IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

926 NORTH ARDMORE AVENUE, LLC, *Plaintiff and Appellant,* vs. COUNTY OF LOS ANGELES, *Defendant and Respondent.*	Supreme Court Case No. **S222329** Court of Appeal, Second District Case No. B248536 Los Angeles County Superior Court Case No. BC476670

[PROPOSED] BRIEF OF AMICI CURIAE COUNTY OF TEHAMA *and* TEHAMA COUNTY CLERK-RECORDER JENNIFER A. VISE; COUNTY OF ALAMEDA; COUNTY OF FRESNO *and* FRESNO COUNTY ASSESSOR-RECORDER PAUL DICTOS; KERN COUNTY ASSESSOR-RECORDER JON LIFQUIST; COUNTY OF MONO; COUNTY OF MONTEREY *and* MONTEREY COUNTY ASSESSOR-CLERK-RECORDER STEPHEN L. VAGNINI; NAPA COUNTY and NAPA COUNTY ASSESSOR-RECORDER-COUNTY CLERK JOHN TUTEUR; COUNTY OF PLACER *and* PLACER COUNTY CLERK-RECORDER-REGISTRAR JIM MCCAULEY; COUNTY OF RIVERSIDE *and* RIVERSIDE COUNTY ASSESSOR PETER ALDANA; COUNTY OF SAN BENITO *and* SAN BENITO COUNTY CLERK, AUDITOR & RECORDER JOE PAUL GONZALEZ; COUNTY OF SAN DIEGO *and* SAN DIEGO COUNTY ASSESSOR/RECORDER/COUNTY CLERK ERNEST J. DRONENBURG, JR.; COUNTY OF SAN MATEO; COUNTY OF SANTA BARBARA *and* SANTA BARBARA COUNTY ASSESSOR JOSEPH E. HOLLAND; COUNTY OF SONOMA *and* SONOMA COUNTY CLERK-RECORDER-ASSESSOR WILLIAM F. ROUSSEAU; *and* COUNTY OF STANISLAUS

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Additional appearances on next page

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici curiae, to the best of their knowledge, are unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated:

Respectfully submitted,

ARTHUR J. WYLENE
Tehama County Counsel

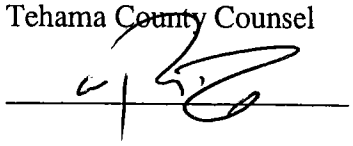

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

TABLE OF AUTHORITIES

Federal Cases

TABLE OF AUTHORITIES (CONT.)

California Statutes

Federal Statutes

California Regulations

Federal Regulations

TABLE OF AUTHORITIES (CONT.)

Law Review Articles and Treatises

TABLE OF AUTHORITIES (CONT.)

Other Authorities

TABLE OF AUTHORITIES (CONT.)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the classic conundrum of static statutory language in a dynamic world. It is beyond dispute that many old forms of holding and conveying property have fallen into disuse, and been replaced by novel means of accomplishing the same result. The question is whether these new transactional forms evade the venerable taxes upon the privilege of transferring real property via a written document. As will appear, they do not. Though some outward details of the transactions may have changed, these are matters of form, not substance. The essence of these transactions – the *sale* of *real property* by means of a *writing* – remains the same, and the Legislature plainly intended, in 1967 and today, that such transactions be subject to tax.

Petitioner would petrify California's transfer tax system, as a snapshot of the federal Stamp Tax circa 1967, rendering it immune to economic changes and gradually decreasing in relevance. Further, the regime they envision is substantially regressive, with individual homeowners routinely paying the tax when selling modest homes, but owners of high value commercial real estate routinely escaping. This inflexible and inequitable tax structure never existed under federal law, and was never intended by our Legislature. As will appear, from the very beginning, the Legislature has understood the close connection between the Documentary Transfer Tax and the property tax, and has demonstrated time and again its intent that the two operate cooperatively and coextensively. The Court of Appeal consequently did not err in looking to the property tax statutes to determine whether the transactional instruments here effected a transfer of real property taxable under California law.

II. ORIGIN AND NATURE OF THE DOCUMENTARY TRANSFER TAX

The Documentary Transfer Tax, like the former federal Documentary Stamp Tax, is an excise tax on the privilege of selling real property by means of a written instrument. (*Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137, 146 ["a transfer tax attaches to the privilege of exercising one of the incidents of property ownership, its conveyance"].) Contrary to Petitioner's suggestion, it is *not* a recording fee, and applies without regard to whether the subject instrument is recorded (or recordable). (See *Raccoon Development, Inc. v. United States* (Ct.Cl. 1968) 391 F.2d 610, 613 ["neither the Treasury Regulations nor any other authority make recordation of a deed the touchstone of taxability for documentary stamp purposes"].)[1]

"Indeed, this tax on the transaction of transferring title by mere paper has an interesting historical background. For in ancient England, whence our law springs, originally a paper, vellum or parchment transfer of title was unknown, the only way one could transfer a freehold then being a feoffment by livery of seisin. This, in turn, required the feoffor and feoffee to go upon the land, whereupon the feoffor delivered to the feoffee a clod of earth from the land. 2 Bla.Com. 315. This ceremony at earliest common law constituted the conveyance of real estate. Thereafter, the sovereign authority of England, operating through the Parliament and its courts, enabled a conveyance of land to be accomplished by the much simpler method of the execution of a paper or parchment deed. In return for the aid of the sovereign authority in thus simplifying conveyancing, the sovereign was of course justified in imposing a tax, the

[1] Petitioner's only authority for this proposition, *City of Cathedral City v. County of Riverside* (1985) 163 Cal.App.3d 960, 962, is plainly dictum – and Petitioner wisely does not attempt to develop this line of argument.

American successor of which is the stamp tax in question." (*Endler v. United States* (D.N.J. 1953) 110 F.Supp. 945, 948.)

In short, the Documentary Transfer Tax had its genesis as a means of raising revenue from novel modes of conveying real property, and the real question is whether our Legislature has retained that flexibility today.

As relevant here, Revenue and Taxation Code section 11911 authorizes an excise 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 . . ." The legislative objective of broad coverage is plain from the statutory text (which describes each major element in multiple overlapping and expansive terms), and from its manifest purpose. As the federal courts observed many years ago, "[t]he Act imposing the stamp tax is a revenue measure and is not to be restricted by technical refinements in construction." (*Royal Loan Co. v. United States* (8th Cir. 1946) 154 F.2d 556, 558 [discussing the companion provisions imposing stamp duties on stock transfers]. See also *Stuyvesant Town Corp. v. United States* (Ct.Cl. 1953) 111 F.Supp. 243, 248 ["taxing statutes are to be construed and given effect in the light of the taxing purpose they evidence, and it was obviously contemplated by the Congress that the statute in question should be construed as being broad and comprehensive in scope"].)

Petitioner's argument rests on the oft-repeated assertion that the transfer of a controlling interest in a legal entity that owns real property simply does not involve any "deed . . . or writing . . . by which any . . . realty sold [was] . . . conveyed to . . . [a] purchaser, upon which a documentary transfer tax could be imposed." (*Open. Brief*, p. 2.) However, this assumes the conclusion. It is undisputed that the transaction at issue in this case was (like all

such transactions) accomplished by means of a writing. (*Id.* at p. 8.) Whether the bundle of rights "sold" through this document constitutes "lands, tenements, or other realty" within the meaning of Section 11911 is the central issue presented for resolution, and cannot be addressed without carefully examining the very assumption upon which Petitioner relies.

