926 North Ardmore Ave., LLC v. County of Los Angeles

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Supreme Court of California
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926 North Ardmore Avenue, LLC, a California limited liability company, Plaintiff and Appellant, v. County of Los Angeles, Defendant and Respondent.

Type: Petition for Appeal

Prior History: After a Decision by the Court of Appeal, Second Appellate District, Case No. B248356. Los Angeles County Superior Court, Case No. BC 476670. The Honorable Rita Miller, Judge Presiding.

Counsel

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Title

Petition for Review

Text

ISSUE PRESENTED

Does *Revenue and Taxation Code section 11911* authorize a ″county,″ or a ″city and county,″ to impose a documentary transfer tax based on a change in ownership in a legal entity that directly or indirectly (through one or more layers) holds title to real property?

WHY REVIEW SHOULD BE GRANTED

Revenue and Taxation Code section 11911, [1] which is part of the Documentary Transfer Tax Act (″DTTA″), authorizes the imposition of a documentary transfer tax ″on each deed, instrument, or writing by which any lands . . . or other realty sold . . . [are] granted, assigned, transferred, or otherwise conveyed to … the purchaser or purchasers.″ [2]
[*2]
In this case, in a marked departure from the statute's plain language, the Court of Appeal ruled that ' a documentary tax may be applied to transfers of interests in legal entities [that hold title to real property through one or more layers] pursuant to section 11911 if the transfer results in a 'change of ownership″' of the entity within the meaning of section 64 (slip opn., p. 30) even absent any actual or constructive conveyance of title to the realty held by the entity, as required by the plain meaning of the statute.
The Court of Appeal's expansive and unprecedented reading of section 11911 departs markedly from the plain meaning of its statutory text, which only authorizes the ″impos[ition]″ of a documentary transfer tax on ″each deed, instrument, or

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[1] Unless specified otherwise, all statutory references are to the Revenue and Taxation Code.

[2] Section 11911 (a) authorizes counties to impose the tax; section 11911 (b) authorizes cities within counties that have already imposed the tax to impose the tax as well.

writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers...." (*Ibid.*) The court's decision threatens to upend decades of well-settled precedent, practice, and understandings applying excise taxes such as the DTTA only to *documents* evidencing the transfer of *realty*. That, in turn, will [*3] create chaos and confusion if left unaddressed, and also raises serious constitutional issues, all of which warrant this Court's review before the effects of this decision, applied inconsistently across 58 different counties and hundreds of cities throughout the State, become difficult, if not impossible, to unwind.

Transfers of realty are evidenced by some type of "deed, instrument, or other writing" by which property is conveyed, and those writings have long been the object of the DTTA, as they were under the Federal Stamp Act that it replaced and on which the DTTA was patterned. (§ 11911.) [3] The person who makes, signs, or issues the instrument subject to the tax or for whose benefit the same is made, signed, or issued, is thus liable for this excise tax. (§ 11912.)
[*4]

The statute extends the incidence of the tax beyond the actual conveyance of title to realty in only one instance: when a "partnership" "h[olding]" the realty "shall be treated as having executed an instrument whereby there was conveyed. . . all realty held by the partnership" [4] by virtue of the partnership having "terminated" within the meaning of *Section 708(b) of the Internal Revenue Code of 1986*. [5] (§ 11925, subd. (b).) In those instances, such entities are treated as though they have made a constructive conveyance of the real property, and are therefore subject to the tax imposed under section 11911. No analogous provision exists for shares of corporations, or shares of entities, such as single-member limited liability companies, because shares of corporations were governed by a different (and now-repealed) provision of the federal tax code that the California Legislature opted *not* to incorporate in enacting the DTTA. [6]
[*5]

California's DTTA typically has been construed by looking to precedent interpreting the identical provision of the now-repealed Federal Stamp Act (former *26 U.S.C. § 4361*), which did not impose a documentary tax on transfers of interests in corporate entities directly or indirectly holding title to realty. (See *United States v. Seattle-First Nat'l Bank (1944) 321 U.S. 583, 589-590* (*Seattle-First*) [holding that identically-worded predecessor to former *26 U.S.C. § 4361* did not apply where the "realty was not conveyed to or vested in respondent by means of any deed, instrument or writing"].)

The Court of Appeal acknowledged that section 11911 is patterned on former *26 U.S.C. § 4361*, and that section 11925, setting forth the limited exemption for partnerships, is patterned on former 26 U.S.C. § 4383. (Slip opn., p. 10.) Yet, in a surprising and largely unexplained turn, the court rejected prior appellate decisions that [*6] had explicitly held that courts "must infer that the Legislature intended to perpetuate the *federal administrative interpretations* of [the Federal Stamp Act]" (*Thrifty Corp. v. Cnty. of L.A. (1989) 210 Cal.App.3d 881, 884* (*Thrifty*), italics added; *Brown v. Cnty. of L.A. (1999) 72 Cal.App.4th 665, 668* (*Brown*)), and numerous Opinions of the Attorney General of California that had virtually unanimously held that the documentary transfer tax was intended to apply in the same way as the Federal Stamp Act on conveyances of real estate. [7] Instead, the court stated that "federal law does not dictate the meaning of the DTTA." (Slip opn., p. 27.)

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[3] (See, e.g., Enrolled Bill Report to S. B. 837 [section 11911 "is designed to conform to the existing federal tax on transfers of real estate, which expires January 1, 1968"], 3 Clerk's Transcript (CT) 449; Legislative Analyst's June 12, 1967 Analysis of Senate Bill No. 837 [referring to the "substantially similar federal tax which expires January 1, 1968"], 2 CT 437-438; Opinion of Legislative Counsel, S.B. 837, dated Aug. 1, 1967, printed in Senate Journal, Aug. 4, 1967, 3 CT 503-504.)

