CORWOOD ENTERPRISES, INC., ET AL. - DETERMINATION - 03/11/04

In the Matter of CORWOOD ENTERPRISES, INC., ET AL.
TAT(H) 00-39 (RP) ET AL. - DETERMINATION

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

REAL PROPERTY TRANSFER TAX – THE REAL PROPERTY TRANSFER TAX ("RPTT") DEFICIENCY ASSERTED BY THE COMMISSIONER OF FINANCE AGAINST FIVE FOREIGN CORPORATIONS ON THE SALE ("TRANSFER") OF STOCK IN SUBSIDIARY FOREIGN CORPORATIONS THAT OWNED DELAWARE SUBSIDIARIES THAT TOGETHER OWNED 100% OF THE STOCK (A CONTROLLING ECONOMIC INTEREST IN REAL PROPERTY) IN A LIMITED LIABILITY COMPANY THAT OWNED AND OPERATED THE FOUR SEASONS HOTEL, WAS UPHELD. THE IMPOSITION OF THE RPTT ON THE TRANSFERS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE (1) THE VALUES SUBJECT TO TAX ARE ATTRIBUTABLE TO THE BENEFITS GIVEN BY THE CITY AND (2) THE CORPORATIONS, THROUGH THEIR OFFICERS AND AGENTS, HAD THE MINIMUM CONNECTIONS WITH THE CITY NECESSARY FOR *IN PERSONEM* JURISDICTION. NOR DID THE TAX VIOLATE THE COMMERCE CLAUSE BECAUSE THE CORPORATIONS, THROUGH THEIR OFFICERS AND AGENTS, HAD SUBSTANTIAL NEXUS WITH THE CITY. THE IMPOSITION OF THE RPTT ON THE TRANSFERS DOES NOT VIOLATE ARTICLE XVI, SECTION 3 OF THE STATE CONSTITUTION BECAUSE THE RPTT IS NOT IMPOSED ON THE PRESENCE IN THE CITY OF THE STOCK CERTIFICATES AND THE RPTT IS NOT AN *AD VALOREM* TAX. FINALLY, THE ENABLING LEGISLATION DOES NOT PRECLUDE THE IMPOSITION OF THE RPTT ON A TRANSFER THAT CLOSED OUTSIDE THE CITY SO LONG AS THE PROPERTY THAT IS THE SUBJECT OF THE TRANSFER IS LOCATED IN THE CITY.
MARCH 11, 2004

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	:	**DETERMINATION**
of	:	**TAT(H) 00-39(RP), et al.**
CORWOOD ENTERPRISES, INC., et al.	:	

Schwartz, A.L.J.:

Petitioners, Corwood Enterprises, Inc. ("Corwood"), Edgemont Enterprises, Inc. ("Edgemont"), Bosworth Enterprises, Inc. ("Bosworth"), Surrey Hill Enterprises, Inc. ("Surrey Hill") and Milewood International, Inc. ("Milewood") each filed a petition[1] for an allowance of a refund of New York City ("City") Real Property Transfer Tax ("RPTT") under Title 11, Chapter 21 of the City Administrative Code ("Code") in connection with certain transfers of stock that occurred on March 12, 1999 (the "Transfers").

A hearing was held on June 11 and 12, 2002. The record was left open pending receipt of certain documents from the Petitioners. Those documents were received on November 7, 2002, at which time the record was closed. Petitioners' post-hearing brief was received on January 27, 2003. Respondent's brief was received on April 1, 2003. Petitioners' reply brief was received on May 2, 2003. Respondent's sur-reply brief was received on July 3, 2003. Petitioners were represented by Herbert Teitelbaum, Esq. and David P. Kasakove, Esq. of Bryan

[1] These petitions have been designated, respectively, TAT(H) 00-39(RP), TAT(H) 00-40(RP), TAT(H) 00-41(RP), TAT(H) 00-42(RP), and TAT(H) 00-43(RP).

Cave LLP. Erin M. Naftali, Esq. and Esta Smith Luber, Esq., of the same firm, also participated on Petitioners' briefs. The Commissioner of Finance ("Respondent" or the "Commissioner") was represented by Robert J. Firestone, Esq., and Martin Nussbaum, Esq., Assistant Corporation Counsels.

ISSUES

I. Whether the imposition of the RPTT on the Transfers violates the Equal Protection Clause of the United States Constitution.

II. Whether the imposition of the RPTT on the Transfers violates the Commerce Clause of the United States Constitution.

III. Whether the imposition of the RPTT on the transfers of shares by non-New York sellers violates Article XVI, Section 3 of the New York State Constitution.

IV. Whether the RPTT enabling legislation precludes the imposition of the RPTT on a transfer of shares that closed outside the City.

FINDINGS OF FACT

Corporate structure

1. Each of Petitioners Corwood, Edgemont, Bosworth, Surrey Hill and Milewood is an International Business Company ("IBC") that was incorporated in the British Virgin Islands ("BVI") in 1997 pursuant to the BVI International Business Companies Act. At all pertinent times, the Registered Office of

each of the Petitioners was located in the BVI. At all pertinent times, each of the Petitioners was listed on the BVI's register of IBCs as being in good legal standing and as having paid all fees, license fees, and penalties due and payable under the BVI International Business Companies Act. By consent of each of the Petitioners' Board of Directors, the initial location of each of the Petitioners' books, records and minutes was at the office of the law firm of Robinson Silverman Pearce Aronsohn & Berman ("Robinson Silverman") in the City.

2. Petitioners were the indirect owners, through two tiers of intervening entities, of Hotel 57 LLC ("LLC"), a limited liability company formed under the laws of the State of Delaware on June 11, 1996. At all pertinent times, LLC had a Registered Office in Delaware and was in good standing and had a legal corporate existence under the laws of the State of Delaware, having filed its annual reports and having paid all applicable franchise taxes.

3. From August 1, 1996 to March 12, 1999, LLC owned the Four Seasons Hotel, including the underlying real property, located at 57 East 57th Street, New York, New York (the "Four Seasons"). At all pertinent times, LLC was engaged in no business other than in relation to its ownership of the Four Seasons.

4. At all pertinent times, LLC was treated for federal, state and local income tax purposes as a partnership, and filed Federal Forms 1065, U.S. Partnership Return of Income, Forms IT-204, New York State Partnership Returns, and Forms NYC 204, Unincorporated Business Tax Returns.

5. The two intervening tiers of entities between Petitioners and LLC consisted of five BVI corporations (the "Lower Tier BVI Subs") which were owned by Petitioners and five Delaware corporations (the "Delaware Subs") which were owned by the Lower Tier BVI Subs.

6. At all pertinent times, each Petitioner owned one hundred percent of the shares of a Lower Tier BVI Sub in the following manner: Corwood owned 100% of Kaywood Enterprises, Inc. ("Kaywood"); Edgemont owned 100% of Kilborn Trading Corp. ("Kilborn"); Bosworth owned 100% of Romney International Limited ("Romney"); Surrey Hill owned 100% of Expert Tips Limited ("Expert Tips"); and Milewood owned 100% of Brantwood Enterprises, Inc. ("Brantwood"). Each of the Lower Tier BVI Subs is also an IBC incorporated in the BVI pursuant to the BVI International Business Companies Act. Expert Tips was incorporated in 1994. The other four Lower Tier BVI Subs were incorporated in 1996. At all pertinent times, the Registered Office of each of the Lower Tier BVI Subs was located in the BVI. At all pertinent times, each of the Lower Tier BVI Subs was listed on the BVI's register of IBCs as being in good legal standing and as having paid all fees, license fees, and penalties due and payable under the BVI International Business Companies Act.

7. Each of the Lower Tier BVI Subs owned 100% of the shares of a Delaware Sub, all of which are corporations formed under the laws of the State of Delaware on June 11, 1996. Kaywood owned 100% of Hotel 57 Corp. II, Inc. ("Hotel 57 Corp. II"); Kilborn owned 100% of Hotel 57 Corp. III, Inc. ("Hotel 57 Corp. III"); Romney owned 100% of Hotel 57 Corp. IV, Inc. ("Hotel 57 Corp. IV"); Expert Tips owned 100% of Hotel 57 Corp.

V, Inc. ("Hotel 57 Corp. V"); and Brantwood owned 100% of Hotel 57 Corp. I, Inc. ("Hotel 57 Corp. I").

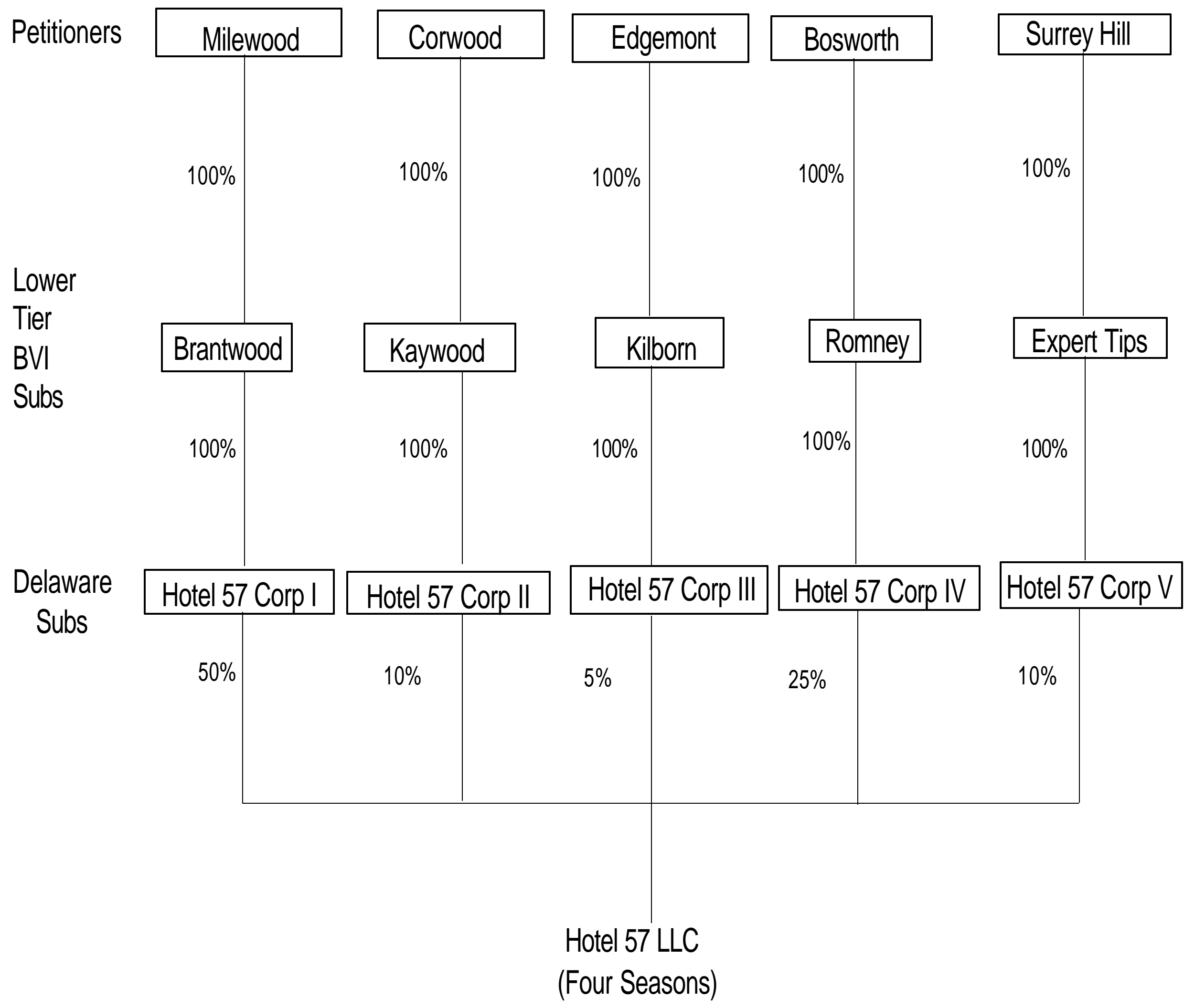
8. At all pertinent times each of the Delaware Subs had a Registered Office in the State of Delaware and was in good standing and had a legal corporate existence under the laws of the State of Delaware, having filed its annual reports and having paid all applicable franchise taxes.

