

Case No.: S266590

IN THE SUPREME COURT OF CALIFORNIA

**AMEN FAMILY 1990 REVOCABLE TRUST, Real Party in
Interest**

Appellant

v.

JEFFREY PRANG, Los Angeles County Assessor

Respondent

After a Decision of the Court of Appeal
Second Appellate District, Division Five
Appeal Case No. B298794
Appeal from Los Angeles Superior Case No. BS173698
Hon. James C. Chalfant

APPELLANT'S MOTION FOR JUDICIAL NOTICE

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APPELLANT’S MOTION FOR JUDICIAL NOTICE

A. Motion for Judicial Notice

Pursuant to Evidence Code sections 452, 453, and 459, and California Rule of Court 8.252, Appellant Amen Family 1990 Revocable Trust (“Appellant”) hereby requests that the Court take judicial notice of an official record of the California State Board of Equalization (“State Board”).

B. Good Cause Exist For Judicial Notice

Judicial notice is appropriate here because the legal opinion of the State Board that is attached here as Exhibit A supports Appellant’s argument that the phrase “ownership interests” in Revenue and Taxation Code section 62, subdivision (a)(2) (“Section 62(a)(2)”) is measured for corporations using voting stock alone and that the term “stock” is included in Section 62(a)(2) to distinguish among the various ways control is exerted over a corporation (*i.e.*, stock versus an executive position or membership on the board of directors) and not to create a unique definition of “ownership interests” for Section 62(a)(2) that is based on all forms of stock in a corporation.

The specific material for which judicial notice is requested is as follows:

- 1. Exhibit 1:** The State Board’s legal opinion dated February 20, 1985 underlying Annotation 220.0120, available at the State Board’s website:

https://www.boe.ca.gov/proptaxes/pdf/220_0120.pdf.

The Legal opinion addresses “the question [of] whether the acquisition of the voting rights of more than 50% of a corporation’s voting stock through an irrevocable proxy constitutes direct or indirect control of the stock for purposes of the definition of ‘control’ adopted by the Legislature” and “conclude[s] that the answer is affirmative.” (Ex. 1 at p. 2.) The State Board reasoned: “The change in ownership test employed by the Legislature in subdivision (c) of Section 64 refers to the ownership or control of a majority of the voting stock and this reference is apparently based upon the control of corporate affairs normally granted to the majority shareholder. This control arises from the power to elect a majority of the board of directors and to thereby control the operations of the corporation and make other major corporate decisions such as merger, sale of assets, etc. This kind of control is not dependent upon participation in the other normal incidents of common stock ownership, such as participation in dividends or distribution of corporate assets. Thus, where the stock voting rights are separated from these other incidents of stock ownership, we conclude

that the Legislature intended that the test follow the voting rights.” (*Id.* at p. 3.)

Dated: June 10, 2021

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: /s/ Colin W. Fraser

Colin W. Fraser

Cris O’Neal

Attorneys for Appellant

Amen Family 1990 Revocable Trust

MEMORANDUM OF POINTS AND AUTHORITIES

A reviewing court may take judicial notice of “any matter specified in [Evidence Code] Section 452,” even where the trial court was not requested to (or could not) take notice. (Evid. Code, § 459(a); see also *Hogen v. Valley Hosp.* (1983) 147 Cal.App.3d 119, 125.)

Evidence Code section 452 provides that the Court may take judicial notice of:

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

California Rules of Court, rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

(A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; (C) if judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and (D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, rule 8.252(a)(2).) Taking each of these issues in turn:

A. The State Board legal opinion to be judicially noticed is relevant to this appeal because it supports Appellant's argument that the phrase "ownership interests" in Revenue and Taxation Code section 62, subdivision (a)(2) ("Section 62(a)(2)") is measured for corporations using voting stock alone and that the term "stock" is included in Section 62(a)(2) to distinguish among the various ways control is exerted over a corporation (*i.e.*, stock versus an executive position or membership on the board of directors) and not to create a unique definition of "ownership interests" for Section 62(a)(2) that is based on all forms of stock in a corporation. The State Board addressed this issue to an extent in the legal opinion attached as Exhibit 1, explaining: "Control of a corporation exists, of course, at a variety of levels" including "chief executive officers" and "the corporation's board of directors," but "the ultimate control of the corporation rests with its stockholders, and this is the level of control referred to in subdivision (c) [of Revenue and Taxation Code section 64] by referencing "voting stock." (Ex. 1 at p. 2.)