[4] Under the statute, the term "partnership" includes any "other entity treated as a partnership for federal income tax purposes." (§11925(b).)

[5] Title 26 of the U.S. Code.

[6] (See former 26 U.S.C. § 4321.)

[7] (See 51 Ops. Cal. Atty. Gen. 50, 52;51 Ops. Cal. Atty. Gen. 55, 56-57;53 Ops. Cal. Atty. Gen. 252;56 Ops. Cal. Atty. Gen. 79, 82-83;62 Ops. Cal. Atty. Gen. 87;82 Ops. Cal. Atty. Gen. 56, 58-59; and 85 Ops. Cal. Atty. Gen. 235, 236-238 [following federal precedents under the federal documentary stamp tax law on conveyances of real estate in interpreting California's DTTA].)

[*7]

The Court of Appeal's departure from its sister courts' longstanding deference to federal interpretations in favor of the definition of ″change in ownership″ in section 64-a *property*-tax provision that appears in a different division of the Revenue and Taxation Code employs different terminology, and was enacted in response to Proposition 13 [8] twelve years *after* section 11911-cannot be the proper interpretation of section 11911. It also is likely to result in significant ″unfair surprise″ to taxpayers who hold real estate through corporate entities, particularly because documentary transfer taxes may be imposed years after the transaction that purportedly gives rise to them. Those reliance interests are bound to be upset, across thousands of transactions, because the Court of Appeal's decision now allows counties and cities to impose documentary transfer taxes whenever there is a change in ownership of some entity at some point in the chain of ownership above the realty taxed. The court's decision does so by importing into the DTTA's *excise-tax* provision the *state property-tax* definition of ″change of ownership″ in *section 64 of the Revenue and Taxation Code*.
[*8]

Review is necessary in order to protect these reliance interests, to restore the integrity of section 11911 and the plain meaning of its text, to ensure consistent and coherent administration of various independent segments of the Revenue and Taxation Code, and to guard against the type of end-run around the Legislature and pertinent constitutional limitations on taxes (including the two-thirds supermajority approval requirement) that the Court of Appeal effectuated here. The numerous ″important issues of law″ raised in this Petition call for resolution by this Court, and the plaintiff, 926 North Ardmore Avenue LLC (″Ardmore″), respectfully requests that this Court grant review pursuant to *Rule 8.500(b)(l) of the California Rules of Court*.

STATUTORY FRAMEWORK

The Documentary Transfer Tax Act authorizes counties and cities to impose 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 or purchasers, or any other person or persons. . .at the rate of fifty-five cents ($ 0.55) for each five hundred dollars ($ 500) or [*9] fractional part thereof.″ (§ 11911.) [9] In passing the DTTA in 1967, the Legislature intended to base and pattern it on the now-repealed Federal Stamp Act. (Former *26 U.S.C. §§ 4361*, 4363; *see* Thrifty, supra, 210 Cal.App.3d at p. 884.)

Unlike California's ad valorem property taxes-which tax the *ownership* of property-the DTTA is an excise tax and ″tax[es]. . .the exercise of the right or privilege of transferring real property.″ (*City of Huntington Beach v. Super. Ct. (1978) 78 Cal.App.3d 333, 340* (*City of Hunlington Beach*), italics added.) Any tax imposed under this provision ″shall be paid by any person who makes, signs or issues any document or instrument subject [*10] to the tax....″ (§ 11912.) Section 11911 's enforcement provision provides that the county recorder ″shall not *record* any deed, instrument or writing subject to the tax. . .unless the tax is paid at the time of recording.″ (§ 11933, italics added.)

Because the Court of Appeal incorporated section 64 into its interpretation of section 11911, Ardmore provides some background regarding the context in which that section was enacted. In 1978, the voters approved Proposition 13, adding article XIIIA to the California Constitution. Proposition 13 limits the amount of property taxes that may be levied on homes and businesses by capping the maximum amount of any ad valorem tax on real property to one percent of the ″full cash value″ of the property. (Cal. Const., art. XIIIA, § 1, subd. (a).) The full cash value of any real property is the value of such property as shown on the property's 1975 -1976 tax bill. (*Id.* § 2, subd. (a).) Property is subject to reappraisal whenever it is purchased, newly constructed, or undergoes a ″change in ownership.″ (*Ibid.*)

Various provisions of the Revenue and Taxation Code implement Proposition 13's mandate, and section 64 defines ″change

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[8] Proposition 13, of course, amended the California Constitution in 1978, 12 years after the DTTA was enacted. Among other things, Proposition 13 imposes limits on the ad valorem taxation of real property in California. (Cal. Const., art. XIIIA, § 1, subd. (a).)

[9] The County and the City of Los Angeles each have enacted ordinances imposing a documentary transfer tax pursuant to section 11911, using language essentially identical to. the provisions in sections 11911 and 11925. (See L.A.C.C. §§ 4.60.020, 4.60.080; L.A.M.C. §§ 21.9.2, 21.9.8.)

in [*11] ownership″ of real property held by an entity for purposes of a reappraisal. This provision generally exempts the transfer of ownership interests in legal entities from reappraisal, except in the following two circumstances:

> (c)(1) When a . . . legal entity, or any other person obtains control through direct or indirect ownership or control of more than 50 percent of the voting stock of any . . . legal entity through the purchase or transfer of corporate stock, partnership, or limited liability company interest, or ownership interests in other legal entities, including any purchase or transfer of 50 percent or less of the ownership interest through which control or a majority ownership interest is obtained, the purchase or transfer of that stock or other interest shall be a change of ownership of the real property owned by . . . [the] legal entity in which the controlling interest is obtained;
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> (d) . . . Whenever shares or other ownership interests representing cumulatively more than 50 percent of the total interests in the entity are transferred by any of the original co-owners in one or more transactions, a change in ownership of that real property owned [*12] by the legal entity shall have occurred, and the property that was previously excluded from change in ownership . . . shall be reappraised.

(§ 64, subds. (a), (c), (d).)

The 2009 and 2011 amendments to sections 408, 408.4 and 480 further require that: (1) any entity undergoing a change in ownership file a change in ownership statement within 90 days of the transaction with the State Board of Equalization; and (2) county recorders ″conducting an investigation to determine whether a documentary transfer tax [should be] imposed″ have access to such filings.

FACTUAL AND PROCEDURAL BACKGROUND

A. Transactional Background [10]

In 1972, Beryl and Gloria Averbook established a family trust that owned several assets, including an apartment building located at 926 North Ardmore Avenue (the ″property″ or ″apartment building″). (Slip opn., p. 2.) After a series of intra-family [*13] transactions set forth in detail in the Court of Appeal's opinion (*id.*, pp. 2-3), the property came to be held by Ardmore, which was wholly owned by a Delaware limited liability limited partnership, BA Realty LLP (″BA Realty″), which was, in turn, owned by four different subtrusts of the original family trust.

In January 2009, Gloria directed several of the subtrusts to either distribute or sell interests in BA Realty to two subtrusts she had created for her sons, Bruce and Allen, and their issue. The net result was that Allen's trust and Bruce's trust each received approximately 45% of the total interests in BA Realty, while one of Gloria's trusts directly and indirectly held the remaining 10%. (Slip opn., p. 3.) Ardmore reported this sale, along with the prior sales and transactions, to the State Board of Equalization, in a ″statement of change in ownership of legal entities.″ (*Id.*, pp. 3-4; 3 Reporter's Transcript (RT) 375:6-17.) The Los Angeles County Assessor then reassessed 926 North Ardmore Avenue for property tax purposes. (3 RT 375: 19-26.)

B. Notice and Demand For Payment

A year later, in a notice first posted on the County Recorder's website in 2010, [*14] the County Recorder's office announced that it had begun to enforce ″collection of Documentary Transfer Tax . . . *on legal entity transfers where no document is recorded*, but which resulted [in] a greater than 50% interest in control of the legal entity being transferred.″ (3 RT 433:14-434:1; italics added.) The notice stated ″collection is made pursuant to Chapter 4.60 of the Los Angeles County Code, and California Revenue and Taxation Code (″RTC″) sections 11911 and 11925, and is consistent with case law that defines 'realty sold' as having the same meaning as changes in ownership for property tax purposes in *RTC section 64(c)(1)*.″ (1 CT 6, 15,47.)

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[10] The facts set forth herein were undisputed, as were the rest of the pertinent facts in this case. (8 CT 1719.)

At trial, the Assistant Registrar Recorder admitted that this was a marked change in County practice and that the County Recorder had not published anything beforehand that suggested in any way that a documentary transfer tax would be due on the transfer of a greater-than-50%-interest in an entity directly or indirectly owning real estate. (3 RT 432:28-433:3,436:15-19.)

On August 11, 2011-more than two years after the subtrusts' transfer of 45% interests in BA Realty to each of Allen's and Bruce's trusts-the County Recorder [*15] sent a Notice and Demand for Immediate Payment of Documentary Transfer Tax to Ardmore asserting that the transfer of a controlling interest in Ardmore on [January] 8, 2009 retroactively triggered liability for the documentary transfer tax on the value of 926 North Ardmore Avenue. (1 CT 6, 47.) The Notice and Demand sought $ 2,160.40 in documentary transfer tax owing to the County and $ 8,838 to the City of Los Angeles (″the City″). (3 RT 376:5-9, 376:24-377:4.) Ardmore paid the tax demanded under protest and then promptly filed a refund claim. (3 RT 377:6-19; 10 CT 2216-2217.)

C. Challenges to the Assessment

Ardmore's claim for a refund contended, among other things, that: (1) the documentary transfer tax did not apply to the transfer of interests in BA Realty because no realty was in fact transferred; (2) the only provision in the Revenue and Taxation Code that would have authorized a transfer tax, section 11925, subdivision (b), did not apply because Ardmore, rather than BA Realty, ″held″ the Ardmore A venue property and because, under federal grantor trust rules, Gloria Averbook remained the owner of the Bruce's and Allen's trusts and had effectively conveyed [*16] her interest in BA Realty to herself. (See *26 U.S.C. §§ 671-679*.) Consequently, the partnership had not ″terminat[ed]″ within the meaning of section 11925, subdivision (b) and thus no documentary transfer tax was owed.

After the County rejected Ardmore's claim, Ardmore sued the County in Los Angeles Superior Court for a refund of $ 10,948.40 in documentary transfer tax collected by the County and the City from Ardmore under their respective ordinances; Ardmore also sought attorneys' fees under *Code of Civil Procedure section 1021.5*. (1 CT 3-39.)

D. Statement of Decision, Entry of Judgment, and Appeal

In its 2013 Statement of Decision, the trial court stated that there was no dispute as to any material facts and that its judgment would be for the County. The court ruled that ″the transfer of more than a 50% interest in a partnership [BA Realty] permitted the recorder to 'collect a documentary transfer tax on [the] real property″' owned by Ardmore and provided that a documentary transfer tax ″could be collected, even though the apartment building″ was not owned directly by BA Realty. (Slip opn., p. 7.) The Statement of Decision also stated [*17] that even had Ardmore prevailed, it would not have been entitled to attorneys' fees under *Code of Civil Procedure section 1021.5* as a private attorney general because, in that court's view, the action would have conferred no public benefit. (8 CT 1720.) [11]

The Court of Appeal affirmed the trial court's decision on the ground that the January 8, 2009 transfers of interest in BA Realty had resulted in a ″change of ownership″ of the real property owned by Ardmore under section 64, subdivision (d), and thus the Recorder was authorized to impose a documentary transfer tax under section 11911.

The Court of Appeal acknowledged that the DTTA ″'replace[d] and was patterned after the [portion] of the Federal Stamp Act [applying] to conveyances [*26 U.S.C. § 4361*]″' (Slip opn., p. 10, quoting *Thrifty, supra, 210 Cal.App.3d at p. 884),* [*18] and that most of the exemptions in California's DTTA were ″patterned on similar exemptions that had appeared in the now-expired federal stamp tax.″ (*Ibid*.)

Nonetheless, the Court of Appeal disagreed that the DTTA should be ″construed in the same manner as the federal statute that it was designed to replace″ (slip opn., p. 26), and ruled instead that the phrase ″realty sold″ in section 11911 was ″sufficiently similar″ to the definitions of ″change in ownership″ in sections 64(c) and (d) that the two should have the same meaning. (*Id*., pp. 22-26.)

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[11] If review is granted and the Court of Appeal's decision is reversed, the matter must be remanded to allow the lower courts to determine Ardmore's right to attorneys' fees.

The Court of Appeal rested this interpretation on several grounds. First, it concluded that relying on the state *property*-tax-law definition of ″change in ownership″ to interpret section 11911 (an excise tax in a separate division of the Revenue and Taxation Code) was ″supported by recent changes in the law that suggest the Legislature endorses the view that a transfer tax may be imposed when there is a 'change in ownership' of a legal entity under section 64, subdivisions (c) or (d).″ (Slip opn., p. 24.) Those recent changes included the Legislature'S passage of Assembly Bill 563, ″which required the assessor to provide information [*19] to city officials conducting an investigation to determine 'whether a documentary transfer tax should be imposed for an unrecorded change in control or ownership.'″ (Slip opn., p. 24 [citing § 408.4].)

Second, the Court of Appeal concluded that the federal interpretations of former *26 U.S.C. section 4361*, which routinely had been consulted for half a century to interpret California's DTTA, should not be applied because the ″former federal stamp scheme applied to multiple categories of transfer,″ including transfers of interests in capital stock. (Slip opn., p. 27.) However, the court reached this conclusion even though it also acknowledged that documentary transfer taxes on those other categories of transfer were never adopted by the California Legislature in enacting California's DTTA-only the realty conveyance portions of the erstwhile Federal Stamp Act had been. (*Id*., pp. 27-28.) The court also found that ″[t]he former federal stamp tax is . . . of limited utility . . . because limited liability companies did not exist in California until 1994.″ (*Id*., p. 28.)

Third, the court found it ″instructive that the Legislature has taken no action in [*20] response to multiple court decisions and several local county ordinances that have specifically interpreted the DTTA to permit a transfer tax when a 'change in ownership' has occurred.″ (Slip opn., p. 25.)

Finally, the court addressed section 11925, which provides that the documentary transfer tax may not be applied to transfers of interests in partnerships (or entities treated as partnerships for federal income tax purposes) that hold realty unless the transfer results in ″termination″ of the partnership for federal income tax purposes. It concluded that section 11925 did not apply here ″because BA Realty [the partnership] did not hold title to the realty; instead, it owned Ardmore [the LLC], which held title to the realty.″ (Slip opn., p. 31.)

On October 6, 2014, Ardmore filed a petition for rehearing. The Court of Appeal denied the petition three days later.

ARGUMENT

The Court of Appeal's holding that ″a documentary tax may be applied to transfers of interests in legal entities pursuant to section 11911 if the transfer results in a 'change of ownership' under section 64, subdivision (c) or (d)″ (slip opn., p. 30) is a significant departure from the plain language of [*21] the statutory text and from well-settled precedent, practice, and understandings-one that will have broad implications for thousands of transactions throughout the State. Ardmore submits that review is warranted for at least the following three reasons:

First, the Court of Appeal's decision is the first to extend the statute well beyond its plain language to allow the 58 different counties and 482 different cities in this State to each impose, to varying extents, a documentary transfer tax based on a change in ownership of an entity that holds (directly or indirectly) realty, even when there is no ″realty sold,″ no ″deed, instrument, or writing″ evidencing any ″convey[ance]″ or transfer of realty, and no transfer of title to any realty. Prior to this decision, parties understood a documentary transfer tax to be ″the fee paid in connection with the recordation of deeds or other documents evidencing transfers of ownership of real property.″ (*Cathedral City v. Cnty. of Riverside (1985) 163 Cal.App.3d 960, 962* (*Cathedral City*).) Thus, this radical interpretive change will upset the settled expectations of parties to thousands of transactions, by allowing a mere [*22] ″change of ownership″ of an entity under section 64 (which appears in an entirely different division of the Revenue and Taxation Code) to trigger the imposition of a documentary transfer tax under the DTTA, when such transactions had hitherto never been treated as within the ambit of the DTTA.

