

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GKK 2 HERALD LLC	:	DECISION
for Revision of a Determination or for Refund of Real	:	DTA NO. 826402
Estate Transfer Tax under Article 31 of the Tax Law for	:	
the Period December 22, 2010.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 26, 2016. Petitioner appeared by Morrison & Foerster, LLP (Irwin M. Slomka, Esq., Thomas P. McGovern, Esq., and Kara M. Kraman, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

The Division of Taxation filed a brief in support of the exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard in New York, New York on June 22, 2017. The parties were permitted to file additional written submissions following oral argument. The six-month period for the issuance of this decision began on November 10, 2017, the date that the final such submission was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly asserted real estate transfer tax against GKK 2 Herald LLC for a transaction that occurred on December 22, 2010.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. On December 21, 2012, the New York City Department of Finance issued a notice of determination (the NYC notice) to GKK 2 Herald LLC (petitioner), asserting liability for New York City real property transfer tax in the amount of \$2,923,593.75, and interest in the amount of \$469,033.37, for a total amount due of \$3,392,627.12.

2. As a result of the conclusions reached by the New York City Department of Finance, as reflected in the NYC notice, the Division of Taxation (Division) performed an audit of petitioner relating to the real estate transactions and the transfer of an interest in an entity that owns real property that occurred in the year 2010.

3. On February 11, 2013, the Division issued a statement of proposed audit changes to petitioner (statement). The statement asserts liability for New York State real estate transfer tax (RETT) in the amount of \$445,500.00, interest in the amount of \$77,240.21, and penalty in the amount of \$155,925.00, for a total amount due of \$678,665.21.

4. On April 1, 2013, the Division mailed a notice of determination (notice) to petitioner. The notice asserts liability for RETT in the amount of \$445,500.00, interest in the amount of \$82,529.45 as of April 1, 2013, and penalty in the amount of \$155,925.00, for a total amount due of \$683,954.45.

5. On May 10, 2013, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS).

6. On April 25, 2014, BCMS issued a conciliation order that upheld the assessment of RETT in the amount of \$445,500.00 and interest computed at the applicable rate, but cancelled the penalty in the amount of \$155,925.00.

7. On July 21, 2014, petitioner filed a petition in connection with the notice.

8. On October 1, 2014, the Division filed its answer in response to the petition.

9. On October 20, 2014, petitioner filed a reply to the Division's answer.

Description of Transaction at Issue

10. Pursuant to an agreement of sale, dated April 9, 2007, petitioner and SLG 2 Herald LLC (SLG) acquired real property located at 2 Herald Square, New York, New York a/k/a 1302-28 Broadway, New York, New York (the property), as tenants-in-common.

11. Upon acquisition, petitioner held an undivided 45% tenant-in-common fee interest in the property and SLG held an undivided 55% tenant-in-common fee interest in the property.

12. RETT was paid in connection with petitioner's and SLG's acquisition of the property as tenants-in-common on April 9, 2007.

13. On or about December 14, 2010, petitioner and SLG formed 2 Herald Owner LLC, a Delaware limited liability company (Owner LLC).

14. On December 22, 2010, petitioner and SLG contributed their respective 45% and 55% interests in the property to Owner LLC. As consideration for such contributions, petitioner received a 45% membership interest in Owner LLC and SLG received a 55% membership interest in Owner LLC.

15. On December 22, 2010, petitioner executed and delivered to Owner LLC a bargain and sale deed without covenants (the GKK deed) with respect to its 45% tenant-in-common fee interest in the property.

16. On December 22, 2010, SLG executed and delivered to Owner LLC a bargain and sale deed without covenants (the SLG deed) with respect to its 55% tenant-in-common fee interest in the property.

17. On December 22, 2010, petitioner sold its 45% membership interest in Owner LLC to SLG. In exchange for the conveyance of its 45% membership interest in Owner LLC to SLG, petitioner received consideration of \$111,375,000.00, which was based on the purchase price of \$25,312,500.00 and the prorated mortgage amount of \$86,062,500.00. On the New York State combined real estate transfer tax return for the conveyance between petitioner and SLG, petitioner and SLG reported no consideration for the amount of the conveyance and checked the box stating “exemption claimed.”

18. Petitioner and SLG timely filed a New York State combined real estate transfer tax return (form TP-584) reporting the contribution of petitioner’s fee interest to Owner LLC and the sale to SLG of petitioner’s membership interest in Owner LLC (joint RETT return). On the return for the conveyance between petitioner and SLG, under the section for “condition of conveyance,” boxes are checked stating, “conveyance for which exemption from transfer tax claimed . . .” and “other” wherein the description is stated as “transfer of 45% interest.” The joint RETT return includes form TP-584.1, New York State real estate transfer tax return supplement schedules, reporting the contribution of petitioner’s fee interest to Owner LLC as a conveyance that consists of a mere change of identity or form of ownership or organization.

19. SLG timely filed a New York State combined real estate transfer tax return (form TP-584) reporting the contribution of its fee interest to Owner LLC (SLG RETT return). The SLG RETT return reports the condition of the conveyance as a “conveyance which consists of a mere change of identity or form of ownership or organization.”

20. Since December 22, 2010, through the date of the petition filed by petitioner in this matter, Owner LLC continued to own the property.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that RETT is generally imposed on each conveyance of real property or interest therein. She noted further that, for RETT purposes, a conveyance includes any direct interest in real property and also includes a controlling interest, i.e., an interest of at least 50%, in an entity with an interest in real property. The Administrative Law Judge also noted that conveyances of real property that effect a mere change of identity or form of ownership are not subject to RETT.

The Administrative Law Judge observed that, considered separately, none of the three transfers that occurred on December 22, 2010 give rise to RETT liability. Specifically, petitioner’s contribution of its 45% tenant-in-common interest to Owner LLC in exchange for a 45% interest in Owner LLC and SLG’s contribution of its 55% tenant-in-common interest to Owner LLC in exchange for a 55% interest in Owner LLC are exempt from RETT as mere changes in the form of ownership. Additionally, petitioner’s transfer of its 45% interest in Owner LLC to SLG was a transfer of a minority interest in an entity with an interest in real property and thus was not a conveyance subject to RETT.

The Administrative Law Judge rejected the Division's argument that SLG's exchange of its 55% tenant-in-common interest for a pro rata 55% interest in Owner LLC and petitioner's transfer of its 45% interest in Owner LLC to SLG must be aggregated to determine RETT liability in the present matter. The Administrative Law Judge found that, while the first sentence of the regulation upon which the Division's argument relies does provide for the aggregation of multiple transfers or acquisitions of interests in an entity that has an interest in real property, the SLG-Owner LLC exchange was a mere change in the form of ownership and was not, therefore, a transfer or acquisition of an interest in an entity with an interest in real property. Accordingly, the Administrative Law Judge determined that the regulation did not authorize the aggregation of the two transactions. The Administrative Law Judge further observed that the second sentence of the regulation provides for aggregation where a transfer or acquisition of a controlling interest occurs and RETT is paid, and an additional transfer or acquisition subsequently occurs. The Administrative Law Judge determined that this part of the regulation does not require aggregation of the two transactions because, as the SLG-Owner LLC exchange was a mere change in the form of ownership, RETT was not paid on that transfer. The Administrative Law Judge thus found that the Division's position was inconsistent with this part of the regulation as well.

The Administrative Law Judge also rejected the Division's contention that the repealed real property gains tax law (Tax Law former article 31-B) provides support for its position in the present matter. The Administrative Law Judge found that the definition of a transfer of real property under the repealed gains tax (Tax Law former § 1440 [7]) differs significantly from the

definition of a conveyance under RETT (Tax Law § 1401 [e]) and that, therefore, an understanding of the former would not elucidate the latter.

Finally, the Administrative Law Judge declined the Division's invitation to defer to its position in the present matter, noting that the purely legal nature of this dispute makes any such deference unwarranted.

SUMMARY OF ARGUMENTS ON EXCEPTION

Similar to its argument below, the Division contends that this Tribunal should defer to its interpretation of the relevant statutes and regulations and asserts, accordingly, that the ultimate issue is whether the Division's interpretation has a rational basis.

The Division also asserts that petitioner and SLG acted in concert to effectuate SLG's acquisition of a controlling interest in Owner LLC. Accordingly, the Division contends that the multiple transactions should be aggregated for RETT purposes and that such aggregation requires the imposition of RETT on the petitioner-SLG transaction.

