CASE NO.: S222329

IN THE SUPREME COURT OF CALIFORNIA

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926 NORTH ARDMORE AVENUE, LLC,
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

After a Decision of the Court of Appeal,
Second Appellate District, Division Seven,
on Appeal from the
Superior Court for the County of Los Angeles,
The Honorable Rita Miller, Judge Presiding
Trial Court Case No. BC 476670
Court of Appeal Case No. B248356

ANSWER BRIEF ON THE MERITS

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MISCELLANEOUS

I. Introduction

The issue presented is whether a change in ownership or control of a legal entity that directly or indirectly owns real property provides a basis for a county imposed documentary transfer tax. (Rev. & Tax. code section 11911.)

The sole asset of Plaintiff 926 North Ardmore Avenue, LLC, a California limited liability company ("Ardmore"), is a 21-unit apartment house. (Trial exhibit 43, p. 21.) Ardmore is wholly owned by BA Realty, a Delaware limited liability limited partnership ("BA Realty".) The partnership owns two other apartment houses, and a single family residence, each held in separately incorporated single asset LLCs. (Trial exhibit 43, pp. 20-23.) The majority of the ownership of BA Realty (approximately 90 percent) was transferred to new owners for consideration in January 2009. The new owners consummated the purchase by executing master transfer agreements, promissory notes, security agreements, and partial guarantees. (Trial exhibits 32 through 41.)

The County of Los Angeles ("County") imposes a documentary transfer tax ("DTT") "on each deed, instrument or writing by which any lands, tenements or other realty sold within the county of Los Angeles shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser [. . .]." (Ordinance 9443, enacted November 14, 1967, section 2; Clerk's Transcript ["CT"], vol. 4, p. 823.) The authority for the County's

ordinance was the Documentary Transfer Tax Act ("DTTA") enacted in 1967, which authorizes counties to enact a documentary transfer tax. The DTTA at the time of its passage included a provision authorizing the assessment of a documentary transfer tax upon the constructive termination of a partnership. (Rev. & Tax. Code § 11925; Ordinance 9443, sec. 4, 4 CT 823-824.)

The Los Angeles County Recorder gained access to the County's Assessor's change in ownership determinations made in the administration of the property tax law pursuant to statutory authority that became effective January 1, 2010. (Rev. & Tax. Code § 408(b); Stats. of 2009, ch. 622 ["SB 816"].) Upon learning of BA Realty's change in ownership, the County Recorder issued a demand for payment of the DTT.

Plaintiff paid the assessment and later sued for a refund of the tax. The County defended the assessment on the basis that BA Realty incurred a constructive termination authorizing the imposition of a transfer tax pursuant to § 11925. (7 CT 1532.) The assessment was upheld following a court trial, and the resulting judgment was affirmed by the Court of Appeal, Second Appellate District, Divison Seven.

Plaintiff contends that the form of the transaction by which the beneficial ownership of the Ardmore apartments were transferred, insulates the transfer from DTT liability. Plaintiff is mistaken. The County's DTT is not a recording tax, but rather is an excise tax that applies to the transfer of

realty for consideration. Pursuant to express statutory direction, the tax administrator examines transactions involving disregarded entities to determine whether realty has changed ownership. (Rev. & Tax. § 11925(b).)

The BA Realty transaction consisted of a transfer of more than 50% of its membership interest, resulting in the entity's constructive termination within the meaning of title 26, United States Code, §708. Plaintiff admits that the transaction constituted a change in ownership for property tax purposes. It also necessarily incurred a DTT liability. The DTT is imposed upon the transfer of rights in realty by means of a writing. Petitioner's payment of the tax was consistent with the County's ordinance, and the framework of the DTTA, particularly as illuminated by the case law and subsequent legislative enactments. Plaintiff's claim was appropriately denied, and we urge that the judgment be affirmed.

II. Factual Background

The facts presented arise from Beryl and Gloria Averbook's estate planning. Beryl Averbook, described by the trial court as the Averbook family patriarch was a physician and together with his spouse, Gloria, accumulated substantial real estate assets including three apartment houses, a residence, and a partial interest in a Las Vegas commercial project. (RT 319:25-320:10.) Prior to Beryl's death in April 15, 2007, the assets were

held in the Beryl and Gloria Averbook intervivos trust, described at trial as the Averbook Family Trust. (Reporter's Transcript ["RT"], p. 305:5-16.)

