220.0000 CHANGE IN OWNERSHIP

220.0278 **Interspousal Transfers.** Revenue and Taxation Code section 63 does not apply to a transfer from a husband and a wife to a corporation, a legal entity, wholly owned by wife. The exclusion provided by Revenue and Taxation Code section 62(a)(2) is not applicable since after the transfer, wife held a 100 percent interest in the property through the corporation. For corporate change in ownership purposes, a husband and a wife are treated as separate individuals, and the ownership interest of one spouse in a corporation is not attributed to the other. C 5/14/93; C 2/22/2007.

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STATE OF CALIFORNIA

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[illegible]

In Re: Change in Ownership - Community Property Interests in A Separate Property Corporation.

Dear [illegible]

This is in response to your letter dated March 18, 1993, to Mr. Verne Walton, in which you requested our opinion concerning the change in ownership consequences under the following set of facts:

1. On July 29, 1977, W (Husband) and S (Wife) acquired a condominium at Donner Lake.

2. On July 24, 1986, Husband and Wife deeded the property to Hardcopy, Inc. (Corporation) of which Wife is the sole owner.

3. On July 18, 1991, Corporation deeded the condominium to Wife; and immediately thereafter, Wife deeded the condominium to Husband.

The taxpayers have objected to a determination that a change in ownership occurred in the 1986 transfer to Corporation on two grounds. First, although the Corporation is registered in the name of Wife only, taxpayers contend that they each have an undivided one-half community property interest in all of its assets, and have submitted income tax returns as evidence of such community property interests. Secondly, taxpayers assert that regardless of the community or separate property nature of the Corporation, the 1986 deed to the Corporation merely reflects a holding agreement whereby the Corporation held bare legal title,

but the beneficial use of the condominium remained in the Husband and Wife. As hereinafter explained, both arguments require a sufficiency of evidence satisfactory to the assessor and to the assessment appeals board in order to justify the conclusion that a reappraisable change in ownership did not occur.

LAW AND ANALYSIS

Community Property Interests in Corporation.

Rev. & Tax. Code Section 60 defines "change in ownership" as a "transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."

Within that definition is the provision of Section 61(i) which includes as a change:

> The transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person.

Based on the foregoing and apart from an applicable exclusion, the transfer of the condominium to the Corporation, resulted in a change in ownership.

Section 64 specifically establishes that a change in ownership occurs when an individual or entity acquires ownership or control of more than 50 percent of the shares of a corporation or more than 50 percent of the ownership interests in the real property of a corporation. Revenue and Taxation Code Section 25105 defines corporate ownership or control as "direct or indirect ownership or control of more than 50 percent of the voting stock." If title to shares or ownership interests is taken in the name of an individual or corporation, there is a presumption that record title reflects the true ownership. The burden of showing that record title does not show true ownership then shifts to the taxpayer.

Evidence Code Section 662 provides that "the owner of the legal title to property is **presumed** to be the owner of the beneficial title." Thus, the assessor can properly assume that when legal title was transferred by the 1986 deed to Wife's wholly owned Corporation, the Corporation, under the control of Wife, had the beneficial use of the property and a change in ownership occurred for property tax purposes. Section 662 further provides that "this presumption may be rebutted only by clear and convincing proof." Clear and convincing proof has been defined as "clear, explicit and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to command

the unhesitating assent of every reasonable mind." (In re Jost, 1953, 117 Cal.App.2d 379, 383.)

Husband and Wife have submitted evidence to prove that they did not intend to transfer their present beneficial interest in the condominium to the Corporation with the result of a merging their community interests into one person (the Wife), notwithstanding the fact that Wife was the sole shareholder. They produced income tax returns filed during the years following the 1986 transfer to establish that the Wife's 100% interest in the Corporation was automatically treated as one-half Husband's community property. There are admittedly some facts appearing in the tax returns which may show that Husband and Wife intended to hold their community property interests in the condominium after the transfer. For example, Husband and Wife both continued in possession of the condominium; continued to collect rent on the property; continued to treat the property as their own for income tax purposes; and continued to pay the property taxes and other property expenses. In our opinion however, these facts do not constitute clear and convincing proof within the meaning of Evidence Code Section 662 that Wife's declared and recorded 100% interest **in the Corporation** was actually shared with her Husband and that each of them held only a 50% interest, thereby qualifying them for the change in ownership exclusion under Section 62(a)(2).

