STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NS 1999 AMERICAN COMPANY NOMINEE FOR THE NS 1991 AMERICAN TRUST	:	**DETERMINATION** DTA NO. 815191
for Revision of Determinations or for Refunds of Real Property Transfer Tax under Article 31 of the Tax Law and of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, NS 1999 American Company, nominee for the NS 1991 American Trust, c/o Schneider, Schecter & Yoss, 1979 Marcus Avenue #232, Lake Success, New York 11042, filed a petition for revision of determinations or for refunds of real property transfer tax under Article 31 of the Tax Law and of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.[1]

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 15, 1997 with all briefs to be submitted by September 9, 1997 which date began the six-month period for issuance of this determination. Petitioner appeared by Diana A. Steele, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert, M. Friedman, Jr., Esq., of counsel).

[1]Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180). Citations in this determination are to the law in effect at the time of the transfer in issue.

ISSUE

Whether, after the transfer of the Empire State Building by petitioner to a partnership, petitioner had a 50 percent interest in the partnership or a 99.745 percent interest in the partnership.

FINDINGS OF FACT

1. Petitioner, NS 1999 American Company, nominee for the NS 1991 American Trust, is a Delaware corporation doing business in New York. The NS 1991 American Trust is a Delaware business trust.

2. Petitioner and the Division of Taxation, by their respective representatives, executed a Stipulation of Facts, dated May 15, 1997. The stipulated facts relevant to resolution of the issues raised by the parties have been incorporated into these findings of fact.

3. In 1993, petitioner acquired ownership of certain real property located at 350 Fifth Avenue, New York, New York, best known as the Empire State Building (the "Property" or "the Empire State Building"). At the time petitioner acquired ownership, the Empire State Building was subject to a long-term lease (the "ESB Lease") which provides for a fixed amount of rent (the "ESB Rent") by the tenant. At that time (and for many years prior), the tenant, or lessee, of the Empire State Building was Harry B. Helmsley or entities controlled by Helmsley. The term of the lease, if renewed pursuant to the lessee's options, will continue until January 5, 2076.

4. On June 28, 1994, petitioner contributed ownership of the Empire State Building to Trump Empire State Partners (the "Partnership"). The partners of the Partnership are petitioner and Trump Empire State, Inc. ("Trumpco"), whose president is the well-known real estate

developer, Donald J. Trump. Both before and after the transfer, the name of the Property was "the Empire State Building", and the name has not changed.

5. On April 13, 1994, petitioner filed a real property gains tax transferor questionnaire with the Division of Taxation ("Division") in connection with the transfer of the Empire State Building to the Partnership. Transfers of real property which are made to effectuate a mere change of identity or form of ownership are generally exempt from the real property transfer tax and the real property gains tax. In its filings, petitioner claimed entitlement to the mere change exemption. At that time, petitioner claimed that Trumpco was obtaining approximately a .111 percent interest in the Property based on Trumpco's expected $50,000.00 capital contribution to the Partnership. Based partially on that claim, petitioner calculated gains tax due on the transfer of $318.40. A draft copy of the Joint Venture Agreement creating the Partnership was submitted to the Division along with other documents.

6. Upon review of the documents submitted by petitioner in connection with its gains tax filings, the Division concluded that petitioner received a 50 percent interest in the Partnership rather than the 99.889 percent interest claimed by petitioner in its Transferor Questionnaire. In an affidavit, James Sottile, a Tax Technician in the Division's Gains Tax Audit Unit, explained the basis for the Division's determination. The Division relied primarily on its analysis of the Joint Venture Agreement. Section 2.5 of that agreement provides as follows:

"**Section 2.5 <u>Percentage Interests.</u>**

> Subject to the other terms and conditions of this Agreement, including, without limitation, the provisions of Article III and IV, each of NS American and Trumpco *shall have a fifty (50%) percent interest in the Venture*" (emphasis added).

The Division determined that the language of section 2.5 is in conflict with petitioner's claim that it retained a 99.889 percent interest in the Partnership.

7. In addition, the Division disputed petitioner's claim that Trumpco's contributions to the Partnership were confined to its contribution to capital. One of the primary purposes of the Partnership was the renegotiation of the ESB Lease to increase the profits flowing from the Partnership's ownership of the Empire State Building. Thus, Section 1.3 of the Joint Venture Agreement includes among the purposes of the Partnership: enforcing the tenant's obligations under the ESB Lease; acquiring the tenant's interest in the ESB Lease; and upgrading and developing the ESB Property. The Division noted that in the introductory paragraphs of the Joint Venture Agreement Trumpco agreed to contribute:

> "the funds and real estate development expertise necessary to formulate and assess alternatives for the enforcement of the tenant's obligations under the ESB lease, the acquisition of the tenant's interest in the ESB lease, the upgrading and redevelopment of the ESB Property and the possible acquisition and development of the Related Property" (Joint Venture Agreement, p. 3).

Based on these provisions of the Joint Venture Agreement , the Division concluded that Trumpco made significant contributions to the Partnership in excess of its cash contribution.

8. The Division noted various other provisions of the Joint Venture Agreement which it identified as contradicting petitioner's claim that Trumpco received only a .111 percent beneficial interest in the Property. The significant provisions identified by the Division are as follows:

(a) Section 3.1 which sets forth definitions of income and losses states, among other things: "Trumpco shall make all accounting decisions and elections permitted to be made by the Venture for federal income tax purposes."[2]

(b) In Article III of the agreement, specific allocations of income, losses and credits were agreed to by both parties.

(c) In the event of sale of Partnership property, income and gain is allocated first to petitioner up to the amount of $45 million, but income and gain exceeding $45 million is divided equally between petitioner and Trumpco. The remaining provisions of section 3.2 were summarized by Mr. Sottile as follows: "[A]dditionally, remaining rental income, income from taxable dispositions, depreciation and/or amortization deductions, losses from taxable dispositions, and credits shall be allocated fifty (50%) to NS American and fifty (50%) to Trumpco." (Sottile Affidavit, ¶ 12.)

(d) The management and control of the day-to-day business and affairs of the Partnership is vested in Trumpco by section 5.1 of the agreement.

(e) Section 5.1 gives Trumpco absolute authority to deal with all television, radio, newspaper and other media sources in connection with the affairs of the Partnership. Petitioner is prohibited from acting on behalf of the Partnership in connection with any matter without prior written consent of Trumpco.[3]

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[2] The preceding sentence states: "Subject to the approval of NS American, such approval not to be unreasonably withheld or delayed, Trumpco shall determine the accounting methods to be followed by the Venture for federal income tax purposes."

[3] Section 5.2(b) of the Joint Venture Agreement states that Trumpco shall not take any "Major Acts" without the prior written consent of petitioner. "Major Acts" include: sale of the Property, entering into any contract with an affiliate or subsidiary of Trumpco, modifying or

(f) Section 6.1 of the agreement states that the books of account of the Partnership shall be kept by Trumpco, and section 6.3 of the agreement states that Trumpco shall be responsible for the maintenance of bank accounts in which income received by the Partnership shall be deposited.

(g) Petitioner has the right, under section 11.5 of the agreement to disclose that petitioner "is a partner of Trump and may use the Trump name in connection with the use of the [Partnership's] name."

9. As support for its determination, the Division also relied on "numerous newspaper and magazine articles [which] have quoted Donald Trump claiming he has a fifty (50%) interest in the joint venture" (Sottile Affidavit, ¶ 13).

10. On August 8, 1994, the Division issued two notices of determination to petitioner. One notice asserted gains tax due of $143,404.80 plus interest. The other asserted real estate transfer tax due of $90,000.00 plus interest. The basis for the assessments of tax was the Division's determination that petitioner transferred a 50 percent interest in the Partnership to Trumpco as stated in section 2.5 of the Joint Venture Agreement. The Division's actual calculations were based upon the information provided in the gains tax questionnaires.

11. Following a Conciliation Conference in the Bureau of Conciliation and Mediation Services, the Division issued a Conciliation Order, dated April 19, 1996, sustaining the notices of determination.

12. Regarding the transfer, the parties have stipulated to the following facts:

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amending the ESB lease, approving the terms of a buy-out or termination of the ESB lease, refinancing of the initial borrowing, the incurring of additional indebtedness in excess of $200,000.00 or of any indebtedness secured by the ESB lease or the Property, the acquisition of related properties, the redevelopment of the related property, the redevelopment of the ESB Property, and the selection of architects, contractors, accountants or attorneys.

(a) The transfer of the Property to the Partnership and the execution of the Joint Venture Agreement actually occurred on June 28, 1994;

(b) the contribution of the property to the Partnership is a "mere change" transaction under sections 1405(b)(6) and 1443(b)(5) of the Tax Law;

(c) the real property was not subject to any mortgage debt;

(d) for purposes of both the transfer tax and the gains tax, the consideration given was $45 million;

(e) the original purchase price of the real property was $42,131,904.00;

(f) Tumpco contributed $115,000.00 to the Partnership as its initial capital contribution under section 2.2(a) of the joint venture agreement;

(g) immediately after the transfer of the real property, the Partnership borrowed $11,700,000.00 using the real property as collateral.

13. Of the $11,700,000.00 initial borrowing, $76,537.50 was deposited into an interest reserve account, $797,216.00 was used to pay closing costs and $10,826,246.50 was distributed to petitioner.

14. In this proceeding, petitioner asserts that there was no transfer of petitioner's beneficial interest in the Empire State Building as result of the transfer of the Property to the Partnership, and that it had a 99.745 percent interest in the Partnership immediately after the transfer.

15. Petitioner, like the Division, relies on the Joint Venture Agreement as evidence of the correctness of its position. Section 2.5 of the Joint Venture Agreement states that petitioner and Trumpco each have a 50 percent interest in the Partnership, subject, however, to other terms and conditions of the agreement, including the provisions of Articles III and IV. Petitioner claims that

when these other terms and conditions are examined it becomes apparent that it did not transfer a 50 percent beneficial interest in the Empire State Building to Trumpco.

16. Article III of the agreement provides for the allocation of ordinary income between the partners. Rental income from the ESB lease is allocated first to petitioner, up to the full amount of the ESB rent. Trumpco is entitled to rental income only if the ESB rent increases because of a renegotiation of the lease or if the Partnership acquires additional income-producing property. Income and gain from disposition of Partnership property are allocated under section 3.2(b) of Article III. Under this provision, income or gain from the sale of Partnership property is allocated 100 percent to petitioner until petitioner's capital account balance equals its Unreturned Capital Contribution. For purposes of the agreement, petitioner's Unreturned Capital Contribution consists of $45,000,000.00 less the amount of the initial borrowing distributed to petitioner ($10,826,246.50) and the amount of prior distributions of the proceeds of sales or exchanges of the Partnership under section 4.4(e) of the Joint Venture Agreement.

17. Article IV of the Joint Venture Agreement sets forth the partners' agreement regarding distributions to the partners. Pursuant to section 4.3, the proceeds from refinancing or from the sale or disposition of Partnership property are to be distributed, after payment of any Partnership debts and the establishment of reserves, 100 percent to petitioner until it has received the aggregate amount of the ESB Rent plus its Unreturned Capital Contribution. Additional proceeds are distributed to Trumpco until it receives its Unreturned Capital Contribution (defined as Trumpco's aggregate capital contributions less aggregate distributions to Trumpco). After these distributions are made, any additional proceeds are to be distributed in equal amounts to petitioner and Trumpco.

18. Article VIII of the Joint Venture Agreement contains the partners' agreement with respect to distributions upon liquidation of the Partnership. Upon dissolution, the capital accounts of the partners are to be adjusted in accordance with the allocation provisions of Article III, section 3.2. Any partner with a deficit capital account is required to contribute cash to the Partnership in the amount of the deficit. After payment of the debts and obligations of the Partnership and the establishment of reserves, the liquidation proceeds are to be distributed to petitioner and Trumpco in accordance with their capital accounts.

19. Petitioner's only witness was Joel Kravitz, an accountant with the firm of Schneider, Schecter & Voss, P.C.. Mr. Kravitz has prepared the tax returns of the Partnership from its inception to the present. He testified that in each year in which the Partnership has filed Federal income tax returns, 1994, 1995 and 1996, allocations of income and expenses have been made in accordance with the terms of the Joint Venture Agreement. One hundred percent of the ESB Rent has been allocated to petitioner; 100 percent of the depreciation on the Empire State Building has been allocated to petitioner; 100 percent of capital expenditures incurred in connection with the Property prior to its contribution to the Partnership has been allocated to Petitioner; and 100 percent of the available cash of the Partnership, namely the ESB Rent, has been distributed to petitioner.

20. The Partnership received interest income associated with the $11,800,000.00 loan taken immediately after the real property transfer. A cash account was established to receive the loan proceeds, and the monies were then distributed to the two partners with Trumpco receiving $400,000.00 or approximately 3.3 percent of the total. The interest income and interest expense

on the loan proceeds were distributed 97 percent to petitioner and 3 percent to Trumpco reflecting the percentage of the loan proceeds received by each partner.

21. In July 1994, Mr. Trump announced his purchase of an interest in the Empire State Building. An Associated Press article, reprinted in the July 7, 1994 edition of the Troy Record, states that Mr. Trump, through his publicist, released a statement claiming that he "arranged equity financing for NS America in return for 50 percent ownership" in the Empire State Building. In *Emperors of the Air*, an article published in the May 1995 issue of Vanity Fair magazine, Bryan Burrough describes the purchase of the Empire State Building by Hideki Yokoi, a Japanese businessman with reputed ties to organized crime figures in Japan; transfer of control of the Empire State Building to one of Yokoi's daughters; and the ensuing lawsuit brought by Yokoi who claims that his daughter stole the Empire State Building from him. Regarding Mr. Trump's ownership interests in the Partnership, the article reports that both Yokoi and the Helmsleys say that "Trump almost certainly doesn't own half the [Empire State] building, but rather, "owns an interest in the financial 'upside' he can create by ousting the Helmsleys from their lease" (*id.*, at 165). In response, to this claim, Mr. Trump is reported to have said: "I'd rather not comment on that . . . . But the ultimate answer is that I own 50 percent of the building. It's a complicated formula. A case could be made I actually own 50 percent. It's just a very complicated formula" (*id.*).

22. At the time of the hearing, the ESB lease was still in effect under the terms existing at the time the Partnership was formed. The ESB rent is $1,970,000.00 per year, representing less than a 5 percent return on the $45 million valuation of the Property.

CONCLUSIONS OF LAW

A. Tax Law § 1402 imposes tax on conveyances of real property or interests in real property when the consideration exceeds $500.00. Former Article 31-B of the Tax Law imposes a tax on gains derived from the transfer of real property (Tax Law § 1441). Under both statutes, the transfer or acquisition of a controlling interest in an entity with an interest in real property is a taxable transaction (Tax Law § 1401[e]; § 1440[7]). Certain transactions are exempt from the transfer tax and the gains tax, including transfers which consist of "a mere change of identity or form of ownership or organization where there is no change in beneficial interest" (Tax Law § 1405[b][6]; *see also*, Tax Law § 1443[b][5]). The Division's regulations provide that the transfer of real property by a person to a partnership in exchange for an interest in the partnership is a mere change of identity or form of ownership, and in such circumstances the conveyance or transfer is not taxable to the extent of the transferor's interest in the partnership (20 NYCRR 575.10[d]; 590.51[a][1]). The parties agree that petitioner's transfer of the Empire State Building to the Partnership is a mere change transaction. They differ over the extent of petitioner's interest in the Partnership after the transfer.

B. Petitioner claims that its transfer of the Empire State Building to the Partnership is exempt from the gains tax and the transfer tax at least to the extent of petitioner's 99.745 percent interest in partnership capital immediately after the transfer. It premises this claim on its interpretation of what constitutes an "interest in the partnership" pursuant to sections 575.10 and 590.50 of the Division's regulations. Since neither the Tax Law nor the regulations provide a definition of what constitutes an "interest in a partnership" for purposes of the mere change exemptions, petitioner turns to three other sources to support its argument: provisions of articles

31 and 31-B of the Tax Law not concerned with the mere change exemption; a decision of the Tax Appeals Tribunal, *Matter of Tomback* (Tax Appeals Tribunal, September 1, 1994); and a Private Letter Ruling (No. 307) issued by the Division to an unrelated taxpayer. It is petitioner's position that these three sources show that an interest in a partnership is consistently defined in terms of the partner's interest in the property, profits and losses of the partnership.

For purposes of both the gains tax and transfer tax, a partnership "controlling interest" is defined as "fifty percent or more of the capital, profits or beneficial interest in such partnership" (Tax Law § 1440[2]; § 1401[b]). Petitioner argues that a partner's interest in the capital, profits or beneficial interest in a partnership is reflected in its entitlement to the income, gain or loss of the partnership. Thus, to determine a partner's interest in the partnership, petitioner would turn to the allocations of income and gain as set forth in the partnership agreement. In this case, those allocations are contained in Articles III and IV of the Joint Venture Agreement, and those provisions establish that Partnership property, profits and losses are allocated to the partners in proportion to each partner's capital contribution.

Petitioner notes that in *Matter of Tomback* (*supra*) the Tax Appeals Tribunal, in deciding an issue unrelated to the instant matter, described the interest in the partnership held by the petitioner as a 10 percent interest "in the partnership's property, profits and losses". This, according to petitioner, supports its position that in determining a partner's "interest in a partnership", the partnership's allocations of gain, income, loss and deduction to each partner must be taken into account. Petitioner also points to Private Letter Ruling 307 (March 16, 1987) where the Division found that an "interest in a partnership" should be determined by reference to each partner's capital interests in the Partnership.

The Division takes the position that section 2.5 of the Joint Venture Agreement establishes that the partners each have a 50 percent interest in the Partnership. According to the Division, that section's statement that each partner "shall have a fifty (50%) interest in the Venture" is determinative of the issue. The Division argues that the newspaper and magazine articles discussed above bolster its position inasmuch as they each report Mr. Trump's assertion that he has a 50 percent interest in the Empire State Building.

The Division dismisses the significance of allocations of income, gain and loss as set forth in Articles III and IV of the Joint Venture Agreement, arguing that the reference to these articles in section 2.5 "are nothing more than terms relating to the disposition of proceeds and liabilities and do not alter the underlying ownership interests" (Division's brief, p. 5). The vast disparity in the initial capital contributions of the partners is dismissed by the Division as not determinative of each partner's ownership interest in the Partnership, inasmuch as the partners explicitly stated that each would have a 50 percent interest in the Partnership. The Division also argues that Trumpco's contribution was not limited to the initial $115,000.00 cash contribution since Trumpco agreed to contribute the funds and financial expertise necessary to enforce the tenant's obligations under the ESB lease, to acquire the ESB lease, and to upgrade and redevelop the Empire State Building.

The Division asserts that *Matter of Tomback* (*supra*) offers no support for petitioner's position because it does not address the legal issue presented in this case. Moreover, the Division finds that the Tribunal's references to "property", "profits" and "losses" supports its position that these are three separate items which may be allocated as the partners choose without affecting their underlying interest in the partnership itself. According to the Division, the partners in

Tomback identically allocated partnership property, profits and losses by agreement, while petitioner and Trumpco divided their partnership interest in an equal manner and divided their profits and losses by a different method. The Division did not address the Private Letter Ruling cited by petitioner. I note that Private Letter Rulings have no precedential value and are not binding on the Division in cases with other taxpayers.

C. Where the petitioner claims entitlement to a statutory exemption, it bears the burden of proof and must demonstrate that its is the only reasonable interpretation of the statutes and that the statutes provide petitioner with the exemption it seeks (*Matter of Howes v. Tax Appeals Tribunal*, 159 AD2d 813, 552 NYS2d 972, 973).

D. The Joint Venture Agreement evidences the creation of the Partnership and the allocation of each partner's interest in the Partnership. Each party argues that the plain language of section 2.5 of the agreement supports its position. Since the parties differ over the interpretation of section 2.5, the first question which must be addressed is the meaning of that section.

The Joint Venture Agreement is an independent contract subject to the principles of contract interpretation. "The cardinal rule of contract interpretation is that, where the language of the contract is clear and unambiguous, the parties' intent is to be gleaned from the language of the agreement and whatever may be reasonably implied therefrom" (*H.R.S. Hunt Club v. Town of Claverack*, 222 AD2d 769, 634 NYS2d 816, *lv denied* 89 NY2d 804, 653 NYS2d 543; *see also*, *W.W.W. Assocs. V. Giancontieri*, 77 NY2d 157, 565 NYS2d 440; *Weisberger v. Goldstein*, ___ AD2d ___, 662 NYS2d 544). In carrying out this task, the words and phrases used by the parties

must . . . be given their plain meaning" (*Brooke Group Ltd. V. JCH Syndicate 488*, 87 NY2d 530, 640 NYS2d 479).

Section 2.5 read as a whole, and in the context of the entire agreement, plainly manifests the intention of the parties to subject each partner's 50 percent interest in the Partnership to other terms and conditions, including those set out in Articles III and IV of the Joint Venture Agreement. I cannot agree with the Division that the reference to other terms and conditions, specifically including those in Articles III and IV, is irrelevant to the allocation of Partnership interests. The drafters of the contract could not have been more precise or clear in stating that the equal division of the Partnership is subject to the allocations of income, profit and gain found in Articles III and IV, as well as to other terms and conditions of the Joint Venture Agreement.

The next question then is to determine petitioner's interest in the Partnership based upon the various terms and conditions of the Joint Venture Agreement. The Division's position is that petitioner transferred the Empire State Building, valued at $45 million, to the Partnership in return for a 50% interest in the Partnership, in essence transferring a 50% beneficial interest in the Empire State Building to Trumpco. Petitioner argues that by subjecting each party's 50 percent interest in the Partnership to other terms and agreements of the Joint Venture Agreement, the parties manifested their intention to allocate partnership interests in accordance with each party's capital contribution and to divide property, profits and losses from the Partnership on an equal basis only when, and if, the value of the property or the level of profit from the ESB lease rise above that which existed at the time of the real property transfer. Petitioner's interpretation of the Joint Venture Agreement is the only one consistent with the plain language of the agreement, the economic reality of the transaction and the theory of the gains tax.

E. There are no Tax Appeals Tribunal decisions or court cases which address the specific issue raised here: how to determine each party's interest in a partnership after the transfer of real property to the partnership. There are, however, cases concerned with whether a taxpayer has shown entitlement to the mere change exemption in the first instance, and these cases provide helpful guidance. Before examining these cases, it is important to return to the exemption statutes themselves. They each provide an exemption from tax where the transfer involves "a mere change of identity or form of ownership or organization *where there is no change in beneficial interest*" (Tax Law § 1405[b][6]; emphasis added; *see also*, Tax Law § 1443[5]). The exemption statutes direct attention first to whether there has been a change in the beneficial ownership of the real property and second to the extent of the change in beneficial ownership. In *Matter of 307 McKibbon St. Realty Corp.* (Tax Appeals Tribunal, October 14, 1988), the Tax Appeals Tribunal stated that the structure of the gains tax is to "[l]ook through entity ownership of real property to determine the beneficial ownership of the property." The Tribunal went on to state that the focus "through entities" to determine beneficial ownership is required by both statutes imposing the tax and the statutes providing exemptions from tax.

In *Matter of Schrier* (Tax Appeals Tribunal, July 16, 1992), the Tribunal examined the examples of mere change transactions which are set forth in the Division's regulations (*see*, 20 NYCRR 590.50[a][2] - [5]) and found evidence there of the underlying theme of the gains tax: the focus through entities to determine the beneficial ownership of the real property. The Tribunal notes that in each example various changes in business form are considered, with the same result in each case: "[p]rovided the owners of the property retain the same proportion of beneficial ownership . . . the change is deemed a mere change." As the Tribunal points out, the only concern

of the examples is "whether the proportion of beneficial interest in the property is preserved." From this, the Tribunal concluded that "the primary concern of the examples is whether the economic interests in the real property have been changed" (*id.*). Thus, the gains tax places the focus on the economic reality of the transaction, reversing the general rule that form takes precedence over substance in the analysis of tax cases (*Matter of Schecter*, Tax Appeals Tribunal, October 13, 1994, *see also*, *Matter of Bredero Vast Goed, N.V. v. Tax Commn.*, 146 AD2d 155, 539 NYS2d 823, *appeal dismissed* 74 NY2d 791, 545 NYS2d 105 [where the court recognizes and upholds economic reality as the key principle underlying the interpretation of the imposition section of the gains tax]; *Matter of Von-Mar Realty Co.*, Tax Appeals Tribunal, December 19, 1991, *confirmed Matter of Von-Mar Realty v. Tax Appeals Tribunal*, 191 AD2d 753, 594 NYS2d 414, *lv denied* 82 NY2d 655, 602 NYS2d 803).

While the "look through" principle has primarily been employed to determine whether there is a change in beneficial interest, it must also apply to determine the extent of the change. Therefore, it is appropriate to look at the economic reality of the transaction between petitioner and Trumpco as reflected in the Joint Venture Agreement to determine the extent of petitioner's interest in the Partnership. This analysis plainly establishes that petitioner had at least a 99.745 percent interest in the Partnership after the transfer.

F. Petitioner asserts that it retained a 100 percent beneficial interest in the Empire State Building after the transfer to the Partnership. Its position is supported by the terms of the Joint Venture Agreement. Under Article III, section 3.2(a)(1) of the Joint Venture Agreement, 100 percent of the ordinary income of the Partnership up to the amount of the ESB Rent is allocated to petitioner. Under Article IV, section 4.2 of the agreement, cash is to be distributed to petitioner

until it has received an amount equal to the aggregate amount of the ESB Rent. Immediately after the transfer, petitioner was entitled to allocations of 100 percent of the depreciation attributable to the Property and to the capital expenditures incurred in connection with the Property prior to its contribution to the Partnership.

Petitioner offers the following hypothetical to demonstrate that petitioner retained its interest in the Property after the transfer. The agreed upon value of the Property at the time of transfer was $45 million. Trumpco contributed $115,000.00 to the Partnership at that time, yielding total Partnership capital of $45,115,000.00. If the Property were then sold for its agreed upon value of $45 million immediately after the transfer, the Partnership would receive $45 million as consideration. The Partnership would then have $45,115,000.00. Under section 8.3 of the Joint Venture Agreement, the $45,115,000.00 would be distributed to petitioner and Trumpco in accordance with their capital accounts. Petitioner would receive $45 million and Trumpco would receive $115,000.00. This hypothetical demonstrates that at the time of the transfer petitioner was entitled to receive 100% of the value of the Property upon a constructive liquidation of the Partnership.

The principles set forth in *Schrier* suggest that in determining the percentage of petitioner's Partnership interest, it is appropriate to first determine the proportion of its economic interest in the real property that was transferred. Based on the terms of the Joint Venture Agreement, I conclude that the proportion of petitioner's beneficial interest in the Property was preserved by the terms of that agreement. There is simply no basis for the Division's determination that petitioner transferred 50 percent of its beneficial interest in the Property to Trumpco under the terms of the

Joint Venture Agreement. The agreement entitles it to a 50 percent interest in any future appreciation in the Property and any potential increases in rent under the ESB lease and no more.

Petitioner calculates its 99.745 percent interest in the Partnership on the basis of each party's capital contribution. Petitioner contributed the Empire State Building with a book value of $45 million, while Trumpco contributed $115,000.00. Thus, petitioner contributed 99.745 percent of Partnership capital and claims a 99.745 percent beneficial interest in the Partnership. Petitioner's calculation of its interest in the Partnership after the transfer is reasonable and consistent with the statute and the regulations. Accordingly, I conclude that petitioner had a 99.745 percent interest in the Partnership as it claims.

G. The Division's arguments for its position fail to take into account the economic realities of this transaction. The allocation of Partnership income, gain, profit and loss is not peripheral to the allocation of Partnership interests. The references to provisions of Articles III and IV and other terms and conditions of the Joint Venture Agreement in section 2.5 of the agreement clearly manifest the parties' intention to qualify the equal division of Partnership interest. The last clause of section 2.5 cannot be read in isolation from the rest of the Joint Venture Agreement.

The Vanity Fair article and newspaper accounts of the transfer do not bolster the Division's position. They merely report, with some skepticism, that Donald Trump claimed to have acquired a 50-percent interest in the Empire State Building without investing his own funds. Evidence of Mr. Trump's interest in the Empire State Building must be found in the unambiguous language of the Joint Venture Agreement, not in his statements to the press.

The value of Trumpco's nonmonetary contributions to the Partnership is far too speculative to consider. In any case, it would appear that those contributions were intended to entitle it to

exactly what it received: a 50-percent stake in any increase in property value or income brought about as a result of its efforts.

H. The petition of NS 1999 American Company, Nominee for the 1991 American Trust is granted, and the notices of determination of real property transfer tax and real property transfer gains tax, dated April 13, 1994, are canceled.

DATED: Troy, New York
February 19, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE