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June 1, 1990

Honorable Samuel Duca
 Assessor of San Francisco
 City and County of San Francisco
 City Hall, Room 101
 San Francisco, CA 94102

Attention Mr. Henry L. McKenzie
 City Appraiser

Re:

Dear Mr. Duca:

This is in response to your letter of May 9, 1990 to the attention of Mr. Richard Ochsner in which you request our opinion concerning the applicability of Revenue and Taxation Code* section 63.1 to the facts set forth below.

FACTUAL BACKGROUND

W died testate on March 13, 1983. Her estate was administered and her will probated in San Francisco Superior Court proceeding No. . . . Included in decedent's estate were undivided one-half interests in two parcels of real property in San Francisco: the decedent's principal residence located at . . . and commercial property located at The court made its Decree of Final Distribution of the estate on December 20, 1983. The decree distributed the residue of decedent's estate including the above property to a testamentary trust of which H decedent's surviving spouse, and A, decedent's son were trustees, to be divided into two trusts, designated as the Part A Trust and the Part B Trust. The subject real property was placed into the Part A Trust. Decedent's will and the decree provided that all of the income from both trusts was

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

payable to H during his life time and that upon his death the two trusts were to be combined and distributed to decedent's two children in equal shares. They further provided that prior to combining the two trusts, the trustee was to pay any incremental federal estate tax attributable to the Part B Trust from the principal of that trust and also to add any accrued but undistributed income of the Part B Trust to the principal of that trust in the event that H failed to exercise his testamentary general power of appointment over such income.

H died testate on October 16, 1986. His estate was administered and his will probated in San Francisco Superior Court proceeding No. . Included in his estate were the other undivided one-half interests in the real property included in W's estate. H's will provided that his estate be distributed to his two children, A and B in equal shares. While H's estate was being administered, however, A and B entered into an agreement concerning the distribution of the estate in which they agreed that the undivided one-half interest in Street would be distributed to A and \$35,000 cash would be distributed to B. The court made its Decree of Final Distribution of H's estate on July 14, 1987 distributing the undivided one-half interest in the property to A pursuant to the agreement between A and B and an undivided one-half interest in the Street property equally to A and B pursuant to H's will. After the decree was issued, A purchased B's undivided one-quarter interest in the Street property.

A, as trustee of the W's testamentary trust, transferred an undivided one-half interest in each property to himself by grant deeds dated July 15, 1987 and recorded July 17, 1987.

A, trustee, now contends that except for the one-quarter interest in the Street property which he purchased from his sister, the remaining interests in the Street property and the Street property which he received from H's estate and from the W testamentary trust are excluded from change in ownership under Proposition 58, section 63.1 and Larson v. Duca (1989) 213 Cal.App.3d 324.

LAW AND ANALYSIS

Probate Estate

As you know, the California electorate passed Proposition 58 in

November 1986 which added subdivisions (g), (h) and (i) to section 2 of article XIII A of the California Constitution. Proposition 58 excluded from change in ownership transfers of real property between parents and children subject to specified limitations which were made after the effective date of the amendment (i.e., on or after November 6, 1986).

Section 63.1, which is the implementing legislation for Proposition 58, provides at subdivision (f) that section 63.1 "shall apply to purchases and transfers of real property completed on or after November 6, 1986, and shall not be effective for any change in ownership, including a change in ownership arising on the date of a decedent's death, which occurred prior to that date." This provision is consistent with Property Tax Rule 462(n)(3) which provides that the date of a change in ownership by will or intestate succession is the date of death of the decedent. The rationale for this rule is set forth in the enclosed letter dated February 25, 1982 from Douglas D. Bell Executive Secretary of the Board. See also California Academy of Sciences v. County of Fresno (1987) 192 Cal.App.3d 1436.

In Larson, however, the court of appeal held that although the decedent died prior to the effective date of Proposition 58 the "change in ownership" in the real property from the decedent to her son did not occur on the date of her death but instead resulted from the decree of distribution of the probate court issued after the effective date of Proposition 58.

The court stated at page 334:

"However, we emphasize the narrowness of our holding which is simply this: When a decedent dies before November 5, 1986, and his child acquires decedent's real property on probate of that decedent's estate through a decree of distribution in those probate proceedings which is issued after November 5, 1986, Proposition 58 proscribes reassessment of that real property by reason of such transfer and change in ownership. We emphasize also that we do not address or decide any other questions beyond the facts of this case."

In view of the narrowness of the holding in Larson, it is our view that it applies only in cases which are factually identical. Thus, we are of the opinion that except for cases factually identical to Larson, the date of a transfer by will or intestate succession is the date of the decedent's death rather than the date of the decree of distribution.

In this case, decedent H devised his undivided one-half interest in the _____ Street and _____ Street properties equally to his two children.

With respect to the _____ Street property, the two children received equal interests therein under the decree of distribution and pursuant to decedent's will. Since the decree was issued after the effective date of Proposition 58, Proposition 58 is applicable under Larson to exclude an undivided one-half interest from change in ownership. The subsequent purchase by A of B's undivided one-quarter interest is, of course, a change in ownership as to that interest.

With respect to the _____ Street property, received decedent's entire undivided one-half interest under the decree of distribution. However, since decedent devised only an undivided one-quarter interest to A, that is all that was transferred from H to A. Accordingly, only that undivided one-quarter interest is excluded under Proposition 58 and Larson. This situation is factually distinguishable from Larson in that there the amount distributed to the child was the amount devised to the child by the decedent.

Since the other undivided one-quarter interest in the _____ Street property was devised to B but was not distributed in the decree of distribution, Larson does not apply. Thus, as indicated above, that undivided one-quarter interest passed to B at the date of H's death which was prior to the effective date of Proposition 58. Accordingly, there was a change in ownership of that undivided one-quarter interest at that time. Consequently, when A received an undivided one-half interest in the decree of distribution, an undivided one-quarter interest was the result of a transfer to him by B pursuant to their agreement concerning the distribution of the _____ Street property. Such transfer constituted another change in ownership of that undivided one-quarter interest as of the date of the decree.

Distribution From _____ Testamentary Trust

A takes the position that distribution of the subject real property from the W's testamentary trust did not occur until deeds conveying an undivided one-half interest in each property were recorded on July 17, 1987, thereby transferring the right of possession and beneficial use of the properties to him. Since that occurred after the effective date of Proposition 58, A contends that Proposition 58 applies and no change in ownership occurred.

As indicated above, Larson, applies only when there is a decree of distribution from a probate estate. Since that is not what occurred here, the subject property having been distributed from a testamentary trust, Larson is inapplicable. There is no question here that but for the possible application of Proposition 58, there was a change in ownership as a result of the death of H. . . . The question is when did it occur?

"Change in Ownership" is defined by section 60 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."

Section 61 provides in relevant part that ". . . change in ownership, as defined in Section 60, includes . . . [¶] (f) [a]ny vesting of the right to possession or enjoyment of a remainder. . . interest which occurs upon the termination of a life estate or other similar precedent property interest. . . ."

Property Tax Rule 462(i)(3) reflects the Board's administrative interpretation of the foregoing sections and provides in relevant part that ". . . the termination of a trust, or portion thereof, constitutes a change in ownership at the time of the termination of the trust." (Emphasis added.)

Probate Code section 15407 provides:

(a) A trust terminates when any of the following occurs:

- (1) The term of the trust expires.
- (2) The trust purpose is fulfilled.
- (3) The trust purpose becomes unlawful.
- (4) The trust purpose becomes impossible to fulfill.
- (5) The trust is revoked.

(b) On termination of the trust, the trustee continues to have the powers reasonably necessary under the circumstances to wind up the affairs of the trust.

Paragraph C of the decree of distribution in W's estate provides that "the primary purpose in creating these trusts is to provide for decedent's husband, and the rights of all other persons interested therein are subordinate and incidental to such purpose."

Since the trust purpose was to provide for H and since that purpose could no longer be fulfilled when he died, the trust purpose was either fulfilled or became impossible to fulfill at that time. We are therefore of the view that the trust terminated at the time of H's death pursuant to Probate Code section 15407(a)(2) or (4). See also Ball v. Mann (1948) 88 Cal.App.2d 695. Moreover, there is nothing here to suggest that the right to possession or enjoyment of the subject real property did not vest in the remaindermen upon the termination of H's life estate on October 16, 1986 rather than when the deeds were recorded.

The subsequent conveyances to A by deeds dated and recorded after the effective date of Proposition 58 are consistent with the foregoing conclusions and the notion that a trustee, after termination of the trust, continues to have the powers reasonably necessary to wind up the affairs of the trust. Probate Code section 15407(b). Further, since the remainder beneficiaries already had present beneficial ownership of the property, the deeds executed by the trustee conveyed at most only legal title (Allen v. Sutter County Board of Equalization (1983) 139 Cal.App.3d 887, 890. Thus, since the deeds did not convey present beneficial ownership, such conveyances were not "transfers" as defined in section 63.1(c)(7) for purposes of Proposition 58 and section 63.1.

Based on the foregoing, it is our opinion that there was a change in ownership of an undivided one-half interest of each of the subject properties under sections 60, 61(f) and Property Tax Rule 462(i)(3) on October 16, 1986. Since this transfer occurred prior to November 6, 1986, Proposition 58 and section 63.1 do not apply.

Although the W's Trust provided for distribution to her children in equal shares, the trustees were given discretion in carrying out this intention to make distributions in kind, or in money, or partly in kind and partly in money. Accordingly, the distribution to H of the subject real property is properly characterized as a transfer from decedent to A as of October 16, 1986 and not as a transfer equally to A and B and then a transfer of B's interest to A.

Honorable Samuel Duca

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June 1, 1990

Our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Very truly yours,



Eric F. Eisenlauer
Tax Counsel

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Enclosure

cc: Mr. John Hagerty
Mr. Verne Walton