

M e m o r a n d u m**330.2102**

To: Marysville – Compliance (COE)

Date: May 28, 1971

From: Tax Counsel (LAA)- Headquarters

Subject:

The problem described in Mr. ---'s two inquiries to you dated February 17, 1971 and February 18, 1971 is a fairly complex one involving principles of property law, partnership law, and family law as well as tax law.

Under Civil Code section 5104, a husband and wife may hold property as joint tenants, tenants in common, or as community property. They may also, under Civil Code section 5104, contract with each other and hold the property as partnership property. In the absence of a contract between the parties, it would be reasonable to assume the property is community property if it were purchased with community funds during the marriage. What is community property can often be difficult to determine.

Without knowing the exact history of the ownership of the property, I cannot answer the questions posed with particularity. Generally speaking, however, the tax would apply as follows assuming the property was acquired tax paid and is leased in substantially the same form as acquired.

1. Partnership property. In two cases which have come before the Board, we have taken the position that the tax-paid status does not carry over where the property was held in the partnership name as partnership property. This is based on the theory that the partnership is an entity and a person separate and distinct from the partners. There may be situations in which the property is not contributed to the partnership even though a partnership does exist, and the application of tax may differ. The same theories apply to property held by a joint venture.

If the transfer from the partnership is exempt, rental receipts would be taxable.

2. Joint Tenants and Tenants in Common. Where property is held in these forms of ownership, the individual interests are divisible for purposes of the sales and use tax. Every effort should be made to continue the prior status of the property when a fractional interest is sold. In these situations, we will not observe the timely election requirements as strictly as we do otherwise. We want to avoid having one portion of the rental receipts taxable and another not taxable.

This is true for sales, but not where one joint tenant (not tenant in common) dies and the others succeed to his share by right of survivorship. In that situation, tax-paid status would continue because the surviving joint tenants would be lessors who paid the tax as to the whole property. The title of each joint tenant extends to the whole property.

3. Community Property. The interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband (Civil Code Section 5105).

When a marriage is dissolved, the court attempts to make a fair division of all the community property taking into account a number of factors. In the cases described, the business property was awarded to the husband.

Because of this unique relationship of the parties to the property, the best answer seems to be that the tax-paid status does carry over. This is, as stated above, assuming the property is community property and there was no agreement removing the property from community property status during the marriage.

LAA:lt