The economic reality of such transactions is plain – and not seriously contested. Every incident of control, possession, and practical value of the underlying real property vests in the entity's new owners with the stroke of the pen upon the transfer agreement. That's *why* California's property tax laws have long recognized such transactions for what they are – changes in ownership. It thus requires little interpretive dexterity to recognize that transfer agreement as a *writing* by which *realty* is *sold*, within both the common meaning of those terms and the clear ambit of the Documentary Transfer Tax Act.[2]

Petitioner's argument for a contrary result here is staked entirely on an unduly narrow and technical reading of Section 11911, which is in turn largely premised on the asserted exemption of such transactions from taxation under federal Stamp Tax provisions repealed nearly 50 years ago. As will appear, this misunderstands the former federal law, the current California law, and the decades of evolution in law and economics separating the two.

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[2] Petitioner themselves recognizes the existence – and taxability – of "constructive conveyances," in which realty is deemed sold without a traditional deed (or any other recorded document). (*Pet. for Rev.*, pp. 3, 19.) Consequently, the real issue is here is not the (supposedly revolutionary) expansion of the Documentary Transfer Tax to transactions accomplished without traditional conveyance of legal title, but rather the more mundane question of *which* such transactions California law treats as "constructive conveyances." The property tax laws provide clear answers to those questions, in a closely related field, and Petitioner has never articulated any good reason for the court to look further.

III. BACK TO THE FUTURE: BUSINESS ENTITY FORMS AND COMMERCIAL REAL PROPERTY, 1967 TO PRESENT

To state the obvious, a lot has changed since 1967, when the federal Stamp Tax repeal took effect and California enacted the Documentary Transfer Tax Act. In the 1960's and before, corporations were the dominant form of business entity[3] – and both federal and state law at the time severely disincentivized use of the corporate form for small businesses (whether in the real estate sector or otherwise). In order to obtain the central benefit of the legal entity form – i.e., limited liability – business owners and shareholders had to accept drastic income tax consequences (since business income was taxed twice – when received by the corporation, and again when distributed by the corporation to the shareholders).[4] They further had to strictly observe fairly burdensome corporate formalities – annual elections, regular board meetings, minutes, etc. – or risk having the liability veil pierced under the unforgiving law of the day.[5] Finally, the corporations laws of most states included governance requirements framed to accommodate public corporations, rather than small closely held entities – adding another layer of difficulty in using this form for anything other than traditional large-scale business activities.[6]

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[3] See Wells, *The Rise of the Close Corporation and the Making of Corporation Law* (2008) 5 Berkeley Bus. L.J. 263, 315; Chrisman, *LLCs Are The New King Of The Hill* (2010) 15 Fordham J. Corp. & Fin. L. 459, 460.

[4] For a comprehensive discussion of the tax disadvantages for small business using the corporate form, see Hamill, *The Origins Behind the Limited Liability Company* (1998) 59 Ohio St. L.J 1459 and Eyal-Cohen, *When American Small Business Hit the Jackpot: Taxes, Politics and the History of Organizational Choice in the 1950s* (2008) 6 Pitt. Tax Rev. 1.

[5] Friedman, *The Silent LLC Revolution: The Social Cost of Academic Neglect* (2004) 38 Creighton L.Rev. 35, 45-46.

[6] *Ibid.*; Wells, *supra,* 5 Berkeley Bus. L.J. at pp. 291-292.

As a result of the foregoing, legal entity organization was not a popular choice for small businesses in general[7] – and the modern practice of using legal entities as single-asset real estate holding vehicles would have been nonsensical in that era. It is consequently unsurprising that the parties have been unable to unearth any contemporary Stamp Tax precedents addressing anything remotely resembling the transaction under review here. Simply put, that's not how property owners held and sold realty then.[8]

The legal and economic changes that lead to such transactions becoming sufficiently commonplace to warrant review by this court were almost entirely the result of developments occurring well after repeal of the Stamp Tax. The trend toward making the legal entity form attractive to small businesses had actually begun a few years earlier, with Congress' creation of the S-Corporation in 1958 (thus allowing qualifying corporations to avoid double-taxation at the federal level);[9] however, this early legislation had substantial limitations, and the effort took decades more to come to fruition.[10] The true revolution began in 1977, when Wyoming

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[7] See Eyal-Cohen, *supra,* 6 Pitt. Tax Rev. at p. 35 (noting that 92.5% of businesses were unincorporated in 1953). The source cited by Eyal-Cohen, Bureau Of Census, U.S. Dep't Of Commerce (1975) Historical Statistics Of The United States: Colonial Times To 1970: Proprietorships, Partnerships, And Corporations: Number, Receipts, And Profits: 1939 To 1970, Series V, pp. 1–12, is available online (<http://www2.census.gov/prod2/statcomp/documents/CT1970p2-01.pdf> [as of September 29, 2015]), and provides an informative look at the economic realities of legal entity formation and operation during the Stamp Tax era.

[8] This is not, of course, to suggest that such an arrangement *couldn't* theoretically have been constructed at that time, merely that such transactions *didn't* occur in meaningful numbers – and that the paucity of authorities on point from that era thus cannot be taken as evidence that such transactions would have been categorically non-taxable.

[9] Eyal-Cohen, *supra,* 6 Pitt. Tax Rev. at pp. 1-2.

[10] Mann, *Subchapter S: Vive Le Difference!* (2014) 18 Chap. L.Rev. 65, 66-67. It is also worth noting that out Legislature did not adopt similar provisions into California tax law until 1987. (*Valentino v. Franchise Tax Bd.* (2001) 87 Cal.App.4th 1284, 1289.)

enacted the first limited liability company law in the nation.[11] LLC's were a remarkable innovation, designed to combine the corporate benefits of limited liability with the tax advantages of a partnership – with organizational requirements customized for small, informal businesses.[12] However, uncertainties over the Internal Revenue Service's acceptance of this new juristic creature and relatively high personal income tax rates hindered LLC expansion until the late-1980's.[13] Beginning shortly thereafter, states began to embrace the limited liability company mechanism in droves, leading to the explosive rise of LLCs, which have rapidly become one of the most popular methods of small business organization.[14]

This tidal shift came to California in 1994, with the enactment of the Beverly-Killea Limited Liability Company Act (Stats. 1994, ch. 1200) – and had the same results. The number of LLC filings showed substantial growth almost immediately,[15] and the LLC remains a

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[11] Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, in *Business Tax Stories: An In-depth Look at Ten Leading Developments in Corporate and Partnership Taxation* 295-298 (Foundation Press 2005). Petitioner is factually mistaken in suggesting that foreign LLC's existed prior to 1967. (*Reply Brief*, p. 13, fn. 2.)

[12] *Ibid.*; Cohen-Whelan, *Individual Responsibility In The Wake Of Limited Liability* (1998) 32 U.S.F. L. Rev. 335, 343-344. See also Harris, *Business Associations and Professions; Limited Liability Companies* (1995) 26 Pac. L.J. 305, 310-311 (noting that California's Limited Liability Company Act was specifically designed for use by small businesses).

[13] Hamill, *The Story of LLCs, supra*, at pp. 296-297; Mann, *supra,* 18 Chap. L.Rev. at p. 69-70.

[14] Chrisman, *supra,* 15 Fordham J. Corp. & Fin. L. at p. 460; Friedman, *supra,* 38 Creighton L.Rev. at p. 35. See also Staff Of The Joint Comm. On Taxation, 112th Cong., *Selected Issues Relating To Choice Of Business Entity* (2012) at p. 8 <https://www.jct.gov/publications.html?func=startdown&id=4402> (as of September 29, 2015) (noting that "[s]ince 1996, LLCs have grown at a rate of approximately 18 percent per year").

[15] Cal. Franchise Tax Board, Calculation of the Adjustment to the Limited Liability Company Fees for 2001 (Dec. 2000) p. 1 < https://www.ftb.ca.gov/businesses/llc_2001.pdf> (as of September 29, 2015).

commonplace of California business. However, the modern limited liability company in California is an economically different animal from the corporate entities familiar during the Stamp Tax era, with approximately seventy-five percent having a total income under $500,000 per year (at the time of the Franchise Tax Board's last statistical report to the Legislature).[16] Notably, "[a]lmost 42 percent of LLCs are in the real estate industry . . ."[17] These developments have made it feasible and attractive to use legal entities as real estate holding vehicles, and to buy and sell realty by the simple expedient of transferring interests in the holding entity.[18]

The lesson to be drawn from this is that the types of real property transactions – and implementing instruments – at issue here are a legislative creation that did not exist (or were, at least, extremely uncommon) during the Stamp Tax era. Consequently, the authorities arising under the Stamp Tax, while helpful in assessing the taxability of the types of transactions prevalent when the Documentary Transfer Tax Act was adopted, are hardly determinative when addressing these modern statutory creations. We must instead look to more recent expressions of legislative intent, as the Court of Appeal properly recognized.

IV. FEDERAL STAMP TAX DECISIONS DID NOT SQUARELY ADDRESS CONTROLLING INTEREST TRANSFERS OF THIS TYPE, MUCH LESS EXCLUDE THEM FROM TAXATION

Before proceeding to state law, it is worth briefly examining Petitioner's central contention that transactional instruments conveying a controlling interest in a legal entity that

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[16] *Ibid.*

[17] *Ibid.*

[18] See, e.g., Stein, *Advanced Asset Protection and Tax Planning with LLCs* (2006) 29-JUN L.A. Law. 17, 22.

holds title to real property would have been clearly and categorically non-taxable under the former Stamp Tax. The available authorities do not support that proposition, and are instead striking in the fact that none of them involves a transaction even remotely resembling the one at issue here. Rather than aiding Petitioner's position, this further demonstrates that the transactional forms in question here evolved long after the Stamp Tax was repealed. Moreover, these authorities clearly show the flexibility and adaptability of the Stamp Tax to accommodate new and different types of real property transactions under the penumbra of the same statutory language – a dynamism inherited by California's transfer tax.[19]

Petitioner places principal reliance upon *United States v. Seattle-First Nat. Bank* (1944) 321 U.S. 583, which involved the "statutory consolidation of banks under Section 3 of the National Banking Act" – a unique procedure under federal law plainly unlike the mundane sale of a single member, single asset LLC. The Supreme Court concluded that the transfer of real property from one bank to another, which resulted by operation of law from the consolidation, was not subject to the Stamp Tax:

> "It is clear, however, from Section 3 of the National Banking Act that the state bank's realty was not conveyed to or vested in respondent by means of any deed, instrument or writing. There was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid. *Nor can the realty be said to have been 'sold' or vested in a 'purchaser or purchasers' within the ordinary meanings of those terms. Only by straining the realities of the statutory consolidation process can respondent be said to have 'bought' or 'purchased' the real property. That we are unable to do.*" (*Seattle-First, supra,* 321 U.S. at pp. 589-590.)

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[19] Such flexibility was necessarily inherent in the Stamp Tax, which had to incorporate a diverse array of property interests created under the often disparate laws of the several states. (See, e.g., Internal Revenue Service General Counsel Memo 20898 (Internal Revenue Cumulative Bulletin 1938-2, p. 414); *Mot. For Jud. Not.*, exh. "F") [analyzing the taxability of a servitude for flowage rights created under Louisiana law, "where the civil law, as distinguished from the common law, prevails . . ."].)

Petitioner stresses the first portion of the Court's statement, but neglects to give due credence to the latter. The Court did not stop – as Petitioner would have it – with the absence of traditional "formal instruments or writings," but instead proceeded to rest its conclusion on "the realities of the statutory consolidation process." Just as today various statutory reorganizations are exempt from the Documentary Transfer Tax, because no functional change in property ownership will occur (see, e.g., Rev. & Tax. Code, § 11924), the *Seattle-First* looked to the economic reality of the transaction there to determine that the bank's realty had not been "sold" in any meaningful sense.

Were there any doubt about the federal rule embodied in *Seattle-First*, the IRS put it to rest with Revenue Ruling 57-580 (1957) (*Mot. For Jud. Not.*, exh. "A"), which concerned the "[a]pplicability of the documentary stamp tax to various transactions involved in the merger of a state bank into a national bank . . ." The IRS applied *Seattle-First*[20] to conclude that "[i]n the event title to any real estate is conveyed by the state bank to the association, no documentary stamp tax will be incurred *on the delivery of the deed or deeds*, since the realty in this type of transaction is not considered to have been sold within the meaning of section 4361 of the Code." In other words, the IRS clearly understood that the critical factor in *Seattle-First* was the nature of the transaction, not the existence or absence of formal conveyance documents – since they proceeded to apply that decision to bank consolidations where realty actually was conveyed through traditional deeds. It was the substance of the transaction, rather than its form that mattered.

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[20] The Revenue Ruling cites Internal Revenue Service General Counsel Memo 24450 (Internal Revenue Cumulative Bulletin 1944, p. 650); *Mot. For Jud. Not.*, exh. "G"), which had announced the Supreme Court's decision in *Seattle-First*.

Contemporary federal authorities showed similar attention to economic reality when determining the scope and application of the Stamp Tax. (See, e.g., *Berry v. Kavanagh* (6th Cir. 1943) 137 F.2d 574, 576 [examining the intent of the parties to conclude that deeds did not effectuate a "sale" of realty]; *United States v. Niagara Hudson Power Corporation* (S.D.N.Y. 1944) 53 F.Supp. 796, 801 [transfer of realty during corporate merger not a sale];[21] *Berkeley Sav. & Loan Ass'n of Newark* (D.N.J. 1969) 301 F.Supp. 22, 25 [examining the parties' intent and the "essence" of the transaction].)

Moreover, while the federal regulations and case law often spoke of conveyances transferring "title" to real property, the authorities were quite clear that this meant functional ownership, rather than simply legal title. (See, e.g., *Socony-Vacuum Oil Co. v. Sheehan* (E.D.Mo. 1943) 50 F.Supp. 1010 ["The deeds given to plaintiff by its said subsidiaries were not needed or given to 'transfer the absolute or general title' of the real estate described therein

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[21] Contrary to Petitioner's suggestion, the *Niagara Hudson Power* court expressly disclaimed any holding that the conveyance of real property there was not taxable due to the *form* of the transfer (which occurred through filing of a statutory "Certificate of Consolidation," rather than a traditional deed). The court rejected this suggestion explicitly, quoting *Niagara Hudson Power Corporation v. Hoey* (2nd Cir. 1941) 117 F.2d 414, 416 for the proposition that "[i]n legal jargon a change of ownership, terminating rights and other relations in one entity and creating them in another, is the essence of 'transfer,' . . ." Rather, the court found that there was no taxable "sale" because of the *underlying nature* of the transaction: "In the transaction now under consideration the elements characteristic of a 'sale' are lacking; there is no agreement to sell; there is no deed containing the description of the realty. The usual bargaining leading up to and culminating in a sale and fixing the value of the property are absent. The change of title results from the filing of the Certificate of Consolidation; it was a form of transfer, but not a sale." (*Ibid.*) Petitioner leaps on the court's reference to a "deed containing the description of the realty" (*Reply Brief*, pp. 8-9), but fails to note the context, and misses the point. (It is worth noting that the putatively taxable transaction documents here *do* in fact contain "the description of the realty"– along with *every single one* of the other "elements characteristic of a sale" cited by the court. (See *Appellant's Exhibits*, No. 20, p. 1.) Once again, the true nature of this transaction, and its close functional resemblance to a deeded conveyance, are utterly unmistakable.)

