STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

VIACOM, INC. : DECISION
DTA NO. 819591

for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period May 4, 2000. : :

Petitioner Viacom, Inc., 1515 Broadway, New York, New York 10036-8901, filed an exception to the determination of the Administrative Law Judge issued on May 26, 2005. Petitioner appeared by Roberts & Holland LLP (Carolyn Joy Lee, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on November 6, 2006 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner McDermott dissents for the reasons set forth in a separate opinion.

ISSUES

I. Whether a conveyance of real property was properly excluded from the real estate transfer tax pursuant to Tax Law § 1405(b)(6) as a "mere change of identity or form of ownership or organization where there is no change in beneficial ownership."

II. Whether penalty imposed under Tax Law § 1416(b) should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On May 4, 2000, the CBS Corporation ("CBS") merged into Viacom, Inc. ("Viacom") (the "Merger"). CBS had been a Pennsylvania corporation; Viacom is a Delaware corporation. The Joint Proxy Statement describes CBS, Viacom, and the terms and conditions of the Merger.

The Merger was a statutory merger effected under the Delaware General Corporation Law ("Delaware Corporate Law") by filing a Certificate of Merger with the Secretary of State of the State of Delaware. A Restated Certificate of Incorporation of Viacom became effective upon the Merger.

At the time of the Merger, Viacom had two outstanding classes of common stock, Viacom Class A voting common stock ("Class A Stock") and Viacom Class B nonvoting common stock ("Class B Stock"). In the Merger, the holders of CBS voting common stock received Viacom Class B nonvoting common stock.

In the Merger, the CBS shareholders received Viacom Class B Stock equal in the aggregate to a 54.88% ownership interest in Viacom.

The terms of the Class B Stock are set forth in the Restated Certificate of Incorporation of Viacom. As set forth therein, (i) the holders of Class A Stock and Class B Stock receive dividends ratably; (ii) upon a dissolution or liquidation of Viacom, the holders of Class A Stock and Class B Stock divide the net assets of Viacom available to common stockholders ratably;

and (iii) any split, subdivision or combination of the outstanding Class A Stock or Class B Stock is to be matched by a proportionate split, subdivision or combination of the other Class's stock. The Certificate of Merger states that each share of Class B Stock has rights, privileges, limitations, restrictions and qualifications identical to a share of Class A Stock, except that shares of Class B Stock have no voting rights other than those required by the Delaware Corporate Law.

The Restated Certificate of Incorporation provided that, contemporaneous with the Merger, the Board of Directors of Viacom was expanded from 10 to 18 directors. In addition, the Stockholders Agreement was entered into by National Amusements, Inc., which owned 68% of Viacom's Class A Stock at the time of the Merger, and CBS. In the Stockholders Agreement it was agreed that, subject to fiduciary limitations, for a three-year period subsequent to the Merger, 8 of the 18 members of Viacom's board of directors would be individuals who had been directors of the former CBS ("CBS Directors"), or replacements those CBS Directors might designate. The remaining ten directors of the combined company were the individuals who were the Viacom Board members prior to the Merger ("Viacom Directors"). Of these ten Viacom Directors, two were required to be either current independent directors of Viacom or other disinterested independent persons who are chief executive officers of a Fortune 500 company or a non-U.S. company of comparable size. Except with respect to matters delineated in Annex 1 of Viacom's Restated Certificate of Incorporation, all actions of the board of directors for the three-year period subsequent to the Merger required the approval of 14 directors. The expanded board size could not be changed without the approval of at least 14 directors for the three-year period subsequent to the Merger. The actions of the board, other than those stated in Annex 1 of

Viacom's Restated Certificate of Incorporation, including any change in board size, thus would require the approval of at least 50% of the former CBS board members.

Mr. Karmazin, then current CEO and President of CBS, was named the President and Chief Operating Officer ("COO") of Viacom at the time of the Merger. During the three-year period following the Merger, Mr. Karmazin could not be terminated or demoted, nor could his operational responsibilities be curtailed, except on the approval of at least 14 directors.

Prior to the Merger, the stock of CBS and the Viacom Class A Stock and Class B Stock were publicly traded on the New York Stock Exchange ("NYSE"). Following the Merger, the Viacom Class A Stock and Class B Stock continued to be publicly traded on the NYSE.

Since the Merger, Viacom has made two dividend payments to holders of Class A Stock and Class B Stock, which dividends were paid ratably as specified in the Restated Certificate of Incorporation of Viacom. On October 14, 2003, Viacom announced the payment of a dividend of $0.06 per share for each share of Class A Stock and Class B Stock. On January 28, 2004, Viacom announced the payment of a dividend of $0.06 per share for each share of Class A Stock and Class B Stock.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> The Merger was effected on May 4, 2000 upon the filing of a certificate of merger with the Secretary of State of Delaware (***see,*** Stipulation of Facts, Exhibit B). The certificate states that the constituent corporations were CBS Corporation, a Pennsylvania corporation, and Viacom Inc., a Delaware corporation, and that Viacom Inc. was the surviving corporation. The parties stipulated that the Merger "effected a transfer of a controlling economic interest in CBS within the meaning of Tax Law Article 31" (***see,*** Stipulation of Facts, p. 4). The interests in real property in New York State owned by CBS at the time of the Merger (collectively the "CBS Real Estate") were reported on Forms TP-584, combined real estate transfer tax returns, filed on May 22, 2000 (collectively the "Returns"). It appears

from the forms that the real property was held directly by the CBS parent corporation rather than subsidiaries.[1]

The fair market value of the CBS New York Real Estate at the time of the Merger was $222,505,992.00 in the aggregate, as indicated on the Returns.

The Returns claimed exemptions aggregating 70.44% under Tax Law § 1405(b)(6). Real estate transfer tax ("RETT") in the amount of $258,106.92 was paid to the New York State Department of Taxation and Finance on May 22, 2000.

The Commissioner of Taxation and Finance issued a Notice of Determination ("Notice") dated May 2, 2003 to Viacom.

The Commissioner accepted the exemption claimed under Tax Law § 1405(b)(6) as to 15.56% of the transfer, but disallowed the claim for exemption for the 54.88% (rounded in the Notice to 54.9%) ownership interest that CBS shareholders received in Viacom as a result of the Merger, on the basis that the Class B Stock was nonvoting stock.

The Commissioner has asserted a RETT deficiency of $493,965.08.

The Commissioner has asserted interest as of May 2, 2003 in the amount of $117,908.11 and a penalty of $172,887.75 with respect to the RETT deficiency.

On July 30, 2003, Viacom filed a timely petition for review of the notice with the Division of Tax Appeals.

On October 1, 2003, the Division of Taxation filed a timely answer to the petition.

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[1]We modified finding of fact "10" to avoid phrasing a factual matter as a legal conclusion and to better reflect the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that where there is a change in the controlling interest in a corporation, it follows that there is a change in the beneficial ownership. Since voting power is an essential aspect of a controlling interest, an exchange of voting stock for nonvoting stock, such as occurred in the present case, necessarily involves a change in controlling interest and accordingly a change in beneficial ownership. Moreover, a different result would create an opportunity for tax avoidance since if the exchange of voting stock for nonvoting stock were not taxed, the nonvoting shares received in the merger could be disposed of in the future without incurring the transfer tax. Finally, the determination concluded that petitioner's failure to pay the applicable tax was not due to reasonable cause and accordingly the imposition of a penalty was appropriate.

ARGUMENTS ON EXCEPTION

Petitioner asserts that the Class B Stock of Viacom which was received by the former CBS shareholders in the merger should be counted as a beneficial ownership in the real estate transferred by CBS with the result that the transfer was entitled to a change-in-form exemption under Tax Law § 1405(b)(6) to the extent of 70.44% consisting of 15.56% represented by pre-existing overlapping ownership and 54.88% represented by Viacom nonvoting stock issued in the merger.

The Division argues that the determination of whether there has been a change of "beneficial ownership" must be read together with the definition of "conveyance" and "controlling interest" and concludes that if there is a change in controlling interest and therefore a conveyance, there is a change in beneficial ownership. If the CBS shareholders had received voting stock in the surviving corporation, instead of nonvoting shares, there would be no such change, because the nature of their ownership interest before and after the conveyance would have been the same, i.e., voting stock in an entity owning real property.

OPINION

The real estate transfer tax is "imposed on each conveyance of real property or interest therein" (Tax Law § 1402[a]). All conveyances are presumed subject to the tax (Tax Law § 1404[b]).[2]

The term "conveyance" is defined, to the extent relevant here, as "the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment . . . or transfer or acquisition of a controlling interest in any entity with an interest in real property" (Tax Law § 1401[e]). The words "controlling interest" have the following definition:

> "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined *voting power* of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such *voting stock* of such corporation . . . (Tax Law § 1401[b]).

In this case, the parties have agreed and stipulated to the fact that the Merger constituted the transfer of a controlling interest in CBS's real property for purposes of Tax Law Article 31.

However, petitioner claims an exemption from real property transfer tax based on the "change in form" provisions of Tax Law § 1504(b)(6). That section provides an exemption from the real property transfer tax for "[c]onveyances to effectuate a mere change of identity or form

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[2]While the grantor is generally responsible for the payment of the transfer tax, the grantee must pay the tax where the grantor fails to do so (Tax Law § 1404[a]).

of ownership or organization where there is no change in beneficial ownership . . ." [Tax Law § 1405[b][6]).

We note that statutory exemptions are strictly construed against the taxpayer (***Bredero Vast Goed, N.V. v. Tax Commn. of the State of New York***, 146 AD2d 155, 539 NYS2d 823, ***appeal dismissed*** 74 NY2d 791, 545 NYS2d 105). In a case such as this, where it is presumed that the determination of the Division is correct, the burden is on petitioner not only to show that its interpretation is reasonable, but that it is the only reasonable interpretation, or that the Division's interpretation is unreasonable (***Matter of Marriott Family Rests. v. Tax Appeals Tribunal***, 174 AD2d 805, 570 NYS2d 741, ***lv denied*** 78 NY2d 863, 578 NYS2d 877). These principles of statutory construction also apply to the interpretation of regulations (***see***, ***Matter of Cortland-Clinton, Inc. v. New York State Dept. of Health,*** 59 AD2d 228, 399 NYS2d 492).

Petitioner argues that following the Merger, the CBS shareholders had an *ongoing* "beneficial interest" in the CBS Real Estate thus entitling the Merger to the 54.88% change-in-form exemption claimed.

While the term "beneficial ownership" is not defined in the Tax Law and regulations, it has been defined by both the courts and the Tax Appeals Tribunal in other areas of the law as being more than a mere financial interest. Beneficial ownership is marked by the command over property or enjoyment of its economic benefits (***Yelencsics v. Commissioner***, 74 T.C. 1513, ***citing Anderson v. Commissioner***, 164 F2d 870, 48-1 USTC ¶ 9109, ***affg*** 5 T.C. 443; ***Matter of Racal Corp. & Decca Elecs.***, Tax Appeals Tribunal, May 13, 1993; ***Matter of Shechter***, Tax Appeals Tribunal, October 13, 1994; ***Macon, Dublin, & Savannah R.R. Co. v. Commissioner***, 40 BTA 1266 [where the Court stated: "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed . . . that is the beneficial ownership”]).

In May 2000, CBS and Viacom merged with Viacom surviving as the new corporate entity. Shareholders of CBS exchanged their voting common stock for shares of Viacom Class B nonvoting common stock. Viacom acquired a controlling interest in CBS which at the time of the Merger had an interest in real property. Pursuant to Tax Law § 1401(b)(i) and (e), we conclude that the Merger between CBS and Viacom resulted in a taxable conveyance of an interest in real property by CBS to Viacom.

Petitioner argues that it is entitled to the change in form exemption because the CBS shareholders continued to have a beneficial interest in the real property transferred to Viacom. To prevail, petitioner needed to show that the beneficial interest owned by the shareholders of CBS after the merger was the same as what they owned prior to the merger (***see***, ***Matter of Shechter, supra***). We note that the statute only provides an exclusion for real estate transfers where there is *no change* in beneficial ownership, so any change in this beneficial ownership resulting from the merger would be sufficient to defeat petitioner’s entitlement to the claimed exemption.

We reject petitioner’s argument, for the reasons set forth by the Administrative Law Judge, that the change-in-form exemption contained in section 1405(b)(6) is to be read independently of the definition of “controlling interest” provided in section 1401(b)(i) so as to determine the issue of “beneficial ownership” without resort to the definition of “control.” The degree of one’s “beneficial ownership” is an inherent consideration in determining whether "control," to some degree, has been transferred. McKinney's Consolidated Laws of NY, Book 1, Statutes § 97 provides, in pertinent part:

> It is a fundamental rule of statutory construction that a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent . . . .
>
> A general expression or a single sentence detached from its context does not reveal the purpose of the statute as a whole, and particular provisions, therefore, should not be torn from their places and, so isolated, be given a special meaning at variance with the general purpose and spirit of the enactment.

The term "beneficial ownership" as it is used in the context of Tax Law Article 31 relating to corporations must be determined by considering the exemption together with the definitions of "conveyance" and "controlling interest," since the exemption provides that the tax shall not apply to "[c]onveyances to effectuate a mere change . . ." (Tax Law § 1405 [b][6]). When used in this context, "conveyance" means a "transfer or acquisition of a controlling interest in any entity with an interest in real property" (Tax Law § 1401[e]). The parties have stipulated that there has been a transfer of a controlling interest in CBS Corporation and its real property to Viacom. In defining "controlling interest," the statute refers only to voting stock (Tax Law § 1401[b]). When, a change in the controlling interest occurs, it necessarily results in a change in the beneficial ownership. Under the express provisions of the statute, voting power [of the stock] is an element required for purposes of determining a controlling interest (Tax Law § 1401[b]). Where 100% voting stock of CBS was surrendered in return for nonvoting stock in Viacom, representing a 54.88% interest in the merged company, there was a transfer of a controlling interest in an entity (CBS) with an interest in real property to Viacom (Tax Law § 1401[d] and [e]). There was also a change in the beneficial interest owned by those CBS stockholders. While the CBS stockholders who received nonvoting shares in Viacom continued to have a financial interest in the real property conveyed to Viacom (to the extent of their 54.88% ownership in Viacom nonvoting shares), their "beneficial interest" in the merged company's real property went from 100 percent before the merger to zero[3] after the merger, since the stockholders no longer had a vote in the company or control or dominion (to the extent of the share ownership) in Viacom's real property. We need not quantify what that vote amounted to in terms of the operations of a company's real property. It is sufficient that the CBS shareholders who received nonvoting stock in exchange for voting stock in CBS did not retain the same dominion and control (through their voting shares) of the real property transferred from CBS to Viacom (***see***, ***Matter of Shechter***, ***supra***). With this change in beneficial ownership, the former CBS stockholders retained a mere financial or economic benefit via their nonvoting shares in Viacom. Thus, their interest in the real property after the Merger differed from their interest in the real property before the Merger. Accordingly, we conclude there has been both a transfer of a controlling interest in real property for purposes of Article 31 of the Tax Law and a change in beneficial ownership.

With respect to the issue of penalty, we agree with the Administrative Law Judge's analysis of this issue in his determination and, as such, the imposition of penalties is sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Viacom, Inc. is denied;

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

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[3]The "zero" refers back to the interest held by the 54.88 percent. The Division accepted the exemption claimed under Tax Law § 1405(b)(6) with respect to 15.55% of the transfer which was not in dispute.

3. The petition of Viacom, Inc. is denied; and

4. The Notice of Determination dated May 2, 2003 is sustained.

DATED: Troy, New York
May 3, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

COMMISSIONER MCDERMOTT dissenting:

For the reasons discussed below, I am unable to join my colleagues in deciding this case and would instead reverse the determination of the Administrative Law Judge.

The outcome of this case depends on whether two statutory concepts are interrelated in the way that the Division asserts or instead operate independently as petitioner argues. The first concept, which defines the event that causes the tax to apply, is stated in the alternative as (i) an actual transfer of an interest in real property or (ii) a transfer of a controlling interest in an entity that owns real property. The second concept, which appears in the statute in the form of an exemption from tax, measures the extent to which the transferor's direct or indirect interest in the real property has been transferred. The statute and regulations define this measurement by stating that there is no taxable transfer if and to the extent that the transfer effects a mere change in the form of ownership and there is no change in the beneficial ownership of the real property. These provisions of the statute and regulations are described below.

Tax Law § 1402 generally imposes a tax on "each conveyance of real property or interest therein." The term "conveyance" is broadly defined, to the extent relevant here, as "the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment . . . or transfer or acquisition of a controlling interest in any entity with an interest in real property" (Tax Law § 1401[e]). The words "controlling interest" have the following definition:

> "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity (Tax Law § 1401[b]).

An exemption from tax is provided in Tax Law § 1405(b)(6) for "[c]onveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership . . . ." The scope of this exemption is explained in the Division's regulations at 20 NYCRR 575.10 which reads *in extenso* as follows:

> To the extent that a conveyance effectuates a mere change of identity or form of ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply. Examples of transactions where the issue of change in beneficial ownership would arise include the following:
>
> (a) the conveyance by tenants-in-common of their interest in real property to a partnership or a corporation, the partnership or corporation interests being in the same pro rata shares as the tenants-in-common held prior to conveyance. Such conveyance is not taxable as there is no change in beneficial ownership;
>
> (b) the conveyance by a corporation to its shareholders who will hold the real property as tenants-in-common in the same pro

> rata share as they own the corporation. Such conveyance is not taxable as there is no change in beneficial ownership;
>
> (c) the conveyance by a corporation to its wholly-owned subsidiary, from a wholly-owned subsidiary to its parent, or from one wholly-owned subsidiary to another. Such conveyance is not taxable to the extent that there is no change in beneficial ownership;
>
> (d) the conveyance by a person to a partnership in exchange for an interest in the partnership. Such conveyance is not taxable to the extent of the grantor's interest in the partnership.

There are two principles that can be drawn from these regulations. First, the use of the words "to the extent that" makes clear that a *pro tanto* application of the exemption is appropriate and that the statutory words "no change" should not be read to disqualify a transaction in its entirety where there is any change. The Division's assertion to the contrary (***see***, Division's brief in opposition, p. 5), which is accepted by the majority, is accordingly inconsistent with the regulations.

Second, there is no suggestion in the regulations that the ability to vote for corporate directors or to influence the governance of a partnership would be significant in determining whether there has been a change in beneficial ownership. The final example quoted above indicates that in a partnership setting the words "beneficial ownership" are synonymous with the partner's "interest in the partnership." The phrase "the partner's interest in the partnership" is a term of art in section 704(b) of the Internal Revenue Code which is interpreted in section 1.704-1(b)(3) of the Treasury Regulations. That provision of the regulations states that among the factors to be considered in determining a partner's interest in the partnership are (a) the partners' relative contributions to the partnership, (b) the interests of the partners in economic profits and losses, (c) the interests of the partners in cash flow and other non-liquidating distributions, and

(d) the rights of the partners in distributions of capital upon liquidation. Again, there is no suggestion that non-economic factors, such as influence on firm governance, are relevant.

The limited case law under similar provisions of the real estate transfer gains tax is also consistent with the conclusion that a change in beneficial ownership should be determined on the basis of economic factors, not the shareholder's role in corporate governance. In ***Matter of Schrier*** (Tax Appeals Tribunal, July 16, 1992, ***confirmed Matter of Schrier v. Tax Appeals Tribunal***, 194 AD2d 273, 606 NYS2d 384, ***appeal dismissed*** 83 NY2d 944, 615 NYS2d 871), we held that the mere change in form exemption under similar provisions of the gains tax and the underlying regulations applied to a liquidating distribution of real estate to corporate shareholders who thereafter held the property as joint tenants, stating as follows:

> [T]he regulations . . . convey the underlying theme of the tax through a series of examples of the mere change in form exemption provided by Tax Law § 1443(5) (***see***, 20 NYCRR 590.50[a][2]-[5]). In these examples, various types of changes in business form are addressed. Provided the owners of the property retain the same proportion of beneficial ownership, the end result of each change in business form is the same -- the change is deemed a mere change. Any variation in the rights and obligations imposed by the new business form is not addressed by the regulation; the only concern articulated in the examples is whether the proportion of beneficial interest of each owner has varied. Thus, the transfer of property from a tenancy in common to a partnership, where each owner's percentage of beneficial interest in the property is preserved, is considered a mere change in form despite any change in the parties' legal relationship under the new business form (***see***, 20 NYCRR 590.50[a][2]). Likewise, the transfer of property from a corporation to its shareholders, who will take the property as tenants in common with the same proportion of beneficial ownership as they had as shareholders, is considered a mere change in form (***see***, 20 NYCRR 590.50[a][3]). From this we conclude that the primary concern of the examples is whether the economic interests in the real property have been changed (***see***, ***Matter of Bredero Vast Goed, N. V. v. Tax Commn. of the State of New York***, 146 AD2d 155, 539 NYS2d 823, 825

> [where the court recognizes and upholds economic reality as the key principle underlying the interpretation of the imposition section of the gains tax]).

By contrast, there is some language in two early gains tax cases that seems to support the Division's position here. In ***Matter of Howes*** (Tax Appeals Tribunal, September 22, 1988, ***confirmed Matter of Howes v. Tax Appeals Tribunal***, 159 AD2d 813, 552 NYS2d 972), an individual acquired a small apartment house in 1997. He occupied one of the apartments as his residence and contributed the remainder of the real property to a partnership in which he held approximately 98% of the capital interest. In 1985, the real property was sold for $1,396,000.00 of which $488,600.00 was allocable to the personal residence and $907,400.00 was allocable to the business use property owned by the partnership. We rejected the petitioner's position that the sale could be bifurcated for purposes of testing whether the $1 million exemption was applicable. In so holding, the decision relied in part on the mere-change-in-form exemption and stated as follows:

> To determine petitioner's ownership interest in the partnership, and thus his beneficial interest in the real property, the definition of controlling interest in the case of a partnership directs us to the ownership of "capital, profits, or beneficial interest in such partnership" (Tax Law § 1440[2]). Since this definition would control how the tax and mere change in form exemption would apply on the transfer of the real property to the partnership in exchange for a partnership interest, [footnote omitted] it also applies in determining the taxability of a subsequent transfer by the partnership.

Similar language is found in ***Matter of 307 McKibbon St. Realty Corp.*** (Tax Appeals Tribunal, October 14, 1988).

Nevertheless, these statements do not seem necessary premises for the holdings in ***Howes*** and ***307 McKibbon St.*** and do not appear to be supported by authority. Moreover, their significance seems substantially diminished by our subsequent decision in ***Matter of Muraskin*** (Tax Appeals Tribunal, March 24, 1994, ***confirmed Matter of Muraskin v. Tax Appeals Tribunal***, 213 AD2d 91, 630 NYS2d 119, ***lv denied*** 87 NY2d 806, 641 NYS2d 597), in which we said the following:

> The Appellate Division's decision in ***Matter of Howes v. Tax Appeals Tribunal*** (159 AD2d 813, 552 NYS2d 972) establishes that it is appropriate for gains tax purposes to "look through" an entity that owns real property to determine the beneficial owners of the real property. Further, ***Howes*** establishes that it is appropriate to aggregate the consideration received from the transfer of the ownership interest in the entity with the consideration received from the transfer of other interests in the real property by the same person to apply the $1 million exemption of section 1443(1) of the Tax Law. Petitioner does not dispute this meaning of ***Howes*** but argues that the rule of ***Howes*** only applies when the beneficial owner of the entity has at least a controlling interest in the entity. Although the petitioner in ***Howes*** did own more than a 50% interest in the entity, we see nothing in the court decision which suggests that this result would only apply where the person owned at least a controlling interest in the entity. . . . [W]e conclude that the principle of ***Howes*** applies regardless of the percentage interest held in the entity.

In ***Muraskin,*** we thus concluded that beneficial interest is determined on the basis of a look-through principle that is divorced from the definition of "controlling interest" and abandoned the inconsistent dicta found in our decision in ***Howes***.

The Division has cited no authority that actually supports its view that the words "beneficial ownership" imply the existence of control. With the sole exception of ***Matter of Shechter*** (Tax Appeals Tribunal, October 13, 1994), the cases cited by the Division involve income and franchise tax statutes and circumstances that are too far removed from the issue here to provide even remote analogies. Moreover, none of those cases involved the issue of how the terms "beneficial ownership" or "beneficial interest" should be interpreted when used in a statute, regulation or contract. Instead, those terms are used by the courts in a more casual way to describe some other standard such as distinguishing mere legal or nominal ownership from real ownership for tax purposes.

In ***Shechter***, an individual sold stock in a corporation owning real property to a partnership in exchange for cash and a promissory note. The partners in the partnership were the seller's brother and a friend. The seller asserted that there was no taxable conveyance because he continued to control the real property through his relationship with the partners. We held that this argument failed by its own terms because the petitioner did not adduce sufficient evidence to establish that he controlled the partnership. The decision does not hold, as the Division argues, that control is an appropriate test for determining the presence of "beneficial ownership." Moreover, the decision went on to state, "To prevail, petitioner also needed to establish a *financial interest* akin to the ownership interest he had before the transfer . . ." (emphasis added).

The words "beneficial ownership" most immediately call to my mind the interest of the beneficiary of a trust. There the control of the corpus is in the hands of the legal owner, the trustee, and the beneficiary's only right is to insist that the trustee follow the terms of the trust and behave in accordance with its fiduciary duty.

In the present case, I believe we should confirm the concepts articulated in ***Schrier*** and ***Muraskin*** and give each of the statutory terms "conveyance" and "beneficial ownership" a full and independent scope by using a simple economic look-through test for "beneficial ownership" that would be easy to understand and apply.

DATED: Troy, New York
May 3, 2007

/s/Robert J. McDermott
Robert J. McDermott
Commissioner