 220.0375. If you require any additional information regarding your request, please contact me at (916) 322-6083, or write to the address above.

Sincerely,

/s/ Michael Lebeau

Michael Lebeau
Tax Counsel

MTL:eb
Prop/prec/bayrcor/02/11ml.doc

Enclosures [Property Tax Rule 462.180, Annotation 220.0375 (C 4/15/98), Cazadd letters 6/14/95 and 11/20/95]

cc: Mr. David Gau MIC:63 (all w/enclosures)
 Mr. Dean Kinnee MIC:62
 Mr. Mark Nisson MIC:62
 Ms. Glenna Schultz MIC:62



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Executive Director

June 14, 1995

In Re: Transfer of Base Year Value Where Original Property is Transferred to Family Partnership.

Dear Mr. :

This is in response to your letter of May 9, 1995, to Mr. Richard Ochsner in which you request our opinion as to whether your client, Ms. , can qualify for the benefits of Proposition 60, California Constitution Article XIII A, Section 2 and Revenue & Taxation Code Section 69.5, and transfer the base year value from her original property to a replacement dwelling, where her original residence was transferred to a family partnership without a sale or any monetary consideration.

You have described the following set of facts for purposes of our analysis:

1. Ms. ("Ms. C") deeded her original property (her residence in) to The Family Limited Partnership ("Partnership") on December 21, 1994, in exchange for a 99% interest in Partnership. Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended replacement dwelling, a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year

value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor denied Ms. C's claim for property tax relief (per May 5, 1995 letter by Deputy Assessor attached) on the ground that the 1994 transfer of the original property to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

Your question is whether the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8). For the reasons hereinafter explained, we believe that it is, subject to the following requirements.

LAW AND ANALYSIS

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, had Ms. C gift deeded her original residence to the family Partnership, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold."

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors on questions involving sales of original properties that recognition of the transactions for Section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. The question is basically whether the parties **intended** to transfer not only legal title but also beneficial ownership of the property.

As you are aware, Revenue and Taxation Code Section 60 defines a change in ownership as "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."

Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To be a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

- (1) It transfers a present interest in real property;
- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Also within that definition is the provision of Section 61(i) which includes as a change:

The transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person.

Based on the foregoing, a claimant for the Section 69.5 benefits must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a partnership, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (Partnership) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer. While there is nothing in Section 69.5 or in the definition of change in ownership indicating that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of an ownership interest in a partnership or other legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide and not subject to the application of an exclusion from change in ownership.

While the facts are not entirely clear in regard to the situation you describe, we believe that Ms. C would qualify for the Section 69.5 benefits if the following conditions are documented to the satisfaction of the assessor: 1) that the

June 14, 1995

transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," 2) that Partnership gave to Ms. C 99% of the Partnership interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in Section 69.5 mandates that claims for base year value transfer benefits are to be granted by assessors only if all the requirements are met. (See Letter to Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide the Marin County Assessor with evidence that Ms. C's original property was actually transferred by her to Partnership for valuable consideration (Partnership interest) within two years of the purchase of her replacement dwelling.

The views expressed in this letter are, of course, advisory only and are not binding upon the Marin County Assessor or the assessor of any county.

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd
Tax Counsel

Enclosure

cc: The Honorable Joan C. Thayer
Marin County Assessor

Mr. John W. Hagerty, MIC:63
Mr. Richard Johnson, MIC:64
Ms. Jennifer Willis, MIC:70



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November 20, 1995

BURTON W. OLIVER
Executive Director

Office of the Marin County Assessor-Recorder
Civic Center, P.O. Box C
San Rafael, CA 94913

In Re: **Transfer of Base Year Value - "Consideration" Upon Sale,
Documentary Transfer Tax.**

Dear Ms. :

This is in response to your letter of June 21, 1995, in which you request our opinion as to whether, in light of newly discovered information on the grant deed from Ms. ("Ms. C") to the Family Limited Partnership ("Partnership"), our conclusion in the attached June 14, 1995 letter to Mr. regarding Ms. C's qualification for the Proposition 60 benefits would change.