Following Beryl's death, an Administrative Trust was established, as were certain trusts defined in the Averbook Family Trust, including a Survivor's Trust, a Bypass Trust, and a Qualified Terminable Interest Property Trust. (Trial exhibit 1, para. 3.1, first sentence.)

The transfer of Plaintiff's property was the product of related steps. On August 5, 2008, BA Realty was formed. On August 8, 2008, Plaintiff Ardmore LLC was formed. On August 24, 2008, BA Realty became the sole member of Ardmore LLC. On September 15, 2008, title to the subject apartment house was conveyed to Ardmore LLC. (Trial exhibit 19.) On December 3, 2008, " the family trust and its subtrusts entered into an agreement for the distribution of the family trust assets. Under the agreement, the family trust distributed its interest in BA Realty among the subtrusts as follows: 65 percent to the Survivor's Trust, 24 percent to the Nonexempt Marital Trust, 10 percent to the Bypass Trust and 1 percent to the Exempt Marital Trust." (Slip opn., p. 3.)

On that same day, December 3, 2008, Gloria Averbook established two irrevocable trusts, one each for her sons Allen and Bruce. (Trial exhibits 29 and 30.) On January 8, 2009, the trustee of each of the son's irrevocable trusts entered into an agreement to purchase interests in BA

Realty from the Survivor's Trust and the two marital trusts according to the valuation established by an appraisal firm. (Trial exhibit 32.)

The sales agreements between the trusts and the trustees of the Averbook sons' respective irrevocable trusts were consummated on January 8, 2009, pursuant to the valuations established by the appraisal firm. The sale was memorialized with master transfer agreements, promissory notes, security agreements, and partial guarantees by the purchasers. (Trial exhibits 32 through 41.)

The sale was reported to the State Board of Equalization ("SBE"), but was not described as constituting a change in ownership for property tax purposes. (Trial exhibit 64.) The SBE later reported the transaction to the Los Angeles County Assessor as a reassessable event and the subject apartment house was subsequently reassessed. (Trial exhibit 65.) Plaintiff later admitted that the property owned by Ardmore changed ownership for property tax purposes. (7 CT 1543 [RFA 1].)

Following the reassessment of the subject apartment house for property tax purposes, the Los Angeles County Registrar-Recorder issued a notice and demand for payment of a DTT in the amount of $10,998.40. The tax was paid, with Plaintiff reporting to the tax administrator that the DTT levy was not due and payable on the basis of "Transfer of Realty held by a continuing partnership. (RTC [Rev. & Tax.] § 11925; LA CC [County Code] § 4.60.080)" (Trial exhibit 68.)

Plaintiff filed a claim for refund of the DTT, claiming that the County's tax was illegally assessed and collected because the DTT is "a tax on the sale of real property and not a tax on the sale of interests in entities, except for sales of interests in partnerships holding real property that result in the termination of the partnerships under IRC § 708. . . ." (Trial exhibit 69, p.2, para. 11.) Plaintiff asserts that the sale of membership interests in BA Realty was not a termination of the partnership under section 708, and that no reassessable event took place that was subject to the DTT. The claim was denied (Trial exhibit 71.) Plaintiff filed suit a month later. (1 CT 3.)

III. Procedural Background

Ardmore filed a Complaint for Refund of Documentary Transfer Tax alleging "[t]here was no transfer of an interest in Plaintiff [Ardmore] or [the property located at 926 North Ardmore] on November 8, 2009, or at any other time in 2009." (1 CT 6 [para. 18.].) Plaintiff alleged that it did not owe a DTT on the same basis as set forth in its claim, and that the collection of the DTT in circumstances other than where a partnership terminates under 26 USC § 708 is arbitrary and capricious. (1 CT 7 [para. 26.] Ardmore's complaint sought attorney's fees pursuant to CCP § 1021.5.

