

**Additional comment from Mordamus:**

Without any law to support this draft LTA the guidance provided by it amounts to tax evasion: circumventing the tax law by means not provided by the law (in a sense it is fraud). i am not concluding that this is what the BOE intended but the draft LTA certainly reads as if it were promoting tax evasion.

I am looking at this issue in big picture form: what is best for the state of California. Government employees have a fiduciary duty to the State of California, they are required to uphold and defend the California Constitution and the laws of this state. This draft LTA appears to be in stark contrast to this duty, this pledge that government employees take when they are hired. Attorney and tax agents have similar ethical duty that they must adhere to.

A rescission is a contract. A contract is only binding on the parties to a contract. How then is the government required to act when parties to a private contract decide to rescind the contract? The government is not in privity with the contract or the parties. Unless the law authorizes the government to act (i.e. reduce a valid and lawful reassessment) the government does not act. In this case if the government does act (i.e. reverse a valid and lawful reassessment) it is doing so as a gift to the taxpayer. The government cannot make gifts of public funds.

Remember, a deed is an executed contract and an executed contract can only be voided/cancelled by a court of law and only upon a showing of fraud, duress, material mistake (property taxes are not a material mistake).

...

Under the BOE's Rescission policy nearly every single transfer of real property is subject to rescission; that means, nearly every single transfer of real property will be excluded from reassessment. I can hardly think of any transfers that cannot be rescinded then re-conducted to avoid a reassessment. Maybe some arms-length transactions, or probate transfers, or some other esoteric transfers might get reassessed (and cannot be rescinded) but the vast majority of transfers can be easily be rescinded. Many, many, many unscrupulous individuals (tax agents and attorneys) stand to make a lot of money under this policy, money that they are not entitled, money that belongs to the people of this State. The BOE policy does not make any distinctions between what transfers can and cannot be rescinded.

My argument is this: Under the California Constitution, the Revenue and Taxation Code and the Property Tax Rules a transfer of real property that is the result of a rescission (whether by rescission deed or court order) is subject to reassessment if 1) it meets the legal definition of a change of ownership; and, 2) it is not explicitly excluded under the Constitution or the laws of this State.

<sup>5</sup> Assessor's are elected officials, do we want elected officials to have discretion with regard to applying tax law. It makes sense that an Assessor would adopt this policy because lowering property taxes will help when election time rolls around. We know what happened recently with the previous Los Angeles County administration.

**It was the intent of the legislature in drafting Proposition 13 and the intent of the citizens in approving Proposition 13 that transfers by a rescission deed are subject to reassessment if they result in a change of ownership.**

The BOE's Rescission policy is against the California Constitution. The California Constitution, as a result of Proposition 13, requires the reassessment of all real property that undergoes a change of ownership. Under Proposition 13 real property in California is only subject to reassessment for property tax purposes when it under goes a change of ownership; gone are the days of cyclical assessments when the Assessor was required to reassess all real property in intervals (every four years or so), if it was your year to get reassessed your property taxes for the next four years or so would be based on that years value. People had serious issue with this because property values in California were skyrocketing and property taxes were getting out of control.

Enter Proposition 13: your property taxes are now going to be based on the value of the property at the time it was last acquired (with a de minimis 2% increase each year). However, if the property ever changes ownership it will be subject to reassessment at its fair market value on the date of the change of ownership. If there are no changes of ownership property tax revenue in California stagnates<sup>6</sup>. While it stagnates the cost of living increases and the States budgets starts to shrink leading to reductions in services. Property taxes are the main source of revenue for the counties.

Property taxes are crucial to the vitality of the State and it is every property owners obligation to contribute their fair share; it is a burden we must all share. The laws governing property taxation are readily available and easily accessible to anyone in this State. Prior to transferring property a property owner can review the relevant law (or hire a professional to review the law) and see what does and does not result in a change of ownership. Or, the property owner can neglect to do so.

The legislature was aware of the importance of changes in ownership. They needed to balance the intent of Prop 13 (controlling property tax increases) with the fiscal needs of the State: "Of the three [ there are three value benchmarks under Prop 13, 1975 Base, Change in Ownership and New Construction] change in ownership is by far the most important, as it is the primary reappraisal 'trigger' under Article XIII A..."*thus, after 1978 the lion's share of the growth in the property tax base will be triggered by, and dependent on, change in ownership...*Change in

ownership, therefore, was the most important subject considered by the Task Force. It deserved - and got - more intensive analysis and discussion than any other topic”.<sup>7</sup>

<sup>6</sup> New construction also results in a reassessment. I am only concerned with changes of ownership. New construction does not bring in anywhere near the revenue that changes of ownership do.

The intent of the legislature was to include in the definition of a change of ownership all transfers of real property both foreseeable and unforeseeable, including transfers by rescission: “the problem with any definition of change in ownership, of course, is that no one, no matter how skilled and imaginative, can foresee and classify as a ‘change’ or ‘non-change’ every possible form of real property transfer. That fact forced the legislature in 1978 to take the approach of including everything in ‘change in ownership’ (including some things which would not be considered a transfer under general law) and then carving out a few limited exceptions”.<sup>8</sup>

“The definition chosen by the Task Force is the ultimate in simplicity of administration...*the only operative test is whether a given transfer is or is not a ‘change of ownership’*<sup>9</sup>. The legislature with the help of the Task Force definitely cast a wide net when it defined a change of ownership as: under Revenue and Taxation Code section 60, “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”; and under Property Tax Rule 462.001, “a transfer of a present interest in the property, including the transfer of the right to beneficial use thereof, the value of which is substantially equal to the value of the fee interest. Every transfer of property qualified as a ‘change of ownership’ shall be so regarded whether the transfer is voluntary, involuntary, by operating of law, by grant, by gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement, or any other means”.

After settling down on a definition of “change in ownership” that would satisfactorily capture all transfers of real property the legislature next explicitly carved out a few narrow and specific transfers that would be excluded from the definition of a “change of ownership”. Certain transfers of real property that would otherwise be subject to reassessment because they fall within the legal definition of a change of ownership are not subject to reassessment. The legally recognizable exclusions from the definition of a change of ownership can be found in Revenue and Taxation Code sections 60 - 69.5 and Property Tax Rules 462.000 - 462.500. *If a particular transfer does not fall within one of these enumerated exclusions the California Constitution requires the local Assessor to reassess the transferred property.*

<sup>7</sup> Report of the Task Force on Property Tax Administration, January 22, 1979, pg. 37. <sup>8</sup> Report of the Task Force on Property Tax Administration, January 22, 1979, pg. 38. <sup>9</sup> Id. at 55.

Thus, it was the intention of the legislature and the citizens of California to include within the definition of a change of ownership for Proposition 13 purposes transfers of real property occasioned by a rescission (deed or court order). The legislature was aware of the remedy of rescission when it codified Proposition 13 and intentionally chose not to exclude transfers by rescission from the definition of a change of ownership: the “legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted a state in light thereof”<sup>10</sup>.

**The Transfer of an interest in real property by means of a Rescission (deed or court order) is subject to reassessment if it results in a change of ownership and is not explicitly excluded by the Constitution or the laws of the State of California.**

The BOE's rescission policy holds that a rescission deed is not subject to the definition of a change of ownership: "The recording of a rescission deed is not considered a change of ownership"<sup>11</sup>.

The California Constitution requires the reassessment of all real property that undergoes a change of ownership. Revenue and Taxation Code section 60 and Property Tax Rule 462.001 define a change of ownership as, "the 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. *Every transfer* of property qualified as a 'change of ownership' shall be so regarded whether the transfer is voluntary, involuntary, by operation of law, by grant, by gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement, or any other means".

Nowhere in the entire property tax scheme (statutes, regulations, case law), nowhere is there any legally binding authority on property taxation that mentions rescissions. Not a single one references Rescission Deeds. There is not a single discussion regarding rescissions. If the legislature intended transfers via rescission to be excluded from the definition of a change of ownership they would have said so. The fact that the legislature is silent on the matter does not mean the BOE, the Assessor, the Assessment Appeals Board or any other person or entity can go ahead and do it; it is not responsible government behavior, especially considering the fiduciary duty public employees owe their constituents, for the public officials to use the "No one said I couldn't do it" excuse as cover for what is clearly the result of either their willful failure to their negligence.

<sup>10</sup> People v. Neild, 99 Cal.App.4th 1223

<sup>11</sup> The remedy of rescission does not automatically transfer property. If parties to a contract agree to rescind the contract, or if a court orders a contract rescinded, the parties must transfer the property, the law does not automatically transfer the property. Therefore, a rescission deed cannot be viewed or labeled as a perfection of title because without the deed the property does not get transferred.

When it comes to taxes, especially when the legislature has already carved out very specific and very narrow exclusions, if the legislature does not explicitly exclude you must conclude that it is subject to reassessment if the transfer resulted in a change of ownership. Again, the legislature used the words "every transfer". "every" means "all", a transfer by rescission is still a transfer and therefore it falls within the "every transfer" category, the legislature has not specifically excluded it therefore we must conclude that it is subject to reassessment if it results in a change of ownership

And if it results in a change of ownership it makes no difference what impact it has on the past transfer because the property, going forward, will have a base year value as of the date of the rescission deed. Even if we concede that the rescission of a valid and voluntary transfer of real property made outside of the court between the parties, in the absence of fraud, duress, undue

influence, or mistake<sup>12</sup> actually does serve to void, invalidate, or cancel the prior transfer, even if we concede that the previous reassessment must be reversed because of the rescission, even if this is true (which it is not), it makes no difference because the rescission deed itself will be reassessed if it results in a change of ownership: prior to the rescission deed Sally owned a present interest in the property including beneficial use thereof, the value of which is equivalent to the fee, after the rescission deed Dave owns a present interest in the property, including the beneficial use thereof, the value of which is substantially similar to the value of the fee interest.

The rescission deed is a valid and voluntary transfer of real property, the law presumes that the transferee is receiving fee simple absolute (unless a lessor estate was intended and the intention stated on the face of the deed), fee simple absolute means that the grantee is receiving a present and an unencumbered interest in real property that includes everything, including the beneficial use thereof<sup>13</sup>. A deed is an executed contract, a contract that has been completed, ownership of the thing transferred has changed: if Sally grants real property to Dave by executing and recording a deed, the law presumes that Sally has transferred complete ownership of the property to Dave, and once Sally executed and recorded the deed the law presumes that Dave has complete ownership of the property (California Evidence Code section 662, the owner of legal title is presumed to be the owner of full beneficial title).

<sup>12</sup> Mistake as to the essence of the bargain, in this case the essence of the bargain is the property, not how expensive owning the property is going to be.

Why would a rescission transfer not result in a change of ownership? The only way a transfer which is the result of a rescission can be excluded from reassessment is if it falls within one of the specific and explicit exclusions found in Revenue and Taxation Code sections 60 - 69.5 (and Property Tax Rules 462.001 - 462.500).

After a careful reading of the relevant law we quickly see that no where in the property tax law did the legislature use the word rescission. Correction was used, when a correction deed is recorded there is no change of ownership unless the property is being transferred, if the property is not being transferred the correction deed serves to correct a mistake such as description, spelling of a name etc... But no where else is any substitute or alternative of rescission used.

The cardinal rule of statutory interpretation is to never imply words not used by the legislature and to never ignore words actually used by the legislature: “it is the role of the judiciary to simply ascertain and declare what is in terms of in substance contained in the statute, not to insert what has been omitted or omit what has been included... [T]he courts ‘may not, under the guise of construction, rewrite the law or give words an effect different from the plain meaning and direct import of the terms uses’<sup>14</sup>. And, “if a statute is clear, the ‘plain meaning’ rule applies, the legislature is presumed to have meant what is said”<sup>15</sup> and meant to exclude that which it did not include.

The legislature excluded any reference to rescission when it codified Proposition 13 and drafted the Revenue and Taxation Code sections 60 - 69.5 and Property Tax Rules therefore we must conclude that it was intentionally excluded. The legislature included “every transfer” when it

codified Proposition 13 and drafted the Revenue and Taxation Code and Property Tax Rules, therefore we must conclude that the Legislature meant

<sup>13</sup> California Civil Code section 1105: A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

<sup>14</sup> Peake v. Underwood, 227 Cal.App. 4th 428, at 443.

<sup>15</sup> Sea World, Inc. v. County of San Diego, 27 Cal.App.4th 1390, at 1402.

“every transfer” was subject to the dictates of Proposition 13. The BOE rescission policy is the BOE including words into the law that the legislature intentionally excluded (Rescission) as well as ignoring words the legislature intentionally included (every transfer).

The only logical and lawful conclusion is that a transfer of real property by Rescission (deed or court order) is subject to reassessment if it results in a change of ownership and it is not explicitly excluded by the Constitution or the laws of the State of California.

**The California Court of Appeals holds that a property owner must accept the tax consequences of her actions.**

According to the California Court of Appeals the remedy of rescission cannot serve to “undo” or “avoid” what is otherwise a lawful reassessment of real property under Proposition 13.

Penner v. County of Santa Barbara, 37 Cal.App.4th 1672, is the leading case on this subject. The case does not deal with rescissions but it is the closet piece of law that we have on the issue of whether or not a property owner can avoid or undo a lawful reassessment that has already occurred.

None of the Annotations or opinions that make up the BOE’s Rescission policy mention Penner.

In Penner real property was transferred to a legal entity, it was reassessed under Revenue and Taxation Code section 61(j). The transfer did not qualify for any legally recognizable exclusions. The property owner was not happy about the increase in property taxes. The Court held:

“Penner argues that the tax consequences of her transaction should be determined by pretending that she took steps which, in reality, she did not. We cannot base our decisions on hypotheticals. ‘[A] transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred. Having chosen to transfer the property directly from herself to the partnership, Penner ‘ must accept the tax consequences of [her] choice whether contemplated or not, and may not enjoy the benefit of some other route [she] might have chosen to follow but did not”.

The BOE rescission policy erroneously advises property owners to “take steps that were not taken”, to redo their transfer “in accord with what might have occurred”. The BOE rescission policy allows tax payers to “enjoy the benefit of some other route [she] might have chosen to

follow but did not”. According to the BOE you do not have to accept your tax consequences, just record a rescission deed and re-conduct the transfer this time taking the steps you didn’t take in the first place.

Again, none of the annotations or opinion letters make any mention of Penner. Holdings by the California Court of Appeals are law, they are binding on individuals and entities. The law says you “must accept the tax consequences of your choices whether they were contemplated or not”. How did the BOE reconcile the holding in Penner with its Rescission policy? It just does not make sense that a Government agency that is tasked with knowing and understanding property tax law would ignore or brush aside Penner when dealing with an issue like rescission.

Thus, according to the California Court of Appeals -according to the law- theBOE’s rescission policy is unlawful because taxpayers must accept the tax consequences of their actions. Under the BOE rescission policy the BOE is informing property owners that they do not need to accept their tax consequences, and the BOE has drawn taxpayers a road map on how to get out of lawful reassessments.

### **Rescission is a remedy between the parties to a contract only.**

Rescission is a legal remedy available to parties to a contract. The remedy is between those parties only. if one party does not want to continue on with the contract, or both parties want to discontinue the contract they are free to do so. Rescission is one of several options the parties can choose. If the parties decide on a rescission the result between the parties is that each party is to return to the other party whatever they have received thus far (also known as returning to the status quo) and the parties go on as if the contract has never been entered into: meaning, one party cannot later on demand that the other party perform some obligation under the contract because as between them, the contract has disappeared. The remedy of rescission has no application / impact on third parties (parties not part of the contract rescinded).

If the contract is still in its executory stages then ownership of the thing bargained for has not transferred. However, if the contract being rescinded is an executed contract, like a deed, ownership of the thing bargained for has transferred and vested in the grantee.

In the case of an executed contract, like a deed, a rescission is nothing more than a re- transfer of ownership of the property back to a prior owner. However, if a court of law determines that the executed contract / deed was executed under duress, fraud, or undue influence then a different scenario would occur and what happens next is up to the courts.