(Reg. 71 (1932) Article 79), but were given and recorded to show the transfer of legal title only, on the records of the county or city in which the lands described in said deeds were located"].)

Moreover, both the IRS and the courts routinely held instruments conveying interests other than legal title subject to the Stamp Tax. *Jones v. Magruder* (D.Md. 1941) 42 F.Supp. 193, 196-199 concerned a long-term "ground rent lease" under Maryland law. To determine whether such instruments sold "lands, tenements, or other realty," the court eschewed "the technical and sometimes highly artificial rules of the common law of real estate" and instead examined the "economic characteristics" and "practical economic effect" of such transactions to find that the Stamp Tax applied.[22] Likewise, Revenue Ruling 59-165 (1959) (*Mot. For Jud. Not.,* exh. "B") held the Stamp Tax applicable to "a sheriff's certificates of sale" under Minnesota law, even though such certificates did not convey legal title. "There is no provision of law or regulations which restricts the application of section 4361 of the Code to instruments conveying estates in fee simple. Instruments that transfer *any interest in the ownership of real property* are subject to the documentary stamp tax." (*Ibid.* See also Internal Revenue Service General Counsel Memo 33134 (1965) 1965 WL 13576; *Mot. For Jud. Not.,* exh. "H".) In each case, the determination focused on a realistic assessment of the nature of the interests transferred by the subject instrument, not their name, nor whether they amounted to legal title to the property in question.

The adaptability of the Stamp Tax to cover evolving transactional forms is aptly demonstrated by examining the development of oil and gas "production payments," a type of

[22] Notably, the court held that the fact that such "ground rent leases" were considered "personal property and not realty" for other purposes under Maryland law was not determinative of their taxability under the Stamp Tax. (*Jones, supra,* 42 F.Supp. at p. 198.)

interest in mineral rights that gained prominence in the 1950's and 1960's.[23] Although traditional mineral leases had long been held subject to the Stamp Tax (see *Phillips Petroleum Co. v. Jones* (10th Cir. 1949) 176 F.2d 737), the IRS initially concluded that transfers of production payments were not taxable. (See Revenue Ruling 59-282 (1959); *Mot. For Jud. Not.*, exh. "C".) However, in 1959, the IRS reversed course, and concluded that interests embodied in such instruments were sufficiently real to be taxable as "realty." (*Ibid.* See also Internal Revenue Service General Counsel Memo 37079 (1977) 1977 WL 46532; *Mot. For Jud. Not.*, exh. "I".) The federal courts upheld this position, approaching the issue through examination of the "bundle of rights" represented by such "production payments," and concluding that those rights in essence resembled a taxable mineral lease. (*Texaco, Inc. v. United States* (5th Cir. 1980) 624 F.2d 20, 21-22.) As above, the functional focus of the Stamp Tax on the substance of the rights conveyed by an instrument, not their name or form, allowed the taxing authorities to effectively address emergent types of transactions.[24]

For these reasons, even if the federal law stood alone, Petitioner would have an uphill battle to convince that a documentary transaction that was, in practical effect, materially indistinguishable from an old-fashioned conveyance does not amount to a taxable sale of realty. However, the federal authorities do not stand alone, and the clock did not stop in 1967.

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[23] See generally Leedy, *ABC Transactions - Enforceability of an Undisclosed Guarantee of the Production Payment* (1966) 18 Stan. L. Rev. 919, 920.

[24] Petitioner's Reply Brief attempts to distinguish the (numerous) federal authorities applying the Stamp Tax to various instruments other than traditional conveyances by arguing that the interests conveyed therein were taxable because they were "deemed the equivalent of 'realty'." (*Reply Brief*, pp. 10-12.) As above, this evades the central question: Is the sale of a controlling interest in a real estate holding entity itself the "equivalent of 'realty,'" in light of the pragmatic and expansive approach taken by these authorities? Petitioner simply assumes the conclusion to this question, thereby missing the point.

As will appear, state law and the intent of our Legislature clearly demonstrates the taxability of the transaction at issue here.

V. FEDERAL STAMP TAX DECISIONS MAY PROVIDE GUIDANCE, BUT HAVE NEVER BEEN A STRAIGHTJACKET FOR CALIFORNIA COURTS

The Court of Appeal here broke no new ground in looking first to California law to determine applicability of the Documentary Transfer Tax. For much of its history, the Stamp Tax itself largely deferred to state law when determining whether the rights conveyed by a particular instrument qualified as "realty." (United States Internal Revenue Service, Regulations 71, Article 84 (1932) (2 C.T. 345) ["What constitutes 'lands, tenements, or other realty' is determinable by the law of the State in which the property is situated"].)[25]

More importantly, almost immediately after California's Documentary Transfer Tax Act was enacted, the California courts made clear that although the taxability inquiry might start with federal law, it could not end there. *People By and Through Dept. of Public Works v. Santa Clara County* (1969) 275 Cal.App.2d 372 concerned the taxability of a final order of condemnation. The court observed that "both parties agree that, although the language of the

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[25] Subsequent regulations altered this rule somewhat, but nonetheless retained relevant reference to state law: "For purposes of the tax imposed by section 4361, the determination of what constitutes 'realty' is not controlled by the definition or scope of that term under State law. *State law determines the character of the rights conveyed by an instrument*, but whether such conveyance constitutes a conveyance of "realty" is to be determined under Federal law." (Former 26 C.F.R. § 47.4361-1(a)(3), as promulgated in 1959 (2 C.T. 305) and 1962 (2 C.T. 242).) Petitioner cites these latter regulations for the proposition that "[f]ederal, like California, law did not treat interests in legal entities as real property." (*Open. Brief*, p. 25, fn. 7.) However, that is an incorrect statement of law. Petitioner again assumes the conclusion that California law would not consider the transaction at issue to constitute the sale of realty, and projects that assumption onto federal law. How *would* the IRS have treated such a transaction which - as here - the relevant state law considers a sale for purposes of *real property* taxation? Petitioner erroneously assumes that they know the answer to this question, but they do not, because this factual and legal scenario was quite foreign to that era.

superseded federal statute was identical to the subject state and county law, the federal government never applied the tax to conveyances by condemnation,"[26] but nonetheless proceeded to examine state law to conclude that "a final order of condemnation is a type of instrument which is encompassed by the provisions of section 11911, and, therefore, is a taxable instrument within the meaning of the statutes and the ordinance." (*Id.* at p. 377.)[27] Even at that early date, the treatment under federal law was noted, but not determinative.