The legal opinion also counters Respondent's argument that a decision in Appellant's favor would "fundamentally alter" the meaning of the Revenue and Taxation Code. Respondent argues that using a uniform definition of "ownership interests" will mean

that “every time any shareholder gives a proxy, transfers voting power in stock to a third person or enters into a voting trust agreement there could be unforeseen changes in ownership of real estate.” (AB at 23.) This is essentially already the law, so Respondent’s concern about drastic change is unfounded. The legal opinion attached as Exhibit 1 states: “the question is whether the acquisition of the voting rights of more than 50% of a corporation’s voting stock through an irrevocable proxy constitutes direct or indirect control of the stock for purposes of the definition of ‘control’ adopted by the Legislature. We conclude that the answer is affirmative.” (Ex. 1 at p. 2.)

B. Appellant did not present the matters to be noticed to the trial court because Appellant’s research did not identify Exhibit 1 until researching Appellant’s concurrently filed Reply brief.

C. Exhibit 1 is subject to judicial notice under Evidence Code section 452, subdivision (c), which applies to “[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States.” The State Board is responsible for promulgating rules and regulations and governing and providing instruction to local boards of equalization and California county assessors. (Gov. Code, § 15606(c) and (e); *Xerox Corp. v. County of Orange* (1977) 66 Cal.App.3d 746, 753.) Annotations and their underlying legal opinions are non-controlling advisory guidance issued by the State Board. Appellate courts have reviewed and

referred to Property Tax Annotations in deciding property-tax related appellate matters. (See *Yamaha Corp. of America v. State Board of Equalization* (“*Yamaha I*”) (1998) 19 Cal.4th 1, 2; *Dyanlyn Two v. County of Orange* (2015) 234 Cal.App.4th 800, 811; *Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 616.)

Evidence Code section 453 provides that “[t]he trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: (a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter.”

D. The matters to be noticed do not relate to proceedings occurring after the judgment that is the subject of the appeal.

For all of the foregoing reasons, Appellants respectfully move this Court to take judicial notice of fact of Exhibit A attached hereto, pursuant to Evidence Code sections 452, 453 and 459, and California Rule of Court 8.252

Dated: June 10, 2021

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: /s/ Colin W. Fraser

Colin W. Fraser

Cris O'Neal

Attorneys for Appellant

Amen Family 1990 Revocable Trust

EXHIBIT 1

Memorandum

To: Mr. Vern Walton

Date: February 20, 1985

From: Richard Ochsner

Subject: Separation of Voting Rights From Stock Ownership

This is in response to your memorandum of July 20, 1984, requesting advice on whether an irrevocable stock proxy transferring the stock voting rights, without an accompanying transfer of the equity or ownership interests represented by the stock, could qualify as a change in ownership of the real property owned by the corporation under Revenue and Taxation Code Section 64.

A preliminary question, of course, is whether an irrevocable proxy is a legally effective means of transferring shareholder voting rights in a corporation. The General Corporation Law is found in the California Corporations Code commencing with Section 100. Provisions dealing with the voting of shares are found in Chapter 7 of the General Corporation Law commencing with Section 700 of the Corporations Code. Section 705 of that code (copy attached) deals with the subject of proxies.

Subdivision (a) of Section 705 states the general rule that every person entitled to vote shares may authorize another person or persons to act by proxy with respect to such shares. Subdivision (e) and (f) of Section 705 deal specifically with irrevocable proxies. Subdivision (e) provides that a proxy stating that it is irrevocable is irrevocable for the period specified when held by any one of six enumerated classes of persons. These are: (1) pledgees; (2) purchasers or sellers of the stock; (3) creditors of the corporation or of the shareholder; (4) persons contracting to perform services, as an employee of the corporation; (5) persons subject to certain voting trust agreements described in Corporations Code Section 706; and, (6) beneficiaries of a trust holding the shares for which the proxy is given. Subdivision (e) further provides that a proxy may be made irrevocable if it is given to secure the performance of a duty or to protect a legal or equitable title until the happening of events which discharge the obligation secured by it. The subdivision also states that an irrevocable proxy become revocable, in spite of the period of irrevocability specified in the instrument, when a specified event occurs which removes the condition which originally qualified the person for an irrevocable proxy. For example, the proxy becomes revocable when the pledge is redeemed, the debtor relationship is terminated, the Section 706 agreement is terminated, etc. Finally, subdivision (f) permits revocation of an irrevocable proxy by a transfer of the shares without knowledge of the proxy, unless the existence of the proxy and its irrevocability appears on the certificate representing the stock shares.

