

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :

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. :

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

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. :

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. :

Petitioner, Whiteface Limited Partnership, P.O. Box 231, Whiteface Inn Road, Lake Placid, New York 12946, filed two petitions 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, respectively, and petitioner, Everest Real Estate Investments, B.V., 131-135 De Lairesestraat, Amsterdam, Holland, petitioner, Whiteface Resort Co., Ltd., P.O. Box 820, Whiteface Inn Road, Lake Placid, New York 12946, and petitioner, 101430 Canada, Inc., 4592 St. Catherine West, Montreal, Quebec H3Z1S3 Canada, each filed a petition 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.

A consolidated hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 19, 1992 at 9:15 A.M. and continued to conclusion at the same location on February 11, 1993 at 9:15 A.M., with all briefs to be submitted by June 15, 1993. Petitioners submitted a trial memorandum at the hearing on October 19, 1992. The brief of the Division of Taxation was received on May 4, 1993, and petitioners' reply brief on June 16, 1993. Petitioners appeared by James H. Tully, Jr., Esq. and Diana K. Bangert-Drowns, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

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

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 <u>Date</u>
(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" in Finding of Fact "1" 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

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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.

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	<u>1,984,040.00</u>
Total Value of Property	\$3,784,040.00
Less: Book value of Furniture & Fixtures etc.	<u>(116,397.00)</u>
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:

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	<u>611,396.08</u>
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	<u>1,656,028.00</u>
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:

<u>Partner</u>	Number of <u>Units</u>	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 <u>units</u>	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:

<u>Shareholder</u>	Number of <u>Shares</u>	Percentage Interest
Eugenio Festa	13 shares	52%
Everest Real Estate Investments, B.V.	12 <u>shares</u>	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:

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

"[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 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:

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

⁴As noted in Finding of Fact "4", 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%.

<u>Individual and Title</u>	<u>Entity</u>	<u>Date of Signature</u>
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, \$780,000.00⁵ 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 balance due of \$1,312,274.00⁶ on a mortgage note dated April 10, 1978 and notes payable of \$671,766.00⁷

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.

⁶A "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.

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

<u>Date</u>	<u>Principal</u>	
January 28, 1980		\$ 65,297.00
March 27, 1980		40,000.00
April 30, 1980	40,000.00	
July 18, 1980	120,000.00	

(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 complements the partners' retirement agreement discussed in Finding of Fact "6", 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.

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	<u>50,000.00</u>	
		\$445,797.00
interest to June 30, 1986		<u>\$225,969.00</u>
		\$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.

⁸Upon 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.

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 units⁹ 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. 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

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

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 in Finding of Fact "4", 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 in Finding of Fact "8", in lieu of Everest. 101430 Canada, Inc. was wholly owned by Muchnote, Ltd., which, in turn, was wholly owned by Verdox, which, as noted in Finding of Fact "4", 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	<u>1,416,966.19</u>
	\$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

¹⁰Petitioners 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.

approximately \$3,660,720 [if you took a rough percentage in the change of ownership which we 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 in Finding of Fact "3". 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

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As noted in Finding of Fact "7", the photocopy of the subscription agreement in evidence was undated.

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 [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."

SUMMARY OF THE PARTIES' POSITIONS

The Division contends that the retirement and withdrawal of Whiteface Resort and Everest from Whiteface Limited Partnership represented the transfer of a controlling interest in the partnership to Eugenio Festa, the remaining partner of Whiteface Limited Partnership, who then had a 100% interest in the partnership:

"[W]here partnership interests are reconveyed to a partnership, any resulting acquisition of a controlling interest in the partnership by a remaining partner is also [like the redemption of a shareholder's stock by a corporation resulting in the acquisition of a controlling interest by the shareholder] subject to tax."

In addition, the acquisition of a 50% interest in Whiteface Limited Partnership by 101430 Canada was a second transfer of a controlling interest in the partnership subject to gains tax. The Division rejects petitioners' argument that there was no change in beneficial ownership of the partnership, even assuming that petitioners proved that the Orsini family were the beneficial owners of Everest and 101430 Canada, because Everest did not transfer its interest in the partnership directly to 101430 Canada. The Division argues that the use of affidavits by petitioners was insufficient to prove the common ownership by Verdox of Everest and 101430 Canada. Furthermore, the Division argues that petitioners' appraisals should be rejected and not utilized for purposes of determining the fair market value of the property at issue.

Petitioners argue that the restructuring of the ownership interests in Whiteface Limited Partnership was exempt from taxation under Tax Law § 1443(5) because there was not a sufficient change in beneficial ownership. According to petitioners, the Division's "two transaction theory" clashes with the facts because the ownership of Everest and 101430 Canada actually overlapped:

"[T]he actual events reflect a transfer of interests between commonly owned parties. Verdox substituted 101430 Canada for Everest, and Mr. Festa went from being the majority owner of Resort, the managing partner, to a 50% direct owner and manager of Whiteface. The identity of ownership between the retiring and subscribing partners thus demonstrates that there was a clear business intent by one entity, that is Verdox, to change its form, and percentage, of ownership in Whiteface."

Petitioners emphasize that the retirement and subscription agreements were interdependent, signalling a single transaction.

In addition, petitioners contend that they have adequately proven the common ownership

of Everest and 101430 Canada by the use of affidavits:

"Since the officers in charge of the books and records of Verdox and its related entities are in Europe, affidavits rather than live testimony have been presented on this issue. (Exhibits '3' through '8'). No one has questioned the integrity or the credibility of any of the individuals signing such affidavits, which were made available to counsel for the Division of Taxation months before the October 1992 hearing."

Petitioners contend that the Division erroneously calculated consideration paid:

"The statutory language which permits an assumption or discharge of indebtedness to be included in consideration, is applicable where the debt is assumed by the transferee or relieved of the transferor. In this transaction, neither occurred. As the transferor, Everest was relieved, not of a debt but of an asset, and Whiteface [Limited Partnership], as a purported transferee, did not assume any debt. Thus, the debts of Whiteface cannot rationally be included as 'consideration' for the retirement of Everest's interests." (Emphasis in original.)

Finally, petitioners argue that "while minor discrepancies may exist with any appraisal", the testimony of the Division's appraiser did "not credibly refute the overall strength and consistency of Petitioners' appraisals."

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, 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 threshold.

B. Tax Law § 1440(7) defines "transfer of real property" to encompass an array of transactions 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." (Emphasis added.)

C. 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"

D. 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." Petitioners contend that the withdrawal of Whiteface Resort and Everest from Whiteface Limited Partnership and the acquisition of an interest in the partnership by 101430 Canada constituted a mere change of form or identity of ownership without a change in beneficial interest, exempt from gains tax under Tax Law § 1443.5.

E. Interpretations of the gains tax law under Article 31-B should focus on the economic reality of the transaction (see, Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992; Matter of Schrier, Tax Appeals Tribunal, July 16, 1992, citing Matter of Bredero Vast Goed, N.V. v. Tax Commn. of the State of New York, 146 AD2d 155, 539 NYS2d 823, 825, appeal dismissed 74 NY2d 791, 545 NYS2d 105). In Schrier (*supra*), the Tribunal decided that the transfer of real property from a corporation, as a liquidating dividend, to the shareholders as joint tenants did not constitute a change in the beneficial ownership of the property, but simply a mere change of identity or form of ownership or organization.

Similarly, in this case, petitioners have demonstrated that 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. As noted in Findings of Fact "4" and "10", the beneficial ownership of Everest, Whiteface Resort (to the extent of Everest's interest in such entity) and 101430 Canada was held by the Orsini family of Ascoli Piceno, Italy. The Division's argument that this fact, concerning the beneficial ownership of Everest and 101430 Canada, was not adequately demonstrated by the mere introduction of affidavits by petitioners is rejected. Affidavits are clearly admissible in administrative hearings (see, Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205; cf., Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458, lv denied 168 NY2d 602, 505 NYS2d 1026; see also, 20 NYCRR 3000.10[d][1]). It is observed that unlike the situation in Matter of Orvis (Tax Appeals Tribunal, January 14, 1993 [wherein the Tribunal rejected the taxpayer's use of affidavits to prove certain crucial facts that varied from other facts in the

record]), here there are no factual findings concerning the beneficial ownership of Everest and 101430 Canada which vary from the facts set forth in the relevant affidavits. Moreover, Eugenio Festa, who had personal knowledge of the Orsini family's beneficial ownership of Whiteface Limited Partnership, testified at the hearing and was subject to cross-examination.

F. It is observed that the "Agreement Concerning Retirement of Partners", as described in Finding of Fact "6", and the "Subscription Agreement", as described in Finding of Fact "7", were interdependent: one could not be effective without the other. In short, petitioners have demonstrated the economic reality of the transaction at issue as that of a mere change in the form in which the Orsini family owned their interest in Whiteface Limited Partnership.

G. 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.

H. Since it has been determined that the transactions at issue are not subject to tax, the second issue concerning the proper calculation of consideration received is rendered moot.

I. The two petitions of Whiteface Limited Partnership and the respective petitions of Everest Real Estate Investments, B.V., Whiteface Resort Co., Ltd. and 101430 Canada, Inc. are granted, and the three notices of determination dated October 23, 1989 and the two notices dated May 6, 1991 are cancelled.

DATED: Troy, New York
December 15, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE