Equalization and California Property Tax Exemptions

I. INTRODUCTION

In recent years, few subjects of statewide concern have occupied the limelight of legislative, administrative, and judicial controversy to an extent greater than that occupied by the California property tax and the felt need for its overhaul and reform.[1] Property tax reform, is a matter which traditionally receives extensive political publicity between legislative sessions, but which rarely realizes any substantive reform when the legislators annually adjourn for the holidays.[2]

Throughout its turbulent history in California,[3] the property tax has been punctuated by periodic legislative and constitutional directives proposed to effectuate the principles of uniformity and tax equity, followed by equally periodic gravitations away from these principles. The impact on the California taxpaying public of this ebb and flow over the years has been

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[1]See Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The need for radical, substantive property tax reform received, perhaps, its ultimate stimulation with the handing down by the State Supreme Court of this landmark Constitutional decision. As a result of this case, a complete overhaul of public school financing bases would appear to be on the horizon.

[2]In contrast to the general stagnative condition of substantive property tax reform, there have apparently been some unheralded but nonetheless momentous advances in the area of administrative appeals and procedures during the past eight years. See, Ehrman, *Administrative Appeal and Judicial Review of Property Tax Assessments—The New Look*, 22 HAST L. J. 1 (1970) (hereinafter cited as Ehrman).

[3]*See generally*, Gould, *The California Property Tax System*, CAL. REV. & TAX CODE ANN. § § 1-3350, 9-44 (West 1970); see also, Holbrook & O'Neill, *The California Property Tax: Proposed Means of Return to Democratic Principles*, 27 SO. CAL. L. REV. 415, 421-428 (1954).

the gradual building of what is today an almost-unbearable property tax burden. From the viewpoint of all concerned—even those who would abolish the property tax altogether as a public revenue source—the role of the property tax in the overall state and local revenue picture is indeed critical: this tax raises more money than any other state or locally-collected tax.[4] Consequently, it would appear that at least some form of the locally-assessed property tax is here to stay and that taxpayers and their counsel must continue to deal with its apparent substantive and administrative problems.

This article deals with the role of the State Board of Equalization and its local counterparts, the county boards of supervisors acting as boards of equalization, in their dealings with this controversial tax. One aspect of this role to be discussed here is the doctrine of exhaustion of administrative remedies as it relates to the Board of Equalization. Particular focus will be given to the subject of claims of property tax exemptions and the individual taxpayer's—and tax counsel's—available options at the point when levy has been made against property allegedly exempt in part from property tax assessment.

II. BACKGROUND

At the heart of the long-standing property tax controversy has been the problem of exemptions from taxation.[5] No other aspect of the California property tax has such a direct impact upon the tax bill of the individual property owner. Likewise, no other issue has caused such public clamor for reform while at the same time remaining the relatively exclusive realm of the various special interest groups whose political muscle has wrought these shelters from taxation.[6]

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[4]In fiscal 1969-70, for example, property taxes constituted over 40% of all local and State taxes combined, a figure which, when converted to an expression of per capita burden, amounted to $250 for each man, woman, and child living in the State. Cal. State Bd. of Equal. Ann. Rep. 11, 1969-70.

[5]For an excellent historical review of the subject of California property tax exemptions, see Stimson, *Exemption From Property Taxation in California*, 21 CALIF. L. REV. 193 (1933) (hereinafter cited as Stimson); see also, EHRMAN & FLAVIN, TAXING CALIFORNIA PROPERTY, § § 8-14 (1967).

[6]See CAL. REV. & TAX. CODE, Part 2, Chapt. 1, Article 1 (West 1970). In the table of contents for this particular division of the Code, one may count 35 separate specific exemptions, some of which, e.g., the "Welfare" exemption, cover more than one specific type of property.

Although generalizations regarding the theory underlying the institution of property tax exemptions are difficult to make, the generally accepted reasons for granting exemptions from property taxation include: the avoidance of cost to the government of taxing its own property, the reimbursement of private individuals who use their property for purposes held to be "governmental," the stimulation of industry and agriculture, the rewarding of actions held to be socially desirable, and the desire to promote socio-political undertakings.[7]

From the individual taxpayer's vantage point, however, the theories grounding the numerous exemptions under present law are not as important as is the nonuniform adjustment of the tax burden which must inevitably follow the granting of each exemption. In every case, it is the unaffected taxpayer who must take up the tax revenue "slack" created by these indirect subsidies which have almost continuously decreased the taxable base within his county or school district.[8] The degree to which unaffected taxpayers feel this financial bite will of course vary from county to county, depending upon the localized concentration of exempt property.

The California State Board of Equalization is the administrative agency charged with the task of administering the cavernous "Welfare" exemption to the property tax.[9] Its local counterparts, the county boards of supervisors acting as boards of equalization, process all other exemptions not administered or directly reviewed by the State Board of Equalization.[10]

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[7]Stimson, *supra* note 5, at 193-94; Note, *Exemption of Educational, Philanthropic and Religious Institutions From State Property Taxes*, 64 HARV. L. REV. 288 (1950).

[8]For an excellent Staff Comment documenting the latest chapter in the substantive expansion of the "Welfare" exemption (CAL. REV. & TAX. CODE § 214, the broadest of California's exemption provisions) see Comment, *The California Welfare Exemptic.1*, 41 SO. CAL. L. REV. 844 (1968).

[9]CAL. REV. & TAX. CODE § 254.5 (West 1970); Cal. Const. art. XIII, § 1c.

[10]CAL. CONST. ART. XII, § 9 establishes the State and county Boards of Equalization and prescribes the division of labor each is to bear in administering California's property tax laws. With the exception of the "Welfare" exemption, the homeowner's exemption (CAL. REV. & TAX. CODE § 218.5), and to a limited extent exemptions relating to intercounty or intercity properties (CAL. CONST. ART. XIII, § § 1.60-1.69), the day-to-day administration of the property tax exemption laws is carried on by the county boards of supervisors acting as local boards of equalization and not directly by the State Board of Equalization. The State Board of Equalization, in most instances, does not sit as an appellate tribunal with respect to threshhold exemption decisions made by county assessors, the local boards of equalization, or Assessment Appeals Boards.

Through its rule-making power,[11] the State Board represents a control element in relation to the county boards of equalization and local assessors and through it, the State Board exercises some modicum of direction over the statewide administration of all exemption laws.[12]

Irrespective of where the exemption is administered, however, it can be said that the essential role of the Board of Equalization is to adjust the value of property listed on county rolls to conform to true market and assessed value, whereby a constant level of opinion may be maintained throughout the State so as to "keep all properties in their proper relationship one to another."[13] As the discussion to follow will indicate, this adjustment function of the Board many times involves the making of decisions on questions of mixed fact and law where value must be attributed to property holdings composed of assessable and non-assessable portions.

A. THE EXHAUSTION PROBLEM

Initially, however, before any conflicts as to matters of exemption can reach the county or State Board of Equalization stage of processing, it is the county assessor who must make the first administrative determination of claims of eligibility for exemption from a county assessor's tax roll.[14] In so exercising their duty, county assessors have long been subject to judicial as well as superior-administrative agency guidance in construing and applying California's tax exemption laws.[15]

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[11]See CAL. GOV'T. CODE § 15606 (West 1970), under which the "Assessor's Handbook" among other rules and regulations is annually published; see also, CAL. GOV'T. CODE § 15607 (West 1970), *Assessors' Meetings;* CAL. GOV'T. CODE § § 15640-15645 (West 1970), *Surveys of Local Assessment Procedures.*

[12]See also, CAL. REV. & TAX. CODE § 401.5 (West 1970).

[13]Eastern-Columbia, Inc. v. Los Angeles County, 61 Cal. App. 2d 734, 743, 143 P.2d 992, 997 (1943); Abrams v. City of S.F., 48 Cal. App. 2d 1, 6, 119 P.2d 197, 200 (1941).

[14]CAL. REV. & TAX CODE § § 601-602 (West 1970) define this statutory duty of county assessors.

[15]The interpretative principle presently in vogue is the "strict but reasonable" rule of construction of exemption statutes. See Cedars of Lebanon Hospital v. Los Angeles County, 35 Cal. 2d 729, 735, 221 P.2d 31, 35 (1950); Sutter Hospital of Sacramento v. City of Sacramento, 39 Cal. 2d 33, 39, 244 P.2d 390, 394 (1952); Stockton Civil Theatre v. Board of Supervisors, 66 Cal. 2d 13, 423 P.2d 810 (1967).

Once the county assessor makes the threshhold decision against the taxpayer's claim of exemption,[16] the question upon which this article is based arises: must the taxpayer, as a condition precedent to judicial suit for recovery of taxes levied against an allegedly exempt portion of his property,[17] apply to the appropriate Board of Equalization for relief from erroneously assessed taxes?[18] Phrased another way, is application to the Board of Equalization necessary where the taxpayer seeks exemption of a specified portion of his holdings, rather than a general reduction in the assessed valuation of his property? The answer to this question, involving as it does principles of exhaustion of administrative remedies, is critical to the rights of the taxpayer.

Most property owners have a justifiably vital and vested interest in avoiding, where legally possible, any unnecessary legal and administrative expenses attendant to the administrative processing of a challenge to an assessor's denial of a claimed exemption. Depending upon the amount in controversy of a claimed exemption, the expense to the taxpayer of processing a claim first through the appropriate Board of Equalization and then through the courts would very likely be prohibitive. Likewise, tax counsel for taxpayers whose claims of exemption involve relatively substantial amounts must be careful not to by-pass any required remedial steps, because the rule of exhaustion of administrative remedies can rise to the level of a jurisdictional limitation on judicial power.[19] Both classifications of tax clients thus have substantial interests in minimizing the total cost of attacking an exemption denial. Time and expense factors are indeed weighty considerations for the prudent tax advisor at the point when a decision is made to mount this taxpayer challenge to the denial of a claimed partial exemption.

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[16]CAL. REV. & TAX. CODE § 251 *et. seq.* (West 1970) prescribe claims procedures for exemptions which require affirmative application by the taxpayer.

[17]CAL. REV. & TAX. CODE § § 5103, 5136-5143 (West 1970) expressly authorize such suits where taxes are paid under protest.

[18]CAL. REV. & TAX. CODE § 1601 *et. seq.* (West 1970) govern the relief obtainable at County equalization sessions.

[19]Security-First National Bank v. Los Angeles County, 35 Cal. 2d 319, 321, 217 P.2d 946, 947 (1950); McCaslin v. DeCamp, 248 Cal. App. 2d 13, 15, 56 Cal. Rptr. 43 (1967); 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 64, 587 (1970).

B. ORIGIN OF THE EXHAUSTION DOCTRINE

The doctrine of exhaustion of administrative remedies has long been a fixture in the field of administrative law.[20] Based upon a policy of orderly procedure, the doctrine favors a preliminary administrative sifting process with respect to matters peculiarly within the competence of the administrative authority.[21] The principal application of the doctrine has thus been to compel parties to administrative proceedings to take full advantage of available administrative remedies. It is designed basically to prevent attempts to "swamp the courts" by resort to judicial relief, where administrative agencies were created by statute expressly to handle particular problems.[22] Although there is no clear authority pinpointing the origin of the doctrine in the American jurisprudence, it is generally assumed that the rule of exhaustion of administrative remedies began in the Federal courts, where it was first encoutered in certain tax cases and cases involving the Interstate Commerce Commission.[23]

California courts have similarly long adhered to the rule of exhaustion of administrative remedies as a jurisdictional prerequisite of judicial relief,[24] even though the statutes which authorize taxpayer refund suits[25] contain no express language requiring previous application to the appropriate Board of Equalization as a condition of relief. How, then, has the exhaustion problem arisen in the area taxpayer challenges to alleged erroneous assessments of exempt property?

1. AGENCY ROLE DEFINITION

An analysis of the "essential role"[26] of a Board of Equalization demonstrates that the peculiar competence of such an agency falls within the areas of valuation of property and the

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[20]See 42 AM. JUR., *Public Administrative Law* § 197 (1942); 10 A.L.R. 2d 284 (1950).
[21]See, Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, (1926).
[22]See, Oklahoma Pub. Welfare Commission v. State, 187 Okla. 654, 105 P.2d 547 (1940).
[23]*See generally*, Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939).
[24]2 CAL. JUR. 2d *Administrative Law* § § 184-185 (1954).
[25]CAL. REV. & TAX. CODE § § 5103, 5136-5143 (West 1970).
[26]Eastern-Columbia, Inc. v. Los Angeles County, 61 Cal. App. 2d 734, 743, 143 P.2d 992, 997 (1943); Abrams v. City of S.F., 48 Cal. App. 2d 1, 6, 119 P.2d 117, 200 (1941).

making of appropriate adjustments to allegedly excessive assessments submitted to it by the complaining taxpayer. On the surface, at least, claims of tax exemption would appear to present no factual issues of valuation adjustment or equality of appraisals such that the "equalizing" powers of the Board might properly be invoked. However, this seemingly uncomplicated analysis of the exhaustion doctrine regarding claims of exemption as opposed to claims of mere excessive valuation has encountered great difficulty where a given taxpayer's property holdings constitute a "mixed bag" of both concededly nonexempt and allegedly exempt properties. Moreover, recent case law has apparently invoked the "exhaustion" rule even in the extremely rare case in which a property owner contends that all of his holdings are tax exempt.

Although exemption and overvaluation are clearly distinguishable legal grounds for objection to a tax,[27] it is no simple task to consistently characterize common fact situations as falling under one or the other of these headings. This is because, from the standpoint of the taxpayer, the impact of a reduced assessed valuation on his total tax bill is the same as would be the exemption "in toto" of certain portions of his property from taxation. This problem of "partial invalidity" of assessments has been the key to difficulties surrounding the "exhaustion" rule in the area of property tax exemptions, and was probably responsible for the conclusion early-reached by the California courts[28] that a comingling of taxable and exempt property in a single assessment necessarily gives rise to factual questions of valuation as opposed to purely legal questions of exemption. This conclusion had been solidly established by 1900, when, in *Henne v. Los Angeles County*,[29] the California Supreme Court even went so far as to propose that whenever a valuation issue is presented, even though coupled with a claim of exemption, the administrative remedy must still be pursued as a condition precedent to suit for refund in the courts.

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[27]The underlying premises of those two concepts are quite different: the former presupposes a constitutional or statutory grant of tax immunity, while the latter is premised upon taxability, but at a level above what is held to be fair taxable value.

[28]See, for example, Fall v. City of Marysville, 19 Cal. 391 (1861); City of Los Angeles v. Glassell, 4 Cal. App. 42, 48, 87 P. 241, 243 (1906); Globe Grain & Milling Co. v. Los Angeles County, 62 Cal. App. 297, 216 P. 631 (1923).

[29]129 Cal. 297, 61 P. 1081 (1900).

2. IMPACT OF THE BRENNER DECISION

The relatively forthright and logically-appealing holding of the *Henne* case was, unfortunately, to enjoy but an abbreviated period of favor with the California Supreme Court. In 1911, *Henne* was expressly overruled by the case of *Brenner v. City of Los Angeles*,[30] a decision which has not only never been overruled but which has been cited on numerous occasions with apparent approval as recently as 1967.[31] In deviating from the holding in the *Henne* case, the Court stated, in part:

> We think it is time to renounce the doctrine that money paid under protest for taxes on property not liable to assessment cannot be recovered unless application [to a Board of Equalization] is made for correction of assessor's error.[32]

In *Brenner*, the taxpayer had not made application to the Board of Equalization for relief from the assessor's erroneous inclusion in the value of the taxpayer's real property of the value of a $60,000 recorded mortgage held by the Regents of the University of California. The taxpayer had not discovered the assessor's failure to properly deduct this mortgage from the value of his assessable property until after the termination of the then-current equalization session of the county board of supervisors. The Court asserted that it would be in error to fail to distinguish between a situation involving an excessive assessment on taxable property and a case wherein an assessment is placed on property, or portions thereof, not liable to assessment. Taxpayer Brenner's case was held to fall under the latter heading. The *Brenner* Court further noted that, unlike the statutes of some other states,[33] the California statutes authorizing suits for recovery of taxes paid under protest do not expressly impose any condition of previous application to the appropriate Board of Equalization. Consequently, Mr. Brenner was not

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[30]160 Cal. 72, 76-77, 116 P. 397, 400 (1911).

