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Executive Director

January 21, 2009

**Re: Change in Ownership – Invalid Foreclosure of
Assignment No.: 08-109**

Dear Ms _____ :

This is in response to your letter of May 29, 2008, wherein you requested our opinion regarding the assessment of property that was erroneously foreclosed upon. As discussed below, it is our opinion that no change in ownership occurred at the time of the trustee's sale and that the base year value at the time of the purported sale should be reinstated, factored to its current assessable value and enrolled. The taxes paid on the value of the property based on the void transfer should be refunded.

We note that this opinion is being requested in connection with a dispute between the _____ County Assessor and certain taxpayers. All parties are aware that we will be issuing this opinion, have examined and/or provided the facts set forth herein, and were given an opportunity to provide additional information.

Facts

The property was purchased in 1989 by _____ A _____. The property was thereafter subject to a loan from J _____ to the A _____ (note). The note was secured by a deed of trust dated August 31, 1989. The A _____ paid the full sum of the note in September of 1994.

In 1997, E _____ commenced foreclosure proceedings against the property despite the fact that the _____ Note had been paid in full. The A _____ were never notified of the foreclosure proceedings. Pursuant to a non-judicial foreclosure, the property was sold to K _____ at a trustee's sale on January 21, 1998. The trustee's deed was recorded on June 27, 2001. Ms. K _____ subsequently transferred title to a third party, and other actions involving the property occurred that are not relevant to your inquiry.

In an action to quiet title, the court found¹ that the purported foreclosure that allegedly took place on January 21, 1998 was void and invalid and the trustee's deed recorded with the Recorder on June 27, 2001 was void *ab initio* and of no effect. The court restored title to the A as if the foreclosure never took place and as if title was in the name of the A and no other person from the date of their original purchase to the present.

Law

A void contract or agreement is without legal significance from the outset, whereas a voidable contract or agreement is effective until rescinded or voided. A transfer of property which is voidable results in a change of ownership, a reappraisal and taxes based on the new value. If the transfer is subsequently rescinded or voided, no refund of taxes would be due. The opposite is true when a transfer is void from the outset. In that case, the base year value at the time of the execution of the agreement should be reinstated, factored to its current assessable value and enrolled. The taxes paid on the value of the property based on the void transfer should be refunded. (Property Tax Annotation (Annotation) 220.0871.)

Section² 51.5 of the Revenue and Taxation Code provides in pertinent part:

"(a) Notwithstanding any other provision of the law, any error or omission in the determination of a base year value pursuant to paragraph (2) of subdivision (a) of Section 110.1, including the failure to establish that base year value, which does not involve the exercise of an assessor's judgment as to value, shall be corrected in any assessment year in which the error or omission is discovered.

"[¶]...[¶]"

"(d) If a correction authorized by subdivision (a) or (b) reduces the base year value, appropriate cancellations or refunds of tax shall be granted in accordance with this division. If the correction increases the base year value, appropriate escape assessments shall be imposed in accordance with this division.

"[¶]...[¶]"

Section 5096 provides, in pertinent part, that "[a]ny taxes paid before or after delinquency shall be refunded if they were:

"[¶]...[¶]"

"(b) Erroneously or illegally collected.

"(c) Illegally assessed or levied."

¹ A copy of the judgment was provided for our review.

² Section references are to the Revenue and Taxation Code unless otherwise indicated.

Analysis

The relevant issue is whether the sale of the property to Ms. K was void from the outset or merely voidable. In this case, there was an action to quiet title and a judgment issued by the County Superior Court on December 13, 2006. The judgment states that the foreclosure that purportedly took place in 1998 was invalid and the trustee's deed recorded in 2001 was void. The court based its decision on E's failure to comply with Civil Code section 2924f, which requires that a trustee give notice of a foreclosure before he can legally sell the property. The court concluded that the defect in notice rendered the foreclosure invalid and that the subsequent deed purporting to transfer the property to Ms. K was "void *ab initio* and of no effect."

In an April 9, 2008 email, the county assessor cited Annotation 220.0597, which discussed a voidable deed. In the situation on which that annotated letter is based, a court order stated that the deed was "void, of no force and effect, and a nullity," and the Board's Legal Department concluded that the court order was merely cancelling the deed and that the deed was fully operative until set aside, in part because the court did not specifically set forth a reason or rationale why the deed should be viewed as never having been made. The distinction in this case is that the court order declared the trustee's deed "void *ab initio*," which means void from the beginning, and stated that title was restored to the A "as if the foreclosure had never taken place and as if title was in the name of the [A] from the date of their original purchase to the present." Furthermore, the court stated that E's attempted foreclosure was "defective" because of E's failure to comply with the notice requirement. It is clear from the court's language that it did not consider the trustee's deed operative at any time, and the court expressly declared the rationale for its determination. It is our opinion that the court considered the trustee's deed void, and not merely voidable.

The court's conclusion that the trustee's deed was void is supported by case law. In *Little v. CFS Serv. Corp.*, (1987) 188 Cal.App.3d 1354, a trustee sold a property pursuant to a non-judicial foreclosure. The trustee did not give notice of the sale as required by Civil Code section 2924b, subdivision (b)(2). The court concluded that the sale of the property was void, rather than voidable. The court reasoned that the failure of notice was "directly prejudicial to individuals who could reasonably have relied on the statutory notice requirements for protection of their interests." (*Id.* at 1361.) Similarly, in this case the A were directly prejudiced by E's failure to fulfill the statutory notice requirements. The A were never notified that their property was undergoing foreclosure proceedings and they were never properly notified of the sale of their property. The court's decision that the contract was void *ab initio* protects the A's interest in their property.

The court's analysis is also consistent with the prior advice of the Board's Legal Department. In Annotation 220.0870 we opined that a deed was void because the person attempting to transfer the property did not have an interest in the property and had no right to transfer the property. In this case, E did not have the legal right to transfer the property because he failed to comply with the notice requirement of Civil Code section 2924f. Because the transferor had no right to transfer the property, the deed was void.

A new base year was established incorrectly in 1998 because no change in ownership occurred. The question of whether the property changed ownership is not a question of value, thus the incorrect base year value established in 1998 under the circumstances does not constitute

an error involving the exercise of the assessor's judgment as to value. Pursuant to section 51.5, subdivision (a), the Assessor has the authority to correct the incorrect base year value established in 1998. The base year value at the time of the purported sale should be reinstated, factored to its current assessable value, and enrolled.

Pursuant to section 51.5, subdivision (d), "appropriate ... refunds of tax" are then required to be granted "in accordance with this division," which refers to Division 1 of the Revenue and Taxation Code, regarding property taxation. In our view, the phrase "appropriate ... refunds of tax" means that under the terms of the applicable refund provisions, the facts of a given case are such that a refund is required to be paid.

In this case, taxes were levied and collected based on assessed values that were excessive as a matter of law, i.e., based on a reappraised value resulting from a "change in ownership" which the assessor thought at the time had occurred, but later discovered had not occurred. As a result, such taxes were "[e]rroneously or illegally collected" and "[i]llegally assessed or levied" pursuant to section 5096, subdivisions (b) and (c). In either of such events, section 5096 requires that such taxes shall be refunded, subject of course to the procedural requirements of section 5097, subdivisions (a)(1) and (2).

The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Daniel Paul

Daniel Paul
Tax Counsel

DP:cme

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cc: Honorable
County Assessor

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