(916)323-7712

September 20, 1983

This is in response to your letter of September 6, 1983, to Mr. James Delaney in which you ask us to review our position taken in CAO 83/17. Specifically, that letter advises assessors that the acquisition of 100% of the voting stock of a corporation by husband and wife, as joint tenants, does not constitute a change in control of the corporation under Revenue and Taxation Code, Section 64(c). We have reviewed this position and are in agreement for the reasons set forth below:

Section 64(c) of Revenue and Taxation Code provides, in relevant part:

> (c) When a corporation, partnership, other legal entity or <u>any other person</u> obtains control, as defined in Section 25105, in any corporation,...through the purchase or transfer of corporate stock, ...such purchase or transfer of such stock...shall be a change of ownership of property owned by the corporation,... in which the controlling interest is obtained. (Emphasis added.)

Section 25105 provides that "Direct or indirect ownership or control of more than 50 percent of the voting stock of the taxpayer shall constitute ownership or control for the purposes of this article."

It is on the basis of these two code sections that you raise the issue of whether or not the acquisition of 100% of the voting stock of a corporation by husband and wife, as joint tenants, constitutes a change in ownership of the corporation.

Civil Code, Section 681 provides that ownership of property by a single person is designated as a sole or several ownership. On the other hand, Section 682 provides that ownership of property by several persons is either: (1) of joint interests; (2) of partnership interests; (3) of interests in common; (4) of community interest of husband and wife. Specifically, Section 683 provides that, "A joint interest is one owned by two or more persons in equal shares...." Based on the foregoing statutes, it is clear that a husband and wife's joint tenancy interest in 100% of the voting stock of a corporation is a form of ownership by more than one person, each owning an equal 50% share of the stock. In such a situation, no one person has obtained control of the corporation. Moreover, the courts have consistently held that when property is conveyed to spouses as joint tenants, it is presumed that the interests of husband and wife are separate property. (Fry v. Behr (1970) 6 Cal.App. 3d 248; Crook v. Crook (1960) 184 Cal.App. 2d 745.)

In enacting Sections 60 - 67 of the Revenue and Taxation Code relating to change in ownership, there is no indication that the Legislature ever intended to treat joint tenancies as legal entities. (See Report of the Task Force on Property Tax Administration, 1/22/79; Property Tax Assessment, 10/29/79; both prepared by the staff of the Assembly Revenue and Taxation Committee.) To the contrary, the Legislature did specifically choose to treat partnerships as legal entities (see Sections 61(i), 62(a), 64) and joint tenancies as a form of ownership by several persons. (See Sections 61(d), 62(f), 63(d), 65, 65.1(a).) Furthermore, recognized that the acquisition in joint ownership of the controlling percentage of voting stock in a corporation did not constitute a change in ownership, when he sponsored the amendments to SB 1200, as amended in May 8, 1980. These amendments would have provided that control could be acquired by an affiliated group of persons such as family members, related by blood or marriage. These amendments were taken out of the bill on June 12, 1980, but again sponsored the proposal as part of its 1981 Legislative Program.

Based on the foregoing, we believe that the position set forth in CAO 83/17 is the correct interpretation of the law.

Very truly yours,

Margaret S. Shedd
Tax Counsel

MSS:jlh

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Executive Director

January 6, 2000

Honorable Bruce Dear
Placer County Assessor
2980 Richardson Drive
Auburn, CA 95603-4305

Attn: Mary M. Solseng, SR/WA, Chief Appraiser

Re: ***"Joint Tenant" General Partner in Limited Partnership; Transfers to Limited Partnership; Disproportionate Transfers.***

Dear Ms. Solseng:

You have requested our review and comment on the change in ownership consequences under the following set of facts:

1. E and son D formed Limited Partnership "(HC Ltd.") in April 1995, in order "to hold, operate, and manage" certain property. According to HC Ltd. Partnership Agreement, Section B (attached), the partners of HC Ltd. are:

   *General partner* - E and D - jointly owning a .5% interest in HC Ltd. capital and profits;

   *Limited partners* - E as sole present beneficiary of M. P. Irrevocable Trust,[1] ("M.P. Trust"), owning a 50% capital and profit interest, and E as an individual, owning a 49.5% capital and profits interest.

2. Before the transfers, E owned 100% of the property, 50% as sole present beneficiary of the M. P. Trust, and 50% as an unmarried individual. Beginning in 1996, E made two transfers of his 50% interests to HC Ltd.:

   First - by quitclaim deed on June 26, 1996, from E and Wells Fargo Bank as co-Trustees, to HC Ltd.;

   Second - by quitclaim deed dated February 28, 1997, from E to HC Ltd..

[1] Additional facts communicated by phone indicate that the M. P. Irrevocable Trust holds the property and assets left to E by his wife who is deceased.

3. Your office determined that a change in ownership occurred on the date of each transfer (using the date on each deed) and reassessed 50% of the property in June 1996, and the remaining 50% in February 1997.

4. HC Ltd. protested the change in ownership and reassessments, and submitted the following arguments:[2]

   "...that the subject transfers were exempt [sic] and did not constitute a change in ownership. This conclusion is based on the application to the facts herein of Revenue and Taxation Code Section 62(f), which provides that the creation of a joint tenancy is not a change in ownership, and on Revenue and Taxation Code Section 65.1(a), which provides that a change of ownership of an interest with a market value of less than 5% of the value of the total property shall not be reappraised if the market value of the interest transferred is less than ten thousand dollars ($10,000)." [3]

Your office believes that this represents an erroneous interpretation of the Revenue and Taxation Code provisions as applied to this transaction, and requests our review of the specific facts. For the reasons hereinafter explained, we agree with your analysis and your conclusion that each transfer (1996 and 1997) resulted in a change in ownership and reappraisal of the 50% undivided interest transferred.

**Legal Analysis**

While the facts relevant to this transaction are not in dispute, the proper application of the statutes clearly is. Your office treated each 50% transfer from E to HC Ltd. as an individual-to-entity change in ownership under Section 61(j), finding that the proportional ownership interest exclusion in Section 62(a)(2) did not apply. The taxpayer treated the transaction as "proportional" and applied the Section 62(a)(2) exclusion. Apparently, the taxpayer assumed that the transfers were not a change in ownership on the grounds that: 1) E and D created a "joint tenancy" as the sole general partner of HC Ltd. under Section 62(f)[4] and the de minimis provision in Section 65.1(a). applied; and 2) as a result, E's real property transfers to HC Ltd. met the proportionality requirements of Section 62(a)(2). We disagree with both of the taxpayer's conclusions.

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[2] Quoted from Placer County Appeal No 98-176 through 98-187, attached.

[3] As stated on page 2 of the findings, under "Section 62(f), the creation of a joint tenancy is not a change in ownership, so the creation of the .5% ownership in the joint tenancy of E... and D... does not trigger reappraisal pursuant to Section 62(a)(2)."

[4] Section 62(f) actually states that a change in ownership shall not include: "the creation or transfer of a joint tencancy interest if the transferor, after the creation or transfer, is one of the joint tenants as porvided in subdivision (b) of Section 65.

1. **Sections 62(f) and 65.1 do not Apply to Real Property Transfers from an Individual to an Entity.**

Section 62(f) and Section 65.1 constitute change in ownership exclusions that pertain to real property transfers to or from co-tenants or joint tenants, not to legal entities. In adopting the change in ownership statutes, the Legislature treated co-ownership interests, such as tenancies-in-common, joint tenancies, and leasehold estates, separately from each other and entirely differently than ownership by legal entities. Under Revenue and Taxation Code Section 61(f), the creation or transfer of a joint tenancy interest is a change in ownership resulting in reappraisal of only that interest transferred. (See Property Tax Rule 462.040(a) and Annotation No. 220.0295, Eisenlauer 4/15/87, attached.) This treatment was based in part on Civil Code Section 683, which provides that a joint tenancy is an estate which creates *undivided interests* in real property with each individual joint tenant owning an equal percentage interest and the right of survivorship.[5] Thus, percentage interests of a co-tenant or a joint tenant in real property are considered to be "owned" by the individual. The statutes never treat the co-owners or joint tenants as a single entity. (See Letters to Assessors No. 79/175 and No. 80/180, attached.)

In stark contrast, the Legislature adopted the "separate entity" theory regarding corporations, partnerships, joint ventures, and other legal entities - recognizing that the general laws of the state endow these entities with an existence and identity separate from its owners. The *"Report of the Task Force on Property Tax Administration"* to Assembly Committee on Revenue and Taxation, January 22, 1979, concluded on page 45, that neither shareholders in a corporation nor partners in a partnership have "undivided interests" or any *"individual rights"* to "possess" the entity's property – rather, partners are limited to using the property for the partnership's purposes as specified in the agreement. For this reason the Assembly Revenue and Taxation Committee recommended to the Legislature, in "Property Tax Assessment," *Implementation of Proposition 13*, Volume I, October 29, 1979, on page 28, "Real property which is contributed to a partnership or is acquired by a partnership IS a change in ownership of the real property, regardless of whether the title to the property is held in the name of the partnership or in the name of one or more of the partners, with or without reference to the partnership." This was deemed to be consistent with Corporations Code provisions which provide that no partner, general or limited, may claim, possess, assign, or convey the partnership real property to the exclusion of the other partners, since it is owned directly by the limited partnership as an entity and only indirectly by the individual partners.[6] Thus, the statutory framework for legal entities, both in the Revenue and Taxation Code and in the Corporations

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[5] "Survivorship rights" in a joint tenancy distinguish this estate in land from all others in that upon the death of one joint tenant, the surviving joint tenants succeed to the entire property by operation of law. For this reason, joint tenancy is recognized as a substitute for a will. See *"Report of the Task Force on Property Tax Administration" to* Assembly Committee on Revenue and Taxation, January 22, 1979, pages 41-43.

[6] Once property is acquired by a partnership, the nature of the interests held in the partnership are defined by the partnership agreement. Where the specific terms of the agreement express the interests of the partners in the capital and profits, (both real property and cash or other assets), those terms are controlling.

Code, treat the partnership, not the individual partners (whether general or limited) as the "owner" of the partnership property.[7]

As to the status of the partners, whether a general partner is one person, two or more persons acting jointly, e.g. "joint tenants," or two or more persons acting and voting separately, the general partner is a creation of the partnership agreement, not a separate co-ownership estate in land. Under the *California Revised Limited Partnership Act*, Corporations Code §15611 subd. (r), a "limited partnership" means "a partnership formed by *two or more persons* under the laws of this state and having one or more general partners and one or more limited partners."[8] In Corp. Code §15611, subd. (n), a "general partner" means a person (or a number of persons) admitted to a limited partnership as a general partner in accordance with the partnership agreement. Corporations Code Section 15645, states that the partnership agreement shall define the rights, powers, and duties of the general partner(s)[9] and may provide that certain specified classes of general *partners vote separately or with others* on any matters. The interests of all partners in a limited partnership are defined as "the aggregate interests of all partners in the current profits derived from business operations of the partnership." (Corp. C. §15611, subd. (o).) The evidence in this case indicates that E and D observed all of the requirements Corp. Code §15611 et seq. in order to form HC Ltd. as a valid limited partnership, giving each of them specific rights, duties, and interests. As the HC Ltd. sole general partner acting jointly, e.g. as "joint tenants," E and D share the same .5% interest in the capital account under Section A, paragraph 15 of the Agreement, and therefore, do not have separate voting rights (as two individual general partners), but vote as one. Though it may be argued that due to this arrangement, D's vote is effectively "controlled" by E, D is nevertheless a partner and hold a minority interest in the HC Ltd. capital.

Since partners hold interests in the partnership and not in the partnership property, the provisions in Sections 62(f) – (excluding certain joint tenancy transfers from change in ownership) and in Section 65.1(a) – (excluding de minimis fractional interest transfers of less than 5 percent and $10,000 in value from change in ownership) do <u>not</u> apply here. The statutes and rules governing transfers to and from partnerships are found in Section 61(j), Section 64, Section 62(a)(2), and Property Tax Rule 462.180. The language in Section 62(f), interpreted by Rule 462.040(b), applies *only* to joint tenancies and excludes joint tenancy transfers from change in ownership <u>if</u>: "(1) The transfer creates or transfers any joint tenancy interest and after such creation or transfer, all transferors are among the joint tenants."

Section 65.1(a) is also an exclusion applicable *only* to transfers of co-tenancy and joint tenancy interests. The legislative purpose for excluding de minimis transfers to and from

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[7] See also, Corporations Code Sec. 15671, which states that "An interest in a limited partnership is personal property and a partner has no interest in the specific partnership property." The term "personal property" in the context of this section and as applied to property tax, distinguishes a partner's <u>*direct*</u> interest in the limited partnership from his/her <u>*indirect*</u> interest in the partnership property.

[8] It is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State in conjunction with entering into a partnership agreement. (Corp. C§15621, subd. (b).)

[9] Corporations Code Section 15643 provides that a general partner of a limited partnership has the rights, powers and liabilities, and is subject to the restrictions of partners in a partnership without limited partners.

co-tenants and joint tenants was a practical one to reduce administrative costs for assessors. As explained in the discussion on *Joint Tenancy* in "Property Tax Assessment," *Implementation of Proposition 13*, Volume I, October 29, 1979, page 21,

> "Reapprasial of fractional interests imposes added administrative burdens on assessors, but to reappraise the ENTIRE property whenever a change involving a single co-owner occurred would be inequitable to the other remaining co-owners."

The solution was to allow assessors to avoid reappraisal on transfers of undivided interests of less than 5 percent and $10,000 in value during any one assessment year. In September 1980, the Legislature added Section 65.1 to include some of the co-tenancy and joint tenancy exclusions that were originally in Section 65(b). The Board staff summarized the legislative analyses of SB 1260 and AB 2777 in LTA No. 80/180, page 3, explaining,

> "This section provides that upon transfer of an undivided interest *(co-ownership interest)* in real property, only the interest or portion transferred shall be reappraised. However, a transfer of an undivided interest with a market value of less than 5 percent of the value of the total property [transferred] shall not be reappraised if the market value of the interest transferred is less than $10,000."

The legislative summaries expressly stated that fractional interests are not a problem with partnerships, because "the transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner or any other person" is a change in ownership of the entire property (Section 61(j)).

The facts here do not involve the creation of a joint tenancy, but the creation of a limited partnership with the general partner being two persons (E and D), rather than one, who share a minority interest. The Partnership Agreement states on page 1, "This ... Agreement is made on April 2, 1995 between E... and D... as joint tenants with right of survivorship, (jointly, the General Partner), D (the Alternate General Partner) ... ". Under Section D of the Agreement, E and D as the general partner jointly receive a .5% interest in the partnership capital and profits, while each limited partner (E as Trustee and E as an individual) receives a 50% interest and a 49.5% interest, respectively. Both E and D signed the Agreement as the general partner. The intent of the two partners is clearly expressed on page 1 of their Agreement before the property transfers ever occurred:

> "By this Agreement, the Partners join together to form a limited partnership under the *California Revised Limited Partnership Act* and agree to all the terms of this Agreement."

Where taxpayers are asserting the existence of a valid limited partnership (or any legal entity), the assessor is entitled to treat such limited partnership as valid, and the partners' express intentions with regard to their capital and profits interests as controlling, based upon the terms of

the partnership agreement. (See *Maletis v. United States* (1952) 200 F.2d 97, 98, where the court held that the burden is on the taxpayer to establish that the form of business he has created for tax purposes, and has asserted in his tax returns is valid with the interests specified therein, is in fact not a sham or unreal, and it if it is in fact unreal, the government and not the taxpayer should have the sole power to sustain or disregard the effect of the fiction in order to check opportunities for manipulation of taxes.)

Based on the Partnership Agreement here, two legal conclusions may be drawn: 1) as partners in a limited partnership, E and D do not hold a joint tenancy interest in the property but rather, a partnership interest in the limited partnership capital and profits; and 2) E did not transfer a "de minimis interest" from himself to another joint tenant (D) under Section 65.1(a) but rather, made two 50% real property transfers from himself to a partnership HC Ltd. under Section 61(j) in which he and D and he alone were partners.

**2. Section 62(a)(2) does not apply because the interests of the HC Ltd. partners were not proportional after the transfers.**

Section 62(a)(2) is the only exclusion applicable to real property transfers into legal entities, and is the major exception to the principle of separately honoring the legal entity. To properly apply Section 62(a)(2) to partnerships or other legal entities, one must "look through" the entity to identify the percentage of partnership interests in the capital and profits held by each partner after the transfer. Section 62(a)(2) excludes from change in ownership, "any transfer between an individual or individuals and a legal entity or between legal entities, ..., that results solely in a change in the method of holding title to the real property and in which proportional ownership interests of the transferors and transferees, whether represented by stock, partnership interest, or otherwise, in each and every piece of real property transferred, remain the same after the transfer."[10] Any shift in the partners' interests in the partnership capital and profits during or immediately after the transfer destroys the proportionality required under Section 62(a)(2), since the interests in the partnership would not be exactly the same following the transfer, as the ownership interests of the real property were before the transfer.

The Section 62(a)(2) requirement for the "sameness" of the interests transferred in a partnership is established by comparing each partner's total interests in both the capital account and the profits/loss account before and after the transfer. (See Annotation No. 220.0385, Eisenlauer 3/12/92, attached.) By looking through a limited partnership to determine whether Section 62(a)(2) applies, the assessor must identify each partner's right to a specific percentage of the capital and profits accounts and then determine whether such interests are exactly the same as his/her ownership interests in the real property prior to transfer to the partnership. (See

[10] With regard to partnerships specifically, Rule 462.180 (e)(1) states that "Except as provided in (b)(2) [analogous to Section 62(a)(2) above], when real property is contributed to a partnership or is acquired, by purchase or otherwise, by the partnership, there is a change in ownership of such real property, regardless of whether the title to the property is held in the name of the partnership or in the name of the partner(s), with or without reference to the partnership. Except as provided in (b)(2), the transfer of any interest in real property by a partnership to a partner or any other person or entity constitutes a change in ownership.

Annotation No. 220.0386, Gembacz 5/3/83, No. 220.0381, Shedd 10/28/81, and No. 220.0382, Shedd 9/1/81, attached.)

In defining "ownership" in a limited partnership for property tax purposes, Section 64 and Rule 462.180(d)(1)(B) provide that an "ownership interest" in a partnership or limited partnership constitutes "the total interests in both partnership capital and profits," and the partner's classification as a "limited" or a "general" partner is disregarded.[11] Thus, a general partner of a limited partnership may make contributions to the capital (cash or property), of the limited partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. (Corp. Code §15644). Further, a person may be a general partner and a limited partner in the limited partnership at the same time. (Corp. Code §15653.) Distributions of capital and profits from the limited partnership to the general and limited partners must follow the terms of the limited partnership agreement, and if the terms do not otherwise provide, distributions which are a return of capital shall be made in proportion to the contributions of each partner. Distributions that are not a return of capital shall be made in proportion to the allocation of profits. (Corp. Code §15654.)

Finally, since the character and percentage of the partners' capital and profits interests are based on the terms of the partnership agreement, the language of a particular agreement may indicate that certain partners have no partnership interests. We have taken the position that if the terms of the agreement provide that some of the limited partners are to have no right to share in either the capital or profits accounts, then no partnership interests can be attributed to them for purposes of determining change in ownership consequences. (See Annotation No. 220.0387, McManigal 10/21/88, attached.) In these situations, only the actual general and limited partners who have definite rights to the capital and profits own 100% of the partnership interests (which represent the ownership of the real property and other assets held by the limited partnership). Similarly, the fact that the general partner in a limited partnership may be paid a salary (e.g., cash distribution, guaranteed payment) for his/her management services (and has all of the rights and powers of management, Corp. Code §15643), does not mean that he has an interest in the partnership capital and profits.[12]

The taxpayer's argument concludes that E made two transfers of 50% of the real property to HC Ltd. in 1996 and 1997, as previously discussed. There is no dispute that at the time of both transfers, E was the sole beneficial owner of the property, in that he owned 50% as the present beneficiary of his wife's trust and 50% as an individual. After each transfer however, E was not the sole owner of the property, since D was a partner in HC Ltd. in addition to E. Even though D owns only a small minority interest, that is, half of a .5% interest in the HC Ltd.

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[11] While there are no definitions of "capital" or "profits" in the property tax rules or the statutes, a "capital" interest in a partnership is described for income tax purposes as any interest in the assets (partnership property, cash, assets) to which any partner is entitled upon his withdrawal from the partnership, or upon the liquidation of the partnership. This "capital interest" is distinguished from the right to participate in the earnings, profits, and losses of the partnership. (Treasury Regulation Sec. 1.704-1(e).)

[12] A "guaranteed payment" under Internal Revenue Code section 707(c) is generally treated as a salary and not as a distribution from the partnership capital or profits. As such, the salary is not considered in the computation of the partners' percentage interests in the partnership, for change in ownership purposes.

capital, D had no interest in the property prior to the transfer. In order to conclude that these transfers were "proportional" under Section 62(a)(2), the terms of the Agreement would have had to have provided that D had no right to share in either the capital or profits accounts, so that no partnership interests could be attributed to him. As terms of the agreement did not so provide, the ultimate ownership of the property (100% in E) did not remain exactly the same after the transfer, and the proportionality requirements for excluding the transfer under Section 62(a)(2) were not met. Where the Section 62(a)(2) exclusion does not apply, the transfer of real property to a limited partnership is a change in ownership, resulting in reappraisal of 100% of the property transferred (Section 61(j)).

This situation is almost analogous to the facts in *Penner v. Santa Barbara County* (1996) 37 Cal.App.4th 1672, in which the court held that reassessment of 100% of the property was required because a parent transferred her real property into a limited partnership owned by herself and her children. The court rejected the taxpayer's argument that since the children only held minority interests, the substantive intent of Section 62(a)(2) was met. The court also rejected the argument that because the taxpayer's real purpose was to transfer her property to her children, the "form" or method of the transaction should be disregarded and the parent-child exclusion in Section 63.1 should be applied. The court recognized that the Legislature does allow parents seeking to utilize the parent-child exclusion to a take series of steps to transfer real property through a partnership to their children and requires assessors to disregard the application of the step transaction doctrine when the steps are followed.[13] Where however, a taxpayer chooses to not follow these steps, and instead, chooses to transfer directly to a partnership in which the proportional interests are not the same, the taxpayer is required to accept the tax consequences of that choice.

If the transfers in this case had been proportional (which they were not), they would appear to have been within the latter category discussed above and thus, in our view, would not constitute a step transaction. This conclusion, of course, depends upon the validity of our view that it is appropriate to "look through" the corporation to its shareholders for purposes of applying Revenue and Taxation Code section 62, subdivision (a)(2). We have consistently held this view since that provision was enacted. Enclosed for your information, however, is a copy of the unpublished opinion of the Court of Appeal in *H.G.C. Associates v. County of Alameda* (May 7, 1992) A050528 in which the court took the opposite view and held that section 62, subdivision (a)(2) does not require the assessor to look to the ultimate ownership of a corporate transferor in determining proportionality.

The views expressed in this letter are, of course, only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts as set forth herein. Therefore, they are not binding on your office or on any person or entity.

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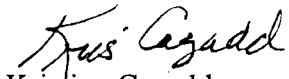
[13] See uncodified statement of legislative intent in Section 2 of Stats. 1987, Ch. 48. To properly execute the recommended steps in the instant case, Edmund should have first transferred the minority interest (half of .5%) in the real property to son D; then E and D should have transferred their respective interests in the real property to HC Ltd. in exchange for partnership interests in HC Ltd. exactly proportional to their real property interests. D would have been required to file a parent-child claim in order to exclude from change in ownership the fractional interest he received, unless the de minimis exclusion in Section 65.1 applied.

Sincerely,



Kristine Cazadd
Senior Staff Counsel

KEC:tr
precdnt/prtnrshp/00/01kec

Attachments

cc: Mr. Dick Johnson, MIC:63
Mr. David Gau, MIC:64
Mr. Charlie Knudsen, MIC:62
Ms. Jennifer Willis, MIC:70