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A PRACTICAL GUIDE TO TRANSFER TAXES IN CALIFORNIA

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I. INTRODUCTION

California, like nearly all states, requires the payment of a tax on most instruments transferring interests in real property. The amount of the tax, and the rules and practices regarding such taxes, vary greatly across the state. As a consequence, a clear understanding of the California transfer tax framework is required to avoid unnecessary confusion, delay and expense in closing California real property transactions.

This article will briefly outline the transfer tax system in California, provide a summary of the major exemptions to the tax, and discuss certain common practices relating to the California Documentary Transfer Tax Act, hereafter referred to as the "Transfer Tax Act".

II. HISTORICAL CONTEXT

In order to make sense of the seemingly schizophrenic treatment of transfer taxes in California, practitioners need to appreciate the political history of how transfer taxes were authorized, expanded and potentially limited in California.

A. Enactment.

In 1967, the California legislature enacted the Transfer Tax Act¹ to replace the Federal Stamp Act² on conveyances, which expired on the same date. The Transfer Tax Act allows a county, a city, or both a county and a city, to impose a tax upon the transfer or conveyance of real property. Counties were authorized to impose a tax of \$0.55 per \$500 (commonly referred to as being \$1.10 per \$1,000) based upon the consideration or value of the property transferred (exclusive of the amount of any lien or encumbrance remaining on the property at the time of the transfer).³ Cities were also authorized to impose a similar tax at a rate equal to one-half the rate imposed by the county in which the city is located.⁴ All counties, and virtually all cities, quickly acted upon the authorizing legislation and enacted their own transfer tax ordinances. Of note, though unlikely to occur, the Transfer Tax Act contains a provision that should the Congress of the United States impose a tax on transfers of real property after July 1, 1968—the effective date of the Transfer Tax Act—the act will have no operative effect on and after the first day of the fiscal year which follows the date such federal tax is imposed.⁵

B. Expansion.

In 1978, in what was hailed nationwide as a "taxpayer revolt," California voters approved an amendment to the California Constitution⁶, Proposition 13, which curtailed state and local gov-

ernment's ability to impose ever-increasing property taxes. Proposition 13 also limited, and in some cases reduced, existing property tax rates.⁷ As a response to the passage of Proposition 13 and the resultant significant reduction in local tax revenues generated through property taxes,⁸ cities throughout the state became creative in finding new sources of revenue.⁹ One major revenue source for charter cities became increased transfer taxes.

Charter cities, unlike general law cities, have the ability to levy taxes without the need for specific state authorizing legislation. Although increasing property taxes after passage of Proposition 13 was no longer an option to increase local revenues, increasing transfer tax rates became a significant means of revenue generation for charter cities since transfer taxes are not considered property taxes.

Property taxes are imposed on the ownership of real property. They recur annually on a fixed date, and no personal liability generally arises from their nonpayment. The sole security for the taxes is the property itself. In contrast, transfer taxes are imposed on the privilege of exercising one of the incidents of property ownership—its conveyance. Liability for a transfer tax arises only when property is conveyed, i.e., upon delivery of the documents transferring title.¹⁰ The property is typically not security for the tax, and liability for payment of the transfer tax is, in most instances, the responsibility of the transferor.¹¹

Seizing upon this additional revenue opportunity, 31 of the state's 108 chartered cities enacted their own transfer tax ordinances, in some cases imposing strikingly greater tax rates than contemplated in the Transfer Tax Act. There is a vast range of transfer tax rates, with rates as low as \$1.10 per \$1,000, (for example, Cloverdale, Windsor, and Woodland), to \$15.00 per \$1,000, (Berkeley and Oakland).

C. Possible Limitation.

Not surprisingly, Proposition 13 spawned considerable litigation¹², legislative and referendum activity¹³ regarding the nature and scope of state and local governments' remaining taxing authority. Through it all, California courts consistently held that transfer taxes, whether they were "special taxes", "general taxes", or "excise taxes", were not "property taxes", and new or increased transfer taxes were not prohibited by Proposition 13, or the subsequently enacted Proposition 62.

