STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
LEGAL DIVISION (MIC:82)
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September 20, 1993

Hon. Carl A. Bontrager
Siskiyou County Assessor
311 Fourth Street
Yreka, CA 96097

Attn: Mr. George L. Singewald
Assistant Assessor

Dear Mr. Singewald:

This is in response to your letter of July 8, 1992 to the attention of Arnold Fong of the Board's Assessment Standards Division in which you request our opinion regarding an assessment of a possessory interest in real property owned by the State Department of Fish and Game. Employees of that department have questioned the propriety of the assessment on the ground that the Department pays a "statutory in-lieu tax" pursuant to Fish and Game Code section 1504 which provides:

> "(a) When income is derived directly from real property acquired and operated by the state as wildlife management areas, and regardless of whether income is derived from property acquired after October 1, 1949, the department shall pay annually to the county in which the property is located an amount equal to the county taxes levied upon the property at the time title to the property was transferred to the state. The department shall also pay the assessments levied upon the property by any irrigation, drainage, or reclamation district.
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> "(b) Any delinquent penalties or interest applicable to any such assessments made prior to September 9, 1953, are hereby canceled and shall be waived.
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> "(c) Payments provided by this section shall be from funds available to the department.

"(d) As used in this section, the term 'wildlife management area' includes waterfowl management areas, deer ranges, upland game bird management areas, and public shooting grounds.

"(e) Payments under this section shall be made on or before December 10 of each year, excepting newly acquired property for which payments shall be made pursuant to subdivision (f).

"(f) Payments for the purposes of this section shall be made within one year of the date title to the property was transferred to the state, or within 90 days from the date of designation as a wildlife management area, whichever occurs first, prorated for the balance of the year from the date of designation as a wildlife management area to the 30th day of June following the date of designation as a wildlife management area, and, thereafter, payments shall be made on or before December 10 of each year."

Under Article XIII, section 1 of the California Constitution, all property is taxable "[u]nless otherwise provided by this Constitution or the laws of the United States". See also Revenue and Taxation Code section 201 to similar effect. Possessory interests in real property are deemed to be real property for property tax purposes. (San Pedro etc. R.R. Co. v. City of Los Angeles (1919) 180 Cal.18, 20-21.)

No federal or state law, either constitutional or statutory, exempts possessory interests such as the one in this case from taxation. Moreover, Fish and Game Code section 1504, quoted above, does not by its terms, prohibit or preclude the taxation of possessory interests in real property owned and operated by the state as wildlife management areas nor does it expressly provide that the payments pursuant to section 1504 are in lieu of any tax.

The payments required under section 1504, however, do raise the issue of whether the assessment of the possessory interest in question results in double taxation. "Double taxation occurs only when 'two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same taxing period.'" (Russ Building Partnership v. San Francisco (1988) 199 Cal.App.3d 1496, 1509.)

The first payment required under section 1504 is "an amount equal to the county taxes levied upon the property at the time title to the property was transferred to the state." That payment does not even purport to be a tax. If it is not a tax, the first requirement of double taxation, i.e., "two taxes" would not be satisfied.

Even if the first payment required under section 1504 were a tax, however, it would have to be of the "same character," i.e., also a property tax for double taxation to occur. (See Fox Bakersfield Theatre Corp. v. City of Bakersfield (1950) 36 Cal.2d 136; City of Stockton v. West Coast Theatres, Inc. (1950) 36 Cal.2d 879.)

As stated by the Court of Appeal in Solvang Mun. Improvement District v. Board of Supervisors (1980) 112 Cal.App.3d 545, 552, and quoted by the California Supreme Court in San Marcos Water Dist. v. San Marcos Unified School District (1986) 42 Cal.3d, 154, 162:

> "An ad valorem tax on real property describes a general tax levy which applies a given rate to the assessed valuation of all taxable property within a particular taxing district. Such is the tax levied by a county to pay for general expenditures, such as fire and police protection, and public buildings, which are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures and improvements...."

In this case, the first amount payable under section 1504 (1) is not levied by a county; (2) is not based on applying a tax rate to an assessment at "full cash value" as defined in Revenue and Taxation Code sections 110 and 110.1 but rather is "an amount equal to the county taxes levied upon the property at the time title to the property was transferred to the state"; (3) is applicable, as to real property acquired prior to October 1, 1949, only when income is derived from such real property; (4) is applicable only as to real property operated by the state as "wildlife management areas" and (5) is applicable only to nontaxable property, i.e., property owned by the State which is exempt from property tax under Article XIII, section 3(a) of the California Constitution.

Further, "the assessments levied upon the property by any irrigation, drainage, or reclamation district" which the Department is also required to pay under section 1504 would

appear to constitute special assessments which are distinguishable from property taxes. (Solvang Mun. Improvement Dist. v. Board of Supervisors, supra, 112 Cal.App.3d at pp. 552, 553.)

For the foregoing reasons, we are of the view that the payments required by section 1504 do not constitute a property tax and, thus, if they constitute a tax at all, are not of the "same character" as the tax on the possessory interest in question.

Even if the payments under section 1504 could be characterized as a property tax, to do so would be tantamount to declaring that section 1504 was contrary to Article XIII, section 3(a) of the California Constitution and thus is unconstitutional. The Board, as an administrative agency, is prohibited from making such a declaration by Article 3, section 3.5, subdivision (b) of the California Constitution.

Assuming for the sake of argument, however, that the payments required by section 1504 do constitute property tax, there must be two property taxes on the "same property" for double taxation to occur as indicated above.

As stated by the Court of Appeal in United States v. Fresno County (1975) 50 Cal.App.3d 633, 640; 429 U.S. 452: "A possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land and improvements alone that is being taxed." Thus, since the assessment of a possessory interest in government property is not considered an assessment of the government property, the "same property" would not be taxed here and no double taxation would occur. Similarly, the requirement that the two taxes be imposed "by the same taxing authority" is not met here in that taxes on the possessory interest are imposed by the county whereas the payments imposed under section 1504 are imposed by the state. (See County of Riverside v. Idyllwild County Water District (1978) 84 Cal.App.3d 655, 659-660 wherein the court held that "unless the Legislature expressly authorizes, property publicly owned and used is exempt from special assessments.")

For the foregoing reasons, we are of the opinion that no double taxation has occurred here and that the possessory interest assessment for the private use of real property owned by the Department of Fish and Game is proper.

Very truly yours,

Eric F. Eisenlauer
Staff Counsel III

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cc: Mr. John Hagerty
Mr. Verne Walton