660.0008

Mr. Verne Walton April 28, 1986

Eric F. Eisenlauer

Air Rights

This is in reply to your memo to Mr. Richard Ochsner dated March 5, 1986, which relates the following facts:

In January 1983 Mr. Clemment Chen, Jr. obtained more than 50 percent of the right to profit and capital of the Pasadena Hotel Development Venture, a California general partnership. On the date that Mr. Chen's interest surpassed 50 percent, the partnership had under lease air rights owned by and located directly above land owned by the Pasadena Redevelopment Agency. Since the underlying fee is public property, the lease term of less than 35 years is not a factor here and clearly a change in control and ownership of the legal entity did occur under Section 64(c).

Based on the foregoing facts, you ask:

(1) Are nontranslocated air rights which are located directly above land that establishes their legal description classified as real property and subject to valuation under Article XIII?

"Real estate" or "real property" generally and "land" in particular consist of the possession of, claim to, ownership of, or right to the possession of land (Revenue and Taxation Code* Section 104(a), Property Tax Rule 121). Unfortunately, the word "land" is not clearly defined by Section 104 or related property tax rules. Civil Code Section 659 as enacted in 1872 did define land, however, as "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance." This definition of land represented the two dimensional concept of land ownership under which air rights are appurtenant to ownership of land. Under this view, space itself is not owned, but with land surface ownership goes the right to use the space above it. (Morris, Air Rights are Fertile Soil, 1 Urb. Law. 247 (1969).) Under this theory, air space could not be legally conveyed separate from the land surface.

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

In 1963, Civil Code Section 659 was amended to delete the word "solid" and add:

> "and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of air space imposed, and rights in the use of air space granted by law."

The trend of authority in this country supports this view known as the three dimensional view of land utility or the "homogeneous space theory". (Morris, supra.) Under this view, land is "simply three-dimensional space defined by two dimensional border lines running from the center of the earth...to just below the navigable air space...and the land owner may convey any part of his three-dimensional land whether contiguous to the surface of the soil or not." (Morris, supra, at page 261.)

Property Tax Rule 124, effective January 18, 1968, appears to have adopted this view by classifying "air rights" as land. Accordingly, since air rights which are located above the land surface which establishes their legal description are part of the land and thus real property, they are subject to assessment under Article XIII of the California Constitution.

(2) If the answer to question (1) is "yes," will appraisal conflict with the definition of "change in ownership" contained in Section 60 which includes the caveat "...substantially equal to the value of the fee interest?"

Under the three-dimensional view of land ownership discussed above, a transfer of a fee interest in air rights separate from the surface rights is legally possible and under Section 60 would constitute a change in ownership of the land (air space) transferred as is the case whenever a landowner transfers a fee interest in a portion of the land he owns. Similarly, a lease of air space owned by a tax exempt government entity would create a taxable possessory interest in the air space and constitute a change in ownership under Section 61(b).

It is therefore our opinion that the Pasadena Hotel Development Venture, a California general partnership owned a taxable possessory interest in land (air rights) owned by the Pasadena Redevelopment Agency. When Mr. Chen obtained a majority ownership interest in the partnership, there was a change in ownership of the real property owned by the partnership which included the possessory interest in the air rights.

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cc: Messrs. Adelman, Gustafson, Davis, Facchini, Palmer