For purposes of this analysis, the following set of facts as described in our June 14 letter, in addition to the new facts provided in your June 21 letter are summarized below:

1. Ms. C deeded her "original property" (her residence in) to the Partnership on December 21, 1994, in exchange for a 99% interest in Partnership. Ms. C's attorney asserted that the Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended "replacement dwelling," a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor's office denied Ms. C's claim for property tax relief (May 5, 1995 letter) on the ground that the 1994 transfer of the original residence to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

4. Per our June 14, 1995 letter, we concluded that Ms. C would qualify for the Section 69.5 benefits, **providing that** the following conditions were documented to the satisfaction of the Assessor: (1) that the transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," (2) that Partnership gave to Ms. C 99% of the Partnership interests which were of substantial (but not necessarily equivalent) "value" in return for the property, and (3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

5. Upon review of our June 14, 1995 letter, the assessor's office observed that the grant deed (94-06151, recorded on December 21, 1994) for the sale of the original property from Ms. C to Partnership on its face exhibits the words, "NO SALE" in the space next to "Documentary Transfer Tax," and that no documentary transfer tax was ever paid.

Your question is whether in light of this newly discovered information, the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is bona fide "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8).

LAW AND ANALYSIS

As previously discussed in our June 14 letter, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." The term "consideration" as found in the context of "any change in ownership...for consideration," depends on whether the subject transfers, for Section 69.5 purposes, were bona fide changes in ownership. Consequently,

we take the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property."

Based on the "NO SALE" notation on the deed and the fact that no documentary transfer tax was paid, you question whether Ms. C's transfer of her original residence to the Partnership was made without consideration, hence, precluding the transfer of base year value to the replacement dwelling. The issue is essentially whether this information on the deed constitutes a basis for finding that all of the requirements pertaining to Section 69.5 claims for have not been met.

The Documentary Transfer Tax Act is locally imposed and administered as authorized in Revenue and Taxation Code Sections 11901 - 11934. There are no provisions in the Act which provide exemptions from the tax for transfers of real property from an individual to a family limited partnership. However, the Board of Supervisors of any county and/or the City Council of any city may adopt an ordinance imposing on each deed or instrument by which real property is transferred the tax due to such county or city and excluding therefrom certain types of transfers which meet specified criteria.

The Act authorizes any county and/or city to impose by ordinance the documentary transfer tax **on any deed by which real property is sold**. Specifically, Section 11911, subdivision (a) authorizes the board of supervisors of any county or city and county to impose "on each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars (\$100) a tax at the rate of fifty-five cents (\$0.55) for each five hundred dollars (\$500) or fractional part thereof."

The Act, therefore, conditions the transfer tax on the term "sold" and a finding that the sale must be for consideration which exceeds the amount of \$100. Since apparently, your office staff, which administers this tax, wrote "NO SALE" on the deed, it seems logical to presume that the staff was not aware that the purchase price of Ms. C's original property was \$925,000. Thus, we understand your concern that perhaps information was provided indicating that the transfer was made either as a gift

November 20, 1995

to the Partnership or for consideration less than \$100, thereby leading to the conclusion that there was no bona fide sale of Ms. C's original property for consideration.

However, there may be other reasons why your office staff made the foregoing notation and did not impose the tax. If, for example, the local ordinance which applied to this particular transaction contained some provision(s) stating that certain types of transfers did not constitute "a sale" subject to the tax, or that certain conveyances were exempt from this tax, the staff could have made the same type of notation and not imposed the tax. Certainly, these are questions which are appropriately addressed to the staff. Moreover, since the documentary transfer tax is administered and collected **solely** by that staff at the time of the transfer, that staff determine how the documentary transfer tax was administered, and only it can provide an appropriate explanation.

Notwithstanding the your office staff's determination, we advised Ms. C's attorney in our June 14 letter that a claimant for the Section 69.5 benefits must establish **to the satisfaction of the assessor** that the transfer of the original property and the payment of "consideration" are bona fide and are not subject to the application of an exclusion from change in ownership. Therefore, if you are not satisfied that Ms. C's transfer to Partnership was "for consideration" (e.g., more than mere nominal value), you have statutory authority to require that further documentation be provided or to deny the claim. Since the term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of ownership interests in a partnership or other legal entity, you may wish to request certified copies of the Certificate of Limited Partnership filed with the Secretary of State, partnership tax returns, canceled checks, etc., so that you are fully satisfied that the claim will be properly documented and duly granted.

The views expressed in this letter are, of course, advisory only and are not binding upon the office of the Marin County Assessor or the assessor of any county.



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KATHLEEN CONNELL
State Controller, Sacramento

James E. Speed
Executive Director

December 31, 2002

**Re: Revenue and Taxation Code Section 69.5
Sale of Original Property
Request Number:**

Dear Mr. _____ :

This letter is in response to your inquiry addressed to the Board of Equalization's Property Taxes Department dated July 23, 2002, requesting our opinion as to whether your proposed transactions would qualify for a base year value transfer under section 69.5.

According to your letter and telephone conversation with Ms. _____, you plan to transfer your current principal residence to your limited liability company (LLC) upon reaching 55 years of age; you would like to have that transaction qualify as a "sale" for the purposes of a base year value transfer pursuant to section 69.5. To reach that result, you asked: (1) Whether your LLC must have a third person member and what percentage ownership interest or investment amount that person needs to have before this transaction would be considered a "sale?" And, (2) whether the property must be reassessed upon the "sale" to your LLC to qualify for the base year value transfer? As a point of further clarification, you made two additional inquiries during our telephone conversation on December 4, 2002: (3) Must you reach 55 years of age before purchasing your replacement dwelling? And, (4) Can you purchase your replacement dwelling from your LLC?

Law and Analysis

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale of their original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration."

To ensure that the transfer of your original property qualifies as a "change in ownership," you and your wife must obtain ownership interests in your LLC that are not proportional to your ownership interests in your original property. Although transfers of property to a legal entity are normally changes in ownership under subdivision (j) of section 61, such is not the result if your ownership interests in the original property before and after the transaction are proportional (i.e., identical). Subdivision (a)(2) of section 62 excludes such transfers from the definition of a "change in ownership." To determine whether a change in ownership has occurred, LLC members' ownership interests are measured by its members' capital and profits interests. If proportionality is maintained, then your original property will *not* have experienced a change in ownership.

If you and your wife own equal interests in your home and transfer the home to your wholly-owned LLC, in which each of you have equal interests, then the proportionality will be maintained before and after the transfer; your property will not be subject to change in ownership. To avoid a proportional transfer, you and your wife must obtain interests in your LLC with a third person—even a fraction of a percent held by a third person will render the transfer nonproportional.

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors that recognition of those transactions for section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, should you and your wife gift deed your original property to your LLC, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold." The basic question is whether you and your wife intend to transfer not only legal title but also beneficial ownership of your property.

Section 60 defines a change in ownership as "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." Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To constitute a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

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- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Based on the foregoing, a claimant for a section 69.5 base year value transfer must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a LLC, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (LLC) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer.

Although nothing in section 69.5—or in the definition of change in ownership—indicate that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the acquisition of an ownership interest in a legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide transactions.

To be eligible for a base year value pursuant to section 69.5, subdivision (e) of that section provides in part:

[T]his section shall not apply unless the transfer of the original property is change in ownership that either (1) subjects the property to reappraisal at its current fair market value in accordance with Section 110.1 or 5803 or (2) results in a base year value determined in accordance with this section, Section 69, or Section 69.3 because the property qualifies under this section, Section 69, or Section 69.3 as a replacement dwelling or property."

In short, your original property must be reappraised at its fair market value, or your transferee (LLC) must receive a base year value transfer, before you are eligible for your own base year value transfer. Here you propose to transfer your original residence to a newly formed LLC. Unless your original residence is reappraised at its fair market value upon that change in ownership, you will not qualify for a section 69.5 base year value transfer.

While the facts are not entirely clear in regard to the situation you propose, we believe that you would qualify for the section 69.5 base year value transfer if you document the following conditions to the satisfaction of the assessor: 1) that the transfer of your original property to your LLC is a bona fide transfer of your interest in the real property "substantially equivalent in value to the fee interest," 2) that your LLC will give you 99 percent of the LLC's interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that your "sale" to the LLC was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in section 69.5 mandates that claims for base year value transfers are to be granted by assessors only if all the requirements are met. (See Letter To Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide your county assessor with evidence that your original property is actually transferred by you to your LLC, for valuable consideration, within two years of the purchase of your replacement dwelling.

During our telephone conversation on December 4, 2002, you asked whether you may purchase your replacement dwelling prior to reaching 55 years of age and still qualify for the base year value transfer benefit. To answer your question we must consider two separate elements of eligibility found in section 69.5. First, paragraph (5) of subdivision (b) requires that your replacement dwelling be purchased or newly constructed within two years of the sale of your original property:

The original property of the claimant is sold by him or her within two years of the purchase or new construction of the replacement dwelling. For purposes of the this paragraph, the purchase or new construction of the replacement dwelling includes the purchase of that portion of land on which the replacement building, structure, or other shelter constituting a place of abode of the claimant will be situated and that, pursuant to paragraph (3) of subdivision (g), constitutes a part of the replacement dwelling.

As applied to the facts of your situation, you may purchase your replacement dwelling no earlier than two years prior to the sale of your original dwelling. However, that requirement must be considered in concert with paragraph (3) of subdivision (b), which states:

At the time of the sale of the original property, the claimant or the claimant's spouse who resides with the claimant is at least 55 years of age, or is severely and permanently disabled.

Paragraph (3), when analyzed in concert with paragraph (5), would permit you to purchase your replacement dwelling prior to reaching 55 years of age provided that (a) you sell your original property within two years of purchasing your replacement dwelling *and* (b) such sale does not occur until after you have reached 55 years of age.

In closing that telephone conversation, you made one last inquiry: may you obtain a base year value transfer if you purchase your replacement dwelling from your LLC? Nothing in section 69.5 precludes purchasing your replacement dwelling from a legal entity. However, that purchase must qualify as a "change in ownership" to ensure that the sale of your original property occurs within two years of purchasing your replacement dwelling. To that end, the purchase of your replacement dwelling from your LLC must meet the definition of a "change in ownership" contained in section 60 and described on page 2 of this letter.

The views expressed in this letter are advisory in nature; they represent the analysis of the Board of Equalization's Legal staff based on present law and the facts set forth herein, and are not binding on any person or public entity. You may wish to consult with private counsel to ascertain all the possible tax consequences of your transaction.

For additional information on transfers involving legal entities, enclosed is a copy of Property Tax Rule 462.180 and Annotation 220.0375. If you require any additional information regarding your request, please contact me at (916) 322-6083, or write to the address above.

Sincerely,

/s/ Michael Lebeau

Michael Lebeau
Tax Counsel

MTL:eb
Prop/prec/bayrcor/02/11ml.doc

Enclosures [Property Tax Rule 462.180, Annotation 220.0375 (C 4/15/98), Cazadd letters 6/14/95 and 11/20/95]

cc: Mr. David Gau MIC:63 (all w/enclosures)
 Mr. Dean Kinnee MIC:62
 Mr. Mark Nisson MIC:62
 Ms. Glenna Schultz MIC:62



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

LEGAL DIVISION - MIC 82
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
Office No. (916) 323-7713
Fax No. (916) 323-3387

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BURTON W. OLIVER
Executive Director

June 14, 1995

In Re: Transfer of Base Year Value Where Original Property is Transferred to Family Partnership.

Dear Mr. :

This is in response to your letter of May 9, 1995, to Mr. Richard Ochsner in which you request our opinion as to whether your client, Ms. , can qualify for the benefits of Proposition 60, California Constitution Article XIII A, Section 2 and Revenue & Taxation Code Section 69.5, and transfer the base year value from her original property to a replacement dwelling, where her original residence was transferred to a family partnership without a sale or any monetary consideration.

You have described the following set of facts for purposes of our analysis:

1. Ms. ("Ms. C") deeded her original property (her residence in) to The Family Limited Partnership ("Partnership") on December 21, 1994, in exchange for a 99% interest in Partnership. Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended replacement dwelling, a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year

value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor denied Ms. C's claim for property tax relief (per May 5, 1995 letter by Deputy Assessor attached) on the ground that the 1994 transfer of the original property to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

Your question is whether the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8). For the reasons hereinafter explained, we believe that it is, subject to the following requirements.

LAW AND ANALYSIS

As you are aware, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." For this reason we have taken the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property." Thus, had Ms. C gift deeded her original residence to the family Partnership, we would conclude that the replacement dwelling could not qualify for the benefit since the original property was never "sold."

With regard to the term "consideration" as found in subdivision (g)(8) in the context of "any change in ownership...for consideration," we have previously advised assessors on questions involving sales of original properties that recognition of the transactions for Section 69.5 purposes depends on whether the subject transfers were bona fide changes in ownership. The question is basically whether the parties **intended** to transfer not only legal title but also beneficial ownership of the property.

As you are aware, Revenue and Taxation Code Section 60 defines a change in ownership as "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."

Whether or not a particular transaction involving real property falls within this definition depends upon the facts in each case. To be a "change in ownership" under Section 60, the particular transaction must embody the following three characteristics contained in the definition:

- (1) It transfers a present interest in real property;
- (2) It transfers the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the fee interest.

Also within that definition is the provision of Section 61(i) which includes as a change:

The transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person.

Based on the foregoing, a claimant for the Section 69.5 benefits must establish to the satisfaction of the assessor that the "sale" of the original property, including a transfer of real property to a partnership, encompasses all three elements of change in ownership. "Present interest," "beneficial use," and "property rights...substantially equivalent in value to the fee" mean that the transferee (Partnership) receives and actually possesses a calculable percentage of the fee interest as the result of the transfer. While there is nothing in Section 69.5 or in the definition of change in ownership indicating that the claimant must receive in exchange specific "consideration" equal in value to the value of the property interest transferred, we have consistently advised that the transfer of property in return for a nominal value should be rejected on the theory that the alleged "sale" is a mere sham. The term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of an ownership interest in a partnership or other legal entity. Most importantly, the claimant must establish that the transfer of the original property and the payment of "consideration" are bona fide and not subject to the application of an exclusion from change in ownership.

While the facts are not entirely clear in regard to the situation you describe, we believe that Ms. C would qualify for the Section 69.5 benefits if the following conditions are documented to the satisfaction of the assessor: 1) that the

June 14, 1995

transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," 2) that Partnership gave to Ms. C 99% of the Partnership interest which was of substantial (but not necessarily equivalent) "value" in return for the property, and 3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

The language in Section 69.5 mandates that claims for base year value transfer benefits are to be granted by assessors only if all the requirements are met. (See Letter to Assessors, No. 91/33, copy enclosed.) Thus, it is essential to provide the Marin County Assessor with evidence that Ms. C's original property was actually transferred by her to Partnership for valuable consideration (Partnership interest) within two years of the purchase of her replacement dwelling.

The views expressed in this letter are, of course, advisory only and are not binding upon the Marin County Assessor or the assessor of any county.

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd
Tax Counsel

Enclosure

cc: The Honorable Joan C. Thayer
Marin County Assessor

Mr. John W. Hagerty, MIC:63
Mr. Richard Johnson, MIC:64
Ms. Jennifer Willis, MIC:70



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450 N STREET, SACRAMENTO, CALIFORNIA
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Controller, Sacramento

November 20, 1995

BURTON W. OLIVER
Executive Director

Office of the Marin County Assessor-Recorder
Civic Center, P.O. Box C
San Rafael, CA 94913

In Re: **Transfer of Base Year Value - "Consideration" Upon Sale,
Documentary Transfer Tax.**

Dear Ms. :

This is in response to your letter of June 21, 1995, in which you request our opinion as to whether, in light of newly discovered information on the grant deed from Ms. ("Ms. C") to the Family Limited Partnership ("Partnership"), our conclusion in the attached June 14, 1995 letter to Mr. regarding Ms. C's qualification for the Proposition 60 benefits would change.

For purposes of this analysis, the following set of facts as described in our June 14 letter, in addition to the new facts provided in your June 21 letter are summarized below:

1. Ms. C deeded her "original property" (her residence in) to the Partnership on December 21, 1994, in exchange for a 99% interest in Partnership. Ms. C's attorney asserted that the Partnership acquired the residence at the appraised value of \$925,000, which is the same amount which Partnership sold it for in January 1995.
2. Ms. C purchased her intended "replacement dwelling," a condominium in on November 23, 1993, and applied to the Marin County Assessor for a transfer of base year value from her original property to her replacement dwelling on April 6, 1995.

3. The Assessor's office denied Ms. C's claim for property tax relief (May 5, 1995 letter) on the ground that the 1994 transfer of the original residence to Partnership was not a "sale" as required by Section 69.5, subdivision (g)(8).

4. Per our June 14, 1995 letter, we concluded that Ms. C would qualify for the Section 69.5 benefits, **providing that** the following conditions were documented to the satisfaction of the Assessor: (1) that the transfer of her original property to Partnership was a bona fide transfer of her interest in the real property "substantially equivalent in value to the fee interest," (2) that Partnership gave to Ms. C 99% of the Partnership interests which were of substantial (but not necessarily equivalent) "value" in return for the property, and (3) that Ms. C's "sale" to Partnership was not subject to the application of an exclusion from change in ownership (which is not otherwise apparent from the information submitted here).

5. Upon review of our June 14, 1995 letter, the assessor's office observed that the grant deed (94-06151, recorded on December 21, 1994) for the sale of the original property from Ms. C to Partnership on its face exhibits the words, "NO SALE" in the space next to "Documentary Transfer Tax," and that no documentary transfer tax was ever paid.

Your question is whether in light of this newly discovered information, the 99% partnership interest received by Ms. C upon the transfer of her original property to the Partnership is bona fide "consideration" for purposes of meeting the requirements of a sale under Section 69.5, subdivision (g)(8).

LAW AND ANALYSIS

As previously discussed in our June 14 letter, Section 69.5 permits a person over the age of 55 years to transfer the base year value of an original property which is "sold," to a replacement dwelling which is "purchased" by that person as his/her principal residence within two years of the sale by that person of the original property. Subdivision (g)(8) defines the term "sale" as "any change in ownership of the original property for consideration." The term "consideration" as found in the context of "any change in ownership...for consideration," depends on whether the subject transfers, for Section 69.5 purposes, were bona fide changes in ownership. Consequently,

we take the position that property which is gifted or devised, without the benefit of consideration, cannot qualify as a "sale" of the "original property."

Based on the "NO SALE" notation on the deed and the fact that no documentary transfer tax was paid, you question whether Ms. C's transfer of her original residence to the Partnership was made without consideration, hence, precluding the transfer of base year value to the replacement dwelling. The issue is essentially whether this information on the deed constitutes a basis for finding that all of the requirements pertaining to Section 69.5 claims for have not been met.

The Documentary Transfer Tax Act is locally imposed and administered as authorized in Revenue and Taxation Code Sections 11901 - 11934. There are no provisions in the Act which provide exemptions from the tax for transfers of real property from an individual to a family limited partnership. However, the Board of Supervisors of any county and/or the City Council of any city may adopt an ordinance imposing on each deed or instrument by which real property is transferred the tax due to such county or city and excluding therefrom certain types of transfers which meet specified criteria.

The Act authorizes any county and/or city to impose by ordinance the documentary transfer tax **on any deed by which real property is sold**. Specifically, Section 11911, subdivision (a) authorizes the board of supervisors of any county or city and county to impose "on each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars (\$100) a tax at the rate of fifty-five cents (\$0.55) for each five hundred dollars (\$500) or fractional part thereof."

The Act, therefore, conditions the transfer tax on the term "sold" and a finding that the sale must be for consideration which exceeds the amount of \$100. Since apparently, your office staff, which administers this tax, wrote "NO SALE" on the deed, it seems logical to presume that the staff was not aware that the purchase price of Ms. C's original property was \$925,000. Thus, we understand your concern that perhaps information was provided indicating that the transfer was made either as a gift

November 20, 1995

to the Partnership or for consideration less than \$100, thereby leading to the conclusion that there was no bona fide sale of Ms. C's original property for consideration.

However, there may be other reasons why your office staff made the foregoing notation and did not impose the tax. If, for example, the local ordinance which applied to this particular transaction contained some provision(s) stating that certain types of transfers did not constitute "a sale" subject to the tax, or that certain conveyances were exempt from this tax, the staff could have made the same type of notation and not imposed the tax. Certainly, these are questions which are appropriately addressed to the staff. Moreover, since the documentary transfer tax is administered and collected **solely** by that staff at the time of the transfer, that staff determine how the documentary transfer tax was administered, and only it can provide an appropriate explanation.

Notwithstanding the your office staff's determination, we advised Ms. C's attorney in our June 14 letter that a claimant for the Section 69.5 benefits must establish **to the satisfaction of the assessor** that the transfer of the original property and the payment of "consideration" are bona fide and are not subject to the application of an exclusion from change in ownership. Therefore, if you are not satisfied that Ms. C's transfer to Partnership was "for consideration" (e.g., more than mere nominal value), you have statutory authority to require that further documentation be provided or to deny the claim. Since the term "for consideration" is not limited to the receipt of cash, but may include the exchange of other property, the cancellation of a debt, or as in the instant case, the transfer of ownership interests in a partnership or other legal entity, you may wish to request certified copies of the Certificate of Limited Partnership filed with the Secretary of State, partnership tax returns, canceled checks, etc., so that you are fully satisfied that the claim will be properly documented and duly granted.

The views expressed in this letter are, of course, advisory only and are not binding upon the office of the Marin County Assessor or the assessor of any county.

November 20, 1995

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd
Tax Counsel

KEC:ba
Attachment
cc:

Mr. John W. Hagerty, MIC:63
Mr. Richard Johnson, MIC:64
Ms. Jennifer Willis, MIC:70

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November 20, 1995

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Sincerely,

Kristine Cazadd
Tax Counsel

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