It has consistently been the position of the State Board staff that for purposes interests in corporations, a husband and a wife are to be treated as **separate** individuals and that the ownership of one spouse is **not** to be attributed to the other. (See Letter to Assessors No. 85/33, March 5, 1985, copy enclosed.) In our view, there is no legal basis for attribution of stock ownership interests held by spouses as community property. (See Eisenlauer Letter on "Reassessment of Real Estate Assets Following Purchase of Stock in the Corporate Owner", August 11, 1986, copy enclosed.)

Moreover, to conclude that Husband owned a community property interest in one half of Wife's corporate shares, would mean that the corporate documents filed with the Nevada Secretary of State showing Wife as the sole shareholder should be disregarded and the Corporation should not be treated as an entity capable of holding title or doing business. The separate entity theory requires that the Corporation must be recognized and cannot be easily "pierced" or disregarded. Thus, the Declaration of Ownership signed under penalty of perjury by Wife and the incorporation forms filed by Wife are conclusive evidence of the existence of the corporation. (15 Cal.Jur. III, Corporations, Section 80.) The corporate entity may be disregarded only when two conditions are met: 1) where there is

such a unity of interest and ownership that the separate personalities of corporation and individual no longer exist; and 2) where the failure to disregard the corporate entity results in a grave injustice to a third party. (Ballentine, Calif. Corps. Laws, Section 54.07, p.14-33.) Here we have the unusual situation of an incorporator who consciously chose the corporate form as a method of doing business but who, because of certain consequences that resulted, now seeks to deny the existence of that entity.

While we do not have sufficient information to understand the Husband's and Wife's motivation in forming the Corporation as solely owned by Wife and in transferring the ownership of the condominium to the Corporation in 1986, nevertheless, under Corporations Code Section 200 a valid corporation existed. No documents have been submitted indicating that some percentage of the corporate shares were ever acquired by the Husband reducing the total interest held by Wife to 50%. Thus, Husband and Wife did not own the same proportionate shares in the Corporation as they did in the condominium before the transfer so as to avail themselves of the exclusion under Section 62(a)(2). Accordingly, under Section 61(i), the transfer of the condominium to the Corporation in 1986 constituted a change in ownership. The interspousal exclusion under Section 63 is **not** applicable to this transfer since the condominium was transferred to a legal entity (Corporation) rather than between spouses as Section 63 requires.

The subsequent transfer of the condominium however, from the Corporation to Wife on July 18, 1991, is excluded from change in ownership under Section 62(a)(2), as a change in the method of holding title and in which the proportional ownership interests remain the same. The final transfer of the condominium from Wife to Husband also on July 18, 1991, is excluded from change in ownership as an interspousal transfer under Section 63.

Corporation under a Holding Agreement

Taxpayers further assert that the 1986 deed to the Corporation was excluded from change in ownership because the Corporation acquired title to the condominium solely for the purpose of holding bare legal title, while they at all times retained the beneficial ownership. As we previously noted under Evidence Code Section 662, when title to shares or ownership interests is taken in the name of an individual or corporation, there is a presumption that record title reflects the true ownership. The burden of showing that record title does not show true ownership is shifted to the taxpayer.

Property Tax Rule 462(k)(3) implements Section 60 with respect to real property transfers occurring under a holding

agreement as follows:

> **Holding agreements.** A holding agreement is an agreement between an owner of the property, hereafter called a principal, and another entity, usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have no discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.
>
> > (A) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.
> >
> > (B) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal.

From the foregoing, we conclude that Rule 462(k)(3) contemplates a **holding agreement** which is created by a transfer of title from a principal to the holder of title. In the instant case the Rule would require the existence of a written agreement between the Taxpayers and the Corporation, indicating that at all times the Corporation was subject to the terms of the holding agreement, was permitted to hold record title only, and that all beneficial use and control remained in the taxpayers. Since no such agreement or similar writing has been submitted to us or referred to in your letter, we will assume for purposes of this argument that the taxpayers will seek to prove that the holding agreement was **oral** in nature and had the effect of establishing a "resulting trust" in which the Trustor/Corporation received title to the condominium as the nominee of the Trustees/Taxpayers.

Oral trusts are generally prohibited by the Statute of Frauds in Code of Civil Procedure §1971:

> No estate or **interest in real property**, other than for leases for a term not exceeding one year, nor any power over or concerning it...can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by the **party's** lawful agent thereunto authorized in writing.

However, CCP §1972 states certain exceptions based on the legal premise that the Statute of Frauds has no applicability to actions for **constructive or resulting trusts.** Such trusts are created by operation of law on the ground that the beneficiary, with the consent of the trustee, enters into possession or irrevocably changes his position in reliance on the trust. (CCP §1972(b).) These exceptions were summarized by the court in Haskell v. First National Bank, (1939) 33 CA2d 399, which stated,

> ...the rule is similar to the rule under which **oral** gifts of land or contracts for the sale of land become enforceable on the ground of part performance. But underlying all this reasoning is the principle that an oral trust in land is not a nullity, but is voidable at the election of the voluntary trustee, and when such trustee has by his conduct ratified and affirmed the trust and induced others to change their position because of it, the doctrine of equitable estoppel comes into play.

In Matter of Torrez, (1988) 63 B.R. 751, 827 F.2d 1299, the court reaffirmed the exception to the requirement of a writing for resulting trusts:

> Under California law, resulting trust is implied by operation of law whenever a party pays the purchase price for a parcel of land and places title to the land in the name of another.

However, it is well settled that the elements proving both the existence and the validity of a resulting or constructive trust must be established by the party asserting its existence. In Parkmerced Co. v. City and County of San Francisco, (1983) 149 C.A.3d 1091, the court stated on page 1095,

> Today it is not at all uncommon for individuals, or corporations such as title companies, to hold "bare legal title" to property for the owner of its beneficial interest. Such a transaction is of the nature of a resulting trust "which arises from a transfer of property under circumstances showing that the transferee has no duty other than to deliver the property to the person entitled thereto, upon demand. And such a transfer, when made, will be of the property's "bare legal title" to the person already entitled to its "beneficial use."
>
> We are brought to a consideration of the uncontroverted material evidence of the case. ... The partnership was formed for the purpose of acquiring and operating Parkmerced. The partnership agreement provided in part

that title to Parkmerced would be held by one of the partners, Parkmerced Corporation, as **nominee** for the partnership. The transaction's documents were executed by Parkmerced Corporation "on behalf of the partnership," and title to the property was taken in Parkmerced Corporation's name **as nominee** of, and as authorized by, the partnership.

Whether or not the similar types of facts of a resulting or constructive trust exist in the instant case is a question of fact to be determined by the assessor and the assessment appeals board upon the examination of all the available evidence. Husband and Wife must establish that they transferred title as "Trustees" and/or that the Corporation received title as "Trustor" or "Nominee" by, or as a result of the 1986 deed.

As we stated earlier, the taxpayer claiming the benefit of an exception or exemption has the burden of establishing to the satisfaction of the assessor and the assessment appeals board that he or she qualifies for the benefit. In cases where formal recorded documents, such as deeds, fail to contain complete information which is consistent with the taxpayer's claim, then the assessor and the assessment appeals board are entitled to require that the taxpayer's representations be established by clear and convincing evidence. (Evidence Code Section 662.) When evaluating the evidence presented, documents, such as affidavits, prepared after the fact are generally given less weight than contemporaneous documents prepared at the time of the alleged event. Moreover, the assessor and the assessment appeals board may demand a variety of documents to establish that the normal incidents of the alleged trust relationship were observed. It seems clear from the issue presented that the assessor and the assessment appeals board are entitled to require that Husband and Wife produce more evidence than the tax returns submitted to support the existence of a valid trust.

In summary, the answers to your questions are as follows: 1) the 1986 transfer of the condominium by Husband and Wife to the Corporation constitutes a change in ownership under Section 61(i); 2) there is no legal basis for attribution of community property interests in stock ownership and the evidence submitted indicates that 100% of the Corporation's stock was Wife's; 3) the 1991 transfer of the condominium from the Corporation to Wife is excluded from change in ownership under Section 62(a)(2) and thereafter from Wife to Husband is excluded under Section 63; and 4) under Evidence Code Section 662 more evidence is required to establish that the Corporation

was merely a trustee and that the 1986 transfer was excluded under Rule 462(k)(3).