9. At all pertinent times, the ownership interests in LLC (which represented the value, vote and profits of LLC) were held by the Delaware Subs as follows:

Entity	Percent Ownership
Hotel 57 Corp. I	50
Hotel 57 Corp. II	10
Hotel 57 Corp. III	5
Hotel 57 Corp. IV	25
Hotel 57 Corp. V	10
Total	100%

Each Delaware Sub was treated as a partner in LLC for federal, state and local tax purposes in proportion to its respective percentage ownership interest in LLC.

10. The diagram below illustrates the corporate structure described above:


Petitioners
Milewood
Corwood
Edgemont
Bosworth
Surrey Hill
100%
100%
100%
100%
100%
Lower
Tier
BVI
Subs
Brantwood
Kaywood
Kilborn
Romney
Expert Tips
100%
100%
100%
100%
100%
Delaware
Subs
Hotel 57 Corp I
Hotel 57 Corp II
Hotel 57 Corp III
Hotel 57 Corp IV
Hotel 57 Corp V
50%
10%
5%
25%
10%
Hotel 57 LLC
(Four Seasons)

The transfers at issue

11. The Petitioners sold all of their shares in the Lower Tier BVI Subs for an aggregate of $275 million (the "Purchase Price") to 57 BB Property, L.L.C. ("Purchaser"), a Delaware limited liability company. The Transfers were made pursuant to a Stock Sale and Purchase Agreement dated February 2, 1999 (the "Contract"). The closing of the Transfers (the "Closing") took place on March 12, 1999 in Chicago, Illinois.

Background

12. LLC had purchased the Four Seasons pursuant to a purchase agreement dated June 18, 1996 ("Purchase Agreement") for $195 million.

13. Ms. Chong, who subsequently became an officer of Edgemont, was present at the purchase of the Four Seasons in 1996, representing Kilborn, Edgemont's Lower Tier BVI Sub. (Tr. 1,[2] p. 43.)

14. LLC and Regent International Hotels, Inc. ("Regent") had entered into an Amended and Restated Hotel Management Agreement, dated August 1, 1996, concerning the management of the Four Seasons ("Hotel Management Agreement"). Regent managed the Four Seasons pursuant to this agreement. Milewood's director, Ambrose Cheung Wing Sum ("Mr. Cheung"), negotiated the Hotel Management Agreement with Regent in 1996. (Tr. 1, p.

[2] The transcript pagination for the second day of the hearing begins again with p. 1. Accordingly, transcript pages for the first day of the hearing are designated "Tr. 1," and transcript pages for the second day of the hearing are designated "Tr. 2."

166.) Petitioners played no role in the management of the Four Seasons.

15. At all pertinent times, each Petitioner engaged in no business other than in relation to its ownership of the stock of its Lower Tier BVI Corp, including, without limitation, taking all actions necessary to carry out, effectuate, and consummate the terms of the Transfers pursuant to the terms of the Contract.

16. Each Petitioner conducted its only business, which was to hold the shares of its Lower Tier BVI Sub, in Hong Kong. No Petitioner directly owned any real estate in the City. Apart from their respective indirect interests in LLC, no Petitioner ever held an ownership interest in any other kind of property or other business in the City. No Petitioner ever held a company meeting in the City.

17. None of the Petitioners ever filed an application for authority to do business in New York State (the "State") with the Department of State of New York.

18. None of Petitioners ever filed any income tax returns in the United States. Corwood, Bosworth and Surrey Hill were never advised to file income tax returns in the United States. Edgemont was advised that it was not required to file income tax returns in the United States. The record is silent with respect to Milewood.

19. At all pertinent times, each of the Lower Tier BVI Subs engaged in no business other than in relationship to its ownership of the stock of its Delaware Sub, including, without

limitation, taking all actions necessary, if any, to carry out, effectuate and consummate the terms of the Transfers pursuant to the terms of the Contract.

20. At all pertinent times, each of the Delaware Subs engaged in no business other than in relation to its ownership interest in LLC, including, without limitation, taking all actions necessary, if any, to carry out, effectuate, and consummate the terms of the Transfers pursuant to the terms of the Contract.

21. Each of the Petitioners, the Lower Tier BVI Subs and the Delaware Subs were single purpose entities which were used to hold the investment in the entity below it in the above described corporate structure. The purpose of this corporate structure was to insulate the ultimate beneficial owners of the Four Seasons from liability and to make it possible for one Petitioner to dispose of its investment in the Four Seasons without disrupting the investments of the other Petitioners and to obtain tax benefits.

Ownership and Management of the Petitioners

Corwood

22. Corwood was owned by Parkview International Properties Limited ("Parkview International"), a corporation incorporated in Hong Kong with its principal place of business in Hong Kong. Parkview International was owned by Hong Kong Parkview Group Limited ("Parkview Group"), a publicly held corporation whose principal place of business was in Hong Kong.

23. Corwood's directors were Brian Chan Chi Fai ("Mr. Chan") and Peter Sin Leung ("Mr. Sin"), both residents of Hong Kong. Pursuant to the consent of Corwood's Board of Directors, Mr. Chan, as Corwood's secretary, was the custodian of Corwood's corporate records. Vincent Kinson Ma ("Mr. Ma") was also an officer of Corwood. During the period 1996 to 1999, Mr. Ma resided in Hong Kong.

24. The decision for Corwood to sell the shares of its Lower Tier BVI Sub was made by its directors in Hong Kong. Mr. Ma executed the Contract on behalf of Corwood in Hong Kong.

Edgemont

25. Edgemont was owned by Arthur Liang Chung Meng ("Mr. Liang"), a resident of Hong Kong. Mr. Liang was Edgemont's sole director. Mr. Liang and Jane Chong ("Ms. Chong"), also a Hong Kong resident, were the officers of Edgemont. Pursuant to the consent of Edgemont's sole director, it was resolved that Ms. Chong be the custodian of Edgemont's corporate records. Mr. Liang and Ms. Chong were also officers of Kilburn, Edgemont's Lower Tier BVI Sub, and of Hotel 57 Corp. III, Kilburn's Delaware Sub.

26. Apart from his indirect interest through Edgemont's Lower Tier BVI Sub, Mr. Liang never owned any real property in the City, never held any ownership interest in any other kind of property in the City and never operated any business in the City.

27. In early 1999, Mr. Liang, on behalf of Edgemont, made the decision to sell Edgemont's shares in its Lower Tier BVI

Sub. That decision was made in Hong Kong. Ms. Chong executed the Contract on behalf of Edgemont in Hong Kong.

Bosworth

28. Bosworth was owned by Sunnet Investments PTE Limited ("Sunnet"), a company incorporated in Singapore with its principal place of business located in Singapore. Sunnet was owned by Chow Tai Fook Enterprises Limited ("Fook Enterprises") and Chow Tai Fook Nominee Limited ("Fook Nominee"), both of which were incorporated in Hong Kong and had their principal places of business in Hong Kong. Fook Enterprises and Fook Nominee were wholly owned by Cheng Yu-Teng, a permanent resident of Hong Kong.

29. Apart from their indirect interest through Bosworth's Lower Tier BVI Sub, Fook Enterprises, Fook Nominee, and Cheng Yu-Tung have never owned any real estate in the City, have never held any ownership or business interests in the City and have never operated a business in the City.

30. Bosworth's directors were Robert Wang ("Mr. Wang") and Chan Kam Liang ("Mr. Chan"), both residents of Hong Kong. Bosworth's officers were Mr. Wang, Mr. Chan and Pei Cheng Ming, Michael ("Mr. Pei") who was secretary/treasurer of Bosworth. Mr. Pei was also a resident of Hong Kong. Pursuant to the consent of Bosworth's directors, Mr. Pei was the custodian of Bosworth's corporate records.

31. The decision for Bosworth to sell its shares in its Lower Tier BVI Sub was made by its directors in Hong Kong. Mr. Pei executed the Contract on behalf of Bosworth in Hong Kong.

Surrey Hill

32. Surrey Hill was owned by Manhattan Realty Limited ("Manhattan Realty"), a company incorporated in the Cayman Islands with its principal place of business in Hong Kong. Manhattan Realty was wholly owned by Manhattan Garments Holdings Limited ("Manhattan Garments"), a corporation also incorporated in the Cayman Islands, with its principal place of business in Hong Kong. Manhattan Garments was wholly owned by James Pei Chun Tien ("Mr. Tien") and members of his immediate family, all of whom were permanent residents of Hong Kong.