It is clear, therefore that irrevocable proxies are legally effective only under the limited conditions described. Whether a particular irrevocable proxy constitutes a valid transfer or voting power, separate from the ownership of the stock, will depend upon facts of each case. For the

remainder of this discussion, however, it will be presumed that an irrevocable proxy satisfies the conditions of Section 705.

Subdivision (a) of Section 64 generally provides that the purchase or transfer of ownership interests such as corporate stock does not constitute a transfer of the real property of the corporation. Exceptions are subdivisions (c) and (d) of Section 64, and subdivision (h) of Section 61. The latter deals with the special situation of a transfer of stock of a cooperative housing corporation and need not be discussed here. Further, subdivision (d) of Section 64 deals with a specifically described situation. It applies only where property is first transferred to a legal entity in a transaction excluded from change in ownership by paragraph (2) of subdivision (a) of Section 62 (a change in the method of holding title with no change in proportional interests), and then "shares or other ownership interests representing cumulatively more than 50% of the total interests in the entity are transferred by any of the original co-owners in one or more transactions...." The reference in this subdivision is expressly to transfers of shares or other ownership interests". I have doubt at this point that a reappraisal of the underlying corporate real property could be triggered under the terms of this provision solely by an irrevocable stock proxy transferring voting rights. We are left, therefore, with subdivision (c) as the focus of this analysis (We note that the last paragraph of subdivision (d) provides that a transfer of shares which results in a change in control of a corporation is subject to subdivision (c) rather than subdivision (d).)

In pertinent part, subdivision (c) provides that a change in ownership of the property owned by a corporation occurs when a corporation, partnership, other legal entity or person obtains "control" of the corporation. "Control" is defined by reference to Revenue and Taxation Code Section 25105 which states that "Direct or indirect ownership of control of more than 50% of the voting stock of the taxpayer shall constitute ownership or control...."

Thus, a subdivision (c) change in ownership is based upon the acquisition by a single entity or person of control of the corporation through the direct or indirect ownership or control of more than 50% of the corporate voting stock. Since the language adopted by the Legislature does not expressly refer to voting rights or stock proxies, the question presented is whether the Legislature intended to include such rights or proxies within the scope of its definition of "control." Put another way, the question is whether the acquisition of the voting rights or more than 50% of a corporation's voting stock through an irrevocable proxy constitutes direct or indirect control of the stock for purposes of the definition of "control" adopted by the Legislature. We conclude that the answer is affirmative.

The standard adopted by the Legislature in subdivision (c) of Revenue and Taxation Code Section 64 is the acquisition by a single person or entity of "control" of the corporation as evidenced by the ownership or control of more than 50% of the voting stock. Control of a corporation exists, of course, at a variety of levels. For example, the chief executive officers of a corporation normally controls the day-to-day operation and policies of the company. But that officer serves at the pleasure of the corporation's board of directors. Thus, the board of directors, or its majority, has the power to control the corporation through the chief executive officer. It is well recognized, however, that the ultimate control of the corporation rests with its stockholders, and this is the level of control referred to in subdivision (c).

A majority shareholder is entitled to elect a majority of the board of directors (see Corporations Code Section 708 requiring cumulative voting for corporate directors) and therefore has the power to control the operation of the corporation and make decisions which bind and control the interests of the minority shareholder. (Graham v. Pasadena Land and Water Company, 152 Cal 596, 93 Pac 498). Further, the consent of a majority of the voting shares is required to authorize a variety of major corporate actions such as: a consolidation or merger (corporation Code section 3632); and, a reduction in stated capital (Corporations Code section 1904). Finally, a majority of the voting stock may elect to dissolve the corporation (Corporations Code section 4500).

The change in ownership test employed by the Legislature in subdivision (c) of Section 64 refers to the ownership or control of a majority of the voting stock and this reference is apparently based upon the control of corporate affairs normally granted to the majority shareholder. This control arises from the power to elect a majority of the board of directors and to thereby control the operations of the corporation and make other major corporate decisions such as merger, sale of assets, etc. This kind of control is not dependent upon participation in the other normal incidents of common stock ownership, such as participation in dividends or distribution of corporate assets. Thus, where the stock voting rights are separated from these other incidents of stock ownership, we conclude that the Legislature intended that the test follow the voting rights.

While we conclude that a transfer of the voting rights of more than 50% of the voting stock by means of an effective irrevocable proxy can constitute a change in ownership, it should be recognized that there are a number of exceptions which might apply. For example, one of the classes of persons to whom an irrevocable proxy may be given is a creditor of the corporation or shareholder where the proxy is given in consideration of an extension or continuation of credit. (See Corporations Code section 705, subdivision (e)(3).) Subdivision (c)(1) of the Revenue and Taxation Code section 62 provides, however, that a change in ownership shall not include the creation, assignment, termination, or reconveyance of a security interest. Thus, where the irrevocable proxy is transferred in connection with a true security transaction, the transfer would not constitute a change in ownership because of the provisions of Revenue and Taxation Code section 62 (see also Property Tax Rule 462(k)(1).) Another exception might arise where the transferee of the irrevocable proxy is under a contractual or fiduciary duty to exercise the voting rights solely for the benefit of the owner of the corporate shares. Where the transferee of the proxy has only limited discretion when exercising the voting rights, then those limitation must be examined to determine whether true control has actually transferred. For those reasons, we believe that each transaction involving a transfer of voting rights by means of an irrevocable proxy must be carefully examined and our decisions in this area should be made on a case-by-case basis.

In the first example you cite, A and B each own 50% of the voting stock of the corporation. On B's divorce, his wife receives one half (25%) of B's stock. The corporation then purchases the stock from B's former spouse and retires it. This leaves B with one third (25%) and A with two thirds (50%) interest. A then transfers to B, by irrevocable proxy, sufficient voting rights to make them equal in voting power.

Two things come to mind under these facts. First, unless the irrevocable proxy were issued prior to the point in time when 25% of the corporation stock was redeemed and retired, a change in ownership occurred as soon as A become a two thirds owner. A Subsequent transfer of voting rights would not change that result Second, the facts do not show that B falls within one of the classes of person described in Corporations Code section 705(e) as qualified to hold an irrevocable proxy Thus, the legal effectiveness of the irrevocable proxy is in question. In conclusion, a change in ownership under these facts could be avoided only if the irrevocable proxy is legally effective and if it is issued before A become a two thirds owner.

In your second example, A owns 10% and B owns 90% of the stock in the corporation. For an unspecified reason, B transfers the voting rights to all of his stock by irrevocable proxy, to A. Assuming, (a) that the irrevocable proxy satisfies the requirements of Corporations Code section 705(e), and (b) that this is not a security transaction, then it would appear that the transfer of voting rights from B to A would constitute a change in ownership under the interpretation set forth above. A final decision in this matter would, of course, require a detailed examination of all the facts in this matter together with any supporting documentation, such as contracts, escrow agreements, etc

Finally, it appears that this interpretation will be the controlling precedent for the foreseeable future. We have abandoned an earlier proposal to seek clarifying legislation on this subject.

RHO: mw

Attachment

cc: Mr. James Delaney
Mr. Gordon Adelman
Mr. Robert Gustafson
Ms. Michele Hicks
Mr. Eric Eisenlauer

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 18565 Jamboree Road, Suite 500, Irvine, CA 92612.

On June 10, 2021, I served **APPELLANT’S REPLY IN SUPPORT OF OPENING BRIEF**, on the interested parties, addressed as follows:

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Executed on June 10, 2021 at Irvine, California.

/s/ Vanessa Hudak

Vanessa Hudak

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PRANG v.
AMEN**

Case Number: **S266590**

Lower Court Case Number: **B298794**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **frasercw@gtlaw.com**
3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/10/2021

Date

/s/Vanessa Hudak

Signature

Fraser, Colin (266867)

Last Name, First Name (PNum)

Greenberg Traurig, LLP

Law Firm