The County's witness, Monique Blakely, Assistant Registrar-Recorder, testified at trial. She stated that beginning in 2010, the County had started assessing a DTT whenever a legal entity had undergone a

change in ownership within the meaning of California property tax law. This was prompted by the amendment to Rev. & Tax. § 408 effective January 1, 2010, [SB 816], that allowed recorders to obtain information regarding legal entity transfers from the Assessor. (RT 436-437.)

The trial court issued an order at the conclusion of the hearing. The Court stated that the issue presented was whether "the County may treat plaintiff [. . .] as a "lower-tier entity" of the "higher-tier entity" that owns and controls it." (8 CT 1718.) The Court concluded that the County's reliance on section 11925 was appropriate and that granting a refund to Plaintiff would not comport with "equity and good conscience." (*Sprint Communications Co. v. State Board of Equalization* (1995) 40 Cal.App.4th 1254, 1259.) (8 CT 1720.) In addition, the Court observed that even if plaintiff had prevailed, the Court would not have been inclined to grant an award of attorney's fees because the subject transaction was unique, and the facts complex. (*Id.*)

The Court of Appeal, Second Appellate District, Divison Seven, affirmed the trial court's judgment. The Court applied a de novo standard of review, and determined that the case required an interpretation of the DTTA as applied to undisputed facts. (Slip opn., p. 8.)

The Court's opinion reviewed the statutory framework of the DTTA and property tax change in ownership statutes, and took particular note of the legislative history pertaining to the enactment of Rev. & Tax. § 408.4.

The court also reviewed the decisions in *Thrifty Corp. v. County of Los Angeles* (1989) 210 Cal.App.3d 881 and *McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612 and agreed with their conclusion. As stated in the *Ardmore* opinion:

> . . . [W]here, as here, the DTTA does not directly address whether a particular type of transaction qualifies as "realty sold" within the meaning of section 11911, courts may look to the definitions of "change in ownership" set forth in the property tax provisions. As explained in Thrifty, under principles of statutory construction, similar terms used "in the same code and governing ... analogous subject[s]" should generally "be defined consistently" unless " 'countervailing indications require otherwise.'
> (Slip Op. 22, citations omitted.)

The Court noted that the legislative history to § 11911 has numerous references to an intent to authorize a "tax on the transfer of real property", and that Rev. & Tax. § 60 defines the elements of a real property transfer. (Slip Opn., pp. 22-23.) The Court rejected Plaintiff's view that only federal authorities should be considered in interpreting § 11911. (Slip Opn., p. 26.) California decisional law has varied from federal laws that have expired

over 45 years ago. Also, the structure of the former federal scheme made a distinction between conveyances of realty and transfers of interests in capital stock for the purpose of avoiding double assessments. (Former 26 USC § 4383(b)(2); 1 CT 96.) California's DTTA assesses "realty" yet provides for the tax administrator to look through a legal entity to assess the substantive result of a transaction. (§ 11925.)

In addition, the federal authorities were found by the court to be of limited use because " limited liability companies did not exist in California until 1994, which is almost 30 years after the federal stamp tax expired." (Slip opn., p. 28.)

The legislative amendment to § 408, and the enactment of § 408.4 suggests that the " Legislature endorses the view that section 11911 permits counties and cities to impose a documentary tax on transfers of interests in legal entities that result in a "change of ownership" within the meaning of section 64." (Slip opn., p. 28.)

IV. Standard of Review

"In a suit for refund of tax, the burden of proof is on the taxpayer. [Citation.] The taxpayer must not only prove that the tax assessment is incorrect, but also he must produce evidence to establish the proper amount of the tax." (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal. App. 3d 739, 744.) A taxpayer may recover a refund only if he shows that

more has been exacted than in equity and good conscience should have been paid. (*Sprint Communications Co. v. State Bd. of Equalization* (1995) 40 Cal.App.4th 1254, 1259.)

Plaintiff is barred from a recovery on any ground not specified in its refund claim. (Rev. & Tax. code §§ 5142(a); 11934.)

V. Overview of the Documentary Transfer Tax Law

The DTT is an excise tax. An excise tax is triggered by some particular use of the property or privilege associated with ownership, but is distinct from a property tax imposed on the ownership of property. (*Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1088-1089.) The event that is the trigger for the DTT is the transfer of realty for consideration.