33. Mr. Tien was a Director and the President of Surrey Hill. Patrick Chow ("Mr. Chow"), a resident of Hong Kong, was vice-president of Surrey Hill and was responsible for looking after its investment in its Lower Tier BVI Corp. Mary Tien Huynh Ngoc Hoa ("Ms. Tien"), also a resident of Hong Kong, was a Director, Secretary and Treasurer. Pursuant to the consent of Surrey Hill's Board of Directors, it was resolved that Ms. Tien, as Surrey Hill's Secretary/Treasurer, would be the custodian of Surrey Hill's corporate records.

34. Apart from their indirect interest through Surrey Hill's Lower Tier BVI Sub, Manhattan Realty, Manhattan Garments and the Tien Family have never owned any real estate in the City, have never held any ownership or business interests in the City and have never operated any business in the City.

35. Mr. Tien made the decision for Surrey Hill to sell its Lower Tier BVI Corp. Mr. Tien executed the Contract on behalf of Surrey Hill in Hong Kong.

Milewood

36. Milewood was owned by Lai Sun International ("Lai Sun"), a Bermuda company with its principal place of business in Hong Kong. Lai Sun is listed on the Stock Exchange of Hong Kong.

37. Milewood's directors were Peter Lam Kim Ngok ("Mr. Lam") and Mr. Cheung, both residents of Hong Kong. Pursuant to the consent of Milewood's Board of Directors, Brian Yeung Kam Hoi, as Milewood's Secretary, was the custodian of Milewood's corporate records. Allan Yaf Wah Chung Li ("Mr. Li"), also a Hong Kong resident, was Milewood's Assistant Secretary. Mr. Li was also an officer of Brantwood, Milewood's Lower Tier BVI Sub.

38. The decision to have Milewood sell its shares in its Lower Tier BVI Sub was made by Mr. Lam and Mr. Cheung, as directors of Milewood, and by Lai Sun, Milewood's parent company. Mr. Cheung signed the Contract on behalf of Milewood. Mr. Li testified at the hearing that he believed Mr. Cheung executed the Contract in Hong Kong.

Events leading up to the Transfers

39. Each Petitioner had one witness testify at the hearing: Mr. Ma for Corwood, Ms. Chong for Edgemont, Mr. Pei for Bosworth, Mr. Chow for Surrey Hill, and Mr. Li for Milewood ("Petitioners' Witnesses"). Each of Petitioners' Witnesses was an officer of his or her respective corporation and attended the Closing in Chicago on behalf of that corporation. None of Petitioners' Witnesses was a director or shareholder of his or her respective corporation. Each of the Petitioners' Witnesses

had a background in accounting, business, banking, and/or finance and was responsible for overseeing the investment of his or her respective corporation. Each of Petitioners' Witnesses had a very limited knowledge of the Transfers. Petitioners provided no witness who purported to be knowledgeable about how the Transfers were marketed or who provided a detailed explanation of what role the various "advisors" and/or "agents" who are discussed below played in the Transfers.

40. Petitioners' Witnesses contradicted one another regarding who initiated the plan to dispose of the shares in the Lower Tier BVI Subs. Mr. Pei, Bosworth's officer, testified that Milewood's shareholder approached Bosworth to suggest selling Bosworth's asset. (Tr. 1, p. 99.) Mr Chow, Surrey Hill's officer, testified that Mr. Li, on behalf of Milewood, approached him with the suggestion to market Surrey Hill's "asset." (Tr. 2, p. 30.) Mr. Ma, Corwood's officer, also testified that Milewood was the major investor among the Petitioners and that they all "listened" to Mr. Li. (Tr. 1, p. 118.) Nevertheless, Mr. Li, Milewood's officer, testified that he did not know if he approached the other Petitioners on behalf of Milewood or they approached him regarding selling the investment. (Tr. 1, P. 161.)

41. Mr. Li testified that since "the hotel has international stature," Petitioners were advised to market the hotel internationally as this was the "proper way of selling this hotel or selling our interest in the shares." Petitioners retained an agent, Morgan Stanley, to assist in the marketing and to prepare a marketing brochure (the "Marketing Memorandum"). Petitioners sent the Marketing Memorandum to selected purchasers. (Tr. 1, 148.)

42. The first paragraph of the Marketing Memorandum states that it is based on:

> Information provided by **Hotel 57 L.L.C. (together with its direct and indirect members and shareholders, the "Company" or "Hotel 57 L.L.C.")**, a Delaware limited liability company, the owner of the Four Seasons Hotel New York (the "Hotel"). It is being delivered on behalf of the Company by Morgan Stanley Dean Witter ("Morgan Stanley") **upon receipt of a signed Confidentiality Agreement** to a limited number of parties who may be interested in a transaction involving the Company and the Hotel. [Emphasis added.]

Page 00581 of the Marketing Memorandum states that:

> Hotel 57 L.L.C. . . . the owner of the Four Seasons Hotel New York, has authorized Morgan Stanley to act as **the Company's** exclusive advisor and agent in connection with the potential sale of the Company as described in this Memorandum. [Emphasis added.]

43. In a section entitled "Proposed Transaction," on page 00584 of the Marketing Memorandum, the proposed transaction is described as follows:

> Morgan Stanley has been retained by Hotel 57 L.L.C. as its financial advisor and agent in the potential sale of the Company. The proposed transaction is to sell the stock of five off-shore entities incorporated in the British Virgin Islands that own individually the interests in five United States corporations that wholly own in the aggregate all of the membership interests in Hotel 57 L.L.C., the owner of the Hotel.

> See Section III – "Summary of the Ownership Structure".

The referenced "Summary of the Ownership Structure," on page 00597, further describes the five United States corporations as follows:

> Hotel 57 L.L.C., in turn, has five members, each of which is a special purpose Delaware corporation wholly owned by five individual offshore entities incorporated in the British Virgin Islands ("BVI Corporations"). It is the stock in these five BVI Corporations that is being offered for sale pursuant to this Memorandum.

44. The Marketing Memorandum is a thirty-three page marketing brochure. Most of the brochure consists of a detailed description and photographs of the Four Seasons including: rooms, meeting rooms and various amenities; extensive information about the financial condition of the hotel's operations; extensive information about the Management Agreement; and information about certain ground leases. It also contains a section entitled "New York Market Overview" which describes the spectacular growth of the City hotel market.

45. The Hong Kong office of Morgan Stanley prepared the Marketing Memorandum. However, all communications, inquiries and requests for information concerning the material in the Marketing Memorandum are directed to a Morgan Stanley address and telephone number in the City and to Morgan Stanley personnel at telephone numbers in the City. (Marketing Memorandum, p. 00577.) The Marketing Memorandum also states that if a prospective purchaser "wish[es] to proceed with an in-depth evaluation of the Company and the Hotel, including . . . interviews with management and a detailed evaluation of . . .

the Hotel's operations" that the prospective purchaser submit a preliminary proposal to a Morgan Stanley address in the City. (Marketing Memorandum, p. 00581.)

46. Mr. Li testified that Morgan Stanley initially attempted to market the deal but "I think they had no success, and thereafter a few months, we terminated the engagement." (Tr. 1, p. 169.) (*But see*, Finding of Fact 48, *infra*.)

47. Mr. Li testified that he did not know much about how the Transfers came about as illustrated by the following exchange which took place on cross examination:

> Q. (Mr. Nussbaum) You mentioned that brochures were sent to prospective purchasers.
>
> A. (Mr. Li) Yes.
>
> Q. When a prospective purchaser was interested, who did they contact?
>
> A. When a prospective purchaser was interested, they would have contacted our agent at the time.
>
> Q. Which agent or agents were they at the time?
>
> A. Which time?
>
> Q. At the time after these brochures were printed and distributed that you discussed before?
>
> A. For a while, they contacted Morgan Stanley.
>
> Q. Who else would they have contacted?

> A. After Morgan Stanley was no longer acting, then I am not sure who. I cannot speculate. Morgan Stanley acted for us for a time and then it stopped acting. (Tr. 1, p. 152.)[3]

48. Section 16.18 of the Contract states:

> . . . **Purchaser or its Affiliate dealt with Morgan Stanley Dean Witter with respect to entering into a confidentiality agreement for this transaction.** The parties agree that Purchaser is not responsible for any fees or commissions to Morgan Stanley Dean Witter. Sellers [defined as Petitioners herein] have retained PKF Consulting ["PKF"] and Polylinks International Ltd. ["Polylinks"] in connection with the transactions contemplated by the [Contract] . . .. [Emphasis added.]

49. The Closing Statement, in which the Petitioners are the "Sellers," describes the "Sellers' Agent" as "PKF by: John Fox" and "Sellers' Advisors" as "Polylinks International Ltd. By: Margaret Lau, Daniel Yu, Beatrice Wen and Maureen Wong."

50. Polylinks was variously characterized as the "advisor," "broker," or "consultant" with respect to the sale by Petitioners of the Lower Tier BVI Subs. (Tr. 1, pp. 52, 102-03, Tr. 2, pp. 39-40.) Polylinks was compensated directly by the Petitioners for its services in marketing the Four Seasons and

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[3] It is important to note that as to certain of the factual matters that are most relevant to this determination's factual conclusions, Petitioners, who have the burden of proof in this matter (*see*, City Charter §170.d), provided witnesses who had or professed to have a notable lack of knowledge of the essential facts. This is particularly disconcerting with respect to Mr. Li, since the record indicates that Milewood, the corporation for which he served as an officer, owned an indirect 50% interest in the Four Seasons and was the dominant force in the decision making regarding the Transfers.

effectuating a sale of the shares of the Lower Tier BVI Subs. (Tr. 1, pp. 55-56, 103, 136.)

51. Among the services Polylinks provided to the Petitioners was to advise them of whether they should consider a particular proposal to purchase the shares of the Lower Tier BVI Subs both from the perspective of the sufficiency of the price offered and the ability of the prospective buyer to actually make payment. (Tr. 2, pp. 38-40.)

52. Daniel Yiu and Beatrice Wan, of Polylinks, were the brokers who effectuated the purchase of the Four Seasons by LLC in 1996. (Tr.1, p. 43.)

53. PKF was hired through Polylinks to assist with the marketing of the Four Seasons and to provide information to prospective purchasers. (Tr. 1, pp. 52-55.) Ms. Chong explained that PKF was hired because "Polylinks was out of Hong Kong, and they couldn't possibly attend to all the day-to-day or whatever, all the myriad number of tasks that they needed to show the hotel." (Tr. 1, p. 74.)

54. In a letter agreement, dated February 3, 1998, on the letterhead of PKF's San Francisco office to Daniel Yiu at Polylinks at a Hong Kong address (the "PKF Agreement"), the parties agreed that PKF would act as "confidential asset advisor" to LLC with respect to the Four Seasons. Mr. Yiu executed the PKF Agreement as "Polylinks International Limited on behalf of Hotel 57 LLC." Among the services PKF agreed to provide were:

> 1. Analyzing the implications of holding or selling the asset [the Four Seasons],
>
> 2. assisting in preparing the property for sale (if appropriate),
>
> 3. communicating that decision to a carefully selected market of investors,
>
> 4. monitoring the sales/bidding process to maximize the value of the asset, [and]
>
> 5. assisting in monitoring the due diligence exercises conducted by potential buyers.

The PKF Agreement provided that "[t]he Senior Vice President and Director of PKF's New York office, John Fox, will be assigned as the Four Seasons' on-site liaison with you and/or your designated representatives. John is recognized as one of the foremost authorities concerning the New York City hotel market . . .." The PKF Agreement also provided that Patrick Quek, as president of PKF, would be "fully and personally involved in every aspect of the advisory services [they] are prepared to offer." PKF was to be compensated by a fixed fee for services rendered and not by a commission based on a sale.

55. The importance of having someone on site in the City to show the Four Seasons is illustrated by the following exchanges which took place on cross examination of Mr. Li:

> Q. (Mr. Nussbaum) Were you aware of which particular prospective purchasers were visiting the hotel or inspecting the hotel?
>
> A. (Mr. Li) I think any serious purchaser would look at the hotel and inspect the hotel.

> Q. How would they get such permission to enter the premises?
>
> A. They were qualified by the agents, because they came up with the price and the agents told us they were credible purchasers with the ability and capacity to buy these interests. (Tr. 1, pp. 170-71.)
>
> . . .
>
> Q. Did you help in any way facilitate or did you help facilitate any purchaser viewing the Four Seasons Hotel?
>
> A. No, the agents do that.
>
> Q. Did you provide the authorization to those agents? In other words, did you authorize the agent to act on your behalf to do that?
>
> A. I am not sure whether I did personally.
>
> Q. Did another officer or director of Milewood?
>
> A. I am not sure. (Tr. 1, pp. 153-154.)

56. Ms. Chong, an officer of Edgemont, received marketing information from Polylinks and PKF. (Tr. 1, p. 49.) She was also apprised by Polylinks and/or PKF that arrangements were made for prospective purchasers to be shown around the Four Seasons. She testified that:

> prospective purchasers requested to view the hotel, and permission was given by Hotel 57 LLC for Polylinks International and/or PKF Consulting to approach the relevant personnel at Regent International so that arrangements were made for employees of the Four Seasons Hotel to show prospective

> purchasers around the hotel as was requested. (Tr. 1, p. 70.)

57. Ms. Chong was in the City on at least two occasions when she met with prospective purchasers. In one case she met the prospective purchaser at the office of Robinson Silverman. In the other case the location was at an airport hotel near J.F.K. Airport. (Tr. 1, p. 50-51.)

58. Ms. Chong was also in the City for one day just prior to attending the Closing in Chicago, during which time an inventory of the Four Seasons was taken and certain closing adjustments were computed. She testified that she was in the City to receive the attorneys' advice and to give instructions as to how certain final adjustments such as inventory, receivables, taxes and other cut-off issues should be dealt with. (Tr. 1, pp. 45-46.)

59. Mr. Ma, an officer of Corwood, "was sent by [his] boss to New York City to sign the closing agreement. It was supposed to be in January of '99." (Tr. 1, p. 117.) He had to leave the City "empty-handed" because the representatives of the five Petitioners could not agree about certain aspects of the transaction. (Tr. 1, p. 123.)

60. In early 1999, Petitioners' Witnesses attended a meeting with Petitioners' attorneys, Robinson Silverman, at Robinson Silverman's offices in the City to discuss various issues relating to the Contract. The Purchaser was not present at that meeting. (Tr. 1, pp. 96, 123, 138.)

61. The parties stipulated that with respect to the Contract, attorneys at the firm of Robinson Silverman, based in the City, represented the Petitioners, and attorneys at the firms of Levenfeld Glassberg Tuchman & Goldstein and Kubasiak, Cremieux, Fylstra, Reizen & Rotunno, both located in Chicago, Illinois, represented the Purchaser. Negotiations concerning the terms of the Contract took place between parties' counsel by telephone and in one or more meetings in the City.

62. In discussing the economic factors surrounding the growth rate of the Four Seasons Hotel, the Marketing Memorandum, on page 00591, states that there has been "spectacular growth" of the New York City Hotel market in 1997, and "[a]verage daily rates are expected to experience continued growth of 8% to 10% as the New York City economy is expected to remain vibrant and total inventory of rooms is expected to remain steady."

Relevant provisions of the Contract

63. The Contract is designated a "Stock Sale and Purchase Agreement" and provides for the sale by Petitioners of the shares in the Lower Tier BVI Subs. (Contract, section 2.1.) Petitioners are designated "Sellers." (Contract, opening paragraph.) The five Lower Tier BVI Subs, the shares of which constitute the property being sold, are defined as "Seller BVI Companies." (Contract, section 1.81.) The five Delaware Subs, which are wholly owned by the entities being sold under the Contract, are defined as "Seller U.S. Companies." (Contract, section 1.88.) LLC is defined as "Owner." (Contract, section 1.57.)

64. In numerous places, the Contract provides that the Petitioners are required to "cause Owner" [LLC] to do any number of tasks between the time the Contract was entered into up to and including the time of the Closing:

> a. Petitioners shall cause LLC to have the appropriate agencies read water meters (Contract, section 4.2);
>
> b. Petitioners shall cause LLC to have utility companies read meters (Contract, section 4.3);
>
> c. Petitioners shall cause LLC to either maintain existing insurance policies or replace them with equivalent coverage (Contract, section 9.2);
>
> d. Petitioners shall not permit LLC to modify various existing agreements or enter into certain new agreements including various leases, the Management Agreement, and various service contracts without Purchaser's consent (Contract, sections 9.3 – 9.5); and
>
> e. Petitioners agree to cause LLC to use reasonable efforts to obtain an estoppel certificate (Contract, section 9.6).

65. The Contract also provides that Petitioners:

> shall, during normal business hours and upon reasonable prior notice to [Petitioners] permit Purchasers . . . to interview all Key Employees [defined as LLC's general manager, controller and chief engineer] and to have such access to the Property [defined to include the Four Seasons] as is reasonably necessary to confirm the accuracy of the representations and warranties of [Petitioners] hereunder and the performance

> of [Petitioners'] covenants hereunder. . ." (Contract, section 9.9.)

66. Article IV of the Contract explicitly states that:

> The parties hereto acknowledge and agree that although this transaction is a stock purchase, they wish the adjustments to the Cash Balance [the portion of the purchase price to be paid at the Closing] to be made as if the transaction were an acquisition of the Property [the Four Seasons, personal property, accounts receivable, etc.]

Accordingly, real estate taxes were required to be prorated as if the real property, rather than the shares of the Lower Tier BVI Subs, had been sold. (Contract, section 4.1.)

67. Contract, section 13.1, dealing with tax certiorari proceedings, provides that:

> [i]f any tax reduction proceedings in respect of the Real Property, relating to any fiscal years ending prior to the fiscal year in which the Closing occurs, are pending at the time of the Closing, [Petitioners] reserve and shall have the right to cause [LLC] to continue to prosecute and/or settle the same. . ..

68. Article III of the Contract, dealing with the Purchase Price, requires each Petitioner to pay off at the Closing any debt held by its Lower Tier BVI Sub or its Delaware Sub out of that Petitioner's share of the Purchase Price.

69. Article V of the Contract, dealing with title and permitted exceptions, provides that Petitioners are required to provide Purchaser with good title to the real property:

> a. It is a condition to Purchaser's obligation to purchase the [shares of the BVI Subs] that on the Closing Date the Title Insurer (or Title Insurers) would be prepared to issue to [LLC] a [title insurance policy] . . . (Contract, section 5.1);
>
> b. [Petitioners] shall discharge, or cause [LLC] to discharge, all Voluntary Title Exceptions on or prior to the Closing . . . (Contract, section 5.5); and
>
> c. Petitioners will use the sale proceeds to discharge any title exceptions (Contract, section 5.3).

70. Various portions of the Contract that deal with the condition of the Four Seasons provide that Petitioners are responsible for how it is managed:

> If . . . the Property becomes subject to . . .violations . . or. . .liens . . [Petitioners] shall have thirty (30) days . . . to ensure that such future violations shall be cured . . (Contract, section 6.1(c).)
>
> . . .
>
> Between the date hereof and the Closing Date, [Petitioners] shall cause the [Lower Tier BVI Subs], [Delaware Subs] and [LLC] to continue to operate and maintain the Property in the ordinary course and substantially in accordance with the practices and procedures customarily followed prior to the date hereof . . .. (Contract, section 9.1.)

71. The Contract, by its terms, is governed by the substantive laws of the State. (Contract, section 16.1(a).)

72. Contract, Section 16.1(b) provides that:

> [Petitioners] . . . irrevocably consent and submit to the jurisdiction of any Federal, state, county or municipal court sitting in the State of New York with respect to any action or proceeding brought by any party concerning any matters arising out of or in any way relating to [the Contract].

73. Contract, Section 2.2(d) provides that the "Closing Location" is either "(i) the Sellers' counsel's offices in New York City or (ii) the offices of Purchaser's counsel in New York City." However, the Closing actually took place in Chicago.

Tax Payments and Refund Claims

74. In connection with the sales of the shares of the Lower Tier BVI Subs pursuant to the Contract, Petitioners received consideration, a portion of which was apportioned to the real property as follows:

Petitioner	Total Consideration	Amount Apportioned to Real Property
Corwood	$ 27,500,000	$ 23,607,809.80
Edgemont	13,750,000	11,803,904.90
Bosworth	68,750,000	59,019,524.50
Surrey Hill	27,500,000	23,607,809.50
Milewood	137,500,000	118,039,049.00
Total	$275,000,000	$236,078,048.70

75. Pursuant to section 11.1 of the Contract, Petitioners paid the RPTT, including applicable filing fees on March 12, 1999, as follows:

Corwood	$ 619,730.00
Edgemont	309,877.50
Bosworth	1,548,287.51
Surrey Hill	619,730.00
Milewood	3,098,550.30
Total	$6,196,175.31

76. Under cover letters dated March 8, 2000, Petitioners respectively filed claims for refunds of the RPTT paid with respect to the Closing, plus interest.

