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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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August 9, 1991

Honorable Bruce A. Reeves
MONTEREY COUNTY ASSESSOR
P. O. Box 570 - Courthouse
Salinas, CA 93902
Attn: Mr. Gerald L. Thomas
Assistant Assessor

Dear Mr. Thomas:

This is in response to your letter of July 2, 1991, in which you request our assistance with respect to the following facts which were contained in your letter and attachments thereto.

On December 15, 1980, Barbara Higgins entered into a "Declaration of Intervivos Revocable Trust" between herself as Trustor and her daughters as Trustees. On and subsequent to that date Trustor transferred assets including real property to that trust.

On October 8, 1984, Trustor amended and restated the trust in its entirety. The amended and restated trust, however, continued to be revocable by the Trustor, Barbara Higgins.

On November 5, 1986, Proposition 58 became effective. On March 2, 1987, Barbara Higgins died. On June 17, 1987, Revenue and Taxation Code (all statutory references are to the Revenue and Taxation Code unless otherwise indicated) section 63.1 became effective. The purpose of this legislation was to implement Proposition 58.

As originally enacted, subdivision (d) of section 63.1 required a claim to be filed with the assessor by an eligible transferee seeking the parent-child exclusion, however, no time limit was imposed for filing the claim. Subdivision (f) of section 63.1 expressly made section 63.1 applicable to transfers made on or after November 6, 1986.

Effective January 1, 1989, section 63.1 was amended to require the claim for exclusion to be filed within three years after the transfer of the real property for which the claim is filed.

The subject real property was conveyed by the Trustees to Fritzi Higgins, one of decedent's two daughters pursuant to the terms of the trust by deed dated April 3, 1990 and recorded April 9, 1990.

Based on the foregoing, you concluded that the parent-child exclusion was not available and appraised the property because of the failure to file a claim within the three year period.

On June 24, 1991, Fritzi Higgins submitted a Claim for Reassessment Exclusion for Transfer Between Parent and Child and a letter from her attorney setting forth why she believes her claim is timely.

First, taxpayer contends that to be constitutional, the amendment to section 63.1 establishing the three year time limit must be applied prospectively only to transfers occurring after January 1, 1989 rather than retroactively as provided in section 63.1(f). Under taxpayer's argument, transfers occurring prior to January 1, 1989, would not be subject to the three year claim filing limit.

Article 3 section 3.5 of the California Constitution provides in relevant part that:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) . . . .

The California Attorney General has opined that the foregoing provision applies to a county board of equalization whether it is the county board of supervisors acting as a local board of equalization or an assessment appeals board. (64 Ops. Cal. Atty. Gen. 690.)

We have taken the position that such provisions also apply to the State Board of Equalization.

Thus, even if the retroactive application of the amendment to section 63.1 requiring a claim for exclusion to be filed within three years of the transfer is unconstitutional, neither the State Board nor the county boards of equalization have any power to declare such retroactive application of the provision unconstitutional or to refuse to so apply such provision on constitutional grounds unless an appellate court has determined that retroactive application of such provision is unconstitutional. As yet, no appellate court has made that determination.

Further, under the reasoning of the aforementioned Attorney General's opinion, a county assessor may also be "an administrative agency" for purposes of Article 3 section 3.5. In any event, a county assessor would be precluded from refusing to apply the three year limitation retroactively on constitutional grounds by section 538 which instead requires an assessor to bring an action for declaratory relief.

Taxpayer's additional and alternative argument is that the transfer date for purposes of section 63.1 is April 9, 1990, the date of the recordation of the deed conveying title to the property to Fritzi Higgins rather than the date of death of Barbara Higgins.

Since a transfer which qualifies as a change in ownership under section 60 would also constitute a transfer for purposes of section 63.1 (see section 60 and 63.1(c)(7)), Property Tax Rule 462(n) entitled "Date of Change in Ownership" would be applicable in determining the date of transfer under section 63.1 in our view. That rule provides that with respect to revocable trusts, the date of the change in ownership is the date the trust becomes irrevocable (Rule 462(n)(4)(A). See also section 61(g). Clearly, the trust in question became irrevocable at the date of death of Barbara Higgins. See also paragraph 2.04 of the trust. Thus, for purposes of section 63.1, the transfer between Barbara Higgins and Fritzi Higgins occurred on the date of death of Barbara Higgins. The time for filing a claim under section 63.1, therefore, expired March 2, 1990.

Taxpayer further argues that the effect of this interpretation is to deny the exclusion to the claimant because she was precluded from filing a claim until the property was transferred to her which is an unconstitutional interpretation. With respect to taxpayer's constitutional argument, our comments in response to taxpayer's first

constitutional argument are equally applicable here.

We disagree, however, that the constitutional issue asserted by taxpayer even arises because taxpayer was not precluded from filing a claim until the property was transferred to her by deed recorded April 9, 1990. There were two parcels of real property in the trust of which one was the decedent's principal residence. The trust provided that the trust estate was to be divided equally between the two daughters and that such division could be made in kind including undivided interests, or partly in kind and partly in money in the Trustee's discretion (Paragraph 6.10).

Although it is true that no claim requirement existed as of the date of the decedent's death and that the three year claim requirement did not become effective until January 1, 1989, decedent's daughters still had 14 months after that date in which to decide how the property was going to be distributed so that claims could be timely filed. This, of course, was in addition to the 22 previous months since decedent's death during which that decision could also have been made. This is more than ample time for two people who are to share equally in the trust estate to decide how to distribute two parcels of real property between themselves. Moreover, determining whether the property would have to be sold to pay taxes would not preclude the daughters from filing claims until distribution was made. There was a transfer of present beneficial interest to the daughters at the time of the decedent's death for purposes of section 63.1 for which a claim had to be filed in order for the exclusion to apply. A later sale of the property by the trust would not alter that requirement notwithstanding the fact that the sold property never would have been distributed to either daughter. Therefore, actual transfer of title was not necessary in order to file a claim. Further, under a recent amendment to subdivision (d), the claim would have to be filed <u>prior</u> to a transfer to a third party, e.g., a sale by the trust, if such transfer occurred less than three years after the parent-child transfer. (Stats. 1990, Ch. 1494.) Thus, not only are eligible transferees not precluded from filing claims prior to distribution, but subdivision (d) contemplates that to be timely, claims <u>must</u> be filed prior to distribution under certain circumstances.

Based on all of the foregoing, we agree with your conclusion that because of the failure to file a timely claim, the parent-child exclusion is not applicable.

Our intention is to provide timely, courteous and

helpful responses to inquiries such as yours. Suggestions that help us to accomplish this are appreciated.

Very truly yours,

Eric F. Eisenlauer

Eric F. Eisenlauer
Tax Counsel

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cc: Mr. John W. Hagerty
Mr. Verne Walton