STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

WHITEFACE LIMITED PARTNERSHIP :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

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WHITEFACE LIMITED PARTNERSHIP :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

In the Matter of the Petition :

of :

EVEREST REAL ESTATE INVESTMENTS, B.V. :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

In the Matter of the Petition :

of :

WHITEFACE RESORT CO., LTD. :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

DECISION
DTA NOS. 809263, 810534, 809255, 809262 AND 810535

In the Matter of the Petition	:
of	:
101430 CANADA, INC.	:
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 15, 1993 with respect to the petitions of Whiteface Limited Partnership, P.O. Box 231, Whiteface Inn Road, Lake Placid, New York 12946, Everest Real Estate Investments, B.V., 131-135 De Lairessestraat, Amsterdam, Holland, Whiteface Resort Co., Ltd., P.O. Box 820, Whiteface Inn Road, Lake Placid, New York 12946, and 101430 Canada, Inc., 4592 St. Catherine West, Montreal, Quebec H3Z1S3 Canada. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey (James H. Tully, Jr., Esq., of counsel) and D'Agostino, Hoblock, Greisler & Siegal, P.C. (Diana K. Bangert-Drowns, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioners filed a brief in opposition and the Division of Taxation filed a reply. Oral argument was heard on June 15, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly treated the liquidation and acquisition of certain partnership interests in Whiteface Limited Partnership, which owned real property in Lake Placid, as transactions subject to the imposition of gains tax, or whether such transactions represented a mere change in the form of ownership of Whiteface Limited Partnership, with no change in beneficial interest that would be subject to tax.

II. Whether, if the transactions above are subject to tax, the Division of Taxation properly calculated the consideration received on the transfers of the controlling interest in Whiteface Limited Partnership.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued five notices of determination asserting real property gains tax due (plus penalty and interest) as follows:

Date of Notice	Taxpayer Named In Notice	Tax Asserted Due	Tax Period Ended Date
(1) October 23, 1989	Whiteface Limited Partnership	$177,656.50	June 30, 1986
(2) October 23, 1989	Everest Real Estate Investments, B.V.	$142,210.60	June 30, 1986
(3) October 23, 1989	Whiteface Resort Co., Ltd.	$ 35,445.90	June 30, 1986
(4) May 6, 1991	101430 Canada, Inc.	$ 17,779.35	not specified in notice
(5) May 6, 1991	Whiteface Limited Partnership	$ 17,779.35	June 30, 1986

The notices numbered "1", "2" and "3" above each referenced "attached correspondence" for "a further explanation of this liability". However, the notices in evidence did not have any correspondence attached. Apparently, a letter dated August 28, 1989 of Terrence A. Matthews, an auditor in the Division's Transaction and Transfer Tax Bureau, to R. Scott Boushie of William Sweeney and Associates, petitioners' accountants, which was marked into evidence separately from the notices as the Division's Exhibit "A", was the correspondence referenced by such notices. This letter provided as follows:

> "Enclosed are the revised figures for the change in controlling interest in the Whiteface Ltd. Partnership.
>
> "The revisions were to give credit for the personal property and to adjust the ownership figures to correct the percentage of ownership.
>
> "I do not agree with the other arguments in your letter.
>
> "Section 1440 1(a) defines 'consideration', one of the definitions of which is the cancellation or discharge of an indebtedness or obligation.

"We view the assignment of debt referenced to in Schedule A in the agreement concerning retirement of partners as additional consideration.

"Because the partnership was restructured at one time, we view the parties involved to have acted in concert.

"The parties involved in the transaction, 101430 Canada and Engenio [sic] Festa, had a beneficial interest in the property. As principal owners of Solid Birch, Inc. they had built condominiums on the property and had plans for additional real estate development.