[31]*Cf.* El Tehon Cattle Co. v. County of San Diego, 252 Cal. App. 2d 449, 456, 60 Cal. Rptr. 586, 593 (1967).

[32]Brenner v. City of Los Angeles, 160 Cal. 72, 76-77, 116 P. 397 (1911).

[33]In Osborn v. Danvers, 6 Pick. (Mass.) 98 (1823), a case cited by the *Henne* Court, the applicable taxpayer action statute contained express language requiring initial application to the appropriate administrative body as a condition of judicial relief.

barred from judicial relief for his failure to exhaust his administrative remedies.

When considered in the light of the previously-noted established doctrine of "exhaustion" in exemption appeals and of the square holding of the *Henne* case,[34] it is apparent that the meaning of the *Brenner* case can be appreciated only by constructing the latitudes of its possible interpretations. On the one hand, it might be concluded that *Brenner* held that no application for relief to a Board of Equalization need ever be made when exempt property is included in a unitary assessment, whether commingled with taxable property or otherwise. This reading of the case, as the following review of the authorities will indicate, is overly broad to the point of being untenable in modern times. On the otherhand, viewing the case narrowly with respect to the facts there involved, *Brenner* could be regarded as holding that prior application to the Board of Equalization is necessary in all instances of a single assessment of commingled exempt and non-exempt properties, with one exeption. That exception would be where the assessment is incorrect due to an error which is merely mathematical in character and which does not require for its correction the weighing of evidence or other exercises of the "essential role" of a Board of Equalization. In view of the discussion to follow, this latter narrow reading of the case would appear to be the more precise synopsis of its precedential effect.

THE PROGENY OF THE BRENNER CASE: INDISSOLUBLE PROBLEMS OF COMMINGLING, PARTIAL INVALIDITY, AND VALUE SEGRETATION

I. UNMANAGEABLE FACTUAL DISTINCTIONS

As might be expected, application of the subtle distinctions which grounded the *Brenner* decision was beset by troublesome and inconsistent factual characterizations from the very out-

[34]The *Henne* decision, albeit exprelly overruled, still contained much discussion of the exhaustion doctrine which had theretofore been unquestioned; thus, Brenner must be carefully analyzed in order to discern exactly what it did hold in light of this clear line of prior authority.

set.[35] In the first case to be decided after *Brenner*, *Kern River Co.* v. *Los Angeles County*,[36] the Court was confronted by the taxpayer with a unitary assessment of the total value of its power lines, the value of which had then been distributed by the county assessor[37] among the various school districts through which the lines extended, but without regard to whether these lines passed over public or private roadways. That is, the total value of these lines was *pro rata* distributed without regard to whether they were "within" the school districts for assessment purposes. As a result, the taxpayer's franchise was assessed at relatively substantial figures in all such school districts, despite the fact that in one district, the power lines in question did not extend over public lands at all and in several other districts, crossed public highways in only isolated instances. The two issues presented were extremely technical: 1) was the undisputed fact of total non-use of the franchise within one district equatable with its "non-existence" therein for assessment purposes, or 2) was the entire problem really a question of mere overvaluation in relation to the remaining school districts in which there had clearly been a substantial exercise of the public easement franchise?

The Supreme Court's opinion stated, without citing authority, that such a public utility franchise became taxable only when it was "within" the public rights of way of a given school district, and that there was "obviously nothing to assess" in districts in which said franchise involved no actual use of the public easements.[38] As to the other school districts, where there was

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[35]In connection with the discussion of cases following the *Brenner* decision, it is important to note that although the exhaustion rule is considered a jurisdictional limitation on judicial power, there are generally-recognized exceptions to the rule which are not susceptible of exact definition, for example, where the subject matter of the dispute is without the ambit of authority or power of an administrative agency to grant any relief of any kind (this would appear to be the broad administrative law principle underlying *Brenner*). See, 42 AM. JUR. *Public Administrative Law* § 200 (1942); 72 A.L.R. 2d 1417 (1960).

[36]164 Cal. 751, 130 P. 714 (1913).

[37]At that time, this practice supposedly insured compliance with the language of CAL. CONST. ART. XIII § 10; today, the State Board of Equalization itself, under CAL. CONST. ART. XIII, § 14, does the state-wide assessment of public utility property.

[38]Kern River Co. v. Los Angeles County, 164 Cal. 751, 755, 130 P. 714, 717 (1913).

a minimal exercise of the franchise over public roadways, the Court regarded the disproportionate assessment problem as merely one of partial invalidity due to overvaluation for which initial recourse to the Board of Equalization was appropriate and thus mandatory.[39] *Brenner* was cited as authority for only the first holding, a gesture which compounded the perplexities of that case, and not expressly in support of the second part of the holding. The *Brenner* case, it will be remembered, was not a case dealing with a wholly void assessment, but rather with an assessment only partially invalid due to the erroneous inclusion in it of non-taxable value. The Court's failure to explain why it invoked *Brenner* as authority on the first issue, to which it was only indirectly relevant, but not on the second, to which it seemed directly applicable, was indeed suggestive of the analytical difficulties of that case which were to be involved in subsequent exemption litigations.

In several other of the tax exemption cases which followed *Brenner*,[40] the California courts struggled to the point of torturing the formularized and tenuous exemption-valuation factual distinctions of that case to consistently handle exemption controversies in which the allegedly exempt property was included in an otherwise assessable collection of properties and in which no application had initially been made to the Board of Equalization. The holding in *Montgomery Ward* v. *Welch*,[41] was another striking instance of incongruous reliance on *Brenner* for the view that application for relief to the Board of Equalization is not required only when the entire assessment is "absolutely void," a proposition for which the citation of *Brenner* adds nothing whatever. Such misplaced reliance can hardly be considered a resounding reaffirmation of the *Brenner* decision.

As indicated above, the *Brenner* rationale gave rise to serious problems of factual classification and a series of inconsistent factual distinctions as regards its "partial invalidity" setting.

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[39] *Id.* at 755-756, 130 P.2d at 718.

[40] See, for example, Globe Grain & Milling Co. v. Los Angeles County, 62 Cal. App. 297, 216 P. 631 (1923); Southern California Manufacturing Co. v. Los Angeles County, 49 Cal. App. 712, 194 P. 62 (1920).

[41] 17 Cal. App. 2d 127, 131-132, 61 P.2d 790, 792-793 (1936). The holding in this case could realistically be viewed as a *sub silentio* undermining of the factual differentiations specified in the Brenner case.

By the mid-1930's, it was clear that the courts were experiencing insurmountable difficulties in consistently distinguishing between cases involving "mere assessment overvaluation" as opposed to "illegal assessments" which were part of the unitary assessment of both nonexempt and exempt holdings of the taxpayer.[42]

II. PROBLEMS OF ISSUE CHARACTERIZATION

The authority of *Brenner*, for whatever proposition it might have been said to stand, was further undermined by a series of decisions in the early 1950's involving what was ultimately held to be the discriminatory misclassification of certain bank vault doors of national banks as improvements to real property for assessment purposes.[43] In *Simms v. Los Angeles County*,[44] a case in which twenty-three separate appeals were decided by a single opinion, the Supreme Court ordered the discrimination expressly found to be corrected by remanding the cases for resubmission to the Board of Equalization so that the values attributable to taxable portions of the national banks' property could be "segregated out" from the values attributable to exempt real fixtures for purposes of arriving at a proper tax bill. In so acting, the Court was fairly clearly indicating that the es-

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[42]Witness: Associated Oil Co. v. Orange County, 4 Cal. App. 2d 5, 9, 40 P.2d 887, 889 (1935). Here, the owner of an oil lease furnished the assessor a statement of production which, by simple mistake, stated an amount of oil storage largely in excess of the actual amount and an assessment was made based on the erroneous statement. The mistake was not discovered by the taxpayer until after the Board of Equalization sessions had terminated. The District Court, in reversing the trial court, held that the case was not one of "mere overvaluation" by the assessor, but rather one of "illegal assessment" in the context of *Brenner*. One is indeed at a loss to understand how a court can concede that "almost any mistake which results in excessive assessment amounts to an overvaluation of the property of the taxpayer," (a point squarely stated in the Henne case) and yet reject in the same decision the application of the rationale of the *Henne* case because of some unarticulated difference between the types of overvaluation thus recognized.

[43]In support of his classifications of the bank vault doors as improvements rather than trade fixtures, the county assessor assertedly relied upon the decision in San Diego Trust & Savings Bank v. County of San Diego, 16 Cal. 2d 142, 105 P.2d 94 (1940); however, in 1946, the passage of 12 U.S.C. § 548 (together with the effect of CAL. CONST. ART. XIII, § 16(1)(a)) made such fixtures exempt for purposes of these case appeals.

[44]35 Cal. 2d 303, 217 P.2d 936 (1950), *cert. den.*, 340 U.S. 891 (1950).

sential role of a Board of Equalization is invoked in the typical case of a unitary assessment of commingled taxable and allegedly exempt property.[45] In a companion case,[46] the Court flatly denied recovery to plaintiffs who had failed to make timely application to the Board of Equalization for relief from the same error of classification. There was but a cavalier attempt to distinguish the *Brenner* precedent,[47] the effect of which again was to imply that the case was authoritative only in "wholly void" assessment situations - a proposition hardly derivative from the facts of the *Brenner* case.

The holdings in the national bank cases would thus appear to reflect a studied ignoring of the facts of the *Brenner* case while adhering to the general principal – which by then was well established – that "valuation functions" are reposed exclusively in the appropriate Board of Equalization.[48] They further reflected the growing consistency of judicial classifications of "partial nullities" of the *Brenner* type as issues calling for the invocation of the valuation-segregation function of the Board of Equalization, for which application to it is a prerequisite of judicial relief.

Consonant with this emerging line of analysis was the case of *City & County of S.F. v. County of San Mateo*,[49] a complicated controversy over the partially exempt portions of airport property in which the Supreme Court again held that it is within the province of a Board of Equalization to "adjust" the assessment so as to segregate the exempt from the nonexempt portions of the property. However, the Court's opinion in this case could quite arguably stand for the proposition that *Brenner* was of no further efficacy, because it was not even cited during the course of a lengthy and thorough opinion.

