

Memorandum



755.0045

To: Mr. Ramon J. Hirsig, MIC:61

Date: May 12, 1998

From: Robert W. Lambert

Robert Lambert

RECEIVED

MAY 13 1998

Subject: The Assessment of the S _____'s Yard

DEPUTY DIRECTOR
PROPERTY TAXES

This is in response to your memorandum dated December 9, 1997 in which you request an opinion with regard to the assessment of certain real property owned by _____ Company (SP). Your memorandum states the following facts:

1. SP both owns and uses the _____ Yard (the property).
2. SP has entered into a written agreement with the California Department of Transportation (CalTrans) that grants CalTrans the "irrevocable right to possession and use" of a portion of the property.
3. Agreement for Possession and Use dated October 28, 1992:
 - a. Parties: SP is referred to as the "Owner" and CalTrans is referred to as the "State."
 - b. Recital: "It is hereby agreed by and between the parties that the State requires the right of immediate possession of a portion of Owner's real property to reconstruct a state highway project.... The New Corridor is required for the purpose of reconstructing a portion of Interstate Highway Route I-880. The purposes of this agreement are to allow State to proceed with the reconstruction of the highway project without delay and to allow Owner to avoid litigation at this time."
 - c. Grant: "Owner hereby irrevocably grants to State, ... and all others deemed necessary by State, the irrevocable right to possession and use of the New Corridor as of October 28, 1992."
 - d. State Deed of Trust: "Simultaneously with State's payments to Owner and Escrow Agent under paragraph 1 above, Owner will convey to State a deed of trust... on the New Corridor, securing Owner's obligations to convey title to the New Corridor as described herein...."

e. Real Property Taxes: "Owner agrees to pay when due all taxes, including prorated taxes for the current year, and special assessments due on the date State takes possession of the New Corridor....After such date, State shall be responsible for paying all taxes and assessments for the periods thereafter."

f. Eminent Domain: "This Agreement is made with the understanding that State will continue to negotiate in good faith with Owner to acquire its interest in the New Corridor by direct purchase. It is further understood that in the event a settlement is not reached within a reasonable time, State shall file a complaint in eminent domain to acquire sufficient title to the New Corridor, to construct, own and operate I-880 thereon (however, such condemnation shall allow Owner to retain sufficient property rights on a portion of the property north of 14th Street to conduct rail operations as contemplated by the Construction and Maintenance Agreement and the mutual understanding of the parties."

g. Condition to Delivery: "The parties hereto recognize and agree that the State's estimate of probable just compensation for the New Corridor in the sum of \$26,368,616 was based on an assumption that the New Corridor will be delivered to the State free and clear of hazardous wastes and/or contaminated materials."

The property, including that portion referred to as the "New Corridor," was still owned by SP -- and not CalTrans -- on January 1, 1998. For prior years, the property was assessed to SP under section 19 of article XIII of the California Constitution. Under the authority of section 19, the Valuation Division staff believes that the property should continue to be assessed to SP in 1998. For the reasons set forth below, we agree with the Valuation Division staff.

CalTrans, on the other hand, has taken the position that:

... (a) all taxes (assessments) should be canceled as of the date of possession, not as of the recordation [i.e., sale] date, (b) Cal Trans agrees that it is contractually obligated to pay the property taxes and special assessments, but since it is a tax exempt government agency all lands possessed by their department should be exempt from taxation. Therefore, the State Board of Equalization should not include any assessment for those areas one hundred percent possessed by Cal Trans including any areas still used (and owned) by the railroad and (c) the county tax collector cancels taxes as of the date of possession, not as of the recordation date. It is Cal Trans' opinion, that the Board of Equalization should follow the same procedure.

Set forth below are the Legal staff's responses to your three specific questions relating to the above facts and contentions:

Question No. 1: Does the power of eminent domain or an order of condemnation or possession by a tax exempt government agency negate or modify the Board's constitutional authority to assess property owned or used by a utility or regulated railroad? If so, which of the following is the cancellation date: date of entry; date of possession; date of agreement; date of recordation; order of condemnation; or a meeting of the minds.

Due to the constitutional mandate that the Board assess all property owned or used by regulated railway companies, the Board must assess the property in this case, as it is both owned and used by SP, unless SP or CalTrans can demonstrate that a property tax exemption is available.

The exemption set forth in subdivision (a) of section 3 of article XIII of the California Constitution is inapplicable, however, as it exempts only "[p]roperty owned by the State." In this case, while the so-called New Corridor might be considered to have been in escrow on January 1, 1998, the escrow had not, as of that date, closed on such property and no deed had yet been recorded in favor of the CalTrans. So record title remained in SP. Furthermore, as of that date, the pre-conditions to the closing of the escrow had apparently not been satisfied and, in addition, the stated purchase price for the property appears to have been only estimated preliminarily. Thus, based on all of the circumstances, there does not appear to be any clear and convincing proof that, as of January 1, 1998, the title to the property was inconsistent with SP's record title thereof. (See Property Tax Annotation 220.0580.) Nor have there been any facts presented indicating that the execution of the Agreement for Possession and Use constituted, under real property law, a *de facto* transfer of title or beneficial ownership to the property to CalTrans. (See Property Tax Annotations 220.0445 and 220.0446.)

Section 214.6 of the Revenue and Taxation Code provides a welfare exemption for certain property that has been leased to governmental entities. That welfare exemption is not available here, however, because: (i) the property is not "leased" to CalTrans; and (ii) SP is not a nonprofit "religious, hospital, or charitable" organization within the meaning of subdivision (b) of section 4 of article XIII of the California Constitution.

Section 231 of the Revenue and Taxation Code also provides a property tax exemption for certain property leased to the government. That statutory exemption is also unavailable here, however, because it is limited to "[p]roperty which is owned by a nonprofit corporation and leased to, and used exclusively by government...." In this case, the property is neither owned by a nonprofit corporation, leased to CalTrans, nor used exclusively by CalTrans.

Even if the New Corridor were held to have been effectively "leased" to CalTrans, that fact alone -- absent adherence to the other requirements of either section 214.6 or 231 -- would not be sufficient to exempt all or any portion of the property, including the New

Corridor. In *Ohrbach's Inc. vs. County of Los Angeles* (1961) 190 Cal.App.2d 575, a nonexempt lessor leased real property to the State of California. There, the court held that the "lessor should not gain a tax exemption merely because it leased a portion of its nontax-exempt property to a lessee that allegedly was entitled to tax exemption." (*Id.* and 581.)

Thus, in answer to your first question, there is no property tax exemption which precludes the Board from continuing to assess the property, including the New Corridor, to SP as before -- despite the execution of the Agreement for Possession and Use, the pendency of the escrow, the potential sale to CalTrans, and the threatened eminent domain proceeding. In other words, the property owned and used by SP has not become exempt from property taxation merely because of the possibility of a future "order of condemnation" or the "possession by a tax exempt government agency" under the Agreement for Possession and Use.¹

Question No. 2: If the Board cancels this assessment as of the date of possession, and at a later date discovers that CalTrans did not acquire land title, does the Board have the authority to enroll an escaped assessment?

Yes. As indicated in No. 1, above, however, the Board should continue to assess the property.

Pursuant to section 861 of the Revenue and Taxation Code, if any property subject to assessment by the Board pursuant to section 19 of Article XIII of the constitution escapes assessment, the Board shall assess it. Thus, if the Board cancels the assessment based upon a belief that CalTrans became the owner of the property on October 28, 1992, and then subsequently discovers that SP, in fact, remained the owner on and after that date, escape assessments could be made. Such escape assessments would, of course, be subject to the statute of limitations set forth in section 866 of the Revenue and Taxation Code.

¹ In the memorandum from Lowell & Robbin dated January 27, 1998 regarding *Baldwin v. Los Angeles*, the city apparently accepted a donative grant deed to certain property, but failed to record it for some time. Under California law, title to real property typically transfers upon the acceptance of the deed -- not the date of recordation. (Miller & Starr, Vol. 2 California Real Estate 2d, §6.43.) Consequently, I do not believe that either the Lowell & Robbin memorandum or the referenced lawsuit have any relevance to the issues addressed here.

Question 3: Since CalTrans has apparently not acquired land title, should the Board assess the entire fee simple estate or just the portion of the land rights to be retained by SP?

Since SP remains the owner of the property -- and there is no exemption arising from CalTrans' mere "possession" of the New Corridor under the agreement with SP -- the Board should assess the entire fee simple estate to SP. As held in *Graciosa Oil Company vs. County of Santa Barbara* (1909) 155 Cal. 140, 144, and approvingly cited in *Ohrbach's, Inc. vs. County of Los Angeles, supra* at 580, "[T]he owner of the fee may fairly be deemed to be the owner of the whole estate for purposes of taxation."

If, however, CalTrans eventually acquires ownership of the New Corridor by grant deed, order of condemnation, or otherwise -- and SP continues make use of a portion of such property -- then SP may, of course, be held to have retained a taxable possessory interest in such otherwise exempt property. (See *DeLuz Homes, Inc. vs. County of San Diego* (1955) 45 Cal.2d 546.)

I hope the above adequately addresses your concerns regarding this matter. If not, please call me.

RWL:jd

h:/property/precednt/govnprop/1998/98001.rwl

cc: Mr. Dick Johnson, MIC:63
Mr. Rudy Bischof, MIC:64
Mr. David Gau, MIC:64
Ms. Jennifer Willis, MIC:70