The DTT was authorized in California when the Legislature enacted Rev. & Tax. code § 11911 following the repeal of its predecessor, the federal documentary stamp tax, former 26 USC § 4361.

Federal stamp taxes have a long history. (See Alexander, "Financing Affordable Housing in Georgia: the Possibility of a Dedicated Revenue Source", 13 Ga. St. U.L. Rev. 363, 378, fn. 76.) A federal stamp tax on the conveyance of realty was first enacted in 1862 to fund the Civil War, and its text is reflected in § 11911. The Civil War-era tax applied to any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold

shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her or their direction, when the consideration or value exceeds one hundred dollars." (Act of July 1, 1862, 12 Stat. 432, 475 [section 94], 481-482 [37th Congress, chapter 119].)

The last federal stamp tax on the transfer of realty was enacted in 1932 (1 CT 201, section 725), and the rate of the tax was later increased. (2 CT 336, §113.82; 6 CT 1290.) The tax was repealed in 1965, but the repeal was delayed until January 1, 1968, to provide state and local jurisdictions the opportunity to enact their own documentary transfer taxes. (1 CT 104-105; 110.)

California enacted Rev. & Tax. code § 11911 effective January 1, 1968, authorizing counties to enact a documentary transfer tax. The County of Los Angeles enacted its DTT ordinance effective January 1, 1968. The County's ordinance was amended in 1984 to provide that state law governed its interpretation. (7 CT 1557.)

The Legislature amended section 11925 in 1999. (Stats. of 1999, ch. 75 [AB 1428]; 3 CT 600.) The purpose of the amendment was to clarify that section 11925 applied to limited liability companies (4 CT 724), and to state the Legislature's intention that a mere change in the form of holding title to real estate, including transfers into and out of legal entities, are not the basis for the assessment of a DTT where the owner's proportional

ownership remains the same before and after the transaction. (3 CT 621.) This provision is analogous to California's property tax law on the subject. (Rev. & Tax. § 62(a)(2).)

In 2009, the Legislature amended Rev. & Tax. § 408 to provide the County Recorder access to assessor records to determine whether a DTT is to be imposed. (Stats. of 2009, ch. 622, § 1; [SB 809].) The chaptered law included revised transfer reporting requirements, and authorization for local jurisdictions to establish a DTT administrative appeal process. The Legislature later added section 408.4 in 2011 to allow a city tax administrator access to Assessor records for the purpose of administering the DTTA. (Stats. of 2011, ch. 320.)

VI. Argument

A. The Economic Substance of Plaintiff's Transaction was a Transfer of Realty for Consideration by Means of a Writing Requiring the Payment of a DTT.

The DTT is an excise tax on the privilege of conveying real property by means of a written instrument. In contrast to a property tax, an excise tax is a tax "imposed on certain of the privileges of ownership, but not on all of them." (*Douglas Aircraft Company, Inc. v. Johnson* (1939) 13 Cal.2d 545, 551.) Unlike a property tax which is assessed against property on a fixed date, an excise tax is an event tax that results in liability ". . . only when the property is conveyed; the transferor and transferee become jointly

and severally liable for the tax upon delivery of the instrument of transfer. . . ." (*Huntington Beach v. Superior Court* (1978) 78 Cal.App.3d 333, 340.)

The DTT is not a recording fee, and applies even if the transferring document is not recorded. (*Berry v. Kavanagh* (6th Cir. 1943) 137 F.2d 574, 575-576; *Raccoon Development Inc. v. United States* (Ct.Cl. 1968) 391 F.2d 610, 613; *Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137, 145.)

The question posed is whether the writings entered into on January 2009, resulting in the change in ownership of BA Realty, reflected a sale of realty for consideration requiring the payment of the DTT. The tax is not imposed on the *subject matter* of lands, tenements, or other realty but on the *conveyance* by deed or other written instrument. (*Jones v. Magruder* (1941) 42 F.Supp. 193, 199.) The term conveyance is synonymous with transfer. (Civ. Code § 1039.) ". . . [I]n legal jargon a change in ownership, terminating rights and other relations in one entity and creating them in another, is the essence of 'transfer'. (*U.S. v. Niagara Hudson Power Corp.* (1944) 53 F.Supp. 796, citing *Hudson Power Corp. v. Hoey* (2d Cir. 1941) 117 F.2d 414, 416.) A conveyance is the voluntary transferring of a right or property. (*Thompson v. U.S.* (2011) 101 Fed. Cl. 416, 427, fn. 14; citing Black's Law Dictionary.)

In the facts presented here, BA Realty incurred a change in ownership. A legal requirement concurrent with the transfer was the

payment of a documentary transfer tax. Plaintiff denies that a tax is due, and the issue requires an interpretation of Revenue and Taxation Code section 11911, and its statutory context.

> Our fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]" (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Plaintiff contends that the BA Realty transaction did not result in a transfer of realty, but instead implicated only a transfer of ownership

interests in a legal entity. It argues that based upon statutory canons, 'a word takes meaning from the company that it keeps', and that the proper scope of section 11911 is limited to transactions that result in "a change to legal title in real property." (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944; Petitioner's Opening Brief, p. 29.) Plaintiff bolsters this argument with the observation that ownership interests in a legal entity are personal property, suggesting by inference that a transfer of personalty, such as membership interests in a partnership, cannot be the basis for a DTT, because it is not "land, tenements, or other realty." (Petitioner's Brief on the Merits, p. 24, fn. 6.)

There are multiple problems with this assertion. The meaning of the phrase "land, tenements, or other realty" has been long recognized as ambiguous. (*Jones v. Magruder* (1941) 42 F.Supp. 193, 199.) Plaintiff's approach, grounded on statutory canons, does not square with the DTT's application to long term leases. Under California law, a lease is a chattel real, and not realty. (*Auerbach v. AAB No.* 1 (2006) 39 Cal.4th 153, 162-163.) In addition, a lease does not convey title to real property. (*San Pedro etc. R.R. Co. v. Hamilton* (1911) 161 Cal. 610, 617, 621.)

Similarly, the predecessor to section 11911, 28 USC § 4361 was challenged on the basis that a "carved out [oil] production payment" was not a transfer of "land, tenements, or other realty", upon which a DTT is owed. (*Texaco v. U.S.* (1980, 5th Cir.) 624 F.2d 20.) Plaintiff's argument

was "that a carved-out production payment is an interest of limited duration that is excluded from the Treasury Regulation's definition of "realty." The "permanent" interests in land in this case [. . .] are Texaco's oil and gas leaseholds; although the assigned production payments have been carved out of these leaseholds, their duration must be viewed as "limited" because they are defined by dollar or production amounts." (*Id.*, p. 21-22.)

The Texaco Court disagreed, ruling that "the "bundle of rights" represented by a carved-out production payment closely approximates the bundle of rights represented by a mineral leasehold and that a carved-out production payment must be considered realty as well. (Id.) In sum, a court will look to the substance of a transaction to determine its DTT consequences. The emphasis in this area is on practicalities. (Cf., *Raybestos-Manhattan, Inc. v. US* (1935) 296 U.S. 60, 63 [". . . The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements."]

The pending case concerns the transfer of membership interests of a legal entity, and the question of whether a change in control of the entity triggers a DTT liability. Notwithstanding Plaintiff's resort to statutory canons, it is apparent that the Legislature intended partnerships, LLCs, and other entities to bear a DTT assessment upon transfer. (§ 11925.) Plaintiff says that the predecessor of this statute, 28 USC § 4383, was intended to provide a practical basis for applying the DTT to partnerships where

theoretically any transfer of a partnership interest could arguably be the basis for a DTT assessment pursuant to the aggregate theory of partnerships. (1 CT 149-150.)

The California Legislature provided in enacting Section 11925, however, for the reassessment of a partnership upon its constructive termination. Section 11925 was later amended in 1999, to make clear that it pertains to "any partnership or **other entity** treated as a partnership." The Legislature has expressly instructed that the constructive termination concept applies to both partnerships and LLCs.

Plaintiff's premise is that the scope of the DTT is limited to conveyances of title to realty. California law provides, however, that a partner does not co-own partnership property and has no interest in partnership property that can be transferred. (Corp. Code § 16501.) A partner's only transferable interest in the partnership is the right to receive distributions and this interest is personal property. (Corp. Code § 16502.) In light of these provisions, and the legislative direction in section 11925, it is apparent that the scope of the DTT extends to transactions beyond those directly resulting in the transfer of realty. The Legislature intended the scope of section 11911 to extend to property that could indirectly result in the transfer of the beneficial ownership of property, such as by a long term lease, or by the transfer of the membership interests in a partnership.

In the pending case, the subject real estate is owned by Plaintiff, and it in turn is wholly owned by BA Realty. BA Realty changed ownership on 2009. The sales price of the transaction was established by appraisal. (Exhibits 42 and 43.) The purchasers executed transfer agreements, took out purchase money financing, signed promissory notes, and entered into security agreements. The purchasers and also provided guaranties of repayment. In every outward appearance, the BA Realty transaction resulted in a transfer of the beneficial ownership of its assets. The beneficial ownership of the real estate owned by Plaintiff were included in the purchased assets. (See e.g., trial exhibit 43: ". . . The properties owned through BA Realty's 100% equity interest in 5118 De Longpre Avenue, LLC, 926 N. Ardmore Avenue, LLC, 450 S. La Fayette Park Place, LLC and 6519 Springpark Avenue, LLC are considered to be direct real estate interests because the intervening entities are essentially pass-through entities and BA Realty has full control of their underlying properties. . . ." (*Id.*, p. 20; the value of these assets were established by appraisal. (Exhibit 43, p. 3; Exhibit 42.)

The County's tax administrator reasonably decided to levy a DTT assessment in view of these facts.

B. The Court of Appeal Properly Considered Case Law, Legislative History, and Public Policy, in Deciding Plaintiff's Tax Refund Claim.

Once established that a statute is ambiguous, a court may look to legislative history and public policy to interpret its meaning. The phrase "lands, tenements, or other realty" is of uncertain meaning and requires interpretation.

In *Thrifty Corp. v. County of Los Angeles* (1989) 210 Cal.App.3d 881, it was determined that intent behind section 11911 was to "generally place leases outside of the scope of section 11911." (*Id.*, p. 884.) Former federal law, however, could be a basis for interpreting the Legislature's apparent intent. Former federal law provided that "a lease was subject to a transfer tax when it was of sufficient duration to approximate an interest such as an estate in fee simple or a life estate." (*Id.*, p. 885.)

The *Thrifty* Court turned to the California property tax change in ownership statutes as legislative guidance in defining the term of an assessable leasehold for purposes of the DTTA. The Court held that the phrase "realty sold" is sufficiently similar to the phrase "change in ownership" to warrant that "each phrase be defined to have the same meaning." The warrant for that determination is that each statute calls for a reassessment upon transfer. For the DTTA, the relevant trigger is a sale of realty ("realty sold"), while for property tax the reassessable event is a change in ownership. (Rev. & Tax. Code §§ 60; 67.) Apart from the

DTTA's requirement that a reassessable transfer take place for consideration, both tax schemes set as the criterion for reassessment, "acquisition value." (Cf., *Amador Valley Joint Unified Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 235.)

The *Thrifty* Court appropriately considered decisional law and public policy in determining that long-term leases are subject to the DTTA. It cites affirmatively the observation in *Gottschalk* that if long-term leases were not subject to reassessment, a large loophole would be created and that this would likely be contrary to the electorate's intent. (*E. Gottschalk v. County of Merced* (1987) 196 Cal.App.3d 1378, 1385.)

Unlike in *Thrifty*, where the issue concerned a leasehold – a property interest not at all addressed in the DTTA – the pending issue concerns a transfer of partnership interests. The DTTA expressly provides for a reassessment upon the constructive termination of a partnership. (§ 11925.) The *Ardmore* Court looked to analogous property tax law for guidance in applying the DTTA to a transfer of interests in a legal entity. It held:

> . . . the history of the DTTA and the overall structure of the Revenue and Taxation Code indicate the Legislature generally intended the documentary tax to apply when there has been a sale, memorialized in writing, that results in a transfer of realty. Interpreting the term "realty sold" to

include the "change of ownership" provisions applicable to legal entities promotes this purpose by capturing most forms of legal entity transfers that result in a change in the beneficial ownership of the property.

(Slip opn., p. 22.)

The Court reasonably determined than an administrator of the DTT may look to property tax change in ownership provisions as guidance in applying the DTTA to legal entity transfers. Long standing decisional law has stood for the point that the property tax law is analogous to the DTTA. (*Thrifty*, *supra*, a grant of a leasehold of more that 35 years duration is deemed realty for the purposes of the DTTA. [Compare Civil Code section 765, with Rev. & Tax. Code section 104].)

The fact that the Legislature has acquiesced in the *Thrifty* decision and indeed has provided tax administrators with enforcement tools to identify legal entity change in ownership transactions is a strong indication that it intended such transfers reflecting a change in ownership of realty to be assessed. If defies logic that the Legislature would provide DTT tax administrators the means to identify unrecorded legal entity transactions were its intention that such transactions not be subject to a documentary transfer tax assessment.

The *Ardmore* Court further notes that public policy considerations support its holding:

> Ardmore's proposed interpretation would, however, work at cross-purposes, effectively permitting property owners to avoid the transfer tax by conveying their real property to a wholly owned, single-entity LLC established for the sole purpose of holding the property, and then selling the LLC (rather than the property) to a third party. Although Ardmore has thoroughly briefed this case, it has never identified any policy reason that would support imposition of a transfer tax when realty is transferred through a direct sale, but not when realty is transferred through the sale of an LLC established solely to hold the realty. We believe the Legislature has signaled—both through the acts it has taken and the acts it has not—that the transfer tax should be interpreted to apply under both circumstances, and in any other circumstance where a transfer in legal entity interests results in a change of ownership within the meaning section 64, subject to the express limitations set forth in section 11925.
>
> (Slip opn., p. 31.)

The Court's consideration of public policy is particularly appropriate in the context of a tax statute of first impression:

> . . . when statutory language is "susceptible to more than one reasonable interpretation" (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519), it is regarded as ambiguous and there is no plain meaning. Where more than one reasonable interpretation is possible, courts must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute. (*Honchariw v. County of Stanislaus* [(2011) 200 Cal.App.4th 1066] at p. 1073.)
>
> Courts determine the apparent intent of the Legislature by reading the ambiguous language in light of the statutory scheme rather than reading it in isolation. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In other words, the ambiguous language must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Ibid.*) In addition, courts may determine the apparent intent of the Legislature by evaluating a variety of extrinsic aids, including the ostensible

objects to be achieved by the statute, the evils to be remedied, the statute's legislative history, and public policy. (*Honchariw v. County of Stanislaus*, *supra*, 200 Cal.App.4th at p. 1073.)

The DTTA's "realty sold", and Proposition 13's "change in ownership" are substantially similar concepts. It is reasonable to conclude that the Legislature intended that they be given the same construction. (*Estate of Griswold* (2001) 25 Cal. 4th 904, 915-916.) The DTTA provides for the assessment of a DTT upon "realty sold." It is apparent that the Legislature intended to provide tax administrators the tools to assess DTT to unrecorded legal entity changes in ownership, and "all powers and duties incidental and necessary to make such legislation effective are included by implication." (*Clay v. City of Los Angeles* (1971) 21 Cal.App.3d 577, 585 [citing Sutherland, Statutory Construction, section 5402].)

C. Section 11925 provides an Alternative Basis for Liability

Plaintiff argues that this Court should not reach the issue of whether § 11925 justifies the challenged assessment, implicitly maintaining that the application of this section is an issue not fairly included within the question before the Court. (Cal. Rule of Court 8.516(a)(1).) As referenced above, statutory context is a fair consideration in interpreting the DTTA. The question before the Court is whether a DTT may be imposed with regard to

a ". . . change in ownership or control of a legal entity that directly or indirectly holds title to real property." Section 11925 is certainly a relevant consideration in analyzing the DTTA, and provides an alternative basis for affirming the judgment. (*D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 19.)

It is a record fact in the pending matter that Petitioner was a disregarded entity for income tax purposes and that the beneficial ownership of Petitioner's apartment house was reflected in the ownership of the profits and capital of BA Realty. Approximately ninety percent of that ownership transferred on or about January 8, 2009, and it is appropriate to look to Rev. & Tax. code § 11925, and analogous provisions of the California property tax law for guidance in determining Petitioner's liability for a DTT assessment.

It has long been the law that a documentary transfer tax is owed on a transfer regardless of whether the document evidencing the transfer is recorded, and this principle has been relied on by the Los Angeles County Registrar-Recorder. (6 CT 1224 [legal advice rendered in 1971 to the County Recorder "The County may collect the tax owing on unrecorded documents by any method which is reasonable and adminstratively workable."]) (See also *Endler v. United States* (D.N.J. 1953) 110 F.Supp. 945, 948; *Raccoon Development Inc. v. United States* (Ct.Cl. 1968) 391 F.2d 610, 613.)

Petitioner asserts that even if a reassessment of BA Realty were required pursuant to section 11925(b), that a reassessment would not then reach to the realty assets owned by BA Realty that are held in the form of an LLC. It argues that though Petitioner is a disregarded entity for income tax purposes, it should be recognized as an entity distinct from BA Realty for excise tax purposes, citing 26 CFR § 301.7701-2 (c) (iv) and (v). Petitioner's challenge is not persuasive. The sections it relies on pertain to federal tax obligations, not to that of a state excise tax.

Instead, relying on property tax law for guidance, if a change in ownership of a legal entity does occur, then ". . . all of the property owned directly or indirectly by the acquired legal entity is deemed to have undergone a change in ownership." (Cal. Code of Regs., title 18, § 462.180(d)(1)(C).)

The same result is suggested in the regulation interpreting section 708, "if the sale or exchange of an interest in a partnership (upper-tier partnership) that holds an interest in another partnership (lower-tier partnership) results in a termination of the upper-tier partnership, the upper-tier partnership is treated as exchanging its entire interest in the capital and profits of the lower-tier partnership." (Title 26, Code of Federal Regulations § 1.708-1 (b) (2).) This rule applies with equal effect to single member LLCs for purposes of the Internal Revenue Code. (McKee, Nelson, Whitmire, 1 Federal Taxation of Partnerships and Partners (4th ed.

2007) § 3.06[3], p. 3-78; RT 38:6-7.) Petitioner, a disregarded entity, is considered a branch of BA Realty and is also subject to DTT reassessment upon BA Realty's change in ownership.

VII. Conclusion

The DTT is an excise tax on the privilege of transferring ownership of real property. Plaintiff was a single member entity that was formed for the purpose of facilitating a change in ownership of its 21-unit apartment house. The beneficial ownership of the underlying property changed hands. Plaintiff conceded as much when it admitted that its property underwent a change in ownership for property tax purposes.

The considerations underlying Prop 13 change in ownership analysis are analogous to those pertaining to the DTT. (Please compare *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal. 3d 84, 88, fn. 3 [reference to "separate entity theory"], with 1 CT 150 [reference to "separate entity theory"].) It is reasonable to look to California law in interpreting the DTT. Reassessment of Plaintiff's property is consistent with the express direction of the DTTA as it pertains to property held in the form of a partnership (or other disregarded entity), and this result is consistent with the transaction's treatment for property tax purposes. (Cf., 18 Cal Code of Regs., § 482.180(d)(1).)

Respondent County of Los Angeles respectfully urges that the judgment herein be affirmed.

DATED: July 6, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

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DATED: July 6, 2015

Respectfully submitted,

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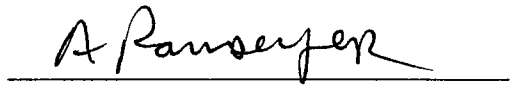
By 
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DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Baron Kishimoto states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on July 6, 2015, I served the attached

ANSWER BRIEF ON THE MERITS

upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as stated below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 6, 2015, at Los Angeles, California.

Baron Kishimoto