

170.0035

170.0035 Easements. An irrevocable right to the limited use or enjoyment of a lake is an easement which is appurtenant (attached to particular land) or in gross (not attached to any particular land) but is, in either case, an interest in real property subject to assessment. C 5/17/83.

(916) 445-6453

May 17, 1983

Mr. R. Gordon Young
San Bernardino County Assessor
Hall of Records
172 West Third Street
San Bernardino, CA 92415

Dear Mr. Young:

This is in reply to your letter to _____ dated January 27, 1983, concerning the assessment of dock rights on Lake Arrowhead. Your letter and the material enclosed therewith, subsequent telephone conversations with Chico Porras, and material and information provided me by Joe Minar at our meeting of April 27 disclose the following facts:

Lake Arrowhead is owned by Arrowhead Lake Association (ALA), a California Non-Profit Corporation. ALA purchased Lake Arrowhead and certain adjoining land from Boise Cascade Home and Land Corporation and Lake Arrowhead Dam Corporation (Boise) in October 1975. In connection with the purchase, ALA granted back to Boise by Grant of Boat Slip Rights the right to place 500 slips on the lake. The Grant of Boat Slip Rights defines a "slip" as a "space on a dock or pier adapted to the mooring of a single boat...while such boat is floating on Lake Arrowhead." A "slip right" is defined in the Grant of Boat Slip Rights as a "separate, distinct, permanent and irrevocable right to construct, place, maintain, use and repair one slip on the [Lake]."

As I understand it, the docks are wooden structures which contain one or more grooves which are called slips. The docks float on the lake and are held in place by cables which encircle posts or pilings which are embedded in the lake and shore. The docks therefore are readily movable and in fact are moved from place to place on the lake by or at the request of ALA.

Fixtures

The 500 slip rights ALA granted to Boise in 1975 were allocated generally to various parts of the lake, however, were not assigned specific locations on the lake and were not made appurtenant to specific residential lots adjoining and surrounding the lake. These rights are known as unassigned rights. Since 1975 there have been many transfers of these rights and they are now owned by many business entities and individuals.

A party owning an unassigned right cannot use it to moor a boat on the lake unless he has a dock site assigned to him by ALA. One must own an improved lot in Arrowhead Woods to obtain an assigned dock site. (Arrowhead Woods is a residential subdivision surrounding the lake and contains some 9,000 parcels.) An assigned right, therefore, is the right to moor a boat at a specific location on the lake. Since 1978, dock sites have been assigned by Agreement and Conveyance of Easement Determinable from ALA to the owner of an improved lot. ALA requires recordation of the document. The Agreement and Conveyance of Easement Determinable identifies the location of the dock site on a map of Lake Arrowhead and provides that the easement for dock site is appurtenant to the grantee's lot. Its terms require that the easement be conveyed by the grantee when he conveys the lot unless the grantee has already conveyed the easement or unless the easement has reverted to ALA in accordance with its terms. Assigned rights are thus apparently transferable with the lot or independently as long as the right is transferred to an owner of an improved lot. The transfer is effected by a Release of Conveyance of Easement Determinable back to ALA, which then issues another Agreement and Conveyance of Easement Determinable to the transferee.

ALA controls the number of slips on the lake. Such control is necessary because the lake is not large enough to permit each lot owner to have a slip. Currently, there are approximately 2,500 slip rights of which approximately 1,750 are assigned and the balance unassigned. At the time of the conveyance of the 500 slip rights in 1975, there were some additional unassigned slip rights already in existence. There were also, of course, a substantial number of assigned rights in existence at that time. In the past, the assigned rights were assessed as part of the value of the property to which they were appurtenant. The unassigned rights, however, have never been assessed either individually or in conjunction with the assessment of the lake or adjoining property.

The first question raised in your letter is: "Are the physical dock sites assessable or are they personal property?"