77. By Notices of Disallowance, dated August 1, 2000, the City Department of Finance (the "Department") denied Petitioners' respective refund claims.

78. On October 26, 2000, Petitioners timely filed their respective Petitions seeking a refund of the RPTT that had been paid.

STATEMENT OF POSITIONS

Petitioners assert that under *Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69 (1926), and *In re Gates' Estate*, 243 N.Y. 193 (1926), the application of a transfer tax to the sale of shares in a foreign corporation based on the location of real property owned by the foreign corporation or its subsidiary violates the Due Process clause of the United States Constitution. Respondent contends that these cases are outdated and rely on obsolete notions of jurisdiction to tax. Respondent also asserts that the RPTT should not be considered a stock transfer tax. Rather, Respondent contends that by taxing the transfer of a controlling interest in an entity, the statute is treating the event as a proxy for the transfer of real property located in the City.

Petitioners also argue that in order to impose a tax without violating due process, the party being subjected to tax must have the same minimum contacts with the taxing jurisdiction

that would give rise to *in personam* jurisdiction, and that the City has failed to establish that Petitioners had those minimum contacts. Respondent counters that because she seeks to tax a single transaction, all that is needed is specific jurisdiction relating to that transaction. She argues that when, as here, a taxpayer purposefully exploits the City's economic market, the due process requirement is satisfied. In addition, the Commissioner asserts that Petitioners had physical presence nexus through their agents/independent contractors. Petitioners argue that the agents involved with the Transfers were not their agents and could not provide nexus for Petitioners to be taxed.

Petitioners contend that the imposition of the RPTT on the Transfers also violates the Constitution's Commerce Clause because Petitioners do not have substantial nexus since they have no physical presence or other contacts with the City and the City cannot impute ownership of the Four Seasons to Petitioners. The Commissioner counters that the only substantial nexus that exists is with the City because that is the location of the real estate that is the subject of the tax. In addition, the Commissioner asserts, Petitioners were physically present in the City through their authorized representatives.

Petitioners, relying on *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), also argue that the imposition of the RPTT on the Transfers violates the Commerce Clause because it prevents the United States from "speaking with one voice" concerning foreign trade. They contend that when the United

States enacted FIRPTA,[4] it chose not to tax transactions of this type. Respondent distinguishes *Japan Line* on the basis that it dealt with instrumentalities of shipping on the high seas, and not a transfer of real estate. Respondent also asserts that FIRPTA would apply to this transaction.

Petitioners assert that *Matter of Cafcor Trust Reg. Vaduz*, DTA Nos. 812682 and 812683 (State Tax Appeals Tribunal, April 17, 1997), which held that a similar stock transfer was subject to the now repealed State Gains Tax,[5] was wrongly decided, and, that in any event, the reasoning in *Cafcor* does not apply here because of differences in the statutory language of the State Gains Tax and the RPTT. Respondent counters that *Cafcor* was correctly decided but, that in any event, the practical application and not the precise words of the statute controls in determining constitutionality.

Petitioners also contend that the imposition of the RPTT on the transfer of intangible personal property by a non-New York seller violates Article XVI, section 3 of the State Constitution. Respondent counters that while the State Constitution prohibits the imposition of an ad valorem tax, the RPTT is not an ad valorem tax since it is a tax on a transfer and not a tax on the mere holding of property.

Finally, Petitioners assert that the State enabling legislation prohibits the imposition of the RPTT in this case because the transfer of shares took place outside the

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[4] Foreign Investment in Real Property Tax Act of 1980, P.L. 96-499, codified at I.R.C. §897.

[5] N.Y. Tax Law, Art. 31-B, Tax on Gains Derived from Certain Real Property Transfers, repealed by Ch. 309, L. 1996 (repeal applicable for transfers occurring on or after June 15, 1996.)

territorial limits of the City. Respondent does not directly address this argument.

CONCLUSIONS OF LAW

Code section 11-2102.b imposes the RPTT on "each instrument or transaction . . . at the time of the transfer, whereby any economic interest in real property is transferred . . .." Code section 11-2101.5 limits the real property subject to tax to property located in whole or in part in the City. Code section 11-2101.3 defines "instrument" to include any document (other than a deed or will) "**regardless of where made, executed or delivered**, whereby any economic interest in real property is transferred." [Emphasis added.] Code section 11-2101.4 defines "transaction" to include "**any act or acts, regardless of where performed** . . whereby any economic interest in real property is transferred . . .." [Emphasis added.] Code section 11-2101.6 defines "economic interest in real property" to include the ownership of shares of stock in a corporation which owns real property and the ownership of an interest in a partnership or other unincorporated entity which owns real property. Code section 11-2101.7 limits the term "transferred" in relation to an economic interest in real property to cases where one transfer or multiple related transfers constitute a "controlling interest" in the corporation or unincorporated entity. Code section 11-2101.8 defines a "controlling interest" to include fifty percent or more of the total combined voting power or value of a corporation or fifty percent or more of the capital, profits or beneficial interests in a partnership or other entity.

The applicable rule implementing the above statutory provisions, 19 RCNY §23-02, provides that related transfers, which include transfers made pursuant to a plan to transfer a controlling economic interest in real property, must be aggregated to determine if the fifty percent threshold is met. The rule also provides that ownership of an entity which owns an economic interest in real property also constitutes an economic interest in real property.

Therefore, under the RPTT and the applicable rule thereunder, by transferring the shares in the Lower Tier BVI Subs pursuant to the plan set forth in the Contract, notwithstanding the fact that the Closing, as well as many events leading up to the Transfers, took place outside the City, Petitioners have transferred a controlling economic interest in the Four Seasons and are subject the RPTT. While Petitioners do not dispute that the statutory and regulatory language would result in the imposition of the RPTT to the Transfers, they raise several objections to the application of the tax in this particular case. These objections are considered below.

Petitioners assert that the imposition of the RPTT to the Transfers violates both the Due Process Clause and the Commerce Clause of the United States Constitution. Petitioners describe the Transfers as sales by alien corporations which are all owned by foreign persons and managed from their offices outside the United States, of shares in lower tier alien corporations, where the decisions to sell the shares, the signing of the Contract, and the Closing all took place outside the City. Petitioners contend that property owned by a corporation cannot be attributed to its shareholders, so that the ownership by LLC of real property in the City cannot create nexus for Petitioners.

Accordingly, Petitioners assert that there is no nexus with the City that would permit the imposition of the RPTT to the Transfers.

Respondent describes the Transfers as a transfer of an indirect interest in City real property where the values subject to tax are City real property values exclusively attributable to the "protections, opportunities, and benefits" provided to the real property by the City. *Wisconsin v. J.C. Penney*, 311 U.S. 435, 444 (1940). Respondent asserts that only the City has substantial nexus with the Transfers.

Due Process requires that "the taxing power exerted by the state bears fiscal relation to the protection, opportunities and benefits given by the state." That is, "whether the state has given anything for which it can ask return." *J.C. Penney*, *supra*, at 444. It cannot be disputed that the City has given something for which it can ask something in return. LLC purchased the Four Seasons for $195 million in 1996. The shares in the Lower Tier BVI Subs were sold in 1999 for $275 million. There is no question that, for all practical purposes, the Contract was a contract to sell the Four Seasons. The increase in value is due solely to the increase in value of the Four Seasons which is located in the City and which necessarily would have had the benefit of all of the City's infrastructure, including police and fire protection, water, sewer and transportation. In addition, because Petitioners were required under the Contract to provide Purchaser with good title to the Four Seasons, the City's title recording system was necessary to effectuate the Transfers. Finally, the Petitioners consented to the jurisdiction of the New York courts to resolve any dispute arising out of the Contract. (Finding of Fact 72.) Petitioners

expected that the New York judiciary would be available for them to use if required.[6]

Under *Quill v. North Dakota*, 504 U.S. 298 (1992), "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax [citation omitted].'" 504 U.S. at 306. The same Due Process standard applicable to determining the jurisdiction of a court also applies to determine whether a taxpayer or activity has sufficient contacts with a taxing jurisdiction to justify the imposition of a tax. *Quill*, *supra*, at 307-08. Thus, under contemporary jurisprudence in the area of jurisdiction subsequent to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the person must have had "minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" [Citations omitted.] *Quill* at 307. If a taxpayer "purposefully avails itself of the benefits of an economic market in the forum State" it has sufficient contact with that State regardless of whether it is physically present in the State such that Due Process is satisfied. Under such circumstances it has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." [Citations omitted.] *Quill* at 308.

The "dormant" Commerce Clause requires that the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against

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[6] The parties to an agreement can stipulate that the New York courts will have jurisdiction over any controversy arising under that agreement. However, if the controversy lacks sufficient New York contacts, a court may dismiss a suit under the doctrine of *forum non conveniens*. *See*, David D. Siegel, *New York Practice* §98 (3rd Ed. 1999).

interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Petitioners are challenging only the substantial nexus requirement. *Quill* makes it clear that "the 'substantial nexus' requirement [of *Complete Auto*] is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Quill* at 313. Because, under *Quill*, a taxpayer may meet the "minimum contacts" standard but not meet the "substantial nexus" requirement, if a taxpayer has the "substantial nexus" required by the Commerce Clause, it follows that it will also have the "minimum contacts" required by the Due Process clause.

The State Tax Appeals Tribunal ("State Tribunal") addressed the constitutional issues raised by Petitioners in the context of the now repealed Gains Tax. *Cafcor*, *supra*, dealt with the sale by a Lichtenstein trust beneficially owned by a foreign individual of the shares of an alien corporation where the alien corporation owned a controlling interest in a State limited partnership that owned a hotel in the State. All the activities of the trust connected with the sale took place outside of the State. The Gains Tax, which imposed a tax on transfers of real property under certain circumstances,[7] defined a "transfer of real property" to include "a transfer . . . of a controlling [fifty percent or more] interest in any entity with an interest in real property." State Tax Law section 1440(7).[8] In *Cafcor*, the State Tribunal analyzed the transaction as a "transfer of real property within the meaning of Tax Law §1440(7)" and found

[7] *See*, State Tax Law §1441 (now repealed. *See*, footnote 5, *supra*).