Second, the Court of Appeal's refusal to be guided by the interpretations of the Federal Stamp Act, upon which the DTTA was patterned, represents a dramatic departure from other court of appeal decisions and Attorney General Opinions that have consistently and nearly unanimously derived their analysis of the DTTA from cases interpreting the predecessor

federal provisions without resorting to ″substantially similar″ subsequently-enacted state law provisions. (E.g., *Thrifty, supra, 210 Cal.App.3d at p. 884;Brown, supra, 72 Cal.App.4th at p. 668.)*

Third, because the Court of Appeal rewrites section 11911 to define ″realty sold″ to encompass any ″change of ownership″ of an entity holding realty under section 64, the court's interpretation conflicts with the limitations on new or increased taxes on the sale of real estate set forth in section 3, subdivision (a) [*23] of Article XIII A of the California Constitution. The Court of Appeal's decision warrants review before other counties and cities begin following Los Angeles County's lead in expanding the reach of the DTTA well beyond what its original purpose and plain language permit.

A. Immediate Review Is Warranted To Secure Much-Needed Uniformity On A Question Of Statewide Importance Implicating Well-Settled Reliance Interests, Given The Dramatic Departure The Court Of Appeal's Opinion Marks From The Plain Meaning Of The Statutory Text And From Prior Practice And Precedent.

1. First, the Court of Appeal's decision is the first of its kind in departing markedly from half a century's worth of well-settled precedent, practice, and understandings, based on the interpretations derived from the former Federal Stamp Act upon which California's DTTA was patterned. Most significantly, the court's expansive reading of the DTTA cannot be reconciled with the plain language of the statutory text, which again will disturb well-settled reliance interests. That text authorizes the ″impos[ition]″ of a documentary transfer ″tax″ only upon:

> each deed, instrument, or writing by which any lands, [*24] tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons . . . , when the consideration or value of the interest or property conveyed . . . exceeds one hundred dollars ($ 100). . .

(§ 11911, subd. (a).) Each of these terms has a clear and unambiguous meaning. A deed, for example, is a ″written instrument by which land is conveyed.″ (Black's Law Dictionary (10th ed. 2014), p. 501.) In the context of real estate, a ″grant″ is a transfer in writing of an estate. (*Civ. Code §§ 1053*, *1092*.) A ″conveyance″ ″embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills.″ (*Id*., § 1215.) And a transfer is ″an act of the parties, or of the law, by which the *title to property* is conveyed from one *living person* to another.″ (*Id*., § 1039, italics added.) Here, based on the common-sense reading of the statutory text, there has been no ″deed,″ ″instrument,″ or ″writing″ by which ″any lands . . . or [*25] other realty sold″ have been ″granted, assigned, transferred, or otherwise conveyed to″ another ″person.″

Thus, prior to the Court of Appeal's decision, a documentary transfer tax was understood to be a fee paid for the privilege of recording a ″deed, instrument, or writing″ (actually or constructively) conveying real property to another person. As explained by then-Associate Justice Arabian, ″A documentary transfer tax is the fee paid in connection with the recordation of deeds or other documents evidencing transfers of ownership of real property.″ (*Cathedral City, supra, 163 Cal.App.3d at p. 962;* see also *City of Huntington Beach, supra, 78 Cal.App.3d at p. 340* [describing DTTA as imposing ″a tax on the exercise of the right or privilege of transferring real property and not a tax on real property″].) That understanding largely flowed from decisions interpreting the DTTA's federal law analogue, the Federal Stamp Act, according to its plain text. (See *infra* section A.3.)

Yet, by equating the *excise-tax* term ″realty sold″ in the foregoing statutory phrase with the *property-tax* definition of a ″change in ownership″ in section 64, the [*26] Court of Appeal has ruled that a documentary transfer tax can be imposed on the value of realty, absent any document evidencing any transfer of any realty, as long as at some unspecified point further up the chain of direct or indirect corporate or entity ownership, there has been a ″change in ownership″ of an entity that owns another entity that actually holds the realty taxed. That ruling is particularly problematic insofar as it sweeps in transactions that are not ″sales″ and that could occur by operation of law, such as gifts, bequests, or devises, where no consideration is paid and no value is claimed on the deed conveying the property.

In addition, the Court of Appeal's holding that ″under the DTTA, a documentary tax may be applied to transfers of interests in legal entities pursuant to section 11911 if the transfer results in a 'change of ownership' under section' 64, subdivision

(c) or (d)" (slip opn., p. 30) admits of no discernible Limiting principle, and marks a dramatic departure from prior appellate interpretations of the documentary transfer tax, and the origins of section 11911. [12] The authorities upon which the court rested its decision (*Thrifty, supra, 210 Cal.App.3d at p. 884;* **[*27]** *McDonald's Corp. v. Bd. of Supervisors (1998) 63 Cal.App.4th 612, 615* (McDonald's)) took as a given that there must actually be a "convey[ance]" or "transf[er]" of an interest in the "realty sold" and taxed, as well as a document evidencing the same, and, consistent with the DTTA's federal forebear, never contemplated expanding the reach of the DTTA to situations in which there were neither, as here.

2. No appellate decision, until the Court of Appeal's decision here, has ever suggested, even in dicta, that **[*28]** a mere change in ownership of some entity upstream at some point in the chain of direct or indirect ownership from the entity actually holding title to the realty taxed could trigger imposition of the DTTA. And even were there any ambiguity as to whether the plain language of the DTTA permits such an extension, the Court of Appeal should have followed the well-established canon that "in case of doubt, statutes levying taxes should be construed most strongly against the government and in favor of the taxpayer." (*McDonald's, supra, 63 Cal.App.4th at p. 617;Larson v. Duca (1989) 213 Cal. App. 3d 324, 329.)*

3. The Court of Appeal's decision also constitutes a radical departure from the longstanding rulings of the California courts of appeal that section 11911 should be construed in conformity with its counterpart under (former) federal law. Specifically, section 11911 was expressly patterned on the Federal Stamp Act, which required stamps to be attached to *recorded documents*. (Former 47 C.F.R. § 4361-3 (1962).) Indeed, California's DTTA originally required a stamp to be attached to the document as well. (Former § 11913.) Section 11911 's fealty **[*29]** to the Federal Stamp Act is further evidenced by the fact that its effectiveness depended first upon the repeal of that federal tax law. (Stats. 1967, ch. 1332, §§ 3 and 4.) Indeed, section 11911 's history explains that it was "designed to conform to the existing federal tax on transfers of real estate, which expires January 1, 1968." (3 CT 449.) [13]

The parallel provision to section 11911 under the Federal Stamp Act never imposed a tax based on a change in ownership of an entity holding realty. (*See* Seattle-First, supra, 321 U.S. at pp. 589-590 [identically-worded predecessor to former *26 U.S.C. § 4361* **[*30]** did not apply to merger of legal entities where the "realty was not conveyed to or vested in respondent by means of any deed, instrument, or writing"].)

However, the Court of Appeal here dismissed Ardmore's argument that section 11911 should be construed consistently with the way its antecedent federal provision had been construed, by commenting that it was "not bound by" federal law in construing state statutes. (Slip opn., p. 26.) While that may be technically true, it makes little sense here, where the state provision is a near-replica of a longstanding federal provision, and where state courts have consistently looked first to federal law in order to resolve the question whether a given interest-a leasehold, a condemned property, or a property subject to foreclosure, for example-was taxable under the DTTA.

That is why other courts of appeal have relied on interpretations of the Federal Stamp Act to determine the DTTA's scope and meaning. In *Brown*, for example, the Court of Appeal observed, in the context of assessing the taxability of a property sold through a nonjudicial foreclosure, that "[b]ecause section 11911 was patterned after [former *26 U.S.C. § 4361*] **[*31]** and employs virtually identical language as that act, we must infer that the Legislature intended to perpetuate the federal administrative interpretations of that federal act." (*Brown, supra, 72 Cal.App.4th at p. 668* [quoting *Thrifty, supra, 210 Cal.App.3d at p. 884].)* For this reason, the Court of Appeal looked to the relevant federal regulations, which calculated the documentary transfer tax based upon the purchase price at foreclosure, and concluded that the DTTA must therefore require the same calculation. (*Id*. at pp. 669-670).

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[12] In 2013, a bill was proposed in the Legislature that would have explicitly amended the DTTA to impose a documentary transfer tax based on a change in legal-entity ownership. (Assemb. B. No. 561 (2013-2014 Reg. Sess.).) This bill garnered little support and died in the first house's tax policy committee. (Assemb. B. No. 561, Assemb. Comm. on Local Gov't Bill Analysis, dated Apr. 30, 2013.) Yet, the Court of Appeal interprets section 11911 as if the 2013 bill *had* been enacted.

[13] Indeed, the effective date of the repeal of the Federal Stamp Act on conveyances of real estate was postponed to January 1, 1968 to give states time to enact such a tax. (See H.R. Rep. No. 89-433 at pp. 32-33 (1965), S. Rep. No. 89-324 at pp. 38-39 (1965), H.R. Rep. No. 89-525 at pp. 7-8 (Conf. Rep. 1965), and Ill Cong. Rec. 13957-13964 at p. 13962 (June 17, 1965 Statement of Rep. Mills).)

In so doing, the *Brown* court rejected an argument by the County urging it not to rely completely on federal law and arguing that those laws were meant to address judicial, rather than nonjudicial, foreclosures, citing a series of differences between the two which might justify different treatment or require the modification of the federal rule. (See Br. for County of Los Angeles, *Brown v. Cnty. of L.A. (1999) 72 Cal.App.4th 665 [1998 WL 3418886* at p. *11].) But the court in Brown disagreed with the County's proposed distinction, describing it as a ″policy issue … that must be argued to the [*32] Legislature″-one that was insufficient to overcome the otherwise clear text of section 11911. (*Id. at p. 669.)*

In *Thrifty*, the Court of Appeal similarly looked first to regulations interpreting the former federal act to determine whether a leasehold of a certain duration was taxable. The federal law answered the initial question-whether a leasehold was a taxable interest-in the affirmative for leases the term of which approximated that of a fee simple or life estate, but did not answer the question of what that term was. Only *after* incorporating the federal rule that leaseholds with such a term were taxable interests under the DTTA did the court look to state law to determine the secondary question of what that term was. (*Thrifty, supra, 210 Cal.App.3d at pp. 884-885;* see also *McDonald's, supra, 63 Cal.App.4th at p. 615* [adopting *Thrifty*].) In *Thrifty*, the Court looked to section 61 only to determine how long a lease term needed to be in order to be treated as equivalent to a fee interest in property. Thrifty only concerned leases, rather than the sale of land, and the Court of Appeal's statement that ″realty sold″ [*33] is ″sufficiently similar to the phrase 'change in ownership'″ was mere dicta. (*Thrifty, supra, 210 Cal.App.3d at p. 886.)* By refusing to construe section 11911 consistently with its federal analogue, the Court of Appeal's decision will upset settled expectations regarding the application of the documentary transfer tax and depart from the aforementioned court decisions.

4. The only transfer of an interest in an entity that is taxable under the DTTA, consistent with its plain meaning, is the transfer of an interest in a ″partnership or other entity treated as a partnership for federal income tax purposes″ that results in its termination under *section 708(b) of the Internal Revenue Code*. In that case, section 11925(b) gives rise to a *constructive conveyance* of the realty whereby the ″partnership or other entity shall be *treated as having executed an instrument whereby there was conveyed*, for fair market value . . . , all realty held by the partnership or other entity.″ (§ 11925, subd. (b).) In the words of the statute, the partnership or other entity is treated as having constructively conveyed its title or interest in the realty taxed ″[i]f there is a termination [*34] of' that ″partnership or other entity . . . for federal income tax purposes, within the meaning of *Section 708 of the Internal Revenue Code of 1986*.″ (*Id.* §§ 11925, subds. (b), (a).) That provision, however, indisputably does not apply here, as the Court of Appeal recognized, where the partnership-BA Realty-did not actually hold the realty taxed. (Slip opn., p. 31.)

5. The Court of Appeal's decision upsets thousands of transactions that have relied on longstanding California interpretations of the DTTA as consistent with the former Federal Stamp Act that it replaced . According to the Board of Equalization, 17,816 parcels of real property were subject to changes in ownership from 2010-2012, as disclosed by its Legal Entity Ownership Program. [14] Again, because county recorders often wait a year or more to actually assess the documentary transfer tax (*see ante*, pp. 8-9), the Court of Appeal's decision exposes these prior transactions to demands for documentary transfer taxes from years earlier. Indeed, that is precisely what happened in this case. If, as this Court has said, ″[m]en must turn square comers when they deal with Government,″ ″it is hard to see why the Government [*35] should not be held to a like standard of rectangular rectitude.″ (*Title Ins. Co. v. State Bd. of Equalization (1992) 4 Cal.4th 715, 730.)*

6. In addition to the foregoing difficulties, the Court of Appeal's decision will prove to be extremely unfair in practice. Counties can, and do, calculate the documentary transfer tax based on the value of the real property conveyed (§ 11911, subd. (a)), and the tax is supposed to be paid by the person who ″makes, signs or issues [the] document,″ or for whose benefit the document is made(§ 11912). Under the Court of Appeal's decision, a purchase of as little as a 1% interest in an entity-if it results in a change of control under section 64(c) or change of ownership under section 64(d)will result in a tax on the entity based [*36] on 100% of the fair market value of the real property held by the entity. (Slip opn., pp. 13-14.) There is no basis for this result under the statutory language of section 11911. In addition to the absence of ″realty sold,″ the entity has not made, signed, or issued any instrument subject to the tax.

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[14] (See State Board of Equalization, Annual Reports, 2010-2012, *available at* http://www.boe.ca.gov/annual/2010-lllrevenues.html; http://www.boe.ca.gov/annual/2011-12/operations.html; http://www.boe.ca.gov/pdf/pub306.pdf.)

7. Finally, the Court of Appeal's decision also creates some unintended but important distortions in the choice of corporate forms. By deciding to extend the DTTA to cover transfers of interests in corporations and limited liability companies not treated as partnerships for federal income tax purposes, the court inadvertently made the partnership form far more attractive, at least from the perspective of minimizing taxes. The reason is simple: Under the court's decision, the transfer of one share of stock from one equal co-owner to the other co-owner could precipitate a change of ownership of a non-partnership entity under section 64(c) and trigger the DTTA, but the same realignment of interests in a partnership entity would not trigger the DTTA, because the partnership would not have ″terminat[ed]″ within the meaning of section 11925(b) (and of *section 708 of the Internal Revenue Code*). **[*37]**

That distortion of incentives poses an equal if not greater risk of abuse than the court's concern that a plain meaning interpretation of section 11911 would ″effectively permi[t] property owners to avoid the transfer tax by conveying their real property to a wholly owned, single-entity LLC established for the sole purpose of holding the property, and then selling the LLC (rather than the property) to a third party.″ (Slip opn., p. 31.) Under longstanding tax doctrines, such as the ″substance over form,″ ″step transaction,″ and other related doctrines, a sham or transitory transfer to an entity not supported by a business purpose would be disregarded for documentary transfer tax purposes. (See, e.g., *General Mills v. Franchise Tax Bd. (2009) 172 Cal.App.4th 1535, 1543* [″For purposes of taxation, what matters is substance, not form.″]; *Shuwa Inv. Corp. v. Cnty. of L.A. (1991) 1 Cal. App. 4th 1635, 1648* [″The 'step transaction doctrine' 'is a corollary of the general tax principle [that] the incidence of taxation depends upon the substance of a transaction rather than its form. [Citation.]'″].) Here, in contrast, the record indisputably shows **[*38]** that there were very real, practical risk-management, business, estate-planning, and other reasons for the BA Realty and Ardmore ownership structure that mitigate any risk or possibility of abuse of the sort hypothesized by the Court of Appeal. (3 RT 305:28-308:7, 309:19-323:12, 324:12-328: 18.)

In addition, forming and maintaining a limited liability company or corporation is hardly without cost. Among other expenses, limited liability companies and corporations must pay annual minimum franchise taxes and annual taxes on their income for their franchises. (§§ 17941, 17942, 23151, 23153, 23501, 23802.) The amount of these taxes in the aggregate greatly exceeds the amount of documentary transfer taxes these entities could possibly avoid by limiting the reach of the DTTA to what its plain meaning allows. Partnerships [15] and individuals are not subject to these annual taxes . Regardless, as explained below, public policy does not justify the Court of Appeal's rewriting of the DTTA to incorporate the unrelated and inapt definition of ″change in ownership″ in *section 64 of the Revenue and Taxation Code*. [16]
[*39]

Even if, as a matter of policy, these doctrines were not sufficient to address the Court of Appeal's tax-avoidance concerns, under well-established precedent, arguments that tax statutes as drafted do not account for important policy considerations must be made to the Legislature, **[*40]** because ″[a]ny further adjustments … are a matter for the Legislature, not the courts.″ (*City of Scotts Valley v. Cnty. of Santa Cruz (2011) 201 Cal.App.4th 1, 48 & fn. 33].)* Indeed, several charter cities, including San Francisco and Santa Clara, saw the need to separately amend their ordinances pursuant to the California Constitution's requirements, in order to reach the kinds of up-the-chain-change-in-entity-ownership-only transactions that the Court of Appeal has judicially rewritten the state DTTA to now reach. (Slip opn., p. 25.) Judicially rewriting the statute to extend the reach of the DTTA well beyond the plain meaning of its terms is particularly inappropriate where, as here, such an interpretation would conflict with constitutional constraints on new taxes or tax increases.

B. Review Is Also Necessary Because The Court Of Appeal's Reasoning Suffers From Significant Constitutional Infirmities That Will Spawn Broad-Based Confusion.

1. The Court of Appeal's decision not only represents a marked departure from the statute's plain meaning and from settled

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[15] Limited partnerships and limited liability partnerships, however, pay annual minimum franchise taxes. §§ 17935 and 17948 .

[16] There is no support for the Court of Appeal's conclusion that sections 408 and 408.4 of the Revenue and Taxation Code implicitly amend the DTTA to incorporate the definition of change in ownership set forth in 64. The DTTA was promulgated thirteen years before section 64 was enacted and nearly fifty years before sections 408 and 408.4 were enacted. ″The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.″ (Lolley v. Campbell (2002) 28 Cal.4th 367, 379 (*Lolley*).) Further, there is no reference to the DTTA anywhere within sections 64, 408, or 408.4. Finally, while sections 64, 408, and 408.4 all appear in Division 1 of the Revenue and Taxation Code (″Property Taxation″), the DTTA appears in Division 2 (″Other Taxes″).

precedent and understandings, but it also raises serious constitutional issues that, at [*41] a minimum, warrant construing the statute to avoid rendering it unconstitutional. (*See* People v. Navarro (2007) 40 Cal.4th 668, 675 [*citing* Ashwander v. Valley Authority (1936) 297 U.S. 288, 347 (cone. opn. of Brandeis, J.)].) Review is also needed promptly to correct these constitutional infirmities before other counties and cities follow Los Angeles County's lead in expanding the reach of the DTTA well beyond what its original purpose or plain language permit.

2. The DTTA was enacted in 1967 and authorizes an excise tax on documents evidencing the sale of real property. Eleven years later, California voters adopted Proposition 13, which amended the Constitution (1) to limit the amount of any ad valorem tax on real property (Cal. Const., art. XIIIA, § 1, subd. (a)); (2) to require that any ″changes in state taxes enacted for the purpose of increasing revenues″ be ″imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature″ (*id*., former art. XIII, § 3); and (3) to prohibit ″new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property.″ (*Id* [*42] ., art. XIIIA, § 3, subd. (a).)

The Court of Appeal's decision concludes that *sections 408 and 408.4 of the Revenue and Taxation Code* effectively amended the DTTA to authorize imposing a tax on the sale of interests in entities that own real property, directly or indirectly, that result in a ″change of ownership.″ (Slip opn., pp. 22-23, 28.) But these statutes were not promulgated in accordance with Proposition 13, as originally enacted or amended, and could not have retroactively changed the meaning of the 1967 legislation.

Not only is subsequent legislation ″of little weight″ in interpreting earlier enactments (*Lolley, supra, 28 Cal.4th at p. 379),* but also, ″[a]n established rule of statutory construction requires [courts] to construe statutes to avoid 'constitutional infirmit[ies]'″ (*McClung v. Employment Dev. Dept. (2004) 34 Cal.4th 467, 477* (*McClung*)] [*quoting* Myers v. Philip Morris Co., Inc. (2002) 28 Cal.4th 828, 846-847). Under the Court of Appeal's construction here, sections 408 and 408.4 effectively amended the DTTA in a manner that subjects legal entities to new or higher property taxes than the DTTA previously [*43] authorized. But because sections 408 and 408.4 were neither enacted through a supermajority vote in the Legislature nor through popular initiative, the Court of Appeal should not have construed them to interpret the DTTA in a manner that expands its scope in conflict with the Constitution. (*McClung, supra, 34 Cal.4th at p. 477.)* Review is needed to promptly correct this constitutional error and because leaving the Court of Appeal's construction in place opens the door for other counties and cities to bypass the stringent prerequisites for imposing new and increased taxes set forth in Article XIIIA.

CONCLUSION

Because the Court of Appeal's decision departs markedly from prior precedent, practice, and understanding, and from what the plain meaning of the statute would permit, and because it also threatens serious practical and constitutional consequences in thousands of transactions across the State-consequences that would be difficult to unwind-this Court should grant Ardmore's petition for review.

DATED: November 3, 2014

Respectfully submitted,

FISHERBROYLES, LLP

By: /s/ [Signature]
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CERTIFICATE OF WORD COUNT

Pursuant to *California Rules of Court, rule 8.504*, subdivision (d)(J), the undersigned certifies that this Petition for Review contains 7,886 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's opinion, the cover information, the signature block, and this certificate.

DATED: November 3, 2014

Respectfully submitted,

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By: /s/ [Signature]
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CERTIFICATE OF SERVICE

I, Lemoine Skinner III, declare as follows:

I am an active member of the State Bar of California and am not a party to this action. My business address is 1334 8th Ave., San Francisco, CA 94122. On November 3, 2014, I served the following document:

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[checkmark] **BY MAIL**: I deposited in the United States mail at San Francisco, California a copy of the attached Appellant's Petition for Review in a sealed envelope, with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

[checkmark] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 3, 2014.

/s/ [Signature]
Lemoine Skinner III

[SEE ATTACHMENT IN ORIGINAL]

[SEE ATTACHMENT IN ORIGINAL]