By this question, I assume you are asking whether any of the physical docks may be characterized as real property instead of personal property. Characterization as real property would require a determination that the docks in question constitute "structures" or "fixtures" and thus are "improvements". See Revenue and Taxation Code* Sections 104, 105. Most of the cases decided under Section 105 involved a determination of whether a particular item was a "fixture". The question as to what constitutes a "fixture" is one of fact to be determined from the evidence in a particular case. M. P. Moller, Inc. v. Wilson (1937) 8 Cal. 2d 31. Enclosed for your information is a copy of a draft of Rule 122.5, FIXTURES, which the Board recently approved for publication prior to hearing. As Rule 122.5 indicates, the docks are fixtures if they are physically or constructively annexed to real property with the intent that they remain annexed indefinitely. The rule further provides that if property, which is actually attached, can be removed without material damage, it nevertheless is to be classified as a fixture unless there is an intent, as manifested by outward appearance or historic usage, that the item is to be moved and used at other locations.

Here, the docks are attached to posts or pilings (which constitute real property improvements) by cables which encircle the posts and are fastened by bolts thus permitting the docks to rise and fall with the water level of the lake. The docks are thus easily removable without damage to them or the real property to which they are attached. Moreover, ALA has the right to move and relocate slips and in fact does so from time to time when reasonably necessary for improvement of mooring facilities on or access to the lake.

From the foregoing limited facts, it appears that the docks, by reference to historic usage, are typically attached with the intent of being moved and used at other locations if necessary. That is to say that they are not attached or annexed with the intention that they remain annexed indefinitely as that term is defined in the proposed rule. Accordingly, from my understanding of the fact as stated above, the docks do not appear to be fixtures but rather are personal property. The key, however, is intent as manifested by outward appearances and historic usage. If an intent contrary to the intent I have assumed here from the limited facts available to me is thereby manifested, the docks should be characterized as fixtures.

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

You next ask: "Are the unassigned rights assessable?"

Section 1 of Article XIII of the California Constitution provides in part:

"Unless otherwise provided by this Constitution or the laws of the United States:

"(a) All property is taxable and shall be assessed at the same percentage of fair market value.... The value to which the percentage is applied, whether it be the fair market value or not, shall be known for property tax purposes as the full value.

"(b) All property so assessed shall be taxed in proportion to its full value."

Pursuant to this constitutional directive, the Legislature has defined "property" to include "all matters and things, real, personal, and mixed, capable of private ownership." (Section 103) Real property is defined to include: (a) The possession of, claim to, ownership of, or right to the possession of land. (Section 104(a))

From the many transfers and grants of slip rights, there is little doubt that they are capable of private ownership and thus constitute property under Section 103. It is clear, however, that they do not constitute tangible personal property. To be assessable therefore, the unassigned rights must be characterized as real property as defined above in Section 104(a).

Most of the unassigned rights in existence seem to have originated in 1975 at the time ALA purchased Lake Arrowhead from Boise. As part of that transaction, ALA granted back to Boise 500 slip rights. The term "slip right" was defined in the granting document as a "separate, distinct, permanent, and irrevocable right to construct, place, maintain, use and repair one slip on the [Lake]...." Although a slip right, as thus defined, may not constitute the actual possession of, claim to or ownership of land, it does seem clearly to be the right to the possession of land (i.e., a portion of the surface of Lake Arrowhead) within the meaning of Section 104(a).

Such irrevocable right to the limited use or enjoyment of the lake is an easement. An easement may be appurtenant (attached to particular land as the dominant tenement as are the assigned dock sites), or in gross (not attached to any particular land as the dominant tenement). Thus, although an easement in gross involves no dominant tenement (i.e., land that is benefitted by the use of other land), it is an interest in the land being used (in this case water) and therefore is as much an interest in real property as an easement appurtenant. Witkin, Summary of California Law, P. 2040-2042, §§ 340, 341, 8th Ed. 1973.

The unassigned rights here, not being appurtenant to particular land are therefore easements in gross. As indicated above, however, they are no less interests in real property than are the assigned rights which are easements appurtenant. To exercise an unassigned right, the owner need only apply to ALA to have a dock site assigned. The owner must, of course, be an owner of an improved lot in Arrowhead Woods and otherwise comply with the rules and regulations of ALA. The legal differences between assigned rights and unassigned rights are therefore negligible. It is my understanding that the assessability of an assigned right is not in dispute, nor should it be. A similar but probably less substantial right (the nonexclusive right to the use of a berth at an exempt harbor district) was held to constitute a possessory interest taxable as real property in Lucas v. Monterey County, 65 Cal. App. 3d 947.

As indicated above, the differences between assigned and unassigned rights are negligible. Thus, if the assigned rights are assessable as real property, as I believe they are, so must the unassigned rights be assessable as real property.

Since ALA granted the slip rights back to Boise when it purchased Lake Arrowhead, the rights were not included in the base year value of Lake Arrowhead and thus have never been assessed to ALA. Had ALA retained the rights, they would have undoubtedly been assessed to ALA through a higher base year value for Lake Arrowhead. The severance of the ownership of these rights from ALA should in no way have affected their status as real property.

Accordingly, it is my opinion, based on all of the foregoing, that the unassigned rights are assessable.

Your final question is: "Are the assigned rights assessable as part of the fee ownership of the real property or as a separate assessment?"

Section 405 provides:

"Assessee. (a) Annually, the assessor shall assess all the taxable property in his county, except state-assessed property, to the persons owning, claiming, possessing, or controlling it on the lien date.

"The assessor may assess the property on the secured roll to the person owning, claiming, possessing or controlling it for the ensuing fiscal year.

"(b) The assessor may assess all taxable property in his county on the unsecured roll jointly to both the lessee and lessor of such property.

"(c) Notices of assessment and tax bills relating to jointly assessed property on the unsecured roll shall be mailed to both the lessee and the lessor at their latest addresses known to the assessor."

Section 405 does not deal specifically with the assessment of easements. The only case even marginally concerned with the separate assessment of easements is McMorris v. Pagano, 63 Cal. App. 2d 446, which held that the law does not require an appurtenant easement to be separately assessed. By implication, it would follow that the law does not preclude the separate assessment of an appurtenant easement.

An easement holder is similar to a lessee in that each has the right to use real property owned by another. In Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, the California Supreme Court stated the general rule with respect to land held under an ordinary lease that, in absence of contrary statutory provisions, there is to be but one assessment of the entire estate in land which should include the value of both the estate for years and the remainder or reversion. The reason for this rule, said the court, is that generally the rent received by the lessor is equivalent to the value of the use

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of the land so that the lessor enjoys the entire beneficial interest in the premises including the leasehold as well as the fee. The court in Graciosa, however, held that since the rationale of the single assessment rule did not apply with respect to a lease of oil bearing lands, the right of the lessee to extract oil could be separately assessed.

The rationale of the single assessment rule does not apply in this case either. Although the owner of an assigned right pays dues to ALA, such dues do not constitute rent. The owner of an assigned right typically has purchased it from a third party. Moreover, although the dues or some part thereof are undoubtedly used to pay property taxes on Lake Arrowhead, which is owned by ALA, no part of the dues are used to pay property taxes attributable to the assigned rights because the assigned rights are not included in the assessment of Lake Arrowhead. It would therefore be inappropriate to assess the assigned rights to ALA.

By its language, Section 405 would at least permit, if not require, assessing the assigned rights to the grantees as persons "owning, claiming, possessing or controlling" taxable property. Tilden v. County of Orange, 89 Cal. App. 2d 586.

Whether the assigned rights are assessable separately or as part of the fee ownership of the appurtenant lot would be of no legal significance since they would be assessed to the same person in either case. However, since an assigned right apparently can be transferred independently of the lot to which it is appurtenant and since many of the assigned rights may, because of the timing of their transfer, have a different base year than the lot owned by the person enjoying the right, it would appear preferable to enroll the right and the lot separately.

I hope the foregoing has been responsive to your questions. If you have further questions regarding this matter, please let me know.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

EFE:fr

Enclosure

bc: Mr. Gordon P. Adelman
Mr. Robert H. Gustafson
Mr. Verne Walton
Legal Section