In a further effort to plug perceived loopholes regarding tax limitations, California voters in 1996 passed Proposition 218,¹⁴ which on its face appears to limit taxes upon any person that are imposed as an incident of property ownership. Although no reported court case has yet directly addressed the application of Proposition 218 to transfer taxes, there is significant concern among local governments regarding

its applicability.¹⁵ Such concerns, and the risk of bad publicity and near certain litigation have effectively prevented local governments from seeking new or increased transfer taxes without compliance with the two-thirds vote requirement imposed under Proposition 218.

III. APPLICATION

Although administered locally, the Transfer Tax Act authorizes the imposition of the tax and sets forth the basic framework for determination and collection of the tax.¹⁶ CA Rev & Tax Code § 11911 authorizes counties and cities to impose a transfer tax on:

“...each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or her direction, when the value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale) exceeds one hundred dollars...”

A. Transfer Tax Applies Generally to All Transfers.

The scope of the Transfer Tax Act is extremely broad. The tax is applicable to virtually every interest in real property which can be created and transferred, including undivided fractional and temporal interests.¹⁷ In addition to the classic conveyance of fee title, transfer tax is imposed on the creation or transfer of all of the following: (i) tenancy in common interests, (ii) joint tenancy interests, (iii) community property interests,¹⁸ (iv) life estates, (v) remainder interests, (vi) long-term leases¹⁹, (vii) non-temporary easements²⁰, and (viii) mobile homes installed on permanent foundations.²¹

Contrary to popular misconception, transfer tax is due and payable on transfers irrespective of whether the transfer instrument is submitted for recording in the county real estate records. In most jurisdictions, the tax is due when delivery of the instrument conveying title occurs and delinquent if not paid when the instrument is submitted for recordation. Recordation is merely a convenient mechanism for the collection of the tax. In fact, payment of the applicable transfer tax is required as a condition to recordation of a transfer instrument pursuant to CA Rev & Tax Code §11933.

Transfer tax may even be payable in the case of transfer of partnership or other equity interests, which interests themselves are personal property, not real property. For instance, where sufficient interests currently or cumulatively in the partnership, or other entity treated as a partnership for federal income tax purposes, have transferred to cause the partnership or other entity to be deemed to have been terminated for federal income tax purposes, under the Transfer Tax Act the partnership or other entity is treated as having executed an instrument transferring the real property of the partnership or other entity. Under such circumstances, transfer tax will be payable based upon the fair market value of the real property owned by the partnership or other entity.²² In practice, however, transfer tax is rarely if ever actually paid under such circumstances as no change in record title is required and no instruments are recorded disclosing the transfer of interests in the partnership or other entity.

B. Determination of the Amount of the Transfer Tax.

Assuming transfer tax is payable with regard to a particular transaction, determination of the amount of the tax due can at times be challenging. Many transactions involve both real property and personal property and require that an allocation be made before the transfer tax can be computed. Some transactions involve non-cash consideration,

such as exchanges or contributions to investment entities, and these require a determination of the value of the real property transferred in order to compute the applicable transfer tax. Other transactions involving transfer of temporal interests, such as life estates or remainder interests, may require actuarial modeling of the property's value at various points in time in order to determine the applicable transfer tax. Finally, some transfers may be partially exempt and partially taxable such as trustee's deeds or deeds in lieu of foreclosure. Generally speaking, the applicable transfer tax rate will be applied against the greater of the consideration actually paid for the interest transferred or the fair market value of the interest transferred as of the date of transfer.

The amount of the transfer tax and the method of computation of the transfer tax, for a particular transaction may vary dramatically from location to location. As noted above, many charter cities have established transfer tax rates in excess of the \$1.10 per \$1,000 county tax rate. In addition, many charter cities disallow the state statute's offset for the value of liens or encumbrances remaining at the time of transfer and/or limit or expand the type of available exemptions.

Consider, for example, a substantially identical \$10,000,000 sale of a property subject to \$9,000,000 in continuing liens in the cities of San Diego, San Francisco and Oakland. In San Diego, the applicable tax rate is the basic \$1.10 per \$1,000 with a deduction for continuing liens. This results in a transfer tax of \$1,100. In San Francisco, the applicable tax rate is \$7.50 per \$1,000, without deduction for continuing liens, resulting in a transfer tax of \$75,000. Finally, in Oakland, the applicable tax rate is \$1.10 per \$1,000 for Alameda County, with a deduction for continuing liens, and \$15.00 per \$1,000 for Oakland, without a deduction for continuing liens, resulting in a total transfer tax of \$151,100.

C. Process.

The Revenue and Taxation Code provides that payment of the transfer tax is a condition precedent to the completion of recording.²³ Any document subject to the tax which is “submitted for recordation” must bear on its face the amount of tax due²⁴ and, if the local ordinance requires it, the tax roll parcel number.²⁵ Upon request, however, the amount of the transfer tax can be left off the recorded instrument and separately submitted. Information regarding the amount of tax paid will still be available to the public at the local government office.²⁶ As noted above, the party who is transferring or conveying title to the property is generally responsible for the payment of the tax.²⁷

D. Interpretation.

The Transfer Tax Act is remarkably concise by legislative standards. It is comprised of barely 6 pages of text split into only 20 sections and contains less than 2250 words. Virtually none of the statute's operative terms are defined. In addition, there is very little reported case law defining the terms utilized in the Transfer Tax Act.

However, because the Transfer Tax Act was patterned after the former federal act and employs virtually identical language as the federal act, the courts have consistently held that the California legislature intended to perpetuate the federal administrative interpretations of the federal act.²⁸ In addition, the courts have frequently looked to the definitions and interpretations applicable to assessment and reassessment of property taxes to aid in the interpretation of the Transfer Tax Act.

E. Enforcement.

Although the Transfer Tax Act contains a provision that requires payment of the tax when a document is submitted for recording,²⁹ it has no special provisions for enforcing payment on unpaid taxes. Under the

Act, the county or general law city would only have a right to bring an action against the party who signed the document, or for whose benefit the document was signed, to enforce payment of the tax.³⁰ Practitioners should take note, however, that the cities of Alameda, Albany, Oakland, San Leandro, Richmond, San Rafael, San Francisco, and San Jose all impose a lien on the property that was the subject of the transfer. Lastly, the cities of Redondo Beach, the City of Sacramento, San Jose, Mountain View and Vallejo hold both the transferor and the transferee jointly and severally liable for any unpaid taxes.³¹

IV. EXEMPTIONS

Although extremely broad in scope, the Transfer Tax Act does provide for a number of exemptions. The exemptions should be kept in mind in structuring transactions so as to avoid or minimize the transfer taxes incurred. The exemptions provided in the Transfer Tax Act are described below.³²

A. Instruments to Secure Debt.

Pursuant to CA Rev & Tax Code § 11921, transfer tax need not be paid with respect to an instrument given to secure a debt. The exemption includes deeds of trust, mortgages, reverse mortgages, and installment sales contracts.³³ The exemption, however, does not ordinarily apply to “debt-like” transactions such as sale-leasebacks and synthetic leases. The disqualifying feature in each of these transactions is the deed from the property owner to the entity providing the financing. Also, in many loan transactions, the lender may require that title to the property be transferred from the existing owner(s)—a trust, tenancy in common or existing entity—to either an individual or a new special purpose, allegedly bankruptcy remote entity. Care should be taken in making such transfers to assure compliance with one or more of the applicable transfer tax exemptions so as to avoid inadvertent incurrence of transfer tax.

B. Transfers to Governmental Entities.

CA Rev & Tax Code § 11922 provides an exemption for any transfer or conveyance to any agency or instrumentality of the United States or any state or any political subdivision of either. The exemption has been broadly construed to include transfers to cities,³⁴ county water districts,³⁵ the public retirement systems³⁶, and federal agencies.³⁷

Several other very narrow and infrequently used exemptions are provided for conveyances or transfers made (i) to implement an SEC order relating to the Public Utility Holding Company Act of 1935³⁸, (ii) to a purchaser from a governmental entity where the purchaser agrees to immediately reconvey the property to a governmental entity³⁹, and (iii) to a non-profit corporation which provided financing for the acquisition, construction or improvement of the property.⁴⁰

