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May 31, 2007

Honorable Dale Flippin
Nevada County Assessor
950 Maidu Avenue
Nevada City, CA 95959-8600

Attn:

Re: Change of Ownership – Transfer from Revocable Trust to Corporation

Dear Mr. Flippin:

This is in response to a January 19, 2007 fax from Ms. _____ of your office to Tax Counsel Mariam Baxley in which Ms. _____ asked whether the transfer of real property from a husband and wife's revocable trust to a corporation owned 51 percent by the wife and 49 percent by the husband qualifies for the proportional transfer exclusion from change in ownership provided by Revenue and Taxation Code¹ section 62, subdivision (a)(2). As discussed in more detail below, it is our opinion that the transfer will not qualify for the proportional transfer exclusion from change in ownership unless husband and wife can present "clear and convincing evidence" to establish that their interests in the corporation were community property.

Factual Background

In 2001, husband and wife jointly formed a revocable trust (trust) and named themselves the initial trustees. In April 2006, husband and wife executed a deed conveying their interest in real property located at _____ (property), which the deed indicated was held as "community property with right of survivorship" to themselves as the trustees of the trust. Later in October 2006, husband and wife, as trustees, transferred the property to a corporation in which 51 percent of the voting stock was held in wife's name and 49 percent of the voting stock was held in husband's name.

¹ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Discussion

Transfer to the Revocable Trust

Section 60 defines a change in ownership 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." Property Tax Rule² (Rule) 462.160, subdivision (a), provides the general rule that a change in ownership occurs when real property is transferred into a trust. Section 62, subdivision (d), provides that a change in ownership does not occur when a trustor, a trustor's spouse, or both transfer property into a revocable trust. (See also Rule 462.160, subdivision (b)(2).) Therefore, husband and wife's transfer of the property to their revocable trust in 2006 was not a change in ownership pursuant to section 62, subdivision (d).

Transfer of the Property to the Corporation

Section 61, subdivision (j), supplements section 60 and further provides that "[t]he transfer of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person" is a change in ownership, unless an exclusion from change in ownership applies. Therefore, husband and wife's October 2006 transfer of the property from the trust to their corporation constituted a change in ownership, unless an exclusion applies.

1. The Proportional Transfer Exclusion (Section 62, subd. (a)(2))

Section 62, subdivision (a)(2) provides an exclusion from change in ownership for "[a]ny transfer between an individual or individuals and a legal entity or between legal entities . . . that results solely in a change in the method of holding title to the real property and in which proportional ownership interests of the transferors and transferees, whether represented by stock, partnership interest, or otherwise, in each and every piece of real property transferred, remain the same after the transfer." Thus, husband and wife's October 2006 transfer would not constitute a change in ownership if husband and wife had the same proportional ownership interests in the property before and after the transfer to the corporation.

According to the April 2006 deed provided with Ms. _____'s fax, husband and wife held the property as community property prior to their transfer to the trust. Therefore, husband and wife each owned "present, existing, and *equal*" interests in the property prior to its transfer to the trust (Fam. Code, § 751), which are treated the same as the 50 percent interests of two joint tenants for change in ownership purposes. (See Letter to Assessors (LTA) 85/33 (March 5, 1985).)³

When the property was transferred to the trust, it retained its character as community property. This is because Family Code section 761 provides that community property transferred to a revocable trust during a marriage remains community property, "unless the trust instrument or instrument of transfer provides otherwise" and neither the trust instrument nor deed of transfer

² Property Tax Rules are promulgated under title 18 of the California Code of Regulations.

³ LTA 85/33 is available on the Board's Web site at: http://www.boe.ca.gov/proptaxes/pdf/lta85_33.pdf.

included with Ms. 's fax provide otherwise. Therefore, prior to the transfer to the corporation, husband and wife had equal, 50 percent interests in the property for change in ownership purposes.

Corporate shareholder records as of November 1, 2006, show that husband owned 49 percent of the corporation's voting stock and wife owned 51 percent of the corporation's voting stock after the property was transferred to the corporation. Evidence Code section 662 provides that "[t]he owner of legal title to property is presumed to be the owner of the full beneficial title" and that the presumption may only be rebutted by "clear and convincing" evidence. Therefore, if husband and wife cannot rebut the presumption, the transfer to the corporation caused their interests in the property, which were now represented by their interests in the corporation's voting stock, to change so that husband and wife no longer had equal interests in the property. (See Property Tax Annotation⁴ (Annot.) 220.0278 (C. May 14, 1993).) Since husband and wife's proportional interests in the property did not remain the same after the transfer to the corporation, the proportional transfer exclusion of section 62, subdivision (a)(2) does not apply. However, if husband and wife can establish by clear and convincing evidence that their voting shares in the corporation are held as community property, the proportional transfer exclusion of section 62, subdivision (a)(2) would apply because each spouse would be treated as owning one-half of the other spouse's shares per LTA 85/33, which would give husband and wife equal, 50 percent interests in the corporation after the transfer.

2. The Interspousal Transfer Exclusion (Section 63)

Section 63 provides an exclusion from change in ownership for interspousal transfers of property and ownership interests in legal entities. (See Rule 462.220.) However, the transfer to the corporation was not a transfer between spouses; it was a transfer to a legal entity so the exclusion provided by section 63 does not apply. (See Annot. 220.0278.)

Conclusion

Husband and wife's transfer of the property to the trust was not a change in ownership because section 62, subdivision (d), and Rule 462.160, subdivision (b)(2), applied. However, the subsequent transfer of the property to the corporation was a change in ownership pursuant to section 61, subdivision (j), unless husband and wife can provide clear and convincing evidence to establish that their voting shares in the corporation are community property. If the presumption that husband and wife own 49 percent and 51 percent of the corporation, respectively, is not rebutted, the proportional transfer exclusion of section 62, subdivision (a)(2) will not apply. Also, the interspousal transfer exclusion of section 63 does not apply because the transfer to the corporation was not a transfer between spouses.

⁴ Property tax annotations are summaries of the conclusions reached in selected legal rulings of State Board of Equalization counsel published in the State Board of Equalization's Property Tax Law Guide. (See Cal. Code Regs., tit. 18, § 5200 for more information regarding annotations.) Annot. 220.0278 is available on the Board's Web site at: http://www.boe.ca.gov/proptaxes/pdf/220_0278.pdf.

The views expressed in this letter are only advisory in nature. They represent the analysis of the Legal Department based on present law and the facts set forth herein. Therefore, they are not binding on any person or governmental entity.

Sincerely,

/s/ Daniel M. Paul

Daniel M. Paul
Tax Counsel

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