"The Notice of Determination will be mailed shortly."[1]

The Notice of Determination dated May 6, 1991 issued against Whiteface Limited Partnership asserting tax due of $17,779.35 referenced "correspondence dated 1/17/91." Such correspondence apparently consisted of a Statement of Proposed Audit Adjustment dated January 17, 1991. This statement showed Whiteface Limited Partnership as the transferor and 101430 Canada, Inc. as the transferee of property located on Whiteface Inn Road in Lake Placid, New York. The statement provided the following explanation:

"Pursuant to Section 1447(3) 101430 Canada Inc., as transferee is liable for gains tax due. This assessment is issued as a result of 50% acquisition by 101430 Canada on June 30, 1986. The fair market value determined has been sustained by a recent BCMS decision involving another Whiteface Limited Partnership transaction which occurred on June 30, 1986. The basis of the property has been stepped-up to reflect the acquisition of Everest Real Estate Investments and Whiteface Resort Co. Ltd."

The statement showed the following calculation for fair market value:

50% Interest $900,000.00 x 2	$1,800,000.00
Note and Mortgage Balance	1,984,040.00
Total Value of Property	$3,784,040.00
Less: Book value of Furniture & Fixtures etc.	(116,397.00)
Fair Market Value	$3,667,643.00

The statement also showed the following calculation for original purchase price used to determine tax due of $17,779.35 on a gain of $177,793.50:

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[1]As noted above, it is somewhat speculative that Mr. Matthews' letter is the one referred to in the October 23, 1989 notices, especially in light of the reference in Mr. Matthews' letter to a single notice and to 101430 Canada and Mr. Festa, when the notices dated October 23, 1989 consisted of two notices against Whiteface Limited Partnership and one notice against Everest Real Estate Investments, B.V.

Original Purchase Price

Retained - Festa 16.67% of $1,532,348.00	$ 255,442.41
Step-up for Everest 66.67% of $3,667,643.00	2,445,217.58
Step-up for Whiteface Resort 16.67% of $3,667.643.00	611,396.08
New Partnership Basis	$3,312,056.07

101430 Canada, Inc. Acquisition

Consideration: 50% of $3,667,643.00	$1,833,821.50
Original Purchase Price: 50% of New Basis $3,312,056.00	1,656,028.00
Gain	$ 177,793.50
Tax @ 10%	$ 17,779.35

In 1977, Eugenio Festa, a native of Rome, Italy, first envisioned the development of the real property in Lake Placid at issue in this matter:

> "We fell in love with the beauty of the property . . . and we felt that there was a potential for a [sic] future growth in that property. It was coming from a bankruptcy; it was on the lake. At that time in Montreal there was a separatist government . . . just being elected, which had created a certain concern in the business environment in Montreal . . . where I was living. So we considered the United States as [an] alternative . . . . For us Europeans, land is worth something per se, and it's a different concept, maybe, from what you have here of the land because you have so much. So we felt that that was a good purchase; it was a good acquisition; we like the property; we purchased it."

The property at issue was purchased by a New York limited partnership, petitioner Whiteface Limited Partnership. As of March 28, 1983, the date on which the real property gains tax became effective, the ownership of Whiteface Limited Partnership, consisting of 18 units,[2] was as follows:

Partner	Number of Units	Percentage Interest
Whiteface Resort Co., Ltd.	3 units	16-2/3%
Eugenio Festa	3 units	16-2/3%
Everest Real Estate Investments, B.V.	12 units	66-2/3%
	18 units	100%

The general partner of Whiteface Limited Partnership was Whiteface Resort Co., Ltd. ("Whiteface Resort"), a New York corporation which was owned as follows:

[2]The percentage interest in the partnership was measured in terms of units.

Shareholder	Number of Shares	Percentage Interest
Eugenio Festa	13 shares	52%
Everest Real Estate Investments, B.V.	12 shares	48%
	25 shares	100%

Petitioner Everest Real Estate Investments, B.V. ("Everest") was a Netherlands corporation with no office or other business interests in the United States. In turn, 100% of Everest was owned by Everest Real Estate Holdings, NV ("Everest Holdings"), which, in turn, was wholly owned by Verdox Enterprises, Inc. ("Verdox"), which, in turn, was wholly owned by the Orsini family of Ascoli Piceno, Italy, who, according to Mr. Festa's testimony, are "in the general contracting business."

Mr. Festa testified that, in June of 1986, it finally seemed possible, due to an improved economy, to consider developing the property:

> "[W]e started seeing the light at the end of the tunnel and a possible use of the property that for many years had been a loss . . . . [W]e start [sic] considering the possibility to start some development . . . . [O]ne essential condition was credit worthiness of the entity that would own the property. The credit worthiness of the setup that we had at the time was meager because of the . . . accumulating losses . . . . So my associates, I think very wisely, decided to switch their interest from these [sic] European company that we're using for holding to a North American company established in Montreal, Canada, which had long-term relationship with Royal Banks of Canada and other financial institutions of Quebec who could provide sufficient basis of credit.
>
> * * *
>
> "[B]ecause the level of involvement that it would be for me personally in the deal, I demanded that little bit given me an increase in interest in the partnership . . . . I think the equity was absorbed by the losses, but it was a promise that if in the future some kind of profit [would result, I would receive a] large[r] cut."[3]

Based upon this desire to obtain bank financing more easily, 101430 Canada was substituted for Everest by the liquidation of Everest's interest and the acquisition of an interest in Whiteface Limited Partnership by 101430 Canada. At the same time, Mr. Festa's percentage

[3]It is noted that Mr. Festa was not a native English speaker, which explains some awkward wording. Nonetheless, he was able to testify meaningfully.

interest in Whiteface Limited Partnership was increased to 50% from his previous interest of approximately 25%.[4] How this restructuring of ownership was carried out is at the center of the dispute in these matters.

Petitioners introduced into evidence as their Exhibit "1", an "Agreement Concerning Retirement of Partners", which had been entered into by the then three partners of the partnership, Whiteface Resort, Everest and Eugenio Festa, and by the partnership. The agreement was signed and dated as follows:

Individual and Title	Entity	Date of Signature
Eugenio Festa, General Partner	Whiteface Limited Partnership	June 30, 1986
Vittorio Sala, Vice-President	Whiteface Resort Co., Ltd.	June 30, 1986
H.C.S. Warendorf, Managing Director	Everest Real Estate Investments, B.V.	December 30, 1986
Eugenio Festa	As an individual	July 28, 1986

This agreement provided, in summary, as follows:

(1) Resort retires as a general partner and withdraws from the partnership reconveying its partnership interest in exchange for a liquidating distribution of $85,000.00 to be paid via a promissory note annexed to the agreement (which set interest at a rate of 10% per annum with payment of the principal not required until 1995);

(2) Everest retires as a limited partner and withdraws from the partnership reconveying its partnership interest in exchange for a liquidating distribution of $900,000.00, $780,000.00[5] of which was to be paid contingent upon the acceptance of Rothschild Bank of the assignment of certain notes and indebtedness from the partnership consisting of a

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[4]As noted above, Mr. Festa owned 3 units of Whiteface Limited Partnership, representing a percentage interest of 16-2/3%. His 52% interest in Whiteface Resort, which owned a 16-2/3% interest in Whiteface Limited Partnership, increased Mr. Festa's percentage interest in the partnership to approximately 25%.

[5]$120,000.00 of the distribution was to be paid by the partnership as a good faith deposit upon the execution of the agreement.

balance due of $1,312,274.00[6] on a mortgage note dated April 10, 1978 and notes payable of $671,766.00[7] (totalling $1,984,040.00);[8] and

(3) Resort's status as general partner continues until the contingency described above is satisfied and attribution of profit and loss of the partnership for calendar year 1986 shall be based on the composition of the partnership as of December 31, 1986.

Petitioners introduced into evidence as their Exhibit "2", a photocopy of a "Subscription Agreement" executed by 101430 Canada, Inc., as subscriber, and accepted by Eugenio Festa, as general partner, on behalf of Whiteface Limited Partnership. This undated agreement, which

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[6]A "schedule A" attached to the Retirement of Partners Agreement detailed the mortgage note balance of $1,312,274.00 as of June 30, 1986, showing the principal amount of $720,000.00 and interest accrued of $52,274.00 for 1978, $72,000.00 for each of the years 1979 through 1985 and $36,000.00 for 1986.

[7]A schedule provided details concerning the notes payable which showed 15 notes as follows:

Date	Principal
January 28, 1990	$ 65,297.00
March 27, 1980	40,000.00
April 30, 1980	40,000.00
July 18, 1980	120,000.00
October 9, 1980	18,000.00
November 3, 1980	20,000.00
March 12, 1981	15,000.00
March 26, 1981	25,000.00
April 24, 1981	5,000.00
May 7, 1981	15,000.00
May 20, 1981	10,000.00
June 5, 1981	15,000.00
June 11, 1981	5,000.00
June 18, 1981	2,500.00
June 4, 1982	50,000.00
	$445,797.00
interest to June 30, 1986	$225,969.00
	$671,766.00

These notes apparently provided the financing necessary for Whiteface Limited Partnership, which was generating losses, to continue operating the resort property. Petitioners' accountant, Richard Boushie, noted that Everest "subsidized the partnership cash flow" by these notes payable.

[8]Upon the acceptance of Everest's assignment by Rothschild Bank, Everest was required to execute for recording in the Essex County Clerk's Office a discharge of the mortgage from the partnership to Friesche Oliefabrieken, B.V. (predecessor to Everest) dated April 10, 1978. Rothschild Bank accepted the assignment on or about August 10, 1987.

complements the partners' retirement agreement discussed above, provided that in exchange for $900,000.00, 101430 Canada, Inc. would acquire 3 partnership units contingent upon the discharge of the mortgage in the amount of $720,000.00 to Friesche Oliefabrieken, B.V. (Everest's predecessor). This mortgage was discharged on October 26, 1987.

Petitioners introduced into evidence as their Exhibit "19", an amendment dated August 28, 1987 to the Whiteface Limited Partnership Agreement by the partners, Eugenio Festa and 101430 Canada, Inc. This amendment provided that Mr. Festa was the general partner holding 3 units[9] in the partnership and 101430 Canada, Inc. was a limited partner holding 3 units. With reference to capital contributions of the partners, the amendment noted no capital contributions:

> "The Partners have contributed to the capital of the Partnership as follows: [left blank]
>
> "The Limited Partner, 101430 Canada, Inc., has (3) Units of the Partnership.
>
> "The General Partner, Eugenio Festa, has (3) Units of the Partnership."

In addition, the amendment specifically noted that "[e]ach Partnership Unit shall be deemed to constitute a one sixth (1/6) undivided interest in the Partnership assets." Finally, the amendment noted that:

> "The major outstanding long-term financing to the Partnership being a loan by Green Season Financial Services, Ltd., a UK, Jersey Corporation, in the amount of $1,165,797.00 principal and $818,243.00 interest through June 30, 1986."

It is observed that Schedule B to the amendment, which set forth "the present value of each outstanding Unit of interest for purpose of this Agreement", was not included with the document introduced into evidence.

Mr. Festa testified that Everest, in substance, was a "middleman" for Whiteface Limited Partnership's borrowing of money from Rothschild Bank, and at or about the time of the restructuring of the ownership interests in the partnership (and Everest's withdrawal from the partnership), Rothschild Bank assigned to an entity called Green Season Financial Services, Ltd.

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[9]The amendment provided that the "percentage interest in the Partnership of each Limited Partner shall be measured in terms of Units."

its interest in the loans to the partnership. The Division introduced into evidence as their Exhibit "T", photocopies of four notes dated June 30, 1986 executed by Mr. Festa, as general partner of Whiteface Limited Partnership, to Green Season Financial Services, Ltd. totalling $1,984,040.00 as follows: (1) $500,000.00 at 8¼% due on or before December 31, 1996; (2) $500,000.00 at 8¼% due on or before December 31, 1995; (3) $800,000.00 at 8¼% due on or before December 31, 1995; and (4) $184,040.00 at 8¼% due on or before December 31, 1994.

The Division's Exhibit "S", a letter dated August 10, 1987 from individuals named H. J. Schneider and W. Muller on the stationery of Rothschild Bank AG of Zurich, Switzerland to Whiteface Limited Partnership, provided as follows:

> "[Everest] has endorsed to our name sixteen notes carrying an interest of 10% per year for a total principal amount of US $1,165,797.00 plus interest in the amount of US $818,243.00, computed through June 30, 1986, as per attached list [totalling $1,984,040.00].
>
> "We are now transferring said notes to Green Season Financial Services Limited, a financial company from the Channel Islands, incorporated under the laws of the United Kingdom. This corporation, as our assignee, shall be your sole creditor for those notes, effective July 1, 1986.
>
> "Please consider this letter as the notice of assignment of said notes."

Apparently, the 16 notes assigned by Everest to Rothschild Bank, which were then transferred to Green Season Financial Services, Ltd., were replaced by the four notes described above, which were executed by Mr. Festa, as general partner of the restructured Whiteface Limited Partnership.

As noted above, the Orsini family of Ascoli Piceno, Italy was the beneficial owner of Everest. This family was also the beneficial owner of 101430 Canada, Inc., which became the limited partner in Whiteface Limited Partnership, as noted above, in lieu of Everest. 101430 Canada, Inc. was wholly owned by Muchnote, Ltd., which, in turn, was wholly owned by Verdox, which, as noted above, wholly owned Everest Holdings. Consequently, the Orsini family remained a beneficial owner of the limited partners of Whiteface Limited Partnership, except that prior to the transaction at issue the family's beneficial ownership of partnership interests in Whiteface Limited Partnership was 74.6%, with Mr. Festa's percentage of beneficial

ownership at 25.4%, and after the transaction, the family's beneficial ownership was 50%, as was Mr. Festa's.[10]

101430 Canada, Inc. and Whiteface Limited Partnership filed a real property transfer gains tax transferee questionnaire and a transferor questionnaire, respectively, each dated December 6, 1988. The transferee questionnaire disclosed that consideration of $900,000.00 was to be paid, while the transferor questionnaire computed "[g]ross consideration to be paid for transfer" by 101430 Canada, Inc. of $853,750.00 (50% of average fair market value of $1,707,500.00). Exemption from tax was claimed on the transferor questionnaire on the basis that "[c]onsideration is less than $1,000,000." A close review of these questionnaires shows that Mr. Festa signed the transferor questionnaire as a partner of Whiteface Limited Partnership and the transferee questionnaire as president of 101430 Canada, Inc. This finding is based upon an examination of the similarity between these two virtually identical signatures (which were not identified in type or print on the documents, either by the signer or the notary public's statement) and the signature on the Subscription Agreement which was identified, in part, as that of Mr. Festa.

Whiteface Limited Partnership, on its 1986 Form IT-204, New York State Partnership Return, reported on Schedule M, "Reconciliation of Partners' Capital Accounts", nontaxable income of $1,463,900.03 consisting of the following:

Section 1231 gain	$ 20,373.31
ACRS deduction in excess of book depreciation	26,560.53
Section 754 basis adjustment	1,416,966.19
	$1,463,900.03

The auditor testified that the partnership reported a new basis of $3,054,078.00 for its land and buildings and improvements which "would indicate a value of the whole property of approximately $3,660,720 [if you took a rough percentage in the change of ownership which we

[10]Petitioners introduced the following affidavits concerning the Orsini family's beneficial ownership of Everest and 101430 Canada: (1) Dr. Urs Peter Kalin of Zurich, Switzerland, (2) Gianfranco Orsini of Ascoli Piceno, Italy, (3) Nello Orsini of Montreal, Quebec, (4) John Arnold Hilton of London, England, and (5) two certifications by attorney Emile Donald Uyldert of Amsterdam, Netherlands.

used of 83.33%]." The tax return also reported that "for consideration in the amount of $900,000.00" controlling interest was acquired by 101430 Canada, Inc. on June 30, 1986.

Richard Boushie, petitioners' accountant, testified as follows with reference to why the ownership interests in Whiteface Limited Partnership were restructured in the fashion described above:

> "I selected the method that I felt was the simplest and easiest to result in what Mr. Festa wanted . . . . Because of the number of units involved, three units were going to be subscribed for by 101430 Canada to be equivalent to the three units that Mr. Festa owned. Instead of doing it in other possible ways, I simply decided to liquidate the 12 units of Everest and the three units of Whiteface Resort so that there would only be three units, and issue the equivalent to 101430 . . . . So in order to avoid all the complicated problems of fractional units, I just did it in a two-step manner. It's just two steps to one single transaction.
>
> "I also want to clarify . . . . [T]he first transaction, by the dating of the documents and the logical progression of this type of a transaction, would be that 101430 Canada first subscribed to three units and became a member of that partnership for a brief moment in time . . . . 101430 brought to it the cash, the consideration that Everest was to be paid. Not only that, but the subscription agreement is dated in July of 1986,[11] and Everest did not remove itself [by] the formality of the documents until December of 1986."

Fair Market Value of Property

Petitioners vigorously contested the Division's calculation that the fair market value of the property owned by Whiteface Limited Partnership was $3,667,643.00, as detailed above. Petitioners introduced into evidence an affidavit of Robert T. Politi, who described himself as follows:

> "I am a State Certified Real Estate Appraiser . . . and hold the MAI designation of the Appraisal Institute. The MIA [sic] designation is held by appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential and all other types of real property. I am also President of Merrill L. Thomas, Inc., a real estate brokerage company with principal offices located in Lake Placid, New York."

Mr. Politi noted that he has conducted many appraisals of commercial and resort properties in the Adirondacks, Wayne Feinberg, an appraiser who testified on behalf of petitioners, noted that he has "not heard of a person within 125 miles of our area [Lake Placid] that is as qualified as

[11]As noted above, the photocopy of the subscription agreement in evidence was undated.

[Mr. Politi] is." Mr. Politi rejected the methodology used by the Division to calculate fair market value of $3,667,643.00 based upon adding the cash consideration paid plus various debts of the partnership less book value of furniture and fixtures because "the debts of a business incurred for operating costs and accrued interest are not reflective of the fair market value of the real property owned by the business." Mr. Politi noted that a series of loans obtained for operating expenses in the sum of $445,797.00 and accrued interest on a mortgage and other notes in the amount of $818,243.00 represented a significant portion of the debt. In conclusion, Mr. Politi opined:

> "[T]he methodology used to produce a value of $3,667,643.00 . . . has no merit in real property valuation techniques. It neither considers the actual thinking process of buyers or sellers, nor does it recognize market conditions as of a specified time period."

Petitioners offered the testimony and the respective appraisal reports of two qualified appraisers, William J. Anderson III and Wayne A. Feinberg, who appraised the real property at issue as of June 30, 1986, and determined fair market value as of that date of $1,740,000.00 and $1,675,000.00, respectively. Messrs. Anderson and Feinberg were unaware of each other's appraisal at the time they prepared their respective reports.

The Division offered the testimony of Vincent Lee, a qualified appraiser of real property, who noted that this case "was very complicated". As its Exhibit "FF", the Division introduced a so-called "written report concerning a review of the [petitioners'] appraisal[s]" prepared by Mr. Lee, in which he calculated a value of $4,124,000.00 for the property at issue as of June 30, 1986. In particular, Mr. Lee disagreed with a number of points in petitioners' appraisals including:

> "The selection of a number of comparables, the adjustments made to some of the comparables, the logic and approach taken in applying the comparables, and the conclusion of value that was reached therein."

OPINION

The Administrative Law Judge concluded that interpretations under the gains tax should focus on the economic reality of the situation and "the economic reality of the liquidation of the partnership interests of Everest and Whiteface Resort and the acquisition of a partnership interest by 101430 Canada represented a mere change in the form of ownership of Whiteface Limited Partnership, with no change in beneficial interest that would be subject to tax" (Determination, conclusion of law "E"). The Administrative Law Judge also observed that the "Agreement Concerning Retirement of Partners" (Retirement Agreement) and the "Subscription Agreement" were interdependent, that one could not be effective without the other. Finally, the Administrative Law Judge held that petitioners had adequately shown that Everest and 101430 Canada were each beneficially owned by the Orsini family of Ascoli Piceno, Italy through the introduction of affidavits. The Administrative Law Judge declined to decide the second issue concerning the proper calculation of consideration, stating that it was moot given his decision that the transactions were not subject to tax.

On exception, the Division argues that there were two separate and distinct transfers of a controlling interest in the Whiteface Limited Partnership: 1) the reconveyance of Whiteface Resort's and Everest's partnership interest to Whiteface Limited Partnership which resulted in the acquisition by Mr. Festa of a 100% beneficial interest in Whiteface Limited Partnership and 2) the acquisition of a 50% interest in Whiteface Limited Partnership by 101430 Canada. The Division contends that because these two transactions each caused a change in the economic ownership of Whiteface Limited Partnership, a focus on the economic reality of the transaction should lead to the conclusion that the transactions were not exempt pursuant to section 1443(5) of the Tax Law as a mere change in the form of ownership of Whiteface Limited Partnership. The Division also argues that the Administrative Law Judge erred in concluding the the Retirement Agreement and the Subscription Agreement were interdependent and that he should have concluded that each agreement was contingent upon a separate but related event.

The relevant sections of Article 31-B include the following:

Tax Law § 1441 imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1) provides for an exemption from gains tax when the consideration is less than the $1,000,000.00.

Tax Law § 1440(7) defines "transfer of real property," in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property . . . . Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . ."

The term "controlling interest" is defined in Tax Law § 1440(2), in relevant part, to mean:

> "(ii) in the case of a partnership . . . fifty percent or more of the capital, profits or beneficial interest in such partnership . . . ."

Tax Law § 1443.5 exempts from gains tax a transfer of real property which involves "a mere change of identity or form of ownership or organization, where there is no change in beneficial ownership."

We affirm the determination of the Administrative Law Judge for the following reasons.

We agree with the Division that the form of this transaction involved two distinct transfers. First, as the result of the withdrawal of Resort and Everest from Whiteface Limited Partnership, Mr. Festa's interest increased from a beneficial ownership interest of approximately 25% in the Whiteface Limited Partnership to a 100% beneficial interest. Second, 101430 Canada acquired a 50% interest.

In response to the Division's exception, petitioners argue that this "'two transaction' theory clashes with the facts, because the fact is that the ownership of Everest and 101430 Canada actually overlapped. As Mr. Boushie testified, 101430 Canada completed its subscription before Everest completed its retirement" (Petitioners' brief in opposition, pp. 7-8). Petitioners argue that the proof supports this. We disagree. The record indicates that the contingency of the

Retirement Agreement (the acceptance of the assignment of the notes held by Everest) occurred on or about August 10, 1987, but that the contingency of the Subscription Agreement (the discharge of the mortgage) did not occur until October 26, 1987. Thus, the withdrawal of Whiteface Resort and Everest was completed before the acquisition by 101430 Canada was completed.

Next, the Division argues that the section 1443(5) exemption cannot apply to exempt these transfers because they are in form two separate transfers. Petitioners respond to the Division's exception by arguing that even if the restructuring is viewed as two transactions rather than one, it is still exempt because section 1443(5) applies to a mere change of form "however effected."

Section 1443(5) provides that an exemption will be allowed "[i]f a transfer of real property, however effected, consists of a mere change of identity . . . ." Thus, on its face, the exemption appears to apply on a transfer by transfer basis and not, as petitioners suggest, to determine whether after a series of transfers a mere change in form of ownership has occurred. However, when the definition of "transfer of real property" is examined at section 1440(7) of the Tax Law, it reveals the "aggregation clause" which includes as a "transfer of real property" "partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article." Therefore, the issue is whether the two transfers in this case are to be considered a single transfer for purposes of the section 1443(5) exemption due to the aggregation clause. We conclude that they are for the following reasons.

First, the two transfers at issue fit the statutory language. The dictionary definition of "partial" is, in relevant part, "of or relating to a part rather than a whole; not general or total" (Merriam Webster's Collegiate Dictionary 847 [10th ed. 1993]). The record clearly establishes that the two transfers were part of a single plan that had as its goal the substitution of 101430

Canada for Everest as a partner to facilitate bank financing.[12] As parts of this overall plan, the two transfers are "partial" transfers within the meaning of the statute. Further, the transfers are not excluded from aggregation by the "unless clause" of the statute, i.e., petitioners have not shown that they did not have a plan to make all of the transfers at issue (see, Matter of Armel, Tax Appeals Tribunal, July 23, 1992).

Next, we can see no reason why it is inappropriate to apply the aggregation clause in this situation. Although past cases have only raised the aggregation clause in the context of the exemption at section 1443(1) of the Tax Law for a transfer for less than $1 million, the aggregation clause is not contained in that exemption: it is contained, as stated earlier, in the general definition of transfer of real property at section 1440(7). Section 1440 provides that the definitions therein are applicable where used "[i]n this article," i.e., Article 40 of the Tax Law.

Finally, as petitioners note, the section 1443(5) exemption contains the words "however effected." This language indicates that a transfer effected through two partial transfers should obtain the benefit of the exemption.

Based on the above, we conclude that the two transfers are a single transfer for gains tax purposes. As a result of this single transfer, Eugenio Festa acquired an additional 25% interest in Whiteface Limited Partnership. As an alternative argument, the Division contends that the Administrative Law Judge incorrectly used this 25% interest to apply the $1 million exemption and that the Administrative Law Judge should have used the controlling interest the Administrative Law Judge concluded was acquired to apply the exemption. The Division declines to argue that a controlling interest was acquired under the Administrative Law Judge's theory of the case, stating that "it is unknown to the Division of Taxation what transfer of a controlling interest is identified by the Administrative Law Judge in conclusion of law 'G'" (Division's brief on exception, p. 17).

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[12]Although it may have been, as the Division contends, theoretically possible for one of these transfers to have been completed without the other being consummated, this does not negate the fact that the two transfers were part of a single plan.

The Administrative Law Judge's conclusion of law "G" stated:

> "The only transfer of an interest which did not represent a mere change of identity or form of ownership is the additional 25% interest in Whiteface Limited Partnership which was transferred to Eugenio Festa. However, even if the Division's valuation was apportioned and attributed to Mr. Festa's 25% acquisition, the consideration would still be less than $1,000,000.00 and therefore exempt from tax."

We think the meaning of this paragraph is clear: the Administrative Law Judge concluded that Mr. Festa acquired a controlling interest with his additional 25% acquisition. This conclusion was in error because the Division's regulations at 20 NYCRR 590.45(c) provide that only acquisitions occurring after March 28, 1983 are added together to determine whether a controlling interest has been acquired. Because Mr. Festa acquired his initial 25% interest in the partnership prior to March 28, 1983, the acquisition after such date is not the acquisition of a controlling interest and is not a transfer of real property within the definition of section 1440(7) of the Tax Law. Because there is no transfer of real property, there is no imposition of tax, no consideration to be determined and no application of the section 1443(1) exemption. Thus, the rule relied on by the Division, i.e., that the section 1443(1) exemption is applied before the section 1443(5) exemption, does not come into play and we need not address the Division's arguments concerning the proper valuation of the real property.

Next, we address the Division's contention that the Administrative Law Judge erred in finding that Everest and 101430 Canada were beneficially owned by the same individuals. The Division contends that the affidavits relied on by the Administrative Law Judge do not explain the details as to the number of members of the Orsini family that are involved in the ownership of the entities or the amount that each family member owns. We think this lack of detail is inconsequential. As petitioners point out, the fact that both Everest and 101340 Canada are each beneficially owned 100% by Verdox is sufficient to support the application of the section 1443(5) exemption. The Division also argues that the Administrative Law Judge gave undue weight to the affidavits submitted by petitioners. We believe that the Administrative Law Judge

properly weighed the affidavits, as well as the other evidence in the record, to find the facts (see, Matter of Orvis Co. v. Tax Appeals Tribunal, ___ AD2d ___, 612 NYS2d 503).

The Division also states that even if Everest and 101430 Canada were commonly owned, the transactions in this case do not include any transfer directly between these entities, and, therefore, the section 1443(5) exemption does not apply. Other than making this assertion, the Division does not provide any authority or logic to support its principle. We are unable to supply either for the Division. Instead, because it is established that levels of an entity are "looked through" to determine if an acquisition of a controlling interest has occurred (Matter of Bredero Vast Goed N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105), we conclude that the section 1443(5) exemption must be applied in the same manner.

Lastly, we note that we have not considered any documents submitted by petitioners on exception, after the closing of the record (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Whiteface Limited Partnership, Everest Real Estate Investments, B.V., Whiteface Resort Co., Ltd. and 101430 Canada, Inc. are granted; and

4. The notices of determination dated October 23, 1989 and May 6, 1991 are cancelled.

DATED: Troy, New York
November 3, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner