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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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September 25, 1995

Honorable David W. Wynne
Tuolumne County Assessor/Recorder
No. 2 South Green Street
Sonora, CA 95370

Re: Possessory Interest Change in Ownership R&T Code Sec. 61(b)

Dear Mr. Wynne:

Your letter, with enclosures, dated January 27, 1995 and addressed to John Hagerty was referred to us for reply on June 30, 1995.

You have requested that we review various documents and papers submitted with your letter which are related to an assessment appeal hearing on the issue of whether the issuance of new permits for recreational cabin sites in the Stanislaus National Forest constituted a change in ownership of the possessory interests in the sites and that we provide you with our opinion on the issue.

In the latter part of 1988, the U.S. Forest Service offered to holders of existing recreation residence permits, having an expiration date for all practical purposes of December 31, 1996, the opportunity to accept a new recreation residence permit with a twenty year term expiring December 31, 2009. If the new permit was accepted, the Forest Service would phase in a recently imposed fee increase of \$244 over four years. If not, the full amount of the fee increase would be payable beginning in 1989. In that event, the old permit would continue in effect until it expired or terminated at which time the new permit would be

issued. In 1989, the expiration date of the new permit was corrected to December 31, 2008.

As to those permit holders accepting the new permits, the Tuolumne County Assessor issued escape assessments in 1992 on the ground that the new permits were a renewal of the possessory interest in the sites and thus a change in ownership under Revenue and Taxation Code¹ section 61, subdivision (b), and California Code of Regulations Sections 462, subdivision (e) (now 462.080) and 467.

The affected permit holders appealed the assessments to the local Board of Equalization (Board) which overturned the reassessments and concluded that "the taxable value of the permit holder's (sic) property shall be calculated without regard to the extension of the term of possession by the new Forest Service permits offered to the permit holders in 1988." The Board's FINDINGS OF FACT AND DECISION is attached. The Board, while not mentioning section 61, thus concluded, in effect, that notwithstanding the fact that there was an extension of the term of possession by the new permits, there was no renewal of a possessory interest within the meaning of section 61, subdivision (b). The primary basis for this conclusion appears to be the argument of the taxpayers' attorneys that this case is analogous to *Wrather Port Properties, Ltd. v. County of Los Angeles* (1989) 209 Cal.App.3d 517 (*Wrather*).

In that case, the taxpayer and the City of Long Beach (City) executed a lease of real property in October 1980, for a term of 40 years, the maximum term then allowed by the city charter. At the time the lease was signed, however, a charter amendment increasing the permissible maximum term to 66 years was on the ballot for an election less than a month later. The lease provided that if the charter amendment passed, the term of the lease "shall be extended" accordingly "and the parties shall promptly execute an amendment to this Lease stating the new expiration date." The voters approved the charter amendment and it took effect in December 1980. In December 1981, the taxpayer and the City executed an amendment to the lease extending the term of possession from 40 to 66 years as required by the lease.

In 1983 the assessor, using a reasonably anticipated term of possession of five years for valuation purposes, first assessed the possessory interest created by the original lease for 1981

¹All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

and subsequent years. In 1985, the assessor revalued the possessory interest retroactive to 1982 on the ground that the automatic increase in the term of the lease from 40 to 66 years in December 1981 was a change in ownership. In the ensuing property tax refund action, the trial court concluded that the lease amendment was not a change in ownership and the county appealed.

The Court of Appeal summarized the trial court's findings of fact as follows:

"(1) Wrather and the City entered into the lease 'based on the reasonable expectation of a *maximum* 66 year term' (italics added); (2) 'The original lease specified a term equal to the maximum term allowed by the City Charter'; (3) 'In making the initial assessment...the Assessor was aware of the Lease and First Amendment, recognized the lease was for 66 years and treated it as a change in ownership'; the "First Amendment" to the original lease...accomplished the mechanical specification of the 66 year term granted in the original lease.' On the basis of these facts, the trial court concluded, '[T]he original lease created the rights to a 66-year term and there has been no subsequent change of ownership for the years involved....'" (209 Cal.App.3d at p. 522.)

The Court of Appeal held that under the particular facts of the case, the trial court properly concluded that the extension of the lease between the taxpayer and City did not constitute a change in ownership. Essentially, the court concluded that the amendment to the lease did not lengthen the lease term since under all the facts, the lease term was 66 years under the original lease. Thus, there was no renewal of the possessory interest and hence, no change in ownership.

On page 10 of his Memorandum, Mr. Selna states that "[t]he Court [in *Wrather*] found because the Assessor had assumed that the reasonably anticipated term of the lease was 66 years at the time he made his initial valuation, he could not use an extension of the lease term by the parties as a change in ownership...."

From that premise, Mr. Selna then concludes at page 11 that "the Assessor in this case is in the same position as the assessor in *Wrather*; from the outset, he has relied on the reasonably anticipated term of the possessory interest rather

than the stated term of any particular permit to establish a value upon which to levy a tax under exceptions contained in Regulation 23(b)."

We disagree with Mr. Selna's analysis and submit that this case is distinguishable from *Wrather*.

The assessor in *Wrather* recognized that the lease was for a term of 66 years but for valuation purposes used a term of five years as the reasonably anticipated term of possession under Rule 23(b). Contrary to Mr. Selna's analysis, the reason the *Wrather* court found no change in ownership was because the original lease created the 66 year term and the subsequent "amendment" could not and did not lengthen the term of the lease from forty years to 66 years. The five year anticipated term of possession for valuation purposes used by the assessor in that case was irrelevant to the issue of whether there was a renewal of the possessory interest just as the assessor's valuation is irrelevant to that issue in this case. Moreover, this case is distinguishable from *Wrather* in that the original lease in *Wrather* created the right to a 66 year term and the "amendment" did not create any additional rights or lengthen the term. In this case, however, the permits in effect before the new ones were issued had an expiration date of December 31, 1996. Nothing in those permits gave the holders of them possessory rights until December 31, 2008. Only the new permits did that. If that weren't true, renewal permits wouldn't have been necessary. Federal law, in fact, prohibits a term of occupancy under a permit to exceed 30 years. (16 U.S.C. 497.) Thus, renewal permits must be issued in order to legally extend the term of occupancy. Although renewal permits may be issued routinely by the Forest Service and permittees may treat their term of occupancy as perpetual, renewals are nevertheless necessary for continued occupancy.

Without the renewal permits, the term of possession of the permit holders in this case would not have been lengthened. Issuance of such permits did lengthen the term of possession. Accordingly, it is our opinion that issuance of the new permits constituted a renewal of the possessory interests held by the permit holders within the meaning of section 61, subdivision (b), then in effect (Cal. Code Regs., tit. 18, §§467, 21, subd. (h).)

If the court were to reach the same conclusion on the application of section 61, which is by no means certain, the constitutional issues not reached by the court in *Wrather* could

arise. Findings of fact 9 and 10 suggest a basis for arguing that treating a "renewal" of a possessory interest as a change in ownership is contrary to Proposition 13 and to the definition of change in ownership in section 60. Thus far, the courts have upheld those legislative definitions of "change in ownership" which have been challenged. It is not necessarily certain, however, that the courts would find that the treatment of a renewal or extension of a possessory interest as a change in ownership under section 61, subdivision (b) is consistent with Proposition 13 or the section 60 definition of change in ownership in this case. It could be argued, for example, that a renewal or extension of a possessory interest is not a change in ownership at the time of the renewal or extension because it is a transfer of a future interest rather than a present interest as required by section 60. In short, judicial resolution of the constitutional issues in this case is difficult to predict.

You have also requested our analysis of the Findings of Fact and Decision in this matter. Findings 1, 2 and 3 state basic facts which are not in dispute. Finding number 4 is a conclusion of law which we don't agree with as explained above. Findings 5, 6, 7 and 8 relate to the argument that *Wrather* is dispositive of this case. As indicated above, this case is distinguishable from *Wrather* in that the new permits were legally necessary to lengthen and did, in fact and in law, lengthen the term of possession beyond that granted in the old permits regardless of the truth of the facts stated in findings 5, 6, 7 and 8. As we have analyzed this case, in light of the *Wrather* decision, such findings are not relevant to the issue of whether there was a renewal of the possessory interests existing under the old permits.

As discussed above, findings 9 and 10 seem to relate more to the question of whether treating the renewal of a possessory interest as a change in ownership is consistent with Proposition 13 and the section 60 definition of change in ownership.

In any event, the question in this case of what constitutes a "change in ownership" is a question of law subject to independent de novo review rather than a substantial evidence standard of review. (*McMillin BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 554.) In our view, this means that the trial court would not be bound by the Board's findings and would be free to hear evidence relevant to the question of whether a change in ownership has occurred and to

Honorable David W. Wynne

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September 25, 1995

make its own determination of the facts necessary to decide the legal issue.

The views expressed in this letter are, of course, advisory only and are not binding on the assessor.

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

Very truly yours,



Eric F. Eisenlauer
Senior Staff Counsel

EFE:ba
Att.

cc: Mr. John Hagerty - MIC:63
Mr. Dick Johnson - MIC:64
Ms. Jennifer Willis - MIC:70

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BEFORE THE BOARD OF EQUALIZATION
IN AND FOR THE COUNTY OF TUOLUMNE

In the matter of the application of the Forest Service permit holders and tax payers, numbers 1-359 for changed assessments, retroactive to 1989.]
] FINDINGS OF FACT
] AND DECISION
]

The above-entitled matter came on for hearing before the Board of Equalization on June 14 and 15, 1994. After receiving evidence both oral and documentary, from the applicants and the Assessor, this Board makes the following findings of fact:

1) The applicants (hereinafter referred to as "permit holders") that made timely and proper appeals that are addressed by this decision are listed both alphabetically and numerically in attachment 1. The 46 applications which were denied for lack of appearance, have been deleted from these lists.

2) The Assessor determined that the permit holders receipt of a new Forest Service permit, extending the duration of the permit holders right to use and occupy the land was a change in ownership and conducted a retroactive reassessment of the property pursuant to Article XIII A of the California Constitution

1 (Proposition 13).

2 3) The permit holders made timely application for a changed
3 assessment, claiming, inter alia, that no change in ownership had
4 occurred and therefore reassessment could not take place.

5 4) There has not been a change in ownership that would allow
6 a reassessment of the possessory interests.

7 5) The reasonably anticipated period of possession is
8 indefinite (perpetual) despite the period specifically listed in
9 the permit. Renewal permits have been routinely issued by the
10 forest service to individual and families over the 70-year history
11 in which the Forest Service has permitted cabin use on federal
12 lands in Tuolumne County.

13 6) The selling price of these permits and the improvements
14 thereon is not affected by the term of the permit. There is a long
15 history of automatic renewals of permits and allowing people to
16 remodel and rebuild their improvements. The present worth of
17 future contract rent is negligible since permit holders expect, and
18 in fact do receive, an indefinite or perpetual interest in the
19 property.

20 7) The history of the use and enjoyment of the permit
21 holders is consistent. The permit holders act as if this property
22 were in fact owned by them. Some of the permits in question have
23 been in their names or family's names since the 1920's. The mere
24 reissuance of a new permit does not change the permittee's
25 expectations to remain on the property.

26 8) Prior to the 1993 reassessment (retroactive to 1989), the
27 Assessor has based his assessed valuation on sales prices of the

1 cabins and land which are the subject of the possessory interests
2 permits. The Assessor has never reduced the assessed valuation of
3 possessory interests held under Forest Service permits as the
4 remaining term of outstanding permits have become shorter.

5 9) The relationship between the Forest Service and the
6 permit holder has not changed. The parties remain the same; the
7 property remains the same.

8 10) Ownership is defined as "the right to the possession and
9 use of property to the exclusion of others." The parties
10 "ownership" rights under the old and new permits remain the same.

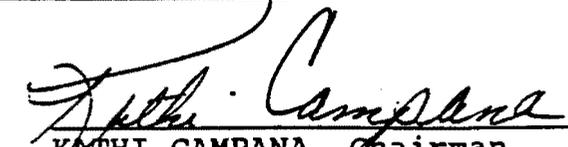
11 IT IS THEREFORE THE DECISION OF THIS BOARD that reassessment
12 of the permit holders that are subject to this application shall be
13 overturned and the taxable value of the permit holder's property
14 shall be calculated without regard to the extension of the term of
15 possession by the new Forest Service permits offered to the permit
16 holders in 1988.

17 Adopted by the Board of Equalization on the 4th day of
18 October 1994, by the following vote, to wit:

19 AYES: Rotelli, Marks, DeBernardi, Holman

20 NOES: Campagna

21 ABSENT: None

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23 
24 KATHI CAMPANA, Chairman
25 Board of Equalization,
26 County of Tuolumne
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