Our opinion is, of course, advisory only and is not binding on your office or the assessor or the assessment appeals board of any county. Our intention is to provide timely, courteous and helpful responses to inquires such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd

Kristine Cazadd
Tax Counsel

cc: The Honorable Richard P. Allen
Nevada County Assessor
Mr. John Hagerty
Mr. Verne Walton

HWCorp.ltr

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February 22, 2007

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Attention: ***Mr.***

Re: *Annotation 220.0211's Effect on Annotation 220.0278*

Dear Mr. :

This letter responds to your December 27, 2006 inquiry regarding two property tax annotations[1] applying Revenue and Taxation Code[2] section 63, Interspousal Transfers. As discussed in more detail below, the State Board of Equalization's Legal Department still holds the opinion expressed in annotation 220.0278, regarding transfers to legal entities, and is not of the opinion that annotation 220.0211, regarding the transfer of an interest in a legal entity, affects the conclusion reached in annotation 220.0278.

Annotation 220.0278 provides that "Revenue and Taxation Code section 63 does not apply to a transfer from a husband and a wife to a corporation, a legal entity, wholly owned by wife."

The May 14, 1993 letter[3] from which the conclusion in annotation 220.0278 is drawn provides that section 63 does not apply to a husband and wife's transfer of their respective community property interests in real property to a corporation wholly owned by the wife. The letter explains that section 63 does not apply because the spouses' transferred their real property interests to a corporation, a separate legal entity, not between themselves, and therefore did not conduct an "interspousal transfer" within the meaning of section 63. This conclusion is

[1] Property tax annotations are summaries of the conclusions reached in selected legal rulings of State Board of Equalization counsel published in the State Board of Equalization's Property Tax Law Guide. (See Cal. Code Regs., tit. 18, § 5200 for more information regarding annotations.)
[2] All further statutory references are to the Revenue and Taxation Code unless otherwise specified.
[3] Available on the Board's website at: http://www.boe.ca.gov/proptaxes/pdf/220_0278.pdf.

consistent with the Legal Department's earlier opinion that corporations, partnerships, and other legal entities are not spouses for purposes of applying section 63, as stated in the letter which formed the basis for annotation 220.0274.[4]

Annotation 220.0211 provides as follows:

> When a surviving spouse acquires majority ownership of a partnership, through the spousal property order of the probate court granting her the deceased spouse's community property interest, the change in control of the partnership is not a change in ownership triggering reappraisal for property tax purposes. The interspousal transfer exclusion of Revenue and Taxation Code section 63 applies to the transfer.

The August 1, 1996 letter[5] from which the conclusion in annotation 220.0211 is drawn, explains that section 63 was intended to apply to "all transfers between spouses, including transfers of interests in legal entities." This conclusion is consistent with Property Tax Rule[6] 462.220, subdivision (a), which specifically provides that a change in ownership does not include "Transfers of ownership interests in legal entities" between spouses.

Thus, the two annotations do not affect each other's conclusions. Annotation 220.0278 concludes that there is no transfer between spouses, and therefore no "interspousal transfer" within the meaning of section 63, where one or both spouses transfer real property to a separate legal entity, not the other spouse. Annotation 220.0211 concludes that section 63 applies to all transfers between spouses, including transfers of ownership interests in legal entities between spouses. Therefore, the two annotations deal with different types of transfers, and reach different conclusions regarding the application of section 63.

I hope this answers your questions. If you require further guidance or have additional questions, please call me or write to the Legal Department again. The views expressed in this letter are only advisory in nature. They represent the analysis of the Legal Department based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Bradley Heller

Bradley Heller
Senior Tax Counsel

BH:pb
Prop/Prec/INTRSPSL/07-001.bh.doc

cc: Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
Mr. Todd Gilman MIC:70

[4] Available on the Board's website at: http://www.boe.ca.gov/proptaxes/pdf/220_0274.pdf.
[5] Available on the Board's website at: http://www.boe.ca.gov/proptaxes/pdf/220_0211.pdf.
[6] All Rule references are to California Code of Regulations, title 18.