C. Transfers Incident to Reorganization or Adjustment.

Under CA Rev & Tax Code § 11923, transfer taxes are not payable with respect to an instrument of conveyance or transfer made to effectuate a plan of reorganization or adjustment (i) confirmed under the Federal Bankruptcy Act, (ii) approved in an equity receivership proceeding in a court involving a railroad corporation,⁴¹ (iii) approved in an equity receivership proceeding in a court involving a corporation;⁴² or (iv) where a mere change in identity, form or place of organization is effected. The exemption under section 11923 is only applicable if the instrument of conveyance or transfer is made, delivered or recorded within five years of the date of the confirmation, approval or change.

D. Transfers of Interests in a Continuing Partnership or Similarly Treated Entity.

As noted above, transfers of interests in partnerships or other entities treated as partnerships for federal tax purposes are exempted from transfer tax pursuant to CA Rev & Tax Code § 11925 (a) provided that the partnership or other entity is deemed to be continuing under the Internal Revenue Code. If, however, the transfer of partnership or other interests causes a termination of the partnership or other entity under the Internal Revenue Code, then pursuant to CA Rev & Tax Code § 11925 (b) all real property held by the partnership or other entity is treated as having been conveyed by the terminated entity to the new entity at the property's then fair market value, and the applicable transfer tax will be due. Also, and as noted above, actual payment of transfer tax with regard to transfers of entity interests is exceedingly rare as generally no instruments are recorded that would trigger the collection of transfer tax.

E. Changes in the Method of Holding Title Without a Change in Proportional Ownership.

Pursuant to CA Rev & Tax Code § 11925 (d), transfer tax is not payable with respect to any transfer which results merely in a change in the method of holding title to real property and in which the proportional ownership interests in the real property remain the same immediately before and after the transfer. This exemption is one of the broadest provided and allows for many advantageous transfers to be accomplished without payment of transfer tax. This exemption is frequently utilized to accomplish lender required transfers to SPE's and to and from revocable trusts. The exemption is also readily applicable in the context of multi-tiered entities where the transferor and the transferee are indirectly but ultimately commonly owned.

For example, Corporation X proposes to transfer Blackacre to its affiliate Corporation Y. Corporation X is owned 50% by Ima Investor and 50% by Corporation Z. Corporation Z is owned 100% by Ima Investor. Ima Investor also owns 100% of Corporation Y. The transfer from Corporation X to Corporation Y will be exempt from transfer tax under CA Rev & Tax Code § 11925 (d) as both transferor and transferee are indirectly but ultimately owned 100% by Ima Investor. Thus, there has been merely a change in the method of holding title to the real property and no proportional change in the ultimate ownership interest in the property.⁴³

F. Transfer Incident to Foreclosure Sale or Deed in Lieu.

CA Rev & Tax Code § 11926 provides that any conveyance or transfer from the mortgagor or trustor to the mortgagee or beneficiary as a result of foreclosure or in lieu of foreclosure will be exempt from transfer tax to the extent that the amount bid does not exceed the unpaid debt, inclusive of interests and costs. If, however, the amount bid by the mortgagee or beneficiary at the foreclosure sale or the value of the property transferred to the mortgagee or beneficiary in lieu of foreclosure exceeds the amount owed to the lender, transfer tax will be payable on the overage. In the case of a third party purchaser at a foreclosure sale, in assessing the transfer tax, the County transfer tax is based upon the purchase price paid at the trustee's sale, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale. The amount of the unpaid debt has no bearing on the amount of the transfer tax.⁴⁴

For example, if a \$1,000,000 deed of trust is foreclosed, with the holder of the note being the successful bidder by entering a \$500,000 credit bid, no transfer tax will be due if the unpaid debt, plus costs

and expenses equaled or exceeded the credit bid. If, however, the successful \$500,000 bid is made by a third party purchaser at the foreclosure sale, transfer tax would be due on the \$500,000 bid amount.

Deeds in lieu often raise a unique set of issues. Frequently, the deed in lieu transaction is to be implemented prior to commencement of foreclosure proceedings (i.e., no notice of default and election to sell under deed of trust or action for judicial foreclosure having been recorded or filed) and styled to look like a traditional purchase and sale transaction. Although potentially of benefit to the debtor for tax purposes, recorders are increasingly questioning whether such deed in lieu transactions qualify for exemption under CA Rev & Tax Code § 11926.

Deeds in lieu are often structured as a transfer of title to the property to a wholly owned subsidiary or commonly owned affiliate of the mortgagee or beneficiary subject to the existing mortgage or deed of trust. The borrower is then released from potential personal liability for the unpaid debt. While achieving the goal of preserving the lien of the mortgage or deed of trust for future foreclosure, if necessary, the benefit of the exemption from transfer tax may arguably be lost as the property is not being transferred to the entity which is the lender, as required by section 11926.

The authors' experience has been that recorder's offices throughout the state do not take a uniform approach to application of the section 11926 exemption to deeds in lieu. Many recorder's offices will accept an unrecorded written explanation of the transaction and will provide an advance determination of the applicability of the exemption. Also, in jurisdictions where deduction of existing liens and encumbrances from value is permitted, the otherwise applicable transfer tax may usually be avoided by leaving the mortgage or deed of trust, which secures an obligation greater than the fair market value of the property, in place upon consummation of the deed in lieu transaction.

G. Transfer Incident to Dissolution or Similar Order.

Under CA Rev & Tax Code § 11927, transfer tax is not required to be paid with respect to an instrument transferring or allocating community, quasi-community, or quasi-marital property assets between spouses for the purpose of effecting a division of property that is required by a judgment decreeing a dissolution of the marriage, a legal separation or a judgment of nullity, or pursuant to an agreement in contemplation of a dissolution, separation or annulment. In order to qualify for the exemption, the instrument must contain a recital, signed by either spouse, stating that the instrument is entitled to the exemption.⁴⁵

Practitioners should take note that Oakland and San Francisco provide exemptions for transfers in dissolution proceedings between Domestic Partners. Oakland requires that the parties submit several documents in support of the exemption. San Francisco requires little more than the filing of a Declaration of Domestic Partnership, or similar government document, and a written recital, signed by either partner, stating they are entitled to the exemption.

H. Transfers by Gift or Death.

Pursuant to CA Rev & Tax Code § 11930, no transfer tax is required to be paid in connection with a deed or other instrument that purports to transfer real property or any interest therein, if the transfer is an inter vivos gift or by reason of the death of any person, the property being transferred outright to, or in trust for the benefit of, any person or entity. This broad exemption covers most tradition-

al familial and charitable gifts. Transfer tax, however, will be payable with regard to partial gift transactions where a property is transferred at a price less than fair market value with the transfer tax being assessed on the consideration paid.

I. Other Exempted Transfers.

(1) Leases.

As interests in realty, leases come within the broad purview of the Transfer Tax Act and no express exemption is provided. Recognizing that short term leases do not constitute "ownership" and are more of a "temporary right of possession" of real property, the court in *Thrifty Corp. v. County of Los Angeles*⁴⁶ looked to the real property tax definition of "change in ownership"⁴⁷ in making its determination that the creation or transfer of a leasehold interest in real property for a period of less than 35 years is not subject to transfer tax.⁴⁸ The 35 year period is determined at any point in time by including the remaining primary term of the lease and all renewal options. For example, the creation of a 25 year lease with 3 renewal options of 5 years each would be subject to transfer tax as the total potential term of the lease is 40 years.⁴⁹ However, if the lease were to be assigned after 10 years, no transfer tax would be due as only 30 years remained in the potential lease term.⁵⁰

(2) Short Term Easements.

As noted above, easements are generally within the scope of the Transfer Tax Act and are not expressly exempted. However, many easements are by their nature non-permanent and short-lived. Based upon interpretation of the former federal act, temporary easements are treated as exempt from transfer tax.⁵¹ Unfortunately, no bright-line duration test has developed. It is clear, however, that perpetual easements, easements for life and easements for fixed periods which can be renewed by the easement holder will trigger payment of transfer tax.

(3) Conveyances by the Court Order.

Certain conveyances of real property effectuated by court order or decree are exempt from transfer tax. In the case of condemnation, in *People ex rel. Department of Public Works v. County of Santa Clara*,⁵² the court held that final orders of condemnation are not transfers or conveyances under the Transfer Tax Act since the court acts in the exercise of a judicial function.⁵³ The court, however, specifically distinguished a transfer made under threat of condemnation which would be subject to transfer tax. In that instance, the court held, the Condemnee is free to negotiate the inclusion of the transfer tax in the negotiated settlement.⁵⁴ Query if a similar rationale would exempt other judicial transfers, such as an order of partition?

(4) Certain Mobilehomes.

Pursuant to CA Rev & Tax Code § 11913, transfer tax will be applicable to transfers of mobilehomes that are installed on a foundation system and subject to local property taxation. Thus, transfers of other mobile homes will be exempt.

V. PRACTICAL CONSIDERATIONS

Dealing with transfer tax in the context of a particular transaction can be challenging and frustrating. Many counties have their own unique customs and practices which are not always readily ascertainable. Failure to divine the applicable requirements for a par-

ticular transaction will often lead to rejection of recording documents resulting in embarrassment, delay and additional cost.

Most county specific requirements relate to submission of forms and documentation of claimed exemptions. Pursuant to CA Rev & Tax Code § 11932, the amount of transfer tax paid with regard to a particular instrument must be shown on the face of the recorded instrument unless the party submitting the instrument for recording requests that the amount of the transfer tax not be made a part of the public records.⁵⁵ Some counties permit or require that the request be shown on the face of the instrument, while others require submission of a separate request. Many counties and cities require that specific tax computation forms prepared by their offices be utilized, and at least four jurisdictions (the City of Alameda, the City of Piedmont, Lake County, and the City and County of San Francisco) require submission of a specific form of transfer tax affidavit as a condition to acceptance of a conveyance document for recording.

As real estate transactions become increasingly complex and as counties and cities become increasingly zealous in their efforts to collect revenue through transfer taxes, county recorders are frequently refusing to record instruments claiming transfer tax exemptions absent concurrent submission of documentation to evidence qualification for the exemptions. Required documentation may be as simple as attachment of a brief letter describing the transaction and the basis for exemption, or may entail provision of off-record agreements and entity formation/ownership documents coupled with a detailed explanation of the nature of the transaction and the relationships among the parties. For major transactions, it is common practice to provide copies of the instruments to be recorded and detailed documentation supporting any claimed exemptions to the title company, (or any other party submitting instruments for recording) for review. Practitioners can also submit the packages to the recorder's office and obtain pre-approval of the claimed exemptions.⁵⁶

VI. CONCLUSION

Compliance with the Transfer Tax Act can be a significant issue both in terms of cost and timing in many real estate transactions. Knowledge of the Transfer Tax Act, and in particular its many exemptions, coupled with creative deal structuring can often achieve substantial tax savings. Similarly, understanding of local customs and practices will reduce the risk of recording rejection and help assure smooth and timely closings.



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ENDNOTES

1. CA Rev & Tax Code §§ 11901-11934
2. *Former* 26 U.S.C. §§ 4361, 4363; See, *Taxes Replace Taxes* (1968) 43 L.A. Bar Bull. 121
3. CA Rev & Tax Code § 11911 (a)
4. CA Rev & Tax Code § 11911 (b); CA Rev. & Tax. Code § 11911 (c) expressly provides that the city tax will be an offset to the county tax if the amount required to be paid is equal to one half the amount of the county tax. Most counties interpret this provision as requiring an offset only when the amount is exactly one-half—no more and no less. A chart detailing the applicable transfer tax rates for all counties and charter cities is included at the end of this article
5. CA Rev & Tax Code § 11901
6. Cal Const. art. XIII A
7. The electorate attempted to severely restrict the ability of state and local governments to raise revenue by imposing property taxes. In addition to limiting real property taxes to one percent of full cash value, it limited subsequent annual inflation adjustments to two percent per annum, and prohibited state and local governments from imposing any sales or transaction taxes on the sale of real property. It also required a two-thirds vote in each house of the legislature to increase or impose new state taxes and a two-thirds vote of the “qualified electors” of any county, city or special district to increase or add new local “special” taxes; Cal. Const. art. XIII A (1)-(4)
8. Proposition 13 had a significant impact on subsequent revenues. As a direct result of the impacts of Proposition 13, the percentage distribution of revenue attributable to property taxes declined by 38.2% for California cities and 28.1% for California counties. In fiscal year 1977-78, property taxes represented 21.7% of revenues in cities and 33.1% of revenues in counties, while in fiscal year 1985-86, they represented 13.4% and 23.8%, respectively. *What is a Property-Related Fee? An Interpretation of California's Proposition 218*, by John S. Throckmorton, 48 Hastings L.J. 1059, 1085, citing Proposition 13: A Ten Year Retrospective 2 (Frederick D. Stocker ed., 1991) at pages 17- 18
9. In response to the decrease in income from property taxes, between 1977 and 1986, local governments enacted taxes that were not subject to super-majority voter requirements and raised thousands of existing taxes and fees. The percentage distribution of revenues attributable to “other taxes” rose 62.4% for California cities and the portion attributable to “fees” increased by 36.2%; *supra*.
10. Cal Rev & Tax Code Cal Rev & Tax Code §§ 11911, 11912, and 11933; see also, *City of Huntington Beach v. S. Ct.*, 78 Cal.App.3d 333 (1978) and *Fielder v. City of Los Angeles*, 14 Cal.App. 4th 137, 145 (1993)
11. Cal Rev & Tax Code Cal Rev & Tax Code § 11912
12. See, *Cohen v. City of Oakland*, 223 Cal.App.3d. 261 (1990), where the court upheld an increase in a transfer tax that was a “general” tax and thus, not in violation of Proposition 13; *Fielder v. Los Angeles*, 14 Cal.App.4th 137 (1993), where the court held that the transfer tax imposed by a charter city did not violate Proposition 13 or Proposition 62, and *Fisher v. County of Alameda*, 20 Cal. App. 4th 120 (1993), where the court upheld amendments to the transfer tax act of another charter city—Berkeley.
13. Proposition 62, enacted as Govt. Code § 53725, which was approved by the voters in November of 1986 in an effort to stop the “end run” around the limitations contained in Proposition 13.

14. Proposition 218 amended Article XIII C and added Article XIII D to the California Constitution. Article XIII D §§ 3 and 6 provide that “no tax, assessment, fee or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except fees or charges for property related services as provided in the Article. Unfortunately, Proposition 218 does not define a “property-related fee or charge” or the meaning of “as an incident of property ownership.”
15. See, *Apartment House Assoc. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830, 840 (2001) where the court discusses taxes on incidents of ownership and, though dicta, discusses transfer taxes.
16. For all counties and “general law” cities practitioners should refer to Rev. & Tax. Code § 11901 et seq. For “charter cities” practitioners should review both the Rev. & Tax Code and any local municipal codes that impose city transfer taxes. As stated before, the transfer tax provisions can be markedly different!
17. *County of Los Angeles v. Southern Cal. Edison Co.*, 112 Cal. App. 4th 1108, 1122 (2003) and Cal Rev & Tax Code § 104
18. Cal Rev & Tax Code § 11927
19. *Thrifty Corp. v. County of Los Angeles*, 210 Cal.App.3d 881 (1989)
20. See, 62 Ops. Cal. Atty. Gen. 87; *Phillips Petroleum Co. v. Jones*, 176 F.2d 737, 741, (1949); *Jones v. Magruder*, 42 F. Supp. 193, 198-200, (1941)
21. In 1979, the legislature amended the Transfer Tax Act to include transfers or conveyances of mobilehomes that are treated as real property under the laws of the State of California. CA Rev & Tax Code § 11913 states that the transfer of any mobilehome installed on a foundation system that is subject to local property taxation falls within the scope of the Transfer tax Act.
22. The City of Albany, in addition to imposing a tax on a conveyance by deed or other written instruments, imposes a tax whenever there is a transfer of greater than a 5% ownership or control of stocks or shares in a corporation, partnership or other legal entity. The unpaid taxes are a lien on the property, and should be of concern to any party acquiring the property from a private, and especially, a publicly traded entity.
23. CA Rev & Tax Code § 11933; *Patience v. Snyder*, 78 Cal. App. 4th 1001(2000) at 1011
24. CA Rev & Tax Code § 11932
25. CA Rev & Tax Code § 11911.1
26. CA Rev & Tax Code §11932; 51 Ops. Cal. Atty. Gen. 62
27. CA Rev & Tax Code §11912
28. *Thrifty Corp. v. County of Los Angeles*, 210 Cal. App. 3d 881, 884 (1989); *Estate of Morse*, 9 Cal.App.3d 411, 415 (1970); 62 Ops.Cal.Atty.Gen. 87, 90; 51 Ops.Cal.Atty.Gen. 50, 57
29. CA Rev & Tax Code §11933
30. CA Rev & Tax Code §11912
31. San Francisco only imposes a lien on the property to the extent the transferor owns an interest in the property as of the date of the recording of the notice of delinquent tax. As stated earlier, the relevant code sections for the cities and counties are contained in the chart at the end of the article and a link to the codes is provided on the “Members Only” section of the CA State Bar Real Property Section’s Website, which is http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10713&id=8002
32. Counsel should keep in mind that charter cities are free to enact any exemptions they believe are appropriate. Do not assume that just because the exemption is applicable to a county that it is applicable for the city where the property is located, also.
33. CA Rev & Tax Code §11921; 53 Ops. Atty. Gen. 252
34. 85 Ops. Cal. Atty. Gen. 235
35. 56 Ops. Cal. Atty. Gen. 79
36. 54 Ops. Cal. Atty. Gen. 218, 219-220, “the Public Employees’ Retirement System is a unit of state government performing a state function and that when it acquires real property in its investment program, the transaction is exempt from a city’s or county’s documentary transfer tax; see also, 56 Ops.Cal.Atty.Gen. 79, 80-84
37. 51 Ops. Cal. Atty. Gen. 55
38. CA Rev & Tax Code § 11924
39. CA Rev & Tax Code § 11928
40. CA Rev & Tax Code § 11929
41. As defined in subdivision (m) of Section 205 of Title 11 of the United States Code, as amended
42. As defined in subdivision (3) of Section 506 of Title 11 of the United States Code, as amended
43. Counsel should keep in mind, however, that the recorder and/or an assessor may look beyond the four corners of the documents submitted for recording and assert that a transfer was structured solely to avoid paying a transfer tax or triggering a reassessment. Under the “substance-over-form” or “step-transaction doctrine,” the recorder may attempt to try to collapse a multi-step transaction and take the position that a transfer tax is indeed owed, despite the fact that a deed was not recorded. Counsel should consider seeking an advance determination from the recorder or assessor prior to recording any documents
44. *Brown v. County of Los Angeles*, 72 Cal. App. 4th 665, 669-670 (1999)
45. CA Rev & Tax Code § 11927
46. *Thrifty Corp. v. County of Los Angeles*, 210 Cal. App. 3d 881 (1989)
47. CA Rev. & Tax. Code, § 61, subd. (c)(1).
48. Supra. Note 44 at 885
49. Practitioners should take note that San Francisco utilizes a 50 year term rather than a 35 year term in calculating whether a transfer tax is owed.
50. For more information on leases see, *E. Gottschalk & Co. v. County of Merced*, 196 Cal. App. 3d 1378, 1375-186 (1987); and *McDonald’s Corp. v. Brd. Of Supervisors*, 63 Cal. App. 4th 612 (1998)
51. 26 C.F.R., § 47.4361-1(a)(4)(i) (1978)
52. 275 Cal. App2d 372 (1969)
53. Id. At 376
54. Id at 378- 379
55. The Attorney General held, in an opinion filed at 51 Ops. Cal. Atty. Gen., that the amount of tax paid must still be made available to the public even if the payor requests that the amount be left off the document submitted for recording.
56. Practitioners should only submit unsigned “draft” copies of the documents for pre-approval in order to avoid an assertion that an unrecorded transfer has occurred and that transfer tax is then due.