Nevertheless, an argument distinguishing the *Brenner* facts from the facts of the airport case can be made out. In *Brenner*,

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[46]Security-First National Bank v. Los Angeles County, 35 Cal. 2d 319, 217 P.2d 946 (1950).

[47]*Id.* at 321, 217 P.2d at 948. "An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction."

[48]*See generally*, Southern California Telephone Co. v. Los Angeles County, 45 Cal. App. 2d 111, 113 P.2d 773 (1941); Eastern Columbia, Inc. v. Los Angeles County, 61 Cal. App. 2d 734, 143 P.2d 992 (1943).

[49]36 Cal. 2d 196, 201, 222 P.2d 860, 863 (1950).

the determination of assessed value attributable to the exempt property interest (the $60,000 recorded mortgage) apparently required only "simply mathematical calculation"; whereas, in the S.F.-San Mateo airport case, the facts were such that this determination (i.e., of the value attributable to the exempt property) necessarily called into play the peculiar competence of equalization judgment.

Four years later, this distinction [implicit in *Brenner* and *Associated Oil* v. *Orange County*[50]] found apparent favor in a Supreme Court opinion in *Parr-Richmond* v. *Boyd*.[51] There, the taxpayer's theory of relief without having made initial recourse to the Board of Equalization was based on the undisputed fact that the assessment levied against his property clearly covered more than the legally taxable limited possessory interest concededly held by him. The Court reasoned that, since determination, i.e. "segregation," of the correct taxable interest of the taxpayer was relatively mechanical under the facts as represented, the issue predominant in the case was therefore not one of "valuation" which would require prior application to the Board of Equalization before recourse to court.[52]

In *Star-Kist Foods, Inc.* v. *Quinn*,[53] *Parr-Richmond* v. *Boyd*, the *Brenner* case, and *Associated Oil* v. *Orange County* were cited in the course of an opinion written by Chief Justice Traynor in a case dealing with the partial invalidity of an assessment of taxpayer's leasehold interests in certain lands owned by and located within the boundaries of the City of Los Angeles. The proposition for which the above-mentioned cases were cited was basically as follows: where assessment is placed upon property in a manner allegedly invalid and unconstitutional under a statute valid on its face,[54] no "valuation" question arises, even though only a segregated portion of the total assessment is

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[50]4 Cal. App. 2d 5, 9, 40 P. 887, 889 (1935).

[51]43 Cal. 2d 157, 165, 272 P.2d 16, 23 (1954).

[52]*Cf.* Parrot & Co. v. County of S.F., 131 Cal. App. 2d 332, 280 P.2d 881 (1955) for another opinion adopting the narrower rationale of the *Brenner* case as applied in cases like *Parr-Richmond* v. *Boyd*, i.e., non-application of the exhaustion rule where the facts are undisputed with respect to clearly definable and evaluated exempt and nonexempt property interests.

[53]54 Cal. 2d 507, 510-512, 354 P.2d 1, 2-3 (1960).

[54]CAL. REV. & TAX. CODE § 107.1 (West 1957): the assessor's argument for the invalidity of this particular statute was based on CAL. CONST. ART. XII, § 12.

illegal. The issue predominant in the case is purely a legal one – statutory constitutionality – rather than what can be called an attack "in part" upon an excessive assessment. Conceding that the distinctions and reasonings of *Star-Kist* are not entirely consistent with the analysis of partial nullities employed by the Court in the national bank and airport cases, the case may nonetheless be characterized as an additional – albeit technical – "wrinkle" of the valuation-illegal assessment distinction announced by the *Brenner* decision.

III. DEVELOPMENT OF JUDICIAL HOSTILITY TO TAXPAYER CIRCUMVENTION OF THE BOARD OF EQUALIZATION

During the 1960's, the previously-discussed commingled-property rationale of the *Brenner* line of cases was apparently rendered quietly into oblivion. In *Citizens' Federal Sav. & Loan Assn. v. County of S.F.*,[55] for example, the District Court of Appeals held that resort to the appropriate Board of Equalization was not rendered unnecessary by the fact that the assessor's error in excessive assessed valuation was due to a partial misclassification of property as personalty rather than realty, and that the taxpayer's failure to make timely use of its administrative remedy was fatal to its right of judicial relief.[56] Another assessment appeals case decided that same year[57] dealt with an assessor's erroneous inclusion of value attributable to aircraft no longer owned by the taxpayer in the total assessed valuation of plaintiff's aircraft holdings. The plaintiff had made no prior application to the Board of Equalization and had sued directly for refund in Superior Court. Following an extensive review of the exhaustion rule in exemption cases, and the now-standard "valuation-wrongful assessment" distinction held to be an exception thereto (citing *Brenner* and *Associated Oil* v. *Orange County*), the court blithely classified the issue of the

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[55]202 Cal. App. 2d 358, 20 Cal. Rptr. 717 (1962) (by implication).

[56]See CAL. REV. & TAX. CODE § 5096(a),(b), & (c) (West 1970) for statutory authorization of tax refunds on order of the county board of supervisors.

[57]Lockheed Aircraft Corp. v. Los Angeles County, 207 Cal. App. 2d 119, 24 Cal. Rptr. 316 (1962).

case as one of "mere valuation"[58] (for which prior application to the Board of Equalization is required) with no clarifying or qualifying discussion whatever regarding the "partial invalidity" fact setting in which the assessment there was attacked as being "illegal."

A. MODERN EXTENSIONS BY THE JUDICIARY OF EXHAUSTION PRINCIPLES

By 1967, the earlier-noted broad reading of *Brenner*, i.e., that given a unitary assessment, where an assessor has lumped together concededly nonexempt and allegedly exempt property interests, the problem was classifiable as one of illegal assessment, could be said to have retained little, if any, vitality. With few deviations, the cases from the mid-1940's through that year had indicated that, in the commingled-property situation, the courts almost invariably require initial recourse to the appropriate Board of Equalization as a condition precedent to judicial relief so long as any of the essential functions of the Board (identifying, segregating, and attributing value to the exempt and nonexempt portions of property) could conceivably be required for disposition of the taxpayer's claim.[59]

The foundations of this reasoning were further solidified by the decision of the Fourth District Court of Appeals in *El Tehon Cattle Co. v. San Diego County*,[60] a case involving an excessively erroneous assessed valuation of cattle owned by the taxpayer. Just as in the case of *Associated Oil Co.* v. *Orange County*,[61] it had been the taxpayer's own error which had been used by the assessor as a basis of computing the assessment. Relying upon seemingly clear precedent, the taxpayer attacked the assessment in Superior Court as being "illegal". In this decision, however, the court held that this "error of judgment" was not one amounting to wrongful or "illegal" assessment for purposes of circumventing the taxpayer's administrative appeal route through the Board of Equalization. The court did concede to

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[58]*Id.* at 130, 24 Cal. Rptr. at 326. Query: did the holding in this case impliedly signal a return to the partial invalidity rationale of the *Henne* case? See also, People v. Coit Ranch, 204 Cal. App. 2d 52, 59, 21 Cal. Rptr. 875, 880 (1962).

[59]See, for example, 207 Cal. App. 2d 119, 129, 24 Cal. Rptr. 316, 325 (1962) (by implication).

[60]252 Cal. App. 2d 449, 463, 60 Cal. Rptr. 586, 596 (1967).

[61]4 Cal. App. 2d 5, 40 P.2d 887 (1935).

Brenner the dignity of a citation, but it was once again for the proposition that the exhaustion rule is inapplicable only in cases of totally exempt or nonexistent property. The court reasoned that this error in the quantity or number of a kind of property that is taxable was simply not classifiable as an "illegal" assessment of nonexistent property.[62] The taxpayer was forthwith thrown out of court for having failed to exhaust his available remedies before the Board of Equalization.

B. REAFFIRMATIONS OF BROAD ADMINISTRATIVE AGENCY JURISDICTION

Concurrent with the visible judicial trend during the 1960's to vigorously apply exhaustion principles to exemption appeals cases, it was also becoming apparent that the courts have actually long recognized and were beginning to reassert that Boards of Equalization possess a limited capacity initially to decide legal as well as special factual issues. In connection with the large majority of contested exemption cases since 1950,[63] the type of relief which the courts have suggested could have been obtained by recourse to the proper Board of Equalization (in most instances, a segregation of the exempt from the nonexempt portions of the property) impliedly presupposes that the State and county Boards of Equalization have the power to pass, initially at least, upon certain underlying questions of law.

For example, consider the remand of the national bank cases by the Supreme Court in *Simms v. Los Angeles County*.[64] Such an act would have been a futile gesture unless the Board of Equalization had the power to consider the essentially legal issue of the propriety of the assessor's classification. The remand in that case was apparently based upon the general principle of administrative law in California that jurisdiction initially to pass upon questions of law incidental to necessary determina-

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[62]252 Cal. App. 2d 449, 458-459, 60 Cal. Rptr. 586, 594 (1967).

[63]See, for example, Simms v. Los Angeles County, 35 Cal. 2d 303, 217 P.2d 936 (1950); City & County of S.F. v. County of San Mateo, 36 Cal. 2d 196, 222 P.2d 860 (1950).

[64]35 Cal. 2d 303, 217 P.2d 936 (1950).

tions of factual matters is vested in the State and local Boards of Equalization,[65] as well as in other State and county administrative agencies.[66] This limited scope of administrative jurisdiction to initially pass upon certain legal issues—subject, of course, to judicial review—is also clearly inherent in the statutory delegations of responsibility to State and local taxing officials.[67]

In 1970, any doubt as to the taxpayer's available options when challenging an allegedly erroneous assessment of exempt property commingled with taxable property was probably laid to rest by the unanimous Supreme Court decision in *Stenocord Corp.* v. *City Etc. of S.F.*[68] The Court in that case refused to hear plaintiff's claim of over-assessment due to its failure to exhaust its administrative remedies. Although the facts of that case did not directly put at issue any claimed property tax exemptions, the holding is nonetheless directly relevant to the exemption problem. The thrust of the decision was that, if prior recourse to the Board of Equalization might conceivably have been appropriate with respect to all possible issues and findings radiating from the facts as presented, then such prior application for administrative relief is a condition of judicial relief.[69]

C. PRACTICAL IMPACT OF THE STENOCORD DECISION

The principle thus adumbrated in the *Stenocord* case—bearing in mind that the Court had before it the entire series of cases allowing exception to the exhaustion rule—would seem simple and uniform in the area of contested exemptions: whenever questions of "valuation" or preliminary underlying law could conceivably become necessary as a prerequisite to refund of

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[65]Universal Consolidate Oil Co. v. Byram, 25 Cal. 2d 353, 153 P.2d 746 (1944) (questions of law concerning the illegality of the method of assessment of oil leases); Dawson v. Los Angeles County, 15 Cal. 2d 77, 98 P.2d 495 (1940) (legal questions relating to intepreting a constitutional prohibition against tax burdens on personal property greater than the tax burden of a taxpayer's real estate).

[66]People v. West Publishing Co., 35 Cal. 2d 80, 88, 216 P.2d 441 (1950).

[67]See CAL. REV. & TAX. CODE § 405 (West 1970), which directs county officials to annually assess all "Taxable" property; CAL. REV. & TAX. CODE § 254.5 (West 1970) which empowers the State Board of Equalization to directly decide legal claims of eligibility under the "Welfare" exemption.

[68]2 Cal. 3d 984, 471 P.2d 966 (1970).

[69]*Id.* at 988, 471 P.2d 970.

taxes,[70] the aggrieved taxpayer must exhaust his administrative remedies before the Board of Equalization by petitioning for at least a segregation of values as between the allegedly exempt and concededly taxable portions of his property.

In view of the *Stenocord* decision, the taxpayer and his tax advisor would be well-advised as a practical matter to make full use of the remedy of negotiation with the county assessor[71] before initiating the time and expense-consuming process of administrative challenge to an alleged illegal assessment. The entire procedure at the administrative level might thereby be greatly simplified, since the taxpayer could quickly secure a clarification of the assessor's views with regard to the taxable and/or exempt portions of the subject property. The position thus taken by the assessor will normally be the basis for any contentions offered by the city or county in the pending refund action. The precise issues to be passed upon by the administrative tribunal can thus be properly and expeditiously framed during a process similar to pretrial discovery. Such a conference with the assessor could indeed result in a stipulation on his part[72] that the taxpayer's attributions of value to the respective exempt and nonexempt portions of his holdings are correct, whereafter the Board of Equalization can easily segregate the appropriate values on the basis of the agreement with stipulations and speedily arrive at the correct amount of refund.

IV. CONCLUSION

Although, as previously indicated, the *Brenner* case has not been expressly overruled or expressly refuted since its rendition some sixty years ago, the authorities herein considered would appear to make justifiable the conclusion that it should be regarded either as having long been overruled "sub silentio,"

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[70]This would also seem to comprehend cases of alleged total exemption of all holdings of a given property owner, because should some portion of his property be found nonexempt by the courts (a finding which a Board of Equalization could make), then there will likely be a remand of the case for resubmission to the appropriate Board of Equalization so that values may be attributed to the respective exempt and non-exempt interests.

[71]See Ehrman, *supra* note 2, at 5-9.

[72]CAL. REV. & TAX. CODE § 1608 (West 1970); see also, CAL. REV. & TAX. CODE § § 4831, 4832, 4840 (West 1970) for other assessment corrections allowed by statute.

or at most as being authoritative only in a narrow range of factual situations in which a segregation of the taxable and exempt portions of the subject property, respectively, involves but a relatively simple mathematic computation which does not require an exercise of "valuation judgment."[73]

From the factual standpoint, then, initial recourse to the appropriate Board of Equalization in any case of commingled exempt and nonexempt property would appear to be the most prudent of the taxpayer's available options at the point at which the challenge to an assessment is to be made. Moreover, it is not inconceivable that some portion of even an alleged totally-exempt tract of land or other set of property holdings will be found nonexempt by the courts against the protestations of the litigating taxpayer (the result of which will probably be a remand of the matter of the State or county Board of Equalization). The California property owner (individual and corporate) is today effectively required to take all but a very narrowly-defined range of official assessment appeals first to the administrative tribunal created for the special purpose of treating such matters. Then, if feasibly possible, the property owner may carry his appeal to a court of general jurisdiction, In the context of an extremely frequent practical example, where the taxpayer disputes the denial in whole or in part of a claimed "Welfare" exemption, he must first apply for relief to the State Board of Equalization[74] before the courts will hear him to contest the denial.

In summary, in the context of the commingling problem here considered, the rule of exhaustion of administrative remedies appears generally to force an acceptable accommodation between the vesting of responsibility for property valuation in an administrative agency created for that purpose and a basic underlying need for expedition of property tax litigations in an era of enormously-crowded court dockets.

It seems fair to presume that most California taxpayers might prefer to avoid the heavy cost in time and total expenses

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[73]*Cf.* Simms v. Los Angeles County, 35 Cal. 2d 303, 318, 217 P.2d 940, 954 (1950); see also, El Tehon Cattle Co. v. County of San Diego, 252 Cal. App. 2d 449, 459, 60 Cal. Rptr. 586, 593 (1967); EHRMAN & FLAVIN, TAXING CALIFORNIA PROPERTY *supra* note 5, at § 157.

[74]CAL. REV. & TAX. CODE § 254.5(d) (West 1970) (sub.(d) enacted 1968).

which is almost always attendant to the processing of a challenge to an assessment through administrative channels and sue immediately for refund in Superior Court. The availability, such as it is, of that option has been carefully analyzed here. It is hoped that this review of the law and the policies generally requiring equalization as a prerequisite to suit for recovery of property taxes wrongfully levied, and the discussion of the few alternatives to this administrative process, will be of some aid to the tax advisor and the administrator whose task it is regularly to grapple with exemptions to this maligned tax.

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