Similarly, *Thrifty Corp. v. County of Los Angeles* (1989) 210 Cal.App.3d 881, discussed in detail by the parties, concluded that certain long-term leases were potentially taxable under both state and former federal law. However, the court explicitly declined to adopt the federal analysis, under which the taxability of a lease was dependent upon questions of fact pertaining to the individual lease – but instead looked to California's property tax statutes to answer that question universally as a matter of law. (*Id.* at p. 886. Compare Revenue Ruling 59-166 (1959); *Mot. For Jud. Not.,* exh. "E" ["lease for a fixed period of 75 years and granting no right to extend the term by renewal or otherwise did not convey an interest in land of sufficient duration to constitute 'realty' within the meaning of section 4361 of the Code"].) Once again, the Stamp Tax provisions provided a starting point, but did not dictate the outcome.

The federal Stamp Tax authorities are most useful when addressing the types of transactions common in that era, where a strong trend in federal law may perhaps be presumed

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[26] In fairness, this concession may have been mistaken, as such instruments do appear to have been taxable under the former federal law. (See, e.g., Revenue Ruling 58-511 (1958); *Mot. For Jud. Not.,* exh. "D".) However, the point is that the former federal treatment – whether or not correctly understood – simply did not sway the court's analysis.

[27] The court ultimately held the tax uncollectible on an alternative *state law* grounds – that there was no "party liable therefore" under Revenue and Taxation Code section 11922. (*Id.* at p. 379.)

to have been known to the Legislature and incorporated into the Documentary Transfer Tax Act. They are, however, not particularly helpful in addressing legal entities that did not then exist, or transactions that were (at a minimum) exceedingly uncommon at that time. In such cases, one cannot logically point to the lack of federal authority on point and draw therefrom the conclusion that such transactions were not taxable. Rather, we simply do "not find adequate guidance in federal law" here – a circumstance in which Petitioner themselves appears to concede that it is not inappropriate to "turn[] to state law for an answer . . . " (*Open. Brief*, p. 41, fn. 11.)

As will appear, the most obvious body of state law to which to turn – the property tax statutes – is also the correct one, as the Legislature when enacting the Documentary Transfer Tax Act specifically contemplated close relationship with the property tax, and has reinforced that relationship on several subsequent occasions.

VI. THE INTENT OF THE CALIFORNIA LEGISLATURE

Petitioner posits an unbridgeable gap between the transfer tax and the property tax, calling them "statutes [that] are found in a different division of the Revenue and Taxation Code, concern a different kind of tax, *and have a different purpose*." (*Open Brief*, p. 1.) This is fundamentally mistaken, as the two taxes have a long cooperative history of which our Legislature was well aware when enacting the Documentary Transfer Tax Act.

To begin with, during the early days of the Stamp Tax, when the classification of interests (as "realty" or otherwise) was entirely dependent on state law, the federal authorities themselves would look to state *property tax* law where relevant to determine whether a particular instrument effected a taxable sale of realty. (See, e.g., Internal Revenue Service General Counsel Memo 21702 (Internal Revenue Cumulative Bulletin 1939-2, p. 383); *Mot.*

For Jud. Not., exh. "J") [looking to Oklahoma's "definition of real property for *ad valorem* taxation purposes" to determine whether a particular interest conveyed there was taxable].)

Even more important, however, was the practical relationship that developed between the two taxes. Indeed, one principal reason cited in the Advisory Commission on Intergovernmental Relations report that originally proposed ceding the transfer tax to the states was that state and local governments relied heavily on the sales information generated by the transfer tax in the administration of their property tax systems. (United States Advisory Commission on Intergovernmental Relations, The Intergovernmental Aspects of Documentary Taxes, Report No. A-23 (1964) pp. 5, 22; *Mot. For Jud. Not.,* exh. "Q".)[28] This rationale was repeated by Congress, which stated explicitly their understanding that most states would re-enact their own transfer taxes not only for the direct revenue, but also for the co-benefits in property tax administration. (Sen. Rep. No. 89-324, 1st Sess. (1965), reprinted in 1965 U.S. Code Cong. & Admin. News, p 1729 (1 C.T. 105) ["the attention of your committee was called to the fact that this tax is often used by local assessment authorities in determining changes in value of real estate in their locales"]; Statement of Senator Long, 111 Cong. Rec. 13573 (June 17, 1965); *Mot. For Jud. Not.,* exh. "P" ["the States and local governments depend upon these stamps on real estate conveyances for assessment purposes"]; Statement of Rep. Mills, 111 Cong. Reg. 13962 (June 17, 1965) (1 C.T. 110) [same].)

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[28] The Advisory Commission on Intergovernmental Relations was a long-term federal advisory body created by Pub.L. No. 86-380. This particular Commission report and its rationale were specifically cited in the legislative history for the Stamp Tax repeal bill. (Hearings before Sen. Com. on Finance on H.R. No. 8371, 89th Cong., 1st Sess., p. 39 (1965), testimony of Secretary of the Treasury Henry Fowler; *Mot. For Jud. Not.,* exh. "O" ["the Advisory Commission on Intergovernmental Relations, in which Federal and State and local tax authorities meet to discuss mutual problems has informed us that they expect some of the States to impose a tax on deeds to replace the one that we would repeal because it ties into State and local real estate transactions"].)

In short, contemporary lawmakers in 1967 clearly understood that the transfer taxes and property taxes were part of an integrated scheme, applicable to the same transactions. Against this backdrop, the *Thrifty* court and the instant Court of Appeal plainly did not err in looking to the property tax system to ascertain whether heretofore novel instruments should be considered to effectuate the *sale* of *realty*. The proceedings leading up to adoption of the Documentary Transfer Tax Act contemplated precisely such integration.[29]

The 1964 Commission report also answers another of Petitioner's arguments, that "the Legislature's decision *not* to enact the portion of the federal act imposing documentary transfer taxes on transfers of shares or certificates of stock . . . reflect[s] the Legislature's unmistakable intent to limit the tax to documents evidencing conveyances of realty." (*Open Brief*, p. 36; *Reply Brief*, p. 14.)[30] However, the report suggests a more prosaic reason that our Legislature saw no need for the stock tax: At the time, very few stock transactions actually occurred in California. (*Intergovernmental Aspects of Documentary Taxes*, p. 2 [noting that "almost 80 percent of the dollar value of stock transfers occurs in New York City"].) As above, this merely proves that such transactions were not common enough to be economically meaningful at that

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[29] The practical integration of the transfer tax and property tax has since grown even stronger with the passage of Proposition 13, which adopted an "acquisition value" system of property tax assessment in place of the former method of annual reappraisals. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 235.) As a result, those same "sale" transactions triggering the transfer tax now directly determine the property's taxable value, making the need for consistency between the two systems even more pressing. As will appear, the Legislature recognizes these practical considerations, and has taken steps to ensure the coordinated administration of both taxes at the local level.

[30] As noted above, the essential question is not *whether* the transfer tax applies to "documents evidencing conveyances of realty," but rather *which* documents convey realty within the meaning of the Documentary Transfer Tax Act. Thus Petitioner's real argument here is that an instrument transferring shares in a legal entity cannot *also* thereby cause a taxable sale of realty. As will appear, this contention cannot be sustained.

time – and says nothing of any intent to allow modern transactions that are, in economic effect, sales of real property to escape taxation.

Even without this history, the approach taken by the Court of Appeal here is consistent with basic principles of statutory construction. As explained by this court in *Isobe v. Unemployment Insurance Appeals Board* (1974) 12 Cal. 3d 584:

> "Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose." (*Isobe, supra,* 12 Cal.3d at pp. 590-591.)

This rule applies with especial force here, as "[t]axing statutes are *in pari materia* and should be construed together in ascertaining the legislative intent." (*Estate of Jacobs* (1943) 61 Cal.App.2d 152, 158.) "And particularly in the construction of statutes relating to revenue and taxation is the rule applicable and invariably invoked upon the theory that all such statutes constitute one law." (*Old Homestead Bakery, Inc. v. Marsh* (1925) 75 Cal.App. 247, 259.)

All of this was very well-established when the Documentary Transfer Tax Act was enacted. In light of the foregoing, it would appear hard to argue that the 1967 Legislature *didn't* intend that the transfer tax be construed in light of the property tax. The correct answer is plainly otherwise: The Legislature fully intended that the two taxes develop together, and consistently address the same transactions. This is evident both as a matter of statutory construction and historical reality.

The change in ownership provisions of property tax law, though postdating the Documentary Transfer Tax Act, fit perfectly into this scheme. As discussed above, the Stamp Tax historically aimed to identify (and tax) those transactional instruments that – common law labels aside – sold a "bundle of rights approximating" those of real property ownership.

(*Texaco, supra,* 624 F.2d at p. 21 quoting former 26 C.F.R. § 43.4361-1(a)(4)(i).) The change in ownership statutes were designed to do just that, providing structured rules to distinguish "true" changes of ownership from paper ones (*Sav-On Drugs, Inc. v. County of Orange* (1987) 190 Cal.App.3d 1611, 1617), and applying this same basic concept to emerging types of transactions unknown (or uncommon) in previous generations. (*Ibid.* [noting that the change in ownership statutes were designed to ensure that property tax may not be avoided "via the simple expedient of disguising transfers of realty by means of selling all or a majority of the stock in real estate holding companies"].) This unrevolutionary refinement in the law is manifestly as relevant to the transfer tax as the property tax, and for the reasons set forth above applies equally to both. Contrary to Petitioner's suggestion, these laws have no "different purpose."

Further, as the Court of Appeal correctly recognized, more recently legislation has confirmed the Legislature's intent that transfer tax liability to attach to changes in ownership and control of business entities that owned real property interests at the time they are taken over. Statutes 2009, chapter 622 (Senate Bill 816) amended Revenue and Taxation Code section 408, subdivision (b) to include a provision obligating the county assessor to furnish information regarding such changes in ownership and control to county recorders in order "to enhance enforcement and administration of the documentary transfer tax." (Sen. Rev. & Tax. Comm., analysis of Sen. Bill No. 816 (2009-2010 Reg. Sess.) as introduced; *Mot. For Jud. Not.,* exh. "R".) The author of the bill (Senator Ducheny) specifically expressed the intention that this legislation "will help recorders determine whether the DTT applies to certain changes of ownership." (*Ibid.*)

Further strengthening the connection between transfer tax liability and changes in control and ownership of a business entity, Senate Bill 816 also amended Revenue and Taxation Code section 480.1 to impose penalties on a party acquiring ownership or control of a business entity that fails to file a change in ownership statement with the California State Board of Equalization – which is exactly the type of information that Senate Bill 816 requires assessors to share with recorders. By expressly granting county recorders access to information regarding changes in control and ownership of business entities for the investigation and collection of transfer tax, Senate Bill 816 clearly indicates Legislature's understanding that those same changes in control of business entities triggering property tax reassessment also constitute sales of realty for purposes of the transfer tax.

The Legislature reinforced this conclusion two years later, with Statutes 2011, chapter 320 (Assembly Bill 563). That legislation added Revenue and Taxation Code section 408.4, in order to "allow for information sharing between County Assessor's Offices' and cities to identify *change of ownership legal entity transfers* and other real property transfers that may not currently be captured." (Assem. Comm. on Rev. & Tax., analysis of Assem. Bill. No. 563 (2011-2012 Reg. Sess.) as introduced; *Mot. For Jud. Not.*, exh. "S".) The bill's sponsor further noted that "...this type of program would help result in improved and increased collection of an *existing revenue source*." (*Ibid.*)

The rationale behind these legislative actions further demonstrates that the Legislature intended that those business entity transactions constituting "changes in ownership" under the property tax laws also trigger Documentary Transfer Tax. If the confidential information regarding corporate takeovers provided to county assessors were irrelevant to the conveyance of real property interests, then neither Senate Bill 816 nor Assembly Bill 563 would be

meaningful.[31] Phrased differently, if the only information relevant to conveyances of real property interests were what county recorders and cities already had access to (i.e. deeds), then this legislation would be pointless. Therefore, if those bills are to be read as effectuating their purpose, they must certainly indicate the Legislature's understanding that transfer tax liability may apply to unrecorded changes in ownership and control of a business entity. The bills are aimed at rectifying the exact lack-of-knowledge problem referred to by the Court of Appeal in this case. (Slip Opn., p. 6.)

In the end, the understanding and intention of the Legislature evidenced by these statutes is not seriously debatable. They gave counties the tools to collect transfer tax from such transactions, and meant them to do the job. Contrary to Petitioner's suggestion, this does not amount to an unconstitutional increase in taxes, or post hoc effort to expand the 1967 legislation. If the history of the Stamp Tax proves anything, it is that the term "realty sold" "is not so certain and clear that it requires no construction." (*E. Gottschalk & Co. v. County of Merced* (1987) 196 Cal.App.3d 1378, 1384.)[32] Under these circumstances, the Legislature is perfectly capable of interpreting that phrase, without any constitutional infirmity – particularly,

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[31] Petitioner's suggestion that these provisions may have been intended *solely* to allow county officials to capture partnership transactions taxable under Section 11925 (*Open. Brief*, pp. 51-52) is creative, but without a shred of support in the legislative history.

[32] The multiple sets of regulations noted above, and myriad other federal interpretive documents generated during the Stamp Tax era, amply demonstrate the continual need for construction and development of these terms. See, e.g., *Milwaukee Land Co v. Poe* (9th Cir. 1929) 31 F.2d 733 [standing timber, taxable]; Internal Revenue Service, S.T. 865 (Internal Revenue Cumulative Bulletin 1937-2, p. 528); *Mot. For Jud. Not.*, exh. "L" [conveyance and leaseback, taxable]; Internal Revenue Service, M.T. 24 (Internal Revenue Cumulative Bulletin 1946-2, p. 182); *Mot. For Jud. Not.*, exh. "M" [revoking S.T. 865, conveyance and leaseback not taxable]; Internal Revenue Service, S.T. 860 (Internal Revenue Cumulative Bulletin 1937-1, p. 341); *Mot. For Jud. Not.*, exh. "N" [water rights, taxable]; Internal Revenue Service General Counsel Memo 23295 (Internal Revenue Cumulative Bulletin 1942-2, p. 271); *Mot. For Jud. Not.*, exh. "K" [lease, possibly taxable].)

as here, to address emergent forms of property transactions. (*Ibid.*; *Sav-On Drugs, Inc., supra,* 190 Cal.App.3d at pp. 1623-1625 [rejecting similar arguments against the change in ownership statutes].) Simply put, the Legislature has not *increased* the transfer tax, but rather provided "a perfectly reasonable interpretation" of its scope. (*Sav-On Drugs, Inc., supra,* 190 Cal.App.3d at p. 1622.)

VII. FROM 4383 TO 11925: THE ORIGIN AND MEANING OF THE TRANSFER TAX'S PARTNERSHIP EXEMPTION

The parties discuss at length the Documentary Transfer Tax Act's special provisions for partnerships, both claiming that it supports their position. The County has the better argument. As relevant here, Revenue and Taxation Code section 11925 provides:

> (a) In the case of any realty held by a partnership or other entity treated as a partnership for federal income tax purposes, *no levy shall be imposed* pursuant to this part by reason of any transfer of an interest in the partnership or other entity or otherwise, *if both of the following occur*:
>
> (1) The partnership or other entity treated as a partnership is considered a continuing partnership within the meaning of Section 708 of the Internal Revenue Code of 1986.[33]
>
> (2) The continuing partnership or other entity treated as a partnership continues to hold the realty concerned.
>
> (b) If there is a termination of any partnership or other entity treated as a partnership for federal income tax purposes, within the meaning of Section 708 of the Internal Revenue Code of 1986, for purposes of this part, the partnership or other entity shall be treated as having executed an instrument whereby there was conveyed, for fair market value (exclusive of the value of any lien or encumbrance remaining thereon), all realty held by the partnership or other entity at the time of the termination.

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[33] As relevant here, a partnership is considered "terminated" (i.e., not "continuing") under Section 708 if "within a 12-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits."

Petitioner argues, in essence, that this section sets forth the *only* circumstance under the change in control of a property-owning legal entity may be treated as a sale of the realty itself. However, the plain language of this provision will not bear that construction. On its face, this provision is structured as an exemption, not a grant – "*no* levy shall be imposed . . . *if* both of the following occur . . ." Further, the legislative history behind the 1999 amendments to this section explicitly refer to these provisions as "*[e]xempt[ing]* partnerships from the tax . . ." (Assem. Comm. on Local Government., analysis of Assem. Bill. No. 1428 (1999-2000 Reg. Sess.) as amended May 3, 1999 (3 C.T. 617).) This language plainly reflects an underlying tax structure in which such "transfer(s) of an interest in the partnership" would otherwise be taxable, but for these provisions. Contrary to Petitioner's argument, this clearly supports a conclusion that other transfers of legal entity interests *may* be subject to tax, leaving only the question of *which* such transfers qualify.

Petitioner correctly recognizes that these provisions are descended almost verbatim from former 26 U.S.C. § 4383, but misunderstands the purpose and effect of that statute. Section 4383 was added in 1958 to address "a question as to whether [transfer] tax is presently imposed where there is merely a change of interests in the partnership and no change in legal title of real property." (Sen.Rep. No. 85-2090, 2d. Sess., p. 61 (1958) (1 C.T. 153).) The House Ways and Means Committee report explained that "[t]he Internal Revenue Service has taken the position that no tax is to be imposed until there is a change of legal title to the real property, irrespective of the changes of interests in the partnership. The Service position in the case of

real property thus to a substantial degree follows the 'entity' approach for partnerships." (H.R.Rep. No. 85-481, 2d. Sess., p. 62 (1958) (1 C.T. 149).)[34]

Petitioner leaps on various statements indicating that Congress approved of the "entity approach" to partnerships, thus presuming Congress' views toward other types of entities. However, Congress emphatically did *not* embrace the result urged by Petitioner here. Quite the contrary, Congress – like the courts and the IRS – opted to focus on the economic reality of such transactions, avoiding taxation of "minor changes in a partnership," but deliberately capturing those transactions where "there has been a sufficient change in a partnership to justify the imposition of a tax . . . " (Sen.Rep. No. 85-2090, at p. 62.; H.R.Rep. No. 85-481, at p. 62.)

Moreover, Congress effectuated this intent by importing a federal rule strikingly similar in concept and operation to our "change in ownership" provisions. Specifically, Section 4383 confirmed that a taxable "sale" of the partnership realty occurs when (as relevant here) "within a 12-month period there is a sale or exchange of *50 percent or more of the total interest in partnership capital and profits*" (i.e., the technical "termination" of the partnership under Section 708 of the Internal Revenue Code).[35] While differing in some details from California's change in ownership rules, the common approach toward respecting the substance of such

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[34] Petitioner's suggestion that Section 4383 was intended to remedy "the then-prevailing 'aggregate' approach to partnerships" (*Open. Brief*, p. 28) is thus mistaken, at least as applied to the tax on conveyances. Congress' action with regard to this Stamp Tax actually represented an *expansion* of the IRS' approach to partnership taxation as described in these reports.

[35] This may be compared to the analogous Property Tax Rule, which provides that a change in ownership occurs "[w]hen . . . any person . . .obtains through . . . any transfer direct or indirect ownership of more than *50 percent of the total interest in partnership or LLC capital and more than 50 percent of the total interest in partnership or LLC profits.*" (Cal. Code Regs., tit. 18, § 462.180, subd. (d)(1)(B).)

transactions, rather than form, for transfer tax purposes is perfectly obvious. Petitioner's assertion that Section 4383 represented a "codification of the entity approach" (*Open Brief*, p. 29) thus requires substantial qualification. The version of the "entity approach" actually adopted by Congress explicitly recognized that transferring majority control of an entity effectively amounts to the (taxable) sale of the entity's assets.

As discussed in greater detail in Part III, *supra*, at the time these provisions were enacted, legal entity forms, other than partnership, were a substantially less common means of organization for small businesses than is prevalent today. It is consequently unsurprising that Congress chose to address the consequences of changes in control for those entities which most frequently underwent such changes – i.e., partnerships. The Stamp Tax was repealed before the advent of the LLC and S-Corporation made such transfers common amongst other types of legal entities, making Congress' silence on the matter unremarkable – and hardly an indication of any intent that such transactions escape taxation.

Petitioner suggests that the existence of these historic special provisions for partnerships, while utilizing the change in ownership rules to assess the taxability of other legal entity transactions, creates an anomaly because "because minor transfers of interests in non-partnership entities would trigger the DTTA, while substantially larger transfers of interests in partnership interests would not." (*Open. Brief*, pp. 54-55.) However, any anomaly is more apparent than actual. Petitioner neglects to note that their hypothetical transfer of a "1% interest in a non-partnership entity" must have been preceded at some point by sale of the other 49% in order to trigger taxability under the change in ownership rules. The only real difference from the special partnership rule is the *timeframe* within which such majority transfer must

occur (which is limited to 12 months under Section 11925). While this is indeed a difference in treatment, it is hardly the dramatic disparity suggested by Petitioner.

More importantly, Petitioners approach would create a huge anomaly in order to avoid a minor one. Under their construction, an entity (or individual) selling realty by recorded deed would be fully taxed, but the same sale accomplished through the simple expedient of transferring the entity itself would be tax-free. *This* is the type of disparity the law abhors, and that the Legislature does not intend when drafting tax statutes.

For all of these reasons, the Documentary Transfer Tax Act's special provisions for partnerships complement and support the application of the transfer tax to similar control changes involving other kinds of entities.

VIII. TAX POLICY CONSIDERATIONS STRONGLY SUPPORT APPLICATION OF THE TRANSFER TAX TO SUCH TRANSACTIONS

The Court of Appeal made a very salient point: "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." (Slip Opn., p. 31.) After another round of intensive briefing in this court, they still haven't. Tax refund actions are equitable proceedings, governed by principles of "equity and good conscience." (*John Deere Co. of Moline v. Franchise Tax Bd.* (1965) 237 Cal.App.2d 663, 665-666.) Petitioner's inability to articulate any reason of equity or public policy favoring their position consequently speaks volumes.

Petitioner makes much of the venerable canon that ambiguities should be resolved in favor of the taxpayer. (*Open. Brief,* p. 5.) However, this is not the only interpretive policy in play, or taxpayers would win every close case. First, and perhaps most obviously, the

fundamental purpose of the Documentary Transfer Tax to *raise revenue* cannot be ignored in the interpretation of its provisions. Unlike some more nuanced taxes (such as the income tax and the property tax), which may balance other public policy goals, the transfer tax is a simple and straightforward excise tax whose only purpose is to provide public funds.[36] This plain reality was influential in the broad interpretation of the federal Stamp Tax (see, e.g., *Royal Loan Co., supra,* 154 F.2d at p. 558; *Stuyvesant Town Corp., supra,* 111 F.Supp. at p. 248), and was equally important to the enactment of the Documentary Transfer Tax Act. (See, e.g., 3 C.T. 453 [letter from Senator Teale, the author of the Act, to Governor Reagan, explaining that the Act would raise revenue for "property tax relief"]; 3 C.T. 457-484 [numerous letters urging approval of the bill for the same reason].) This purpose would be undermined by an unnecessarily narrow and artificial construction of the Documentary Transfer Tax Act which would allow a substantial (and growing) number of real property transactions to escape taxation. In sum, the transfer tax wasn't intended to be a mere annoyance, easily avoided by sophisticated parties; it was meant to generate tax revenues *whenever* real property is sold.

Perhaps more importantly, California's public policy does not favor regressive taxes – but that is exactly what Petitioner proposes. Under their approach, ordinary homeowners would almost universally pay the tax when buying or selling their homes, but corporate property owners would have an easy escape. However, the Documentary Transfer Tax was never intended, and should not be construed, as a regressive tax disproportionately paid by individual homeowners. The Legislature rejected *precisely* this result when enacting the change in

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[36] In this connection, the origins of the Stamp Tax as a wartime revenue measure, in both this country and Europe, are not irrelevant. (See *Intergovernmental Aspects of Documentary Taxes*, p. 4, fn. 1; Dowell, A History of Taxes in England (1884) vol. 3, pp. 322-329.) These had – and still have – the simple, unadorned purpose to raise needed funds for important public purposes.

ownership statutes, recognizing "that it would be patently unfair to require the ordinary homeowner, who cannot avoid reassessment in purchasing property by placing title in the name of a corporate subsidiary, to bear the higher tax burden which would result from allowing corporations to avoid reassessment by such means." (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 95-96. See also *Kraft, Inc. v. County of Orange* (1990) 219 Cal.App.3d 1104, 1109 [describing the legislative intent "to equalize the tax burden between individual and corporate purchasers of real property"]; *Sav-On Drugs, Inc., supra,* 190 Cal.App.3d at pp. 1624-1625 ["If the Legislature had not clarified the phrase 'change of ownership' as it did, corporations might have enjoyed an unjustifiable and unintended advantage over individuals in the buying and selling of real estate"].)

The Legislature did not intend the transfer tax to be "patently unfair" any more than the property tax. Rather, as discussed above, the Legislature intended the two taxes to apply cooperatively to the same set of transactions. The proper approach, adopted by *Thrifty Corp.* and the instant Court of Appeal, avoids any unequal tax burden and fully effectuates both the legislative intent and manifest public policies favoring equity and fairness in taxation.

IX. CONCLUSION

For the reasons set forth above, the broad language of the Documentary Transfer Tax Act, its history, the expressed intentions of our Legislature, and considerations of public policy all favor application of the transfer tax to instruments that effectively convey the bundle of rights comprising real property ownership by means of transferring control of the legal entity that holds record title to the property. While they may differ in form somewhat from their industrial-age forebearers, the economic reality of such transactions is unmistakable, and supplies all of the elements of taxability under the Act: There is a *document*, there is a *realty*,

and there is a *sale*. The judgement of the Court of Appeal recognizing the taxability of such transactions should be AFFIRMED.

Dated: 9/30/15

Respectfully submitted,

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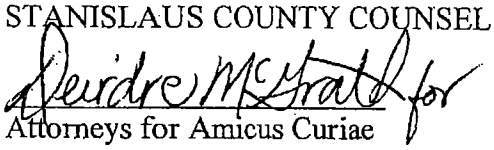

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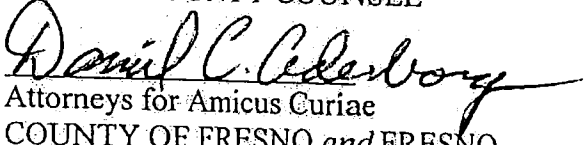

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Preliminary Opposition contains 9,764 words, not counting the tables, and this attachment, as determined by the word count function of Microsoft Office Word 2013.

Dated:

Respectfully submitted,

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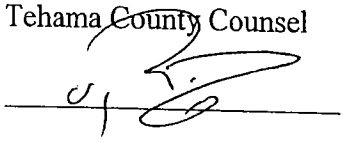
Tehama County Counsel



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CERTIFICATE OF SERVICE

Title of Action: 926 North Ardmore Avenue, LLC
Supreme Court Case No. S222329

I, the undersigned, am employed in the City of Red Bluff, County of Tehama, State of California; my business address is 727 Oak Street, Red Bluff, CA 96080. I am over the age of eighteen years and not a party to the within action. On the date below I caused the following papers to be served a follows:

[PROPOSED] BRIEF OF AMICI CURIAE OF COUNTY OF TEHAMA *and* TEHAMA COUNTY CLERK-RECORDER JENNIFER A. VISE; COUNTY OF ALAMEDA; COUNTY OF FRESNO; *and* FRESNO COUNTYASSESSOR-RECORDER PAUL DICTOS; KERN COUNTY ASSESSOR-RECORDER JON LIFQUIST; COUNTY OF MONO; COUNTY OF MONTEREY *and* MONTEREY COUNTY ASSESSOR-CLERK-RECORDER STEPHEN L. VAGNINI; NAPA COUNTY *and* NAPA COUNTY ASSESSOR-RECORDER-COUNTY CLERK JOHN TUTEUR; COUNTY OF PLACER *and* PLACER COUNTY CLERK-RECORDER-REGISTAR JIM MCCAULEY; COUNTY OF RIVERSIDE *and* RIVERSIDE COUNTY ASSESSOR PETER ALDANA; COUNTY OF SAN BENITO *and* SAN BENITO COUNTY CLERK, AUDITOR & RECORDER JOE PAUL GONZALEZ; COUNTY OF SAN DIEGO *and* SAN DIEGO COUNTY ASSESSOR/RECORDER/COUNTY CLERK ERNEST J. DRONENBURG, JR.; COUNTY OF SAN MATEO; COUNTY OF SANTA BARBARA *and* SANTA BARBARA COUNTY ASSESSOR JOSEPH E. HOLLAND; COUNTY OF SONOMA *and* SONOMA COUNTY CLERK-RECORDER-ASSESSOR WILLIAM F. ROUSSEAU; *and* COUNTY OF STANISLAUS

Causing a true copy thereof, enclosed to be delivered to the office of each party shown below at the address indicated and by leaving the same with a person apparently in charge and over the age of eighteen years;

(X) Placing a true copy there, enclosed in a sealed envelope with first-class postage thereon fully paid, in the United States mail at Red Bluff, California, addressed as follows:

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Second District Court
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Los Angeles, CA 90013

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Court, Dept. 16
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I declare under penalty of perjury that the foregoing is true and correct, executed at Tehama County, California, on October 7, 2015.

Arminda Searcy

ARMINDA SEARCY