[8] Now repealed. *See*, footnote 5, *supra*.

nexus based on that property. The State Tribunal also concluded that Commerce Clause nexus does not require the taxpayer's physical presence in cases other than with respect to use tax collection cases involving out-of-state vendors. Accordingly, the State Tribunal found that the fact that the taxpayer in *Cafcor* had no physical presence in the State did not defeat the imposition of the Gains Tax.

Petitioners assert that *Cafcor*, *supra*, was wrongly decided because *Rhode Island Hospital Trust*, *supra*, and *Gates' Estate*, *supra*, prohibit the taxation of the transfer of corporate shares based solely on the presence of real property in the taxing jurisdiction. *Rhode Island Hospital Trust* involved an attempt by North Carolina to impose an inheritance tax upon the estate of a non-resident on the transfer of shares of stock of the R.J. Reynolds Tobacco Company, a New Jersey corporation, which had two thirds of the value of its property in North Carolina. The U.S. Supreme Court in *Rhode Island Hospital Trust* reaffirmed the long held understanding that a shareholder does not own the corporate property and that jurisdiction over the shareholder for tax purposes cannot be obtained based on the situs of the corporation's property within the taxing state.

Gates' Estate, *supra*, dealt with the attempt by the State to tax the transfer of stocks and bonds owned by a non-resident decedent where the corporations whose stocks and bonds were at issue owned real property in the State. State Tax Law section 220 (2) (Cons. Laws, ch. 60), as in effect on November 28, 1918, read as follows:

> When the transfer is by will or intestate law, of . . . any intangible property, if

> evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized . . . and **the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the State of New York, . . .** in such proportion as the value of the real property of such corporation, joint-stock company or association . . . bears to the value of the entire property of such corporation, joint-stock company or association . . . and the decedent was a non-resident of the State at the time of his death. [Emphasis added.]

The New York Court of Appeals, following *Rhode Island Hospital*, *supra*, struck down the statute noting that the Tax Law sought to tax transfers of corporate stocks and bonds "on the basis of the decedent's ownership of real property within the State. . . . But neither the bonds nor the stock represent any property other than the intangible rights of a bondholder or shareholder." *Gates' Estate*, *supra*, 243 N. Y. 193, 196. This aspect of the *Rhode Island Hospital, supra*, and *Gates' Estates, supra* decisions rests on basic hornbook law and is still valid today other than in very limited circumstances.[9]

Rhode Island Hospital Trust, *supra*, and *Gates' Estate*, *supra*, also held that with respect to Due Process jurisdiction (as understood in 1926 when the decision was rendered), the situs of intangibles such as stock is with the owner of the intangible and the only jurisdictions that can impose a transfer tax on such stock are the State in which the owner resides and

[9] *See*, Harry G. Henn & John R. Alexander, *Laws of Corporations*, Ch. 7 (3rd Ed. 1983).

the State in which the corporation was organized. This analysis, while never directly overruled, rests on the pre-*International Shoe, supra,* notion of *in personem* jurisdiction which has evolved significantly since 1926 from the "physical presence" standard to the "minimum contacts" standard in use today.

In *Cafcor*, the State Tribunal maintained that *Rhode Island Hospital Trust* and Gates' *Estate* were inapplicable. It relied on *Matter of Bredaro Vast Goed, N.V. v. Tax Commn of the State of N.Y.*, 146 A.D.2d 155 (3rd Dept. 1989) (an earlier Gains Tax case), and *595 Investors Limited Partnership v. Biderman*, 140 Misc.2d 441 (N.Y. Cty. 1988) (an RPTT case), for the proposition that the transfer of stock representing a controlling interest in the entity owning real property was "effectively" the transfer of an interest in the real property.

Bredaro, *supra*, involved the sale by three alien corporations of all of the shares in a State corporation which owned an eighty-five percent interest in a State limited partnership which owned real property. At issue in *Bredaro* was whether the Gains Tax, which applied to transfers of controlling interests in entities which owned real property, also applied to a two-tiered transaction. The Appellate Division affirmed the State Tax Commission which held that the taxpayers "effectively transferred an interest" in the building. The jurisdictional issues raised by Petitioners here, and by the taxpayer in *Cafcor*, *supra*, were absent in *Bredaro* because the taxpayers in *Bredaro* transferred shares in a State corporation, an activity that even the *Rhode Island Hospital Trust* Court would have found to be within the taxing jurisdiction of the State.

595 Investors, *supra*, involved the syndication of a Delaware limited partnership which owned another Delaware limited partnership which owned real property in the City. At issue in *595 Investors* was whether Code section 11-2101(7) applied to the transfer of the interests in the upper-tier entity. The court disregarded the upper-tier passive shell to permit the City to treat the transfers of interests in the upper-tier entity as if they were interests in the entity that actually owned the real property. Thus, the Constitutional issues raised by Petitioners and by the taxpayer in *Cafcor*, *supra*, were also absent from *595 Investors*. That is because the prohibition against attributing corporate property or corporate activities to the corporation's shareholders does not apply to partnerships because of the aggregate theory of partnership taxation.[10] Indeed, there is no question that the City may impose taxes on partners based on the activities or property of the partnership of which they are members. *See*, *e.g.*, *Varrington Corp. v. City of New York Dept. of Finance*, 201 A.D.2d 282 (1st Dept. 1994), *aff'd*, 85 N.Y.2d 28 (1995). Accordingly, neither *Bredaro*, *supra*, nor *595 Investors, supra*, addressed the Constitutional issues confronting the State Tribunal in *Cafcor*.

As to *Cafcor* itself, its holding is not determinative of this case because the statutory language of the RPTT differs significantly from the language of the now repealed Gains Tax. The Gains Tax imposed the tax on "transfers of real property"[11] and defined a transfer of real property to include a transfer of

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[10] *See*, 1 William S. McKee, William F. Nelson, Robert L. Whitmore, *Federal Taxation of Partnerships and Partners*, §1.02 (3rd Ed. 1997).

[11] Tax Law §1441.

an interest in an entity that owned real property.[12] However, the RPTT specifically imposes the tax on transfers of shares without defining those transfers as transfers of real property. Compare Code sections 11-2101.a and 11-2101.b.

Under *Rhode Island Hospital Trust*, *supra*, and *Gates' Estate*, *supra*, corporate property may not be attributed to shareholders to establish nexus to tax.[13] Here, however, Petitioners through their corporate offices and through various agents engaged in certain activities in the City which can create substantial nexus.

The parties have stipulated that negotiations concerning the terms of the Contract were conducted by Petitioners' attorneys in the City. (Finding of Fact 61.) In addition Petitioners' officers attended a meeting in the City in early 1999 with their attorneys to obtain advice about certain aspects of the proposed Contract. (Finding of Fact 60.) However, the determination of whether Petitioners had "substantial nexus" with the City does not take these activities into account because sound tax policy demands that foreign corporations should generally be able to use the ordinary professional services of attorneys or other similar professional advisors in

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[12] *Id.*

[13] Attempting to impose a tax on a non-domiciliary corporation that has no contact with a jurisdiction other than by virtue of the shares of an investment it holds presents problems of both jurisdiction and enforcement. *See*, Hellerstein, "State Taxation of Corporate Income From Intangibles: Allied-Signal and Beyond," 48 *Tax L. Rev.* 739, 824-826, n. 446 (1993). In 2003, the State Legislature addressed this issue on a prospective basis by amending the RPTT to redefine "grantor" to include "the entity with an interest in real property or the person or persons who transfer an economic interest in real property." L. 2003, Ch. 63, Part C, section 14. Thus, in the future, the City will have a statutory basis for assessing the RPTT against an entity over which it clearly has jurisdiction where the transferor itself has no contact with the City.

the City without subjecting themselves to tax by virtue of seeking such advice.

Petitioners, however, had other contacts with the City through the activities of their officers. Ms. Chong, as an officer of Kilborn (which was to become Edgemont's Lower Tier BVI Sub) was present in 1996 when the Four Seasons was purchased. (Finding of Fact 13.) She subsequently became an officer of Edgemont when it was formed in 1997. She was present again, these times on behalf of Edgemont, on at least two occasions, when she met with prospective purchasers. (Finding of Fact 57.) Finally, she was present in the City on the date of the Closing in order to give instructions regarding certain cut-off issues. (Finding of Fact 58.) Mr. Ma, Corwood's officer, was in the City in January of 1999 "to sign the closing agreement." However, this did not take place at that time because of disagreements between the Petitioners as to certain aspects of the transaction. (Finding of Fact 59.) Thus, Petitioners' officers conducted some limited activities in the City.

Moreover, a corporation also can have substantial nexus through the activities of an agent. *Tyler Pipe Industries, Inc. v. Wash. Dept. of Revenue*, 483 U.S. 232 (1987) (an out-of-state manufacturer with no office, property or employees in the state had substantial nexus through the activities of its independent contractor sales representatives.) Here, while the Four Seasons was marketed to potential buyers located all over the world, Petitioners, through their agents, engaged in significant marketing activities in the City.

LLC, the direct owner of the Four Seasons, was owned and controlled through a multi-tiered corporate structure. (*See*, Finding of Fact 10.) Each of the entities owning a direct or indirect interest in LLC, up to and including Petitioners, was a single purpose entity whose only activities were to hold the shares of the corporation directly below it in the corporate structure and, to the extent necessary, act to effectuate the Transfers. (Findings of Fact 15, 19 and 20.) All of the entities, including LLC, acted together to reach the goal of effectuating the Transfers.

Morgan Stanley acted not only for LLC but also for all the other entities in the corporate structure up to and including Petitioners. Mr. Li, Milewood's officer, testified that Petitioners retained Morgan Stanley to assist in marketing and to prepare a marketing brochure. (Finding of Fact 41.) The Marketing Memorandum states that it was to be delivered to prospective purchasers "on behalf of the Company" [which was defined to include all the entities in the corporate structure **including Petitioners**]. (Finding of Fact 42.) The Marketing Memorandum states that "Morgan Stanley has been retained by **Hotel 57 L.L.C.** [emphasis added] as its financial advisor and agent in the potential sale of the Company [defined to include LLC and its direct and indirect shareholders]" (Finding of Fact 43.) However, the Marketing Memorandum also states that "[LLC] has authorized Morgan Stanley to act as the Company's exclusive advisor and agent in connection with the potential sale of the Company." (Finding of Fact 42.) It is clear that LLC and its direct and indirect shareholders, including Petitioners, acted in concert with respect to the activities of Morgan Stanley concerning the sale of the shares of the Lower Tier BVI Subs and the effective sale of the Four Seasons.

Petitioners also engaged Polylinks to help with the sale by Petitioners of the Lower Tier BVI Subs and Polylinks was directly compensated by Petitioners for these efforts. (Findings of Fact 48 and 49.) However, because Polylinks was located in Hong Kong, it could not attend to the myriad day-to-day tasks needed to show the Four Seasons. For this reason, PKF, which had a New York office and New York personnel, was hired through Polylinks to deal with certain tasks associated with marketing the Four Seasons. (Findings of Fact 53 and 54.)

Because the PKF Agreement was executed by Daniel Yiu of Polylinks "on behalf of Hotel 57 LLC" (Finding of Fact 54), Petitioners assert that PKF was not their agent but rather was the agent of LLC whose activities cannot be attributed to them. Yet the Closing Statement and the Contract identify PKF as Petitioners' agent. (Findings of Fact 48 and 49.) Petitioners, who have the burden of proof in this matter,[14] did not explain this inconsistency. In any event, PKF could not have been solely the agent of LLC (and not of Petitioners) because LLC did not have the capacity to authorize the sale by Petitioners of shares two tiers above it in the ownership chain. Only Petitioners could have authorized those Transfers.

The Contract makes it clear that all the entities in the corporate structure were collectively considered the "Seller." (Finding of Fact 63.) In addition, between the time of the Contract and the Closing, Petitioners completely controlled LLC in connection with the Transfers and also in connection with how the Four Seasons was managed. Thus, for example, Petitioners

[14] City Charter §170.d.

agreed to "cause LLC" to do numerous tasks in connection with the Transfers, including having utility meters read prior to the Transfers, maintaining insurance policies, and not changing certain agreements related to the operation of the Four Seasons. (Finding of Fact 64.) Under the Contract, Petitioners agreed to permit Purchaser to interview key employees of LLC and have access to the Four Seasons. (Finding of Fact 65.) Petitioners represented in the Contract that they would cause the various entities below them in the ownership chain to continue to operate the property as they had before. (Finding of Fact 70.) Petitioners' complete control of the operations and activities of all the entities below them in the corporate structure allowed them to contract that LLC would complete the activities necessary to effectuate the Transfers.

Because Morgan Stanley, Polylinks, PKF and LLC all acted as agents for Petitioners to help effectuate the Transfers, their activities related to the Transfers may be considered to determine whether Petitioners had substantial nexus with the City. The record is very sparse regarding the details of how the Four Seasons was marketed and just who performed which functions since Petitioners provided witnesses who had very limited knowledge of these activities.[15] There is no doubt, however, that a hotel in the City was being marketed and that any serious prospective purchaser would have visited the Four Seasons and been shown around by someone acting for Petitioners. (Findings of Fact 55 and 56.)

The Marketing Memorandum leaves no doubt that in order to market the shares of the Lower Tier BVI Subs, Petitioners had to

[15] *See*, footnote 3, *supra*.

market the Four Seasons. The bulk of the Marketing Memorandum deals with information about the Four Seasons. (Finding of Fact 44.) In addition, the Marketing Memorandum relies on the strength of the City hotel market to establish the viability of the investment being marketed. (Finding of Fact 44.) It refers requests for information to a Morgan Stanley address in the City and to personnel located in the City (Finding of Fact 45.) Accordingly, Morgan Stanley personnel located in the City would necessarily have to have performed some marketing activities in connection with the presale activities that led to the Transfers.

Mr. Li, Milewood's officer, testified that Morgan Stanley initially attempted to market the deal, "but I think they had no success, and thereafter a few months were terminated the engagement." (Finding of Fact 46.) Nevertheless, it is clear from the documents that Morgan Stanley played a role in the Transfers. The Memorandum states that it was to be delivered to prospective purchasers "on receipt of a signed Confidentiality Agreement." (Finding of Fact 42.) The Contract specifically states that "Purchaser or its Affiliate dealt with Morgan Stanley . . . with respect to entering into a confidentiality agreement for this transaction . . .." (Finding of Fact 48.) By signing the confidentiality agreement, the Purchaser was asking to receive the Marketing Memorandum from Petitioners' agent and Morgan Stanley had at least some involvement in marketing the Transfers to the Purchaser who ultimately consummated the deal.

Mr. Li testified that if prospective purchasers were interested in the investment, they would contact Petitioners' "agent at the time," but he seemed unclear as to who that agent

was. (Finding of Fact 47.) The PKF Agreement, however, states that PKF's responsibilities included monitoring the sales/bidding process to maximize the value of the asset, and assisting in monitoring the due diligence exercises conducted by potential buyers. (Finding of Fact 54.) Ms. Chong, Edgemont's officer, explained that:

> prospective purchasers requested to view the hotel, and permission was given by Hotel 57 LLC for Polylinks International and/or PKF Consulting to approach the relevant personnel at Regent International so that arrangements were made for employees of the Four Seasons Hotel to show prospective purchasers around the hotel as was requested. (Finding of Fact 56.)

Thus, in addition to PKF/Polylinks, even the "employees of the Four Seasons Hotel" assisted with the marketing efforts.

Based on a combination of the activities of their officers, the activities of their agents Morgan Stanley and PKF, and the activities of LLC (their indirect subsidiary acting on behalf of Petitioners to help effectuate the Transfers), Petitioners had the minimum contacts needed for Due Process and the substantial nexus with the City required by the Commerce Clause.

Petitioners, citing *Japan Line, supra,* assert that the imposition of the RPTT to the Transfers also violates the Commerce Clause because it prevents the United States from "speaking with one voice" concerning foreign trade. Petitioners argue that when it enacted FIRPA,[16] Congress chose to not tax transactions such as the type of transfers at issue here and

[16] *See*, footnote 4, *supra*.

that it would prevent the federal government from "speaking with one voice" if the City's taxing power exceeded the power exerted by the federal government.

Under FIRPTA, gain is subject to U.S. federal income tax where there has been a transfer by a foreign person of a direct interest in real property located in the United States or the transfer of shares in a domestic corporation that owns either directly, or through controlling interests in lower-tiered entities,[17] an interest in real property located in the United States where the U.S. real property interest equals or exceeds fifty percent of the value of the assets of the corporation.[18] Unless the alien corporation has made an election to obtain certain tax benefits,[19] the gain on the transfer of shares in an alien corporation that owns U.S. real property is not subject to tax. Petitioners claim that by restricting FIRPTA to only transfers of stock of domestic corporations, the legislative and executive branches of the federal government came together to speak in a single voice to establish a policy which would respect and observe established norms of international taxation and, as a result, the City's attempt to imposed the RPTT on the transfer of shares in alien corporations violates the Commerce Clause.

Japan Line, supra, upon which Petitioners rely, dealt with an attempt by California to impose a property tax on cargo containers carried by Japanese shipping company vessels that were temporarily present in California as part of their

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[17] I.R.C. §§897(a)(1), 897(c)(5).

[18] I.R.C. §897(c)(2).

[19] I.R.C. §897(i).

international journey. The containers were used exclusively in the transportation of cargo in foreign commerce. The containers were registered in Japan, and were subjected to property tax on their unapportioned value in Japan. The Court found that California's tax resulted in actual multiple taxation of instrumentalities of foreign commerce and also violated the Customs Convention on Containers which the United States and Japan had signed.

Citing the scope of Congress' power to regulate commerce "with foreign Nations,"[20] and relying on cases which had previously construed that power, the Supreme Court held that a state tax may be unconstitutional under the Commerce Clause if either it "creates a substantial risk of international multiple taxation" or "impair[s] federal uniformity in an area where federal uniformity is essential" and thus prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." 441 U.S. at 451.

The Court noted that under the Customs Convention on Containers "containers temporarily imported are admitted free of 'all duties and taxes whatsoever chargeable by reason of importation.' . . . The Convention reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic.'" 441 U.S. 434, 453 [citations omitted]. Because Japan did not tax American-owned containers, the imposition of a tax by California created the risk of retaliation by Japan which would be felt by the United States as a whole. Other states might then follow California's lead

[20] U.S. Const. Art. I, § 8, Cl.3.

subjecting foreign-owned containers to various degrees of multiple taxation depending upon the ports the containers entered. This would make it impossible for the United States to "speak with one voice" in the conduct of foreign trade.

Cases decided subsequent to *Japan Line*, *supra*, have indicated that the holding in *Japan Line* should be read very narrowly and that not all cases where state taxing schemes differ from the federal scheme are unconstitutional. *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). Both *Container Corp., supra*, and *Barclays*, *supra*, upheld the constitutionality of California's franchise tax provision that used a worldwide combined reporting method to determine the tax owed by unitary multinational corporate group members doing business in California notwithstanding that the Internal Revenue Code permits separate accounting for the federal corporate income tax.[21] The Supreme Court noted that unlike the companies at issue in *Barclays* and *Container Corp.,* the cargo containers at issue in *Japan Line, supra,* were used as "instrumentalities of foreign commerce." Moreover, the Court found no indication of a specific Congressional intent to preempt California's tax. *Barclay's supra*, 512 U.S. 298, 321. The Court noted that "the tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units such as States." 512 U.S. 298, 321-22.

Here, Petitioners do not assert that there is a substantial risk of international multiple taxation. Nor could they since

[21] *Container Corp.* dealt with a domestic-based multinational group while *Barclays* dealt with a foreign-based multinational group.

both Petitioners and the BVI Subs are IBCs, which pay virtually no tax in the BVI and which make distributions tax-free to shareholders who are non-resident in the BVI.[22] Petitioners rely solely on the requirement in Japan Line that the federal government "speak with one voice." However, for this requirement to be at issue, there must be an "instrumentality of foreign commerce" that is at risk of being taxed. The business of operating a hotel in the City is a purely local business. It does not become an "instrumentality of foreign commerce" because its indirect owners are foreign persons.

There also must be some evidence that Congress intended to preempt state and local taxing authority when enacting FIRPTA. Petitioners have cited no authority for this proposition and the Appellate Division, Third Department, citing *Container Corp., supra*, specifically held that FIRPTA did not preempt state or local taxing authority. *Bredaro*, supra 146 A.D.2d 155, 159.

In addition, FIRPTA operates very differently from the RPTT. FIRPTA is part of the federal income tax regime and includes in taxable income gains from certain dispositions. It does not impose an excise tax on a transfer of real property or shares in an entity that owns real property. U.S. tax policy usually does not restrict the ability of localities to impose taxes different from the federal scheme. Indeed, tax treaties to which the United States is a party generally specifically do

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[22] *See*, William L. Blum, *British & United States Virgin Islands Companies: Caribbean Tax Planning Opportunities For The Pacific Rim*, http://library.lp.findlaw.com/articles/file/00482/004223/title/subject/topic/corporations%2… 12/10/03.

not apply to state or local taxation. *Barclays*, *supra*, 512 U.S. 298, 321.[23]

Petitioners argue that when enacting FIRPTA, Congress refrained from imposing the tax on the transfer of alien shares because that would be beyond the country's taxing jurisdiction. Petitioners point to the study conducted by the U.S. Treasury Department[24] which discussed the taxation of the gain from the sale of real property and summarized the approach taken by various other countries. The Treasury Report noted that where the real property had been transferred to a corporation and the shares of the corporation were the subject of the sale, "[i]f the corporation is foreign with respect to the country where the real property is located, gain on the sale of its shares is almost inevitably beyond the scope of a country's tax law." Treasury Report, p. 61. Petitioners assert that by refraining from taxing shares of alien corporations, FIRPTA respected established norms of international taxation. Petitioners also contend that by attempting to tax the transfer of shares in alien corporations, the City is ignoring federal and international policy in this area, and preventing the United States from speaking with a single voice, in violation of the Commerce Clause.

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[23] *See, also*, Technical Explanation to United States Model Income Tax Convention of September 20, 1996 re Article 2.

[24] U.S. Dep't of the Treasury, *Taxation of Foreign Investment in Real Estate* (hereafter the "Treasury Report") (1979). The Treasury Report was prepared in response to the Revenue Act of 1978, P.L. 95-500, which directed the Treasury Department to conduct a study and analysis of the appropriate tax treatment of income from or gain from the sale of interests in United States property held by foreign persons or alien corporations. *See*, Treasury Report, transmittal letter.

However, international law regarding the appropriate jurisdiction to tax has evolved significantly since 1980 when FIRPTA was enacted. In the 2003 version of the The Organization for Economic Cooperation and Development ("OECD") Model Tax Convention on Income and Capital ("OECD Treaty"),[25] Article 13, which deals with capital gains, provides, with certain specified exceptions, that capital gains are taxable only in the country of the taxpayer's residence. The specified exceptions, which permit the source country to tax the gains include gains from the sale of immovable property (Article 13(1)) and gains from the sales of "shares deriving more than 50 percent of their value directly or indirectly from immovable property," both of which may be taxed by the country in which the immovable property is located (Article 13(4)). Article 13(4) is not limited to shares of corporations organized under the law of the country in which the immovable property is located. Thus, if FIRPTA had been enacted more recently, Congress would likely not have been concerned that imposing a tax on the gain from transfers of shares in alien corporations would violate international taxing norms.

Article 13(4) is a new provision, which was first included in the 2003 draft of the Convention.[26] While the 2003 draft of

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[25] The OECD is an international organization of which the United States is a member. It publishes a model tax treaty, the OECD Treaty, which is used by the United States and many other countries when negotiating bi-lateral treaties. *See,* Joel D. Kuntz and Robert J. Peroni, 2 *U.S. International Taxation* (2002), p. C4-11. In general, the OECD Treaty allocates the right to tax a particular type of income between the country of source and the country of the taxpayer's residence depending upon various factors. The OECD Treaty is periodically updated to reflect changes in the understanding of various nations regarding international taxation.

[26] *Cf*, Kenneth P. Brewer, A Rose By Any Other Name . . .Could Be New York Real Property, 10 *State Tax Notes* 799, fn. 9 (March 11, 1996), describing an earlier version of the OECD Treaty.

the OECD Treaty was promulgated after the year of the Transfers, it reflects an already evolved notion of jurisdiction to tax since it takes time for new ideas to be incorporated into a document such as the OECD Treaty. Accordingly, imposing the RPTT on the Transfers does not violate modern international tax law.

In light of all the above, the imposition of the RPTT does not violate the Due Process Clause or the Commerce Clause of the United States Constitution.

Petitioners assert that even if sufficient nexus existed to meet the Due Process and Commerce Clause requirements, Article XVI, section 3 of the State Constitution precludes the imposition of the RPTT on the Transfers. Petitioners rely on the first sentence of the first clause of Article XVI, section 3:

> Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation,[27] and if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation.

[27] Petitioners quoted and relied only on the language of this provision up to this point.

As the legislative history of Article XVI, section 3 indicates, it was: "designed to assure nonresidents that they could 'keep their money and securities [in New York] without any fear that the established legislative policy [of nontaxability] will be changed' (Journal and Documents, N.Y.S. Const. Conv., 1938. Doc. No. 2, p.3)." *Ampco Printing-Advertisers' Offset Corp. v. City of New York*, 14 N.Y.2d 11, 24 (1964), *appeal dismissed*, 379 U.S. 5 (1964). Here, the question of whether the stock certificates were physically present in the City was not raised and was never a basis for asserting the RPTT on the Transfers.

The balance of Article XVI, section 3 states:

> Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed.

595 Investors, *supra*, holds that the RPTT is not an *ad valorem* tax prohibited by the State Constitution. The RPTT is not a tax "levied for mere ownership of property imposed at any regular interval, but only on the occurrence of a single event: to wit, a transfer." This holding is consistent with the legislative history. As Senator Saxe, the chairman of Committee on Taxation, declared (2 Revised Record, N.Y.S. Const. Conv., 1938, pp. 1113-1114):

> 'It is a further assurance to the people of the whole United States that if they send intangibles into the State of New York they are not going to be subject to ad valorem

> taxation' . . . After noting that the provision would not bar imposition of a stock transfer tax (2 Revised Record, *op. cit.*, pp. 1114-1115), Mr. Saxe went on to say (p. 1115): 'we want to make it impossible for the Legislature itself, or for the Legislature to delegate the right, to levy an excise tax on the mere possession of the property. In other words, the property may enjoy that privilege or *it may be used for some purpose, and then you can levy an excise tax on it if and when it is used' (Emphasis supplied.)" Ampco Printing-Advertisers', supra.*

Accordingly, Article XVI, section 3 of the State Constitution does not bar the imposition of the RPTT to the Transfers.

Petitioners contend that even if the imposition of the RPTT to the Transfers meets both the federal and State constitutional requirements, it is nevertheless impermissible as being outside the scope of the enabling legislation. Petitioners note that the Closing took place in Chicago and that Tax Law section 1220 provides that: "any tax imposed under the authority of this article shall apply only within the territorial limits of the city . . . imposing the tax . . .. "

The City's authority to impose the RPTT is derived from the enabling legislation set forth in Tax Law Article 29 (Tax Law §§1201 *et seq.*). Tax Law section 1201(b) permits the City to impose the RPTT on both conveyances by deed and on transfers of economic interests in real property. In addition, Tax Law section 1201(b) specifically provides that:

> Such taxes may be imposed on any conveyance or transfer of real property or interest

> therein where the real property is located in such city regardless of where transactions, negotiations, transfers of deeds or other actions with regard to the transfer or conveyance take place, subject only to the restrictions contained in section twelve hundred thirty [providing exemptions for certain governmental and charitable organizations].

This portion of Tax Law section 1201(b) was originally enacted as an amendment[28] to the predecessor of Tax Law section 1201(b)[29] in response to the decision in *Realty Equities Corporation of New York v. Gerosa*, 22 Misc.2d 817 (S. Ct. N.Y. Cty. 1959). Prior to the amendment, the State enabling legislation contained the following provisions:

> (3) A tax imposed hereunder shall have application only within the territorial limits of any such city . . ..
> . . .
> (6) This act shall not authorize the imposition of a tax on any transaction, originating and/or consummated outside the territorial limits of any such city, notwithstanding that some acts be necessarily performed with respect to such transaction within such limits.

Realty Equities, supra, dealt with a transfer of real property located in the City where the deed was delivered outside the City. *Realty Equities* held that subdivision (6) above precluded the imposition of the RPTT on such a transfer. Following the 1960 amendment to the enabling act,[30] which

[28] Ch. 785, L. 1960.

[29] Ch. 370, L. 1959, amending Ch. 215, L. 1955.

[30] *See*, footnote 28, *supra*.

specially addressed subdivision (6) but did not affect subdivision (3), transfers of real property located in the City were held subject to the RPTT notwithstanding that the deeds were delivered outside the City. *Samkoff v. Gerosa*, 29 Mis.2d 844 (S Ct. N.Y. Cty. 1961).

Former subdivision 3 (now Tax Law section 1220) simply limits the City's imposition of the RPTT to transfers of real property or economic interests in real property where the real property is located in the City. It places no limitation with regard to where the transfer takes place. Since the enabling legislation does not require that the Transfers occur in the City, the imposition of the RPTT to the Transfers is not outside the scope of the enabling legislation

ACCORDINGLY, IT IS CONCLUDED THAT:

A. The imposition of the RPTT on the Transfers does not violate the Due Process Clause of the United States Constitution because (1) the values subject to tax are attributable to the benefits given by the City and (2) Petitioners, through their officers and agents, had the minimum connections with the City necessary for *in personem* jurisdiction.

B. The imposition of the RPTT on the Transfers does not violate the Commerce Clause of the United States Constitution because Petitioners, through their officers and agents, had substantial nexus with the City.

C. The imposition of the RPTT on the Transfers does not violate Article XVI, section 3 of the State Constitution because

the RPTT is not imposed on the presence in the City of the stock certificates and the RPTT is not an *ad valorem* tax.

D. The RPTT enabling legislation does not preclude the imposition of the RPTT on a transfer that closed outside the City since the provision in question merely limits the imposition of the tax to transfers where the property that is the subject of the transfer is located in the City.

The Petitions of Corwood Enterprises, Inc., Edgemont Enterprises, Inc., Bosworth Enterprises, Inc., Surrey Hill Enterprises, Inc. and Milewood International, Inc., dated October 26, 2000, are hereby denied and the Notices of Disallowance, dated August 1, 2000, are hereby sustained.

DATED: March 11, 2004
New York, New York

MARLENE F. SCHWARTZ
Administrative Law Judge