The Division raises a new issue on exception. Specifically, the Division contends that the step transaction doctrine indicates that the three separate transfers that occurred on December 22, 2010 are properly treated as components of a single transaction and that the substance of the single transaction was the transfer of petitioner's direct interest in the property to SLG. The Division notes that the step transaction doctrine involves two tests, the interdependence test and the end result test; that facts here satisfy both tests; and thereby justify the use of the step transaction doctrine.

As it did below, the Division also contends that the Tax Law and regulations provide that the multiple transactions must be aggregated. More specifically, the Division asserts that

transfers or acquisitions must first be added together to determine if a controlling interest has been transferred or acquired. Employing this approach, the Division would find that, upon completion of the three transfers, SLG acquired a 100% interest in Owner LLC, i.e., a controlling interest in an entity with an interest in real property. The Division would exempt 55% of this 100% interest as a mere change in the form of ownership, and would tax the 45% interest in Owner LLC transferred from petitioner to SLG. The Division contends that the first sentence of the relevant regulation (20 NYCRR 575.6 [d]) compels this result. It further contends that the Administrative Law Judge's conclusion that the petitioner-SLG transfer was not subject to RETT improperly focuses on the second sentence of the regulation.

The Division also argues that the legislative history of the RETT and the former real property gains tax indicate that the Legislature did not intend that individual steps in a series of transactions be considered in isolation. The Division asserts that the RETT is closely related to the former real property gains tax, and that, therefore, the two should be considered in *pari materia*. The Division contends that this Tribunal has issued a decision supporting the proposition that the substantive provisions of the RETT were taken from the former real property gains tax. The Division further contends that gains tax case law requiring the aggregation of multiple transfers supports its position in the present matter.

Petitioner contends, first, that the Division's interpretation of the RETT statutes and regulations is not entitled to deference where, as in the present matter, the issue presented is one of statutory construction.

Next, petitioner contends that the Administrative Law Judge correctly held that RETT regulations do not authorize aggregation under the circumstances of this case. Accordingly,

petitioner asserts that the Administrative Law Judge correctly found that the SLG-Owner LLC and petitioner-Owner LLC transactions were mere changes in form and exempt from RETT and that the petitioner-SLG transaction was the transfer or acquisition of a minority economic interest and thus not subject to RETT. Petitioner disagrees with the Division's claim that the Administrative Law Judge's determination improperly permits tax avoidance. Petitioner notes that the RETT statutes treat direct transfers of interests in real property differently than transfers of economic interests in real property. Accordingly, petitioner reasons that the use of an entity to transfer a minority interest in order to avoid RETT is valid.

Petitioner also asserts that the legislative history of the RETT statute does not support the Division's proposed aggregation of the transactions at issue. Petitioner contends that statutory language requiring aggregation under the former gains tax's definition of a transfer of real property was not adopted into the RETT statute's definition of a conveyance. Additionally, petitioner contends that former gains tax precedent is, upon analysis, inapplicable to the present matter.

Petitioner notes that the Governor's fiscal year 2018 budget proposal included proposed legislation that would have amended the RETT law to subject transfers of a minority interest in an entity with an interest in real property to the tax (*see* Governor's Fiscal Year 2018 New York State Executive Budget Revenue Article VII Legislation, Part JJ and Executive Memorandum in Support). Petitioner notes that the Legislature did not enact this proposal. Petitioner contends that the proposed legislation supports its position that article 31, as enacted, does not impose RETT on transfers of minority entity interests.

Regarding the Division's assertion of the step transaction and substance over form doctrines on exception, petitioner asserts that such issues are inherently factual and thus may not be raised on exception. Petitioner also contends that the step transaction doctrine has been used primarily in corporate income tax cases and asserts that its use in connection with a transaction tax, like RETT, has not been sanctioned by any judicial or administrative authority.

Even if the step transaction may be applied in the present matter, petitioner contends that neither the interdependence test nor the end result test has been satisfied. Hence, according to petitioner, the step transaction doctrine does not support aggregation in the present matter.

Petitioner also seeks to distinguish *Matter of GKK2 Herald* (NYC Tax Appeals Tribunal, July 15, 2016, *confirmed sub nom GKK 2 Herald LLC v City of N.Y. Tax Appeals Trib.*, 154 AD3d 213 [1st Dept 2017]), cited by the Division in support of its step transaction argument. In that case, the New York City Tax Appeals Tribunal used the step transaction doctrine to impose New York City real property transfer tax (RPTT), a tax similar to RETT, in connection with the same transactions as are at issue in the present matter. The City Tribunal's decision was subsequently confirmed by the Appellate Division. Petitioner contends that the City Tribunal's decision is distinguishable because the record before the City Tribunal contained documents that are not in the record in the present matter. Petitioner also notes that the City Tribunal's decision is distinguishable because RPTT was imposed on the transfer of petitioner's tenant-in-common interest to Owner LLC, rather than on petitioner's entity interest transfer to SLG, as is the case herein. Petitioner further asserts that the City Tribunal's decision is distinguishable because of differences between the State RETT regulations and the City RPTT regulations.

OPINION

Preliminarily, we note that we do not defer to the Division's proposed interpretation of the relevant statutes and regulations in this matter. We agree with the Administrative Law Judge's conclusion that the resolution of the present dispute is a matter of statutory construction and that, accordingly, such deference is inappropriate (*see Matter of Purcell*, Tax Appeals Tribunal, November 14, 2016 citing *Matter of Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

Article 31 of the Tax Law imposes RETT "on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars" (Tax Law § 1402 [a]). All conveyances are presumed subject to the tax until the contrary is proven, and the burden of proof is generally on the grantor, here petitioner (Tax Law §§ 1404 [a], [b]; *see also* 20 NYCRR 3000.15 [d] [5]). RETT generally does not apply to "[c]onveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership" (Tax Law § 1405 [b] [6]).

As relevant here, a conveyance of real property is "the transfer or transfers of any interest in real property by any method . . . or transfer or acquisition of a controlling interest in any entity with an interest in real property" (Tax Law § 1401 [e]). An interest in real property includes petitioner's and SLG's tenant-in-common fee interests in the property (Tax Law § 1401 [f]). A controlling interest in an entity with an interest in real property where, as here, the entity is an LLC, is an interest of 50% or more of "the capital, profits or beneficial interest in such . . . entity" (Tax Law § 1401 [b]).

Pursuant to these statutory definitions, the Administrative Law Judge correctly found that, if considered separately, none of the three December 22, 2010 transactions would be subject to RETT. The SLG-Owner LLC and petitioner-Owner LLC transactions, by which these entities exchanged their tenant-in-common interests for proportional Owner LLC interests, are mere change of identity or form transactions under Tax Law § 1405 (b) (6). The petitioner-SLG transaction is a transfer of a minority entity interest, not a controlling interest. Accordingly, that transaction, standing alone, would not be considered a conveyance of real property under Tax Law § 1401 (e) and thus would not be subject to tax.

As noted, on exception, the Division raised the issue of whether the December 22, 2010 transactions resulted in RETT liability to petitioner under the step transaction doctrine. Petitioner contends that this issue is inherently factual and therefore may not be raised for the first time on exception.

It is well established that new legal issues may be raised on exception, but new factual issues may not (*Matter of Howard Enterprises, Inc.*, Tax Appeals Tribunal, August 4, 1994). “Allowance of such new [factual] issues on exception is improper because it deprives the opposing party with the opportunity to offer evidence in opposition to the new factual claim” (*Matter of Coram Diner Corp.*, Tax Appeals Tribunal, March 12, 2015 citing *Matter of Friendly Motors*, Tax Appeals Tribunal, March 20, 1997). This is particularly problematic and prejudicial where, as here, the opposing party bears the burden of proof.

We agree with petitioner that any analysis of the December 22, 2010 transactions under the step transaction doctrine must address new factual issues. As indicated by the First Department in *GKK 2 Herald LLC v City of N.Y. Tax Appeals Trib.*, the doctrine involves two tests:

the interdependence test and the end result test.¹ The interdependence test “focuses on the relationship between the steps [of the transaction], whether under a reasonably objective view the steps were so interdependent that the legal relations created by one of the transactions seem fruitless without completion of the series” (*Kornfeld v Commr.*, 137 F3d at 1235). In analyzing whether the steps of the transaction have independent significance, courts “compare the transaction in question with transactions that might usually be expected to occur in bona fide business settings” (*Merryman v Commr.*, 873 F2d 879, 881 [5th Cir. 1989]). Petitioner did not have an opportunity to offer evidence as to the independent significance of the individual transfers or evidence of any other comparable transactions because the Division did not raise the step transaction theory below. The end result test focuses on the taxpayer’s subjective intent in order to determine whether the taxpayer directed a series of transactions to an intended purpose (*Brown v United States*, 782 F2d 559, 564 [6th Cir. 1986]). “This test clearly makes intent a necessary element for application of the [step transaction] doctrine” (*id.*). As with the interdependence test, petitioner did not have an opportunity to offer evidence of its intent in entering into the December 22, 2010 transactions and thereby attempt to defeat the end result test.

The step transaction issue thus raises factual questions that were not before the Administrative Law Judge. Accordingly, we conclude that this issue was improperly raised by the Division on exception and we decline to consider it herein.

¹ Some courts add a third test (the binding commitment test) to the mix (*see e.g. Kornfeld v Commr.*, 137 F3d 1231, 1235 [1998], *cert denied* 525 US 872 [10 Cir. 1998]).

Having reached this conclusion, we need not address petitioner's related contention that there is no authority for the use of the step transaction doctrine in a RETT context.

For the same reason, the previously cited decisions of the City Tribunal and the First Department pertaining to petitioner (*Matter of GKK2 Herald; GKK 2 Herald, LLC v City of N.Y. Tax Appeals Trib.*), both of which are premised on the step transaction doctrine as applied to the subject transactions, are of no relevance to the present matter.

The Division also contends, as it did below, that SLG's acquisition of interests in Owner LLC in two separate transfers on December 22, 2010 must be added together, or aggregated, in accordance with the Division's regulations and that such aggregation results in the asserted RETT liability against petitioner. The regulation in question provides, in relevant part:

“Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred. Where there is a transfer or acquisition of a controlling interest in an entity on or after July 1, 1989, and the real estate transfer tax is paid on that transfer or acquisition and there is a subsequent transfer or acquisition of an additional interest in the same entity, it is considered that a second transfer or acquisition of a controlling interest has occurred which is subject to the real estate transfer tax. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of an interest in the same entity if they occur more than three years apart . . . ” (20 NYCRR 575.6 [d]).

Before commencing with our explication of the regulation as applied to the present matter, we note that, in the determination, the Administrative Law Judge raised the question of whether the Division exceeded its authority in promulgating a regulation that requires the aggregation of transfers of interests in an entity that has an interest in real property for RETT purposes. She determined, however, that it was unnecessary to answer this question because she found that the

regulation did not require aggregation in the present matter. Petitioner refers to this dicta in its brief, noting that RETT's legislative history "may . . . call into question" whether the Division exceeded its authority in promulgating 20 NYCRR 575.6 (d). Petitioner's brief makes no further comment on the regulation's validity and petitioner indicated at oral argument that the regulation's meaning, and not its validity, was at issue in the present matter. Accordingly, we decline to address whether the Division exceeded its authority in promulgating 20 NYCRR 575.6 (d). The regulation thus has "the force and effect of law" (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]).

In determining whether the regulation requires the aggregation of SLG's two acquisitions of interests in Owner LLC on December 22, 2010, thereby triggering RETT liability for petitioner, we are guided by the principles of statutory construction, which also apply to the interpretation of regulations (*Matter of Unicredit S.P.A.*, Tax Appeals Tribunal, May 19, 2015 citing *Matter of Cortland-Clinton, Inc. v New York State Dept. of Health*, 59 AD2d 228, 231 [4th Dept 1977]). In the present matter, this means that we consider the general purpose of the regulation and seek to effectuate that purpose by harmonizing and construing all parts of the regulation together to reach a fair and practical construction consistent with the regulation's purpose (*see* McKinney's Cons Law of NY, Book 1, Statutes §§ 96, 97, 98; *Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.*, 83 NY2d 240, 244, 245 [1994], *cert denied* 513 US 811 [1994]). We note that the text of the regulation is the clearest indicator of its purpose (*see Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [3d Dept 2006] ["the statutory text is the clearest indicator of legislative intent"]). We note also that we use the statutory definitions of terms used in the regulation in our analysis (*cf. Matter of Automatique, Inc. v Bouchard*, 97

AD2d 183, 186 [3d Dept. 1983] [where a statute does not define a term it is appropriate to interpret it in its ordinary everyday sense]; *Matter of Chemical Bank v Tully*, 94 AD2d 1, 3 [3d Dept 1983] [statutory definition of a word is not guided by common understanding of the word, but by taxing policies of the legislature]). Finally, we note that, as the regulation seeks to tax transfers of otherwise nontaxable minority entity interests, we construe its language narrowly (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661 [1993]).

The text of 20 NYCRR 575.6 (d) provides that multiple transfers or acquisitions of interests in an entity that has an interest in real property that occur within a three-year period must be aggregated to ascertain RETT liability. Such language indicates that the general purpose of the regulation is to inhibit the structuring of transactions to avoid RETT by the use of entity transfers. To determine whether the regulation requires the aggregation of SLG's two acquisitions of interests in Owner, LLC, we must first determine, in the language of the regulation's first sentence, whether "a transfer or acquisition of an interest in an entity with an interest in real property" includes a mere change transfer or acquisition, such as SLG's mere change acquisition of its 55% interest in Owner LLC.

We look to the statutory definitions to resolve this question. A mere change transfer or acquisition is a type of conveyance (Tax Law § 1405 [b] [6]) and a conveyance in an entity transaction is a type of transfer or acquisition of an interest in an entity that has an interest in real property (Tax Law § 1401 [e]). Given these definitions, it follows that a mere change transfer is, in the text of the regulation, "a transfer or acquisition of an interest in an entity that has an interest in real property" (20 NYCRR 575.6 [d]).

This literal interpretation is consistent with the overall statutory scheme. That is, as the Division observes in its brief, if a mere change transaction was not a transfer or acquisition of an interest in an entity with an interest in real property under article 31, then there would be no need to exempt such transfers from the tax.

This interpretation is also consistent with the regulation's anti-avoidance purpose. On this point, we note our agreement with the Division that, given the simultaneous timing of the transactions at issue, the avoidance of RETT was a factor in their structure.

Accordingly, and contrary to the Administrative Law Judge's conclusion, we find that the Division properly aggregated SLG's mere change acquisition of its 55% interest in Owner LLC with SLG's economically substantive acquisition of petitioner's 45% interest in Owner LLC pursuant to 20 NYCRR 575.6 (d), thereby subjecting the petitioner-SLG transfer to RETT.

In arguing against aggregation, petitioner focuses on the economic reality of the SLG-Owner LLC exchange. Petitioner notes that SLG's economic interest in the property did not change with the transfer of its 55% direct interest in the property to Owner LLC for a proportionate ownership share of that entity. Petitioner thus contends that SLG did not acquire anything of substance from Owner LLC and that the formality of a mere change transfer should not be subject to aggregation.

The economic status quo outcome of the SLG-Owner LLC exchange is, of course, the essence of a mere change transfer. Article 31 accounts for this economic reality by exempting such transfers, including the SLG-Owner LLC exchange, from RETT. We find no language in article 31 or the regulations promulgated thereunder, however, to support petitioner's position that mere change transfers are not subject to aggregation under 20 NYCRR 575.6 (d) and hence

no language to effectively extend the benefit of a mere change exemption to an economically substantive transfer.

We also disagree with petitioner's argument that the second sentence of 20 NYCRR 575.6 (d) precludes the aggregation of a non-taxable acquisition of a controlling interest with an acquisition of a minority interest. The meaning of this second sentence is best understood by construing the first two sentences of the regulation together (*see* McKinney's Cons Law of NY, Book 1, Statutes § 97). As discussed, the first sentence of the regulation requires aggregation of multiple transfers or acquisitions to determine if a controlling interest has been transferred or acquired, and hence if RETT is due. The first sentence thus addresses the aggregation of transfers that occur before RETT is paid. The second sentence provides that RETT may be payable on a transfer that occurs even after a controlling interest has been transferred or acquired and RETT has been paid. In effect, this sentence requires aggregation of a minority interest transfer that occurs after payment of RETT with transfers that occur before payment of RETT. Such a subsequent minority entity transfer is deemed "a second transfer or acquisition of a controlling interest" (20 NYCRR 575.6 [d]). By introducing the concept of a second controlling interest, this part of the regulation makes clear its anti-avoidance purpose. In our view, it contains no language precluding the aggregation of RETT-exempt transfers, which are, as previously discussed, subject to aggregation pursuant to the first sentence of the regulation.

Finally, we find nothing in the RETT legislative history or in the 2018 proposed legislation to counter our interpretation of the relevant statutes and regulation as discussed herein, or which supports petitioner's contention that the subject transfers should not be aggregated.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of GKK 2 Herald LLC is denied; and
4. The notice of determination dated April 1, 2013 is sustained.

DATED: Albany, New York
May 10, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner