200.0300(b) GOVERNMENT ACQUISITION

200.0315 **Claim.** The filing requirements of Revenue and Taxation Code Section 68 are mandatory. A failure to timely file a request for a transfer of the assessed value of a property taken by governmental action to a replacement property is jurisdictional and prevents the value transfer. C 12/22/88.

STATE OF CALIFORNIA

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December 22, 1988

Dear M

Re: Trust, Property Taxes
Your File No.

This is in response to your letter of August 31, 1988, in which you request our opinion with respect to the issues you raise as a result of the following facts set forth in your letter.

This matter involves real property consisting of four parcels which, for purposes of discussion, are identified as properties Nos. 1, 2, 3, and 4. All are located in County. All are owned or were owned by the Trust. The trust instrument is a master instrument under which five separate trusts, identified as A, B, C, D, and E, each owns or owned a 20 percent undivided interest in all the properties.

Properties Nos. 1, 3, and 4 were acquired by the trusts after 1966. Property No. 1 was conveyed to the Redevelopment Agency of the City of by deed recorded September 30, 1980. This conveyance arose from a condemnation action filed in County Superior Court, Case No. .

Property No. 2 was acquired by the trusts in February 1982 as replacement property for Property No. 1. Property No. 1 was, and Property No. 2 is, commercial property. Condemnation proceeds from Property No. 1 were $470,000. The acquisition cost of Property No. 2 was $450,000.

The taxable value of Property No. 1 for the 1980-1981 fiscal year was $100,392. A change of ownership statement was filed upon acquisition of Property No. 2. The taxable value for Property No. 2 as shown on the 1982 tax bill was $450,000.

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Under Revenue and Taxation Code section 68 (all statutory references are to the Revenue and Taxation Code unless otherwise indicated), the trusts were entitled to carry over the value, for property tax purposes, from Property No. 1 to Property No. 2. However, through inadvertence, an assessment under section 68 was not timely requested.

The beneficiary of Trust B died January 7, 1983. This event constituted a change in ownership with respect to 20 percent in each of Properties Nos. 2, 3, and 4, but because of inadvertence was not reported.

Property taxes on Properties Nos. 3 and 4 were underpaid commencing in January 1983 because of the failure to report the 20 percent change in ownership. Since Property No. 2 was acquired only eleven months before the death of the beneficiary of Trust B, you state that it is unlikely that the failure to report a change of ownership with respect to a 20 percent interest in Property No. 2 has significant effect. Your preliminary calculations reflect approximate underpayment of taxes in the amount of $17,360.

Property taxes on Property No. 2 commencing in fiscal year 1983 through 1987 were significantly greater than would have been paid had timely application been made for assessment under section 68. Your calculations reflect that the taxes paid on Property No. 2 over this period were approximately $17,000 more than would have been paid had section 68 been applied.

Based on the foregoing facts, you ask first whether there is a basis upon which the taxes unnecessarily paid on Property No. 2 during the period 1983 through 1987 can be offset against the additional taxes due on Properties Nos. 3 and 4 because of the death of the beneficiary of Trust B.

Section 68 provides in relevant part that "[f]or purposes of Section 2 of Article XIIIA of the Constitution, the term 'change in ownership' shall not include the acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from property in this state by eminent domain proceedings, . . .
[¶] Persons acquiring replacement property between March 1, 1975, and January 1, 1983, shall request assessment under this section with the assessor on or before January 1, 1987. . . ."

Property Tax Rule 462.5 is the Board's interpretation of section 68 and provides in pertinent part in paragraph (g)(1) that "[t]he provisions of this section shall apply to property acquired after March 1, 1975, as replacement property for property taken after March 1, 1975, by eminent domain

proceedings, . . . and shall affect only those assessments of the replacement property on the 1983-84 assessment roll and thereafter, provided the person acquiring replacement property makes a timely request for such assessment with the assessor." (Emphasis added.)

You contend that the time limitation described above is the equivalent of a statute of limitation and that since statutes of limitations can be waived by parties in whose favor they operate you make several arguments that a waiver is appropriate here.

We do not agree that the time limitation of section 68 and Rule 462.5 is the equivalent of a statute of limitations. A statute of limitations is an act which prescribes the period beyond which a suit may not be brought (2 Witkin, Cal. Procedure (2d Ed. 1978) Actions, § 222, p. 1080). A statute of limitations is procedural and affects only the remedy rather than the substantive right or obligation (at p. 1082). Since the statute affects the remedy only, it provides the person in whose favor it operates with a personal privilege which may be exercised or not as the person elects (at p. 1087). A statute of limitations may therefore be waived as you suggest.

Statutes that restrict a statutory or other right, however, are not statutes of limitations but rather are in the nature of conditions put by the law on the right given (People v. Kings County Development Co. (1920) 48 Cal.App. 72, 2 Witkin, supra, at p. 1088). Such statutes have been held to be not waivable (at p. 1089).

In our view, the time limitation in question more closely resembles the latter type of statute. The time limitation of section 68 is mandatory. Timely request for treatment under section 68 is a condition on the right to exclusion from change in ownership for property tax purposes. If timely request is not made as required, the right to exclusion from change in ownership does not arise under section 68. The time limitation is therefore jurisdictional in our view. Accordingly, even if the assessor were agreeable to waiving the time limitation, such a waiver would be without legal effect in our opinion.

You also mention the possible application of the doctrine of equitable recoupment under which an overpayment of a tax, for which a refund could not be claimed because of the statute of limitations, can be applied against outstanding tax liabilities.

The doctrine of equitable recoupment is "based on unjust enrichment, i.e., the taxpayer paid more in taxes than he should have in equity and good conscience (Stone v. White

(1937) 301 U.S. 532). The doctrine is applicable, however, only where a single transaction is subjected to two taxes on inconsistent legal theories and thus would not be applicable in a case such as this (Rothensies v. Electrical Storage Battery Co. (1946) 329 U.S. 296). Moreover, under our view of this matter, a refund is not being barred by the statute of limitations. Rather, since no timely claim was made for treatment under section 68, there was no legal basis for exclusion from change in ownership for Property No. 2 and no overpayment of property taxes and thus no unjust enrichment with respect to that property.

Your second question is whether the error regarding Property No. 2 can be corrected for current and future years.

You argue that there has been an error (of omission) in information furnished to the assessor by the taxpayer causing a substantially higher valuation than would have occurred but for the error which may be corrected under section 4831.5. That section provides in part:

> When it can be ascertained by the assessor from an audit of an assessee's books of account or other papers that there has been a defect of description or clerical error of the assessee in his property statement or in other information or records furnished to the assessor which caused the assessor . . . to assess it at a substantially higher valuation than he would have entered on the roll if the information had been correctly furnished to the assessor, the error on the roll may be corrected under this article at any time after the roll is delivered to the auditor by the clerk of the county board and within the time allowed for assessing property which has escaped assessment as provided in Sections 532 and 532.1.

We do not believe section 4831.5 is applicable to this matter. No erroneous valuation was made here. As indicated above, the time limitation of section 68 is jurisdictional. Since it was not complied with, there was no right to a lower assessment under section 68. The assessor's valuation was therefore legally correct and it follows, in our opinion, that there is no error of overvaluation to be corrected.

If we can be of further assistance in this matter, please let us know.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel