

New York City Tax Appeals Tribunal

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: In the Matter of :  
: : DECISION  
1 WORLD TRADE CENTER LLC, et al. :  
: TAT (E) 07-34(CR), et al.  
: Petitioners. :  
: :  
: :  
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The Commissioner of Finance of the City of New York (“Respondent”) filed an Exception to a Determination of an Administrative Law Judge (the “ALJ”) dated December 3, 2009 (the “ALJ Determination”). The ALJ Determination cancelled Notices of Determination issued by the New York City Department of Finance (the “Department”) that asserted New York City Commercial Rent Tax (“CRT”) deficiencies against 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC and 5 World Trade Center LLC, now known as 3 World Trade Center LLC, (collectively “Petitioners” or the “Silverstein Lessees”) for the 12-month CRT tax years beginning June 1, 2001, 2002, 2003, 2004 and 2005 (the “Tax Years”). Petitioners filed a Cross-Exception to the ALJ Determination (“Petitioners’ Cross-Exception”).

Petitioners appeared by Elliot Pisem, Esq. and Joseph Lipari, Esq. of Roberts & Holland LLP. Respondent appeared by Frances J. Henn, Esq., Senior Corporation Counsel, and Joshua M. Wolf, Esq., Assistant Corporation Counsel, New York City Law Department. The Parties filed briefs and oral argument was held before this Tribunal.

Each of the Silverstein Lessees entered into an Agreement of Lease with the Port Authority of New York and New Jersey (the “Port Authority”) dated as of July 16, 2001, having a term of 99 years (individually a “Lease” and collectively the “Leases”).<sup>1</sup> Each Lease related to one of four buildings, respectively known as “One World Trade Center,” “Two World Trade Center,” “Four World Trade Center” and “Five World Trade Center” (the “Buildings”). One World Trade Center and Two World Trade Center also were collectively known as the “Twin Towers.”<sup>2</sup>

The Buildings were located on the World Trade Center site in Manhattan (the “WTC Site”), which contained approximately 16 acres bounded on the north by Vesey Street, on the south by Liberty Street, on the east by Church Street and on the west by West Street.<sup>3</sup> When the Leases were entered into, in addition to the Buildings, the WTC Site contained a Marriott Hotel, a Customs House, retail space leased to an unrelated party and a PATH train terminal.<sup>4</sup> The WTC Site is owned by the Port Authority.

Section 2.1 of each Lease provided, in pertinent part:

The Port Authority hereby lets to the Lessee and the  
Lessee hereby hires and takes from the Port Authority at the  
World Trade Center:

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<sup>1</sup> Taxpayers’ Exhibits (“T. Ex.”) 1-4. For purposes of this Decision, we adopt those Findings of Fact of the ALJ restated in this Decision, although paraphrased and amplified. We have not adopted the remaining Findings of Fact of the ALJ or any of the additional findings of fact requested by Respondent. Petitioners did not request any additional findings of fact.

<sup>2</sup> T. Ex. 31, ¶8.

<sup>3</sup> T. Ex. 1, Exhibit T. *See also* Tr. 36.

<sup>4</sup> *See* T. Ex. 1, § 1.200 and Exhibit T. “PATH” is defined in Lease section 1.199 as the Port Authority Trans-Hudson Corporation. PATH operates a commuter rail line between Manhattan and New Jersey. *See* McKinney’s Uncons. L. Ch. 5.

(a) all that certain volume of space occupied by the Building (as hereinafter defined) and any replacements thereof, . . . situate, lying and being in the Borough of Manhattan, County, City and State of New York, the exterior limits of any horizontal plane which lies within said volume of space being more particularly bounded and described on “Exhibit A” attached hereto. . . .

(b) together with all buildings now or hereafter occupying such volume of space demised under Section 2.1(a) above . . . and any additions thereto, or replacements thereof (individually and collectively, the “Building”). . . .

2.1.1 The Building and the Appurtenances are hereinafter referred to, individually and collectively, as the context requires, as the “Premises”. [Emphasis in original.]<sup>5</sup>

Exhibit A to each Lease includes a metes and bounds legal description of the location of the Building covered by that Lease. The Leases also provided for certain rights that effectively served as easements over certain common areas.<sup>6</sup> In addition, the Lease for One World Trade Center included certain sub-grade space.<sup>7</sup>

The Premises as defined in the Leases (the “Premises”) did not include the land underlying the Buildings. The Leases were identical in all material respects relevant to this Decision other than with regard to the premises covered by each Lease and the rent payable.<sup>8</sup> In the aggregate, the Premises contained approximately ten million square feet of rentable office space in the four Buildings.<sup>9</sup> Because of the height of the Twin Towers, the volume

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<sup>5</sup> T. Ex. 1, § 2.1. Section 2.1 of the other Leases contained comparable language.

<sup>6</sup> T. Ex. 1, § 2.1(c).

<sup>7</sup> T. Ex. 1, Exhibit A.

<sup>8</sup> Each Lease was amended, in part, by an agreement effective as of July 24, 2001. T. Exs. 5-8. Those amendments are not material to this Decision.

<sup>9</sup> T. Ex. 10, § 1(c).

of space occupied by them accounted for approximately ninety percent of the total space leased to Petitioners under the Leases.<sup>10</sup>

Michael Levy was a Vice President and later Senior Vice President of the Silverstein Lessees.<sup>11</sup> Mr. Levy was actively involved in negotiating the Leases with the Port Authority and structuring the transactions.<sup>12</sup> Mr. Levy testified that Petitioners intended to operate the Buildings, and for a short time did operate the Buildings, by subleasing the leased space to subtenants and receiving subtenant rent.<sup>13</sup> Mr. Levy further testified that Petitioners anticipated that the subtenant rents would greatly exceed the amounts payable to the Port Authority under the Leases.<sup>14</sup>

The Buildings were totally destroyed in the terrorist attacks on the World Trade Center on September 11, 2001. Mr. Levy testified that as a result of the destruction of the Buildings, the subtenants that had previously occupied space in the Buildings stopped paying rent to Petitioners. Mr. Levy further testified that while some of the subleases technically continued after the Buildings were destroyed, Petitioners' property insurer did not let Petitioners terminate the leases and Petitioners did not pursue those subtenants to continue to collect rent.<sup>15</sup>

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<sup>10</sup> This includes the sub-grade space in the leased premises for One World Trade Center. T. Ex. 31, ¶9.

<sup>11</sup> He continued to hold those positions with respect to 2 World Trade Center LLC, 4 World Trade Center LLC and 3 World Trade Center LLC (formerly 5 World Trade Center LLC) at the time of the Hearing in this matter. Mr. Levy held that position with respect to 1 World Trade Center LLC until it was transferred to the Port Authority in November 2006. T. Ex. 31, ¶1; Tr. 21-22. *See infra* text accompanying note 49.

<sup>12</sup> Tr. 22.

<sup>13</sup> Tr. 28; T. Ex. 31, ¶4.

<sup>14</sup> Tr. 27-28; T. Ex. 31, ¶4.

<sup>15</sup> Tr. 28-29.

Section 15.1 of the Leases contained the following provision regarding rebuilding the Premises in the event of a casualty (the “Rebuilding Obligation”):

If the Premises . . . shall be damaged or destroyed by fire, the elements, the public enemy or other casualty, or by reason of any cause whatsoever and whether partial or total, the Lessee, at its sole cost and expense, and whether or not such damage or destruction is covered by insurance proceeds sufficient for the purpose, shall remove all debris resulting from such damage or destruction, and shall rebuild, restore, repair and replace the Premises . . . substantially in accordance, to the extent feasible, prudent and commercially reasonable, with the plans and specifications for the same as they existed prior to such damage or destruction or with the consent in writing of the Port Authority, which consent shall not be unreasonably withheld, conditioned or delayed, make such other repairs, replacements, changes or alterations as is mutually agreed to by the Port Authority and the Lessee. Such rebuilding, restoration, repairs, replacements, or alterations shall be commenced promptly and shall proceed with all due diligence. . . .

Mr. Levy testified that after September 11, 2001, he was involved with the Port Authority, other governmental entities and the insurers to address the various issues that arose after the destruction of the World Trade Center.<sup>16</sup> Mr. Levy credibly testified that after September 11, 2001, Petitioners understood that due to the “huge loss of life” in the attacks, office towers could not be rebuilt on the portion of the WTC Site previously occupied by One World Trade Center and Two World Trade Center (the “Twin Towers Footprints”) because the various government entities involved, including the State of New York (the “State”), the City of New York (the “City”), the Lower Manhattan Development Corporation (the “LMDC”) and the Port Authority, would require a memorial to the victims of the attacks to be located there.<sup>17</sup> He later testified that “In the early days following 9/11 and during the

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<sup>16</sup> Tr. 23.

<sup>17</sup> Tr. 31-32.

design concept, there were a number of constituencies who felt that the site should not be redeveloped, and that office buildings should not be rebuilt, and it should be an entire park.”<sup>18</sup>

Immediately following the September 11, 2001, terrorist attacks, the City took control of the entire WTC Site to conduct activities relating to rescuing any survivors, recovering human remains, cleaning up the debris and shoring up the “bathtub.”<sup>19</sup> Mr. Levy testified that from September 11, 2001, until approximately July 1, 2002, neither the Petitioners nor the Port Authority had control over the WTC Site, and no work could be performed by Petitioners, the Port Authority or any private party anywhere on the WTC Site. Mr. Levy testified that on approximately July 1, 2002, the City returned control over the WTC Site to the Port Authority. Mr. Levy further testified that from that time through the remainder of the Tax Years, the Port Authority managed and controlled the entire WTC Site and controlled access to the WTC Site.<sup>20</sup>

After the Port Authority regained control over the entire WTC Site, Petitioners and the Port Authority entered into an Interim Access Agreement dated as of July 18, 2002 (the “Interim Access Agreement”),<sup>21</sup> under which Petitioners agreed to give the Port Authority access and control over the Premises, as defined in the Leases,<sup>22</sup> for a limited period of time not to expire before January 1, 2004, called the “Exclusive Period”<sup>23</sup> to enable the Port

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<sup>18</sup> Tr. 43-44.

<sup>19</sup> Tr. 29-30; T. Ex. 31, ¶6. Mr. Levy described the “bathtub” as the concrete barrier surrounding the WTC Site that keeps the Hudson River out. Tr. 30.

<sup>20</sup> T. Ex. 31, ¶¶7 and 11.

<sup>21</sup> T. Ex. 16.

<sup>22</sup> T. Ex. 16, Recitals.

<sup>23</sup> T. Ex. 16 § 1. That date was extended periodically with the last extension ending on May 31, 2004. See T. Exs. 17-21.

Authority to make repairs to the existing PATH facilities, which were not included in the original Premises, to construct additional PATH facilities, both temporary and permanent, and to enable the Metropolitan Transit Authority (“MTA”) to repair subway lines.<sup>24</sup> Mr. Levy testified that Petitioners understood that because it was a national emergency, the government was going to do this work in any event.<sup>25</sup>

Notwithstanding the access and control granted to the Port Authority, the Interim Access Agreement also gave Petitioners and “their representatives, architects, engineers and other construction consultants” access to the Premises during the term of the Interim Access Agreement to perform work “relating to the design and other pre-construction” aspects of the restoration of the Premises and “for the performance of” that restoration work.<sup>26</sup> Section 5 of the Interim Access Agreement provided that:

During the Exclusive Period, the Port Authority shall control all access to and within, and coordinate activities at, the Premises. . . . [C]onflicting needs for access to and use of the Premises . . . shall be resolved in favor of the Port Authority and the MTA, with reasonable consideration given to the Lessees’ need for such access and use, and . . . [after the end of the Exclusive Period] conflicting needs for access to and use of the Premises . . . shall be resolved by mutual agreement of such parties cooperating in good faith and in the absence of such agreement in favor of . . . Lessees.

Mr. Levy testified that the Port Authority controlled access to the WTC Site and Petitioners or their agents had to receive permission from the Port Authority to enter any portion of the WTC Site.<sup>27</sup>

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<sup>24</sup> T. Ex. 16, Recitals.

<sup>25</sup> Tr. 54.

<sup>26</sup> T. Ex. 16, § 5.

<sup>27</sup> Tr. 30-31, 41-42.

Under the Interim Access Agreement, the Port Authority assumed “any risk of loss or damage of any kind whatsoever” and agreed to indemnify Petitioners against any liability arising out of the Port Authority’s work and the construction of the PATH facilities or otherwise during the Exclusive Period, other than as a result of willful misconduct, gross negligence or bad faith.<sup>28</sup> Petitioners agreed to indemnify the Port Authority and the MTA against any liability arising out of Petitioners’ work at the WTC Site during the term of the Interim Access Agreement.<sup>29</sup> The parties to the Interim Access Agreement recognized that these provisions represented a modification of the indemnification obligation of Petitioners under the Leases.<sup>30</sup>

In addition, the Interim Access Agreement required the Port Authority to insure the Premises during the Exclusive Period and relieved Petitioners of insurance obligations under the Real Estate Operating Agreement.<sup>31</sup>

Finally, the Port Authority was responsible for providing a construction fence around the Premises, as defined, and providing a security force.<sup>32</sup>

The term of the Interim Access Agreement ended on the later of the date the PATH work was substantially completed or the end of the Exclusive Period.<sup>33</sup>

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<sup>28</sup> T. Ex. 16, § 7(a) and (b). The Port Authority also agreed to cause the MTA to provide a similar indemnification. *Id.*

<sup>29</sup> T. Ex. 16, § 7(d).

<sup>30</sup> T. Ex. 16, § 7(e).

<sup>31</sup> T. Ex. 16, § 8(a) and (c). The Real Estate Operating Agreement as it existed at the time the Interim Access Agreement was entered into is not included in the Record.

<sup>32</sup> T. Ex. 16, § 6; Tr. 55.

<sup>33</sup> T. Ex. 16, § 3(a).

Mr. Levy testified that although Petitioners had the Rebuilding Obligation under the Leases, Petitioners could not rebuild until a comprehensive redevelopment plan was adopted by the relevant government entities and the Port Authority issued building permits for the new construction.<sup>34</sup>

In the Spring of 2002, the Port Authority and the LMDC requested design proposals for the WTC Site. They held a design competition, including a public referendum at the Javits Center, and reviewed various proposed site plans. In February 2003, when the design competition was completed, the Governor of the State and the Mayor of the City joined the Port Authority and the LMDC in announcing the selection of a design concept proposed by Daniel Libeskind for the redevelopment of the WTC Site.<sup>35</sup> Mr. Levy testified that the Port Authority and the LMDC did not seek Petitioners' consent in the manner of conducting the site plan design competition or in the selection of the design plan.<sup>36</sup>

Petitioners and the Port Authority entered into an amendment to the Leases dated as of December 15, 2003 (the "2003 Amendment").<sup>37</sup> The 2003 Amendment modified the description of the Premises covered by the original Leases to remove the Twin Towers Footprints and certain surrounding space from the Premises so that a permanent PATH terminal and a memorial, among other facilities, could be built at those locations, and to include in the Premises other space on which Petitioners could build five office towers containing at least ten million square feet of office space<sup>38</sup> to be built "generally in the

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<sup>34</sup> Tr. 32-33, 42-43.

<sup>35</sup> Tr. 33; T. Ex. 31, ¶8.

<sup>36</sup> Tr. 34.

<sup>37</sup> T. Ex. 10.

<sup>38</sup> T. Ex. 10, ¶1(a) and (c). These portions of the 2003 Amendment formalized provisions included in a letter agreement among the parties dated December 1, 2003. T. Ex. 9.

locations shown on [the attached site diagram] (or in other locations mutually acceptable to [Petitioners] and the Port Authority. . . .)”<sup>39</sup> One of the five new towers to be built by Petitioners was designated as the Freedom Tower, which also would be identified as One World Trade Center but would not be built on the footprint of the original One World Trade Center tower.<sup>40</sup> Another of the new towers (“Tower 5”) was to be located south of Liberty Street in an area that was outside the original WTC Site.<sup>41</sup> Mr. Levy testified that the descriptions and space allocated to the Petitioners in the 2003 Amendment were “very crude” lacking detail, distances and elevations.<sup>42</sup>

In 2004, Petitioners, the Port Authority and others entered into another agreement relating to the rebuilding at the WTC Site. That agreement, dated November 24, 2004, was called the World Trade Center Design and Site Plan Agreement (the “2004 Agreement”).<sup>43</sup> Under the 2004 Agreement, the signatories approved the locations of buildings, streets, and other facilities and agreed that they would cooperate with respect to any refinements or changes to the plan.<sup>44</sup> Mr. Levy testified that although this agreement was materially more detailed than the 2003 Amendment, it was still tentative, failing to contain sufficient information to allow Petitioners to rebuild.<sup>45</sup>

In 2004, after Petitioners released a complete design of the Freedom Tower to the public, the City Police Department raised security concerns and the Port Authority would not

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<sup>39</sup> T. Ex.10, ¶1(c).

<sup>40</sup>Tr. 44-45.

<sup>41</sup> T. Ex. 10, Exhibit A.

<sup>42</sup> Tr. 37.

<sup>43</sup> T. Ex. 11.

<sup>44</sup> The locations of the five office buildings to be built by Petitioners (T. Ex. 11, Exhibit A) were substantially the same as under the 2003 Amendment (T. Ex. 10, Exhibit A.) T. Ex. 11, ¶1.

<sup>45</sup> Tr. 38-39.

give Petitioners a building permit.<sup>46</sup> This required a substantial redesign of the Freedom Tower to address the security concerns.<sup>47</sup>

In November 2006, Petitioners and the Port Authority entered into yet another agreement called the Master Development Agreement for Towers 2/3/4 of the World Trade Center (the “2006 Master Development Agreement”).<sup>48</sup> In connection with the execution of the 2006 Master Development Agreement, the ownership of 1 World Trade Center LLC, the lessee of One World Trade Center, was transferred to the Port Authority.<sup>49</sup> Under the 2006 Master Development Agreement, the Port Authority undertook to build both the Freedom Tower and Tower 5,<sup>50</sup> both of which were to have been built by one or more of the Silverstein Lessees under the 2003 Amendment and the 2004 Agreement. The remaining three Silverstein Lessees were given the rights to build three buildings (Towers 2, 3 and 4) containing an aggregate of 6.2 million square feet of office space.<sup>51</sup> None of these buildings was to be located on the Twin Towers Footprints. At the same time, the remaining three Silverstein Lessees executed agreements amending and restating their respective Leases containing, among other modifications, adjustments to the monthly payments to be made thereafter to the Port Authority for the replacement space.<sup>52</sup> The portion of the WTC Site that was set aside for a memorial and memorial museum included the Twin Towers Footprints and the surrounding area.<sup>53</sup>

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<sup>46</sup> Tr. 42-43.

<sup>47</sup> Tr. 52.

<sup>48</sup> T. Ex. 12.

<sup>49</sup> T. Ex. 12, Recitals.

<sup>50</sup> T. Ex. 12, § 1.1(a)(ii).

<sup>51</sup> T. Ex. 12, §§ 1.1(a)(i) and 1.3(b)(iv).

<sup>52</sup> T. Exs. 13-15, § 5.

<sup>53</sup> T. Ex. 12, Exhibit I.

The 2006 Master Development Agreement established a development schedule under which, beginning in 2008, the Port Authority agreed to perform “certain infrastructure preparatory work necessary for the development of” Towers 2, 3 and 4.<sup>54</sup> The Port Authority was required to complete that work and deliver portions of the WTC Site to the remaining Silverstein Lessees in “Construction-Ready Condition” so they could commence building Towers 2, 3 and 4.<sup>55</sup> The Port Authority was required to pay liquidated damages to the remaining Silverstein Lessees if it failed to do so.<sup>56</sup> None of the prior interim agreements provided specific dates by which the Port Authority was required to deliver portions of the WTC Site to Petitioners to permit them to start construction or contained any penalty provisions if the Port Authority failed to do so.<sup>57</sup>

Each Lease required a lump sum called the Initial Rent Payment to be paid at the beginning of the Lease term (the “Initial Rent Payment”).<sup>58</sup> The Initial Rent Payments were made in July 2001. The Initial Rent Payments were described in the Leases as paid “for the letting of the Premises.”<sup>59</sup> The total amount of the Initial Rent Payments under the four Leases was approximately \$491,000,000.<sup>60</sup> Mr. Levy testified that the Initial Rent Payments were viewed by the parties to the Leases as consideration relating to the entire 99-year term of the Leases.<sup>61</sup>

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<sup>54</sup> T. Ex. 12, Recitals at 3.

<sup>55</sup> T. Ex. 12, § 1.3(d)(i).

<sup>56</sup> T. Ex. 12, § 1.3(e)(ii).

<sup>57</sup> Tr. 39-40.

<sup>58</sup> T. Ex. 1, § 5.1.

<sup>59</sup> *Id.*

<sup>60</sup> Tr. 24.

<sup>61</sup> Tr. 27.

Monthly payments were required to be made throughout the 99-year term of the Leases.<sup>62</sup> Petitioners made the monthly payments required under the Leases throughout the Tax Years although the Buildings had been destroyed.

Section 5.5 of the Leases provided:

The Lessee shall report the Initial Rent Payment and the Base Rent for United States federal income tax purposes in accordance with the allocation set forth in Schedule 5.1(b). . . . The Lessee and the Port Authority agree that all amounts payable as the Initial Rent Payment and Base Rent . . . are specifically allocated to monthly rental periods under this [Lease] in accordance with the “Allocated Rent Payment Amount” column of Schedule 5.1(b). The Initial Rent Payment and Base Rent shall be paid solely in accordance with Section 5.1 and 5.2 hereof, and nothing in this Section 5.5 or Schedule 5.1(b) shall require the Lessee or the Port Authority to make any other payments or entitle the Lessee or the Port Authority to any offset, credit, refund or other adjustment of any amount payable pursuant to this [Lease]. [Emphasis in original.]

Mr. Levy testified that Petitioners were required to report rent payments under Internal Revenue Code (the “IRC”) section 467 for federal income tax purposes, which he described as “a straight-lining of rent for income tax purposes with an interest factor attached to it.”<sup>63</sup>

Section 14.1.1 of the Leases required Petitioners to maintain casualty insurance and Lease section 14.3 required the Port Authority to be named as an additional insured. Section 14.1.2 of the Leases also required Petitioners to maintain:

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<sup>62</sup> Section 5.2 of the Leases required equal monthly payments of Base Rent over the Lease term. Additional rental payments were required under sections 5.3 and 5.6 of the Leases.

<sup>63</sup> Tr. 57.

Loss of Revenue/Business interruption insurance in such amounts as shall reasonably be required by the Port Authority for protection against loss of the payments which the Lessee is required to make to the Port Authority . . . for a period of at least three (3) years when the Premises, or a portion thereof, is out of operation. . . .

Mr. Levy described Petitioners' business interruption insurance proceeds as payments for lost subtenant rents and testified that Petitioners made the periodic payments due to the Port Authority under the Leases after September 11, 2001, from their business interruption insurance proceeds.<sup>64</sup>

Section 15.1.4 of the Leases provided that:

no destruction of, or damage to the whole or any part of the Premises or any structures, improvements, . . . or other property located thereon by fire or any other casualty, cause or condition shall permit the Lessee to surrender or terminate this [Lease] or shall relieve the Lessee from its liability to make payment of any monies, charges, fees or rentals or additional rentals payable under this [Lease] or from any of its other obligations hereunder. The Lessee waives any rights now or hereafter conferred upon the Lessee by statute or otherwise to quit or surrender the Premises and terminate this [Lease] or any part thereof, or to any suspension, diminution, abatement or reduction of rent on account of any destruction or damage, except as elsewhere specifically provided herein. The parties stipulate that neither the provisions of Section 227 of the Real Property Law of New York nor those of any other similar statute shall extend or apply to this [Lease].

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<sup>64</sup> Tr. 56.

Mr. Levy testified that Petitioners believed that if they stopped making payments under the Leases, the Port Authority would most likely commence litigation. Petitioners were concerned that if they were held to be in default under the Leases they could lose “all [their] rights” to build on alternative locations at the WTC Site once an agreement was reached regarding rebuilding.<sup>65</sup>

For the CRT Tax Year beginning June 1, 2001, and ending May 31, 2002, Petitioners filed annual CRT returns and reported as rent all Initial Rent Payments and several periodic rent payments. Those returns reported a total amount of CRT due of \$11,710,289.<sup>66</sup> For the Tax Years beginning June 1, 2002, 2003 and 2004, Petitioners filed CRT returns on which they reported as rent all of the payments made to the Port Authority during those Tax Years.

On their annual CRT returns for the Tax Years ending May 31, 2002, 2003, 2004 and 2005, each Petitioner computed its “base rent” subject to CRT by deducting from all amounts of rent paid during the period, including the Initial Rent Payments, all the rents received from subtenants in the same tax period. On those returns, Petitioners also subtracted as the equivalent of subtenant rents, business interruption insurance proceeds described on statements attached to the returns as “calculated by reference to amounts which otherwise would have constituted rents received or due from subtenants. . . .” As a result, Petitioners’ returns showed no CRT liability for the Tax Years ending May 31, 2003, 2004 and 2005.

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<sup>65</sup> Tr. 52-53; T. Ex. 31, ¶11.

<sup>66</sup> City’s Exhibits (“City’s Ex.”) A, B, C and D; T. Ex. 29 at 4. Petitioners’ annual CRT returns for the first Tax Year beginning June 1, 2001, reported CRT payments in the aggregate amount of \$10,953,275 previously made on December 20, 2001. City’s Exs. A, B, C and D. With their annual CRT returns for that Tax Year, Petitioners also paid interest of \$192,816 for the period September 20, 2001 (the due date for the quarterly CRT return for the period beginning June 1, 2001) to December 20, 2001. No copies of Petitioners’ quarterly CRT returns for that quarter are included in the Record.

Petitioners also filed quarterly CRT returns for the period June 1, 2005, through August 31, 2005, on which they reported no base rent claiming an exemption from the CRT based on new section 11-704.a.6 of the Administrative Code of the City of New York (the “Code”), which exempted from the CRT all tenants within the “World Trade Center Area” including the WTC Site, effective August 30, 2005.<sup>67</sup>

Respondent audited Petitioners’ CRT Returns for the Tax Years and disallowed the deductions for the business interruption insurance proceeds as subtenant rents. The Department issued a Notice of Determination, dated May 25, 2007, to each of the Petitioners (collectively the “Notices”) asserting CRT deficiencies and substantial understatement penalties and interest<sup>68</sup> as follows:

1 World Trade Center LLC:

<b>Tax Year</b>	<b>Principal</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
2001/2002	\$ 4,521,322.56	\$2,073,131.28	\$ 452,132.26	\$ 7,046,586.10
2002/2003	2,181,901.68	815,141.50	218,190.17	3,215,233.35
2003/2004	2,037,455.28	585,036.48	203,745.53	2,826,237.29
2004/2005	2,048,576.83	411,427.05	204,857.68	2,664,861.56
2005/2006	512,087.04	52,919.43	51,208.70	616,215.17
<b>Total</b>	<b>\$11,301,343.39</b>	<b>\$3,937,655.74</b>	<b>\$1,130,134.34</b>	<b>\$16,369,133.47</b>

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<sup>67</sup> L. 2005, ch. 2, § A4, eff. Aug. 30, 2005. For the period June 1, 2005, through August 31, 2005, although the Department computed an amount of base rent and asserted CRT deficiencies for that period, Respondent did not expressly address Petitioners’ claim of exemption for that period.

<sup>68</sup> Computed to June 15, 2007.

2 World Trade Center LLC:

<b>Tax Year</b>	<b>Principal</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
2001/2002	\$ 4,354,221.41	\$1,996,511.53	\$ 435,422.14	\$ 6,786,155.08
2002/2003	2,163,361.32	808,214.96	216,336.13	3,187,912.41
2003/2004	1,949,127.38	559,673.94	194,912.74	2,703,714.06
2004/2005	1,959,779.76	393,593.44	195,977.98	2,549,351.18
2005/2006	489,855.42	50,621.99	48,985.54	589,462.95
<b>Total</b>	<b>\$10,916,345.29</b>	<b>\$3,808,615.86</b>	<b>\$1,091,634.53</b>	<b>\$15,816,595.68</b>

5 World Trade Center LLC (now known as 3 World Trade Center LLC):

<b>Tax Year</b>	<b>Principal</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
2001/2002	\$ 478,253.92	\$219,290.49	\$ 47,825.39	\$ 745,369.80
2002/2003	253,893.74	94,852.74	25,289.37	374,035.85
2003/2004	216,376.64	62,130.56	21,637.66	300,144.86
2004/2005	216,385.65	43,457.93	21,638.57	281,482.15
2005/2006	54,223.56	5,603.50	5,422.36	65,249.42
<b>Total</b>	<b>\$1,219,133.51</b>	<b>\$425,335.22</b>	<b>\$121,813.35</b>	<b>\$1,766,282.08</b>

4 World Trade Center LLC:

<b>Tax Year</b>	<b>Principal</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
2001/2002	\$249,690.55	\$114,488.92	\$24,969.06	\$389,148.53
2002/2003	127,484.33	47,627.14	12,748.43	187,859.90
2003/2004	112,767.21	32,380.07	11,276.72	156,424.00
2004/2005	113,140.29	22,722.60	11,314.03	147,176.92
2005/2006	28,196.22	2,913.82	2,819.62	33,929.66
<b>Total</b>	<b>\$631,278.60</b>	<b>\$220,132.55</b>	<b>\$63,127.86</b>	<b>\$914,539.01</b>

The ALJ cancelled the Notices concluding that Petitioners' payments to the Port Authority after September 11, 2001, were not rent paid for taxable premises, and therefore not subject to the CRT, because Petitioners ceased to have the right to occupy specific space following the government takeover of the WTC site on September 11, 2001.

Respondent takes exception to the ALJ's determination that Petitioners' payments to the Port Authority after September 11, 2001, were not subject to the CRT. Respondent asserts that Petitioners' rights under the Leases to occupy the Premises at the WTC site and obligations under the Leases to pay rent and rebuild the Buildings continued throughout the Tax Years and, therefore, Petitioners' payments of rent to the Port Authority were subject to the CRT during the Tax Years. Respondent also takes exception to the ALJ's cancellation of the Notices contending that the ALJ rejected Petitioners' arguments for proration of the Initial Rent Payments and for the deduction of business interruption insurance proceeds as subtenant rents in footnote 59 to the ALJ Determination. Respondent asserts, therefore, that based on the calculations submitted by Petitioners (T. Ex. 29), there is still a CRT deficiency owed by Petitioners of \$6,420,388 plus interest for the portion of the first Tax Year ending September 10, 2001.

Petitioners take exception to the ALJ's statement in footnote 59 to the ALJ Determination that she found all other arguments to be unpersuasive. Petitioners assert that the proceeds of business interruption insurance were deductible as subtenant rent for CRT purposes and that the Initial Rent Payment should not have been included in base rent subject to the CRT when paid in July 2001 but should be prorated either over the entire 99-year term of the Leases or on a daily basis over the period July 16, 2001, through May 31, 2002.

For the following reasons we modify the ALJ Determination to hold that the proper amount of the total CRT deficiencies should be \$6,420,388 for the portion of the first Tax

Year ending September 10, 2001, only, plus interest, and reduce the deficiencies asserted in the Notices accordingly.<sup>69</sup> We also cancel all penalties asserted in the Notices.

During the Tax Years, the CRT was imposed under Code section 11-702 on “base rent” paid by a tenant. Various exclusions, credits and exceptions not relevant to this Decision apply. Code section 11-701.7 defines “base rent” as:

The rent paid for each taxable premises by a tenant to his or her landlord for a period, less the amounts received by or due such tenant for the same period from any tenant of any part of such premises. . . .

Code section 11-701 defines “premises” as “real property or part thereof, and any structure thereon or space therein”<sup>70</sup> and “taxable premises” as “premises in the city occupied, used or intended to be occupied or used for the purpose of carrying on . . . any trade, business, profession, vocation or commercial activity. . . .”<sup>71</sup> The Parties do not dispute that when the term of the Leases began, the Premises as defined in the Leases constituted taxable premises for purposes of the CRT and Petitioners were tenants of those taxable premises. The initial question before us is whether, after September 11, 2001, and for the remainder of the Tax Years, Petitioners paid rent for taxable premises. If not, amounts paid by them to the Port Authority for periods after that date were not base rent subject to the CRT. Code section 11-703 provides that “it shall be presumed that all premises are taxable premises. . . .” In the case before us, the threshold question is whether premises existed after September 11, 2001,

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<sup>69</sup> Specifically, we reduce the CRT deficiency asserted against 1 World Trade Center LLC for that period to \$3,022,765, the CRT deficiency asserted against 2 World Trade Center LLC for that period to \$2,910,964, the CRT deficiency asserted against 4 World Trade Center LLC for that period to \$166,928 and the CRT deficiency asserted against 5 World Trade Center LLC for that period to \$319,731. We affirm the ALJ’s cancellation of the CRT deficiencies for the Tax Years beginning June 1, 2002, 2003, 2004 and 2005.

<sup>70</sup> Code § 11-701.4.

<sup>71</sup> Code § 11-701.5.

and during the Tax Years rather than whether existing premises were taxable premises during that period. Therefore, the presumption of Code section 11-703 initially does not apply.

The Premises covered by the Leases did not include the land under the Buildings. Rather, Lease section 2.1 provides that the Port Authority leased to Petitioners:

(a) all that certain volume of space occupied by the Building . . . situate, lying and being in the Borough of Manhattan, County, City and State of New York, the exterior limits of any horizontal plane which lies within said volume of space being more particularly bounded and described on “Exhibit A” attached hereto . . . and any replacements thereof. . . .

(b) together with all buildings now or hereafter occupying such volume of space demised under Section 2.1.(a) above . . . and any additions thereto, or replacements thereof (individually and collectively, the “Building”). . . .<sup>72</sup>

Exhibit A to each Lease includes a metes and bounds legal description of the location of the Building covered by that Lease.

The definition of “premises” for CRT purposes includes not only real property but “any structure thereon or space therein.”[Emphasis added.]<sup>73</sup> Although the Buildings ceased to exist after September 11, 2001, the volume of space previously occupied by the Buildings continued to exist. Therefore, Respondent argues:

Throughout the Tax Years Petitioners . . . leased spaces within real property, as well as the right to replacement buildings located therein. . . . Absent an effective modification to the Premises under the Leases, reduced to writing and signed by the parties thereto, Petitioners’ rights and obligations persisted

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<sup>72</sup> T. Ex. 1, § 2.1. Section 2.1 of the other Leases is identical in all relevant respects.

<sup>73</sup> Code § 11-701.4.

regardless of anything they may have been told by the Port Authority, and regardless of any deprivation of access by a non-party to such Leases.<sup>74</sup>

We do not accept Respondent's argument. The Premises covered by the Leases included not only the volume of space occupied by the Buildings and the Buildings themselves but also "any replacements thereof." In the event the Buildings were damaged or destroyed in whole or in part, the Leases obligated Petitioners to remove any debris and repair or replace the Premises:

substantially in accordance, to the extent feasible, prudent and commercially reasonable, with the plans and specifications for the same as they existed prior to such damage or destruction or with the consent in writing of the Port Authority, . . . make such other repairs, replacements, changes or alterations as is mutually agreed to by the Port Authority and the [Petitioner].[Emphasis added.]<sup>75</sup>

The above language clearly contemplates alternative replacements for the Premises if reconstruction of the original Buildings is not "feasible, prudent and commercially reasonable" or if the parties agree on other replacements. Lease section 15.1 does not restrict the location or nature of those replacements other than to require them to be agreeable to the parties. As the Premises covered by the Leases included the Buildings and the volume of space occupied by the Buildings as well as "any replacements thereof," we disagree with the ALJ's conclusion that the Premises do not include replacement space at another location.<sup>76</sup>

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<sup>74</sup> Brief in Support of Respondent's Exception to the Determination of the Administrative Law Judge ("Respondent's Brief") at 4.

<sup>75</sup> Lease § 15.1.

<sup>76</sup> ALJ Determination at 25-26.

The definition of Premises included “all buildings now or hereafter occupying such volume of space.” As the definition already included any building occupying the original volume of space in the future, it would have been redundant also to refer to replacements of the Buildings if that phrase were intended to include only replacement of the buildings in their original location.

We also disagree with Respondent’s assertion that until alternative space was agreed to in writing by the parties to the Leases, the Premises continued as premises for CRT purposes after September 11, 2001, because Petitioners continued to have full rights to occupy and rebuild in the original volume of space occupied by the Buildings.<sup>77</sup>

Mr. Levy testified that after September 11, 2001, Petitioners understood that because of the “huge loss of life” a memorial to the victims would have to be built on the Twin Towers Footprints and Petitioners would not be permitted to rebuild the Twin Towers at their original locations.<sup>78</sup> That understanding is consistent with the fact that the Port Authority and the LMDC requested design proposals and launched a competition in the Spring of 2002 and selected a design in February 2003.<sup>79</sup> Mr Levy’s understanding also is borne out by documents in the Record, beginning with a letter agreement dated December 1, 2003,<sup>80</sup> which include a variety of tentative plans for redevelopment of the WTC Site, and all of which excluded the Twin Towers Footprints from the definition of Premises. Respondent did not cross-examine Mr. Levy on this point nor has Respondent identified anything in the Record that contradicts Mr. Levy’s testimony as to Petitioners’ understanding. We reject Respondent’s assertion that Mr. Levy’s testimony should be disregarded because he was

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<sup>77</sup> Respondent’s Brief at 52.

<sup>78</sup> Tr. 31-32.

<sup>79</sup> T. Ex. 31, ¶8.

<sup>80</sup> T. Ex. 9.

incompetent to testify as to any matters outside of his specific responsibilities after September 11, 2001.<sup>81</sup> Mr. Levy testified that after that date he was “getting involved with the Port Authority and dealing with the post-9/11 issues that arose with the Port Authority, with lenders – also with the various government entities that also got involved, [and] with litigation with the property insurers. . . .”<sup>82</sup> Respondent did not object to his testimony during the hearing and, again, did not cross-examine Mr. Levy on these matters. Based on Mr. Levy’s description of his responsibilities after September 11, 2001, in our opinion, he was in a position to know the views of Petitioners as to whether they would be permitted to rebuild on the Twin Towers Footprints.<sup>83</sup>

After September 11, 2001, the location and nature of the Premises covered by the Leases were thrown into sufficient doubt that we cannot conclude that there were identifiable premises covered by the Leases after that date for purposes of the CRT. We believe the Record amply demonstrates that by July 2002, when control over the WTC Site was returned to the Port Authority, the parties did not expect Petitioners to rebuild the Twin Towers or the other Buildings as originally designed in their original location under Lease section 15.1 even though removal of the Twin Towers Footprints from the definition of “Premises” under the Leases was not reduced to writing until December 2003.<sup>84</sup>

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<sup>81</sup> Respondent’s Brief at 55.

<sup>82</sup> Tr. 23.

<sup>83</sup> We also reject Respondent’s contention that Mr. Levy’s testimony should be disregarded under the parol evidence rule. Respondent’s Brief at 53. The parol evidence rule prohibits the admission of evidence of prior or contemporaneous oral agreements to vary the unambiguous terms of a valid written agreement. Prince, Richardson on Evidence § 11-101, Farrell 11th ed. Mr. Levy’s testimony is not parol evidence because it is evidence of circumstances following the execution of the Leases and is considered solely with respect to the question of whether, after September 11, 2001, the parties intended to rebuild the Buildings as they originally existed.

<sup>84</sup> We reject Respondent’s argument that removal of the Twin Towers Footprints from the Premises by the 2003 Amendment did not effectively also remove the volume of space previously occupied by the Buildings above the Twin Towers Footprints. Respondent’s Brief at 36. It would be absurd for Petitioners to expect to reconstruct the Twin Towers in the air space *above* the Twin Towers Footprints after agreeing

While the Leases prohibited Petitioners from constructing replacement Premises at alternative locations without the written consent of the Port Authority, the Record demonstrates that there was an unwritten consensus that the Twin Towers would not be rebuilt as and where they had existed beginning at least with the commencement of the design competition in Spring 2002. For many reasons, even after the 2003 Amendment was entered into, Petitioners and the Port Authority were unable to reach any conclusive agreement on the nature and location of any replacements of the Premises covered by the Leases. The entire Record reflects a constantly moving target as to the location, size and design of any replacement buildings, which were not finalized during the Tax Years. While the general locations and aggregate square footage of the Freedom Tower and the other four replacement buildings appeared to be agreed upon by December 1, 2003, there was no indication of the size of each building and it was clear that further modifications were possible. The 2003 Amendment provides that the Premises covered by the Leases would include “the same amount of commercially viable Class A above-grade . . . office space as existed in the Premises leased by [Petitioners] as of September 10, 2001 . . . in five office towers to be constructed generally in the location shown on the Site Diagram (or in other locations mutually acceptable to [Petitioners] and the Port Authority. . . .” [Emphasis added.]<sup>85</sup> Similarly, the 2004 Agreement provides that “[t]he parties will cooperate reasonably and in good faith to further refine the Dimensioned Site Plan. . . .”<sup>86</sup>

We note that each of the Silverstein Lessees was a tenant of one of the four Buildings covered by the Leases. Nothing in the Record indicates how much replacement square footage each Silverstein Lessee was to have in any replacement building. Mr. Levy testified

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to remove the Twin Towers Footprints themselves from the definition of Premises.

<sup>85</sup> T. Ex. 10, ¶1(c)(i).

<sup>86</sup> T. Ex. 11, Dimensioned Site Plan, ¶1.

that the various site diagrams in the Record were not sufficiently detailed to permit Petitioners to begin construction of any replacement buildings.<sup>87</sup>

Respondent argues that it is not necessary that specific Premises be identified for Petitioners to be tenants of taxable premises, only the “existence of ‘real property or [a] part thereof, and any structure thereon or space therein,’ which is subject to a landlord-tenant relationship” is required.<sup>88</sup> Respondent cites Matter of Debenhams, Inc., 92 A.D.2d 829 (1st Dept. 1983), *appeal after remand* 117 A.D.2d 344 (1st Dept. 1986), in support of their position. In that case, the taxpayer entered into an agreement with the operator of a number of department stores to operate a shoe department within a particular store in the City. However, the agreement did not identify the specific location within the store where the taxpayer would operate. The court did not accept the taxpayer’s argument that it was not a tenant of taxable premises due to that lack of specificity.

In our opinion, the present case is distinguishable from that in Matter of Debenhams, Inc., *supra*. While the agreement in that case did not identify the specific location within the store where the taxpayer would operate, the agreement was clear that the space would be somewhere within the store. By contrast, nothing in Lease section 15.1 establishes any boundaries within which replacement premises must be located. We note that ultimately one of the proposed replacement buildings, Tower 5, was to be located outside the WTC Site. In our opinion, something more than an amorphous reference to replacement premises is required for those premises to qualify as premises for CRT purposes. Respondent concedes that it would have been “insufficient” and “likely objectionable” for the Port Authority to

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<sup>87</sup> Although the Libeskind design for the Freedom Tower was initially adopted in February 2003, in 2004 objections voiced by the City Police Department caused that design to be modified. Ultimately the Port Authority assumed responsibility for building the Freedom Tower. Tr. 33-34, 42-43; T. Ex. 12, § 1.1(a)(ii).

<sup>88</sup> Respondent’s Brief at 4. Emphasis added by Respondent.

convey merely some volume of space in the Leases without a “point of reference to identify the location and dimensions of said space” such as the reference to volume of space occupied by the Buildings in Lease section 2.1(a).<sup>89</sup> That statement directly contradicts Respondent’s argument that the Premises continued to exist after September 11, 2001, in the form of the volume of space previously occupied by the Buildings. The destruction of the Buildings, coupled with the unlikelihood that they would be rebuilt as and where they had existed, created precisely the situation that Respondent admits would be “insufficient” and “objectionable”, a lease for a volume of space without any identifying reference points.

Respondent asserts that the Interim Access Agreement supports his position that the Premises continued to exist as premises for CRT purposes after September 11, 2001, because in that agreement, the Port Authority requested, and Petitioners granted, access to the Premises.<sup>90</sup> We disagree. The term “Premises” for purposes of the Interim Access Agreement is defined as “a portion of the former World Trade Center site as more particularly described in each . . . Lease as the ‘Premises’ thereunder . . . such leased premises are collectively referred to herein as the ‘Premises’ . . .”<sup>91</sup> While the reference in the Interim Access Agreement to the Premises as originally defined in the Leases might indicate a recognition by the parties that those Premises continue to exist in some form, as the Buildings had been destroyed, the reference to Premises in the Interim Access Agreement could not have been intended to include the Twin Towers and the other Buildings, which were part of the original Premises. Further, we note that the competition for the redesign of the WTC Site began in Spring 2002, before the Interim Access Agreement was entered into, so the parties could not have been certain as to what the reconstruction would look like.

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<sup>89</sup> Respondent’s Brief at 33.

<sup>90</sup> Respondent’s Brief at 34, n.14.

<sup>91</sup> T. Ex. 16, first Recital.

We do not believe the reconstruction of the Premises as and where they originally existed was a primary purpose of, or contemplated by, the Interim Access Agreement. The Exclusive Period, during which the Port Authority had control and priority access, was to end when the Petitioners gave notice that they were ready to begin construction or when the Temporary PATH Facilities were completed, whichever came first, but in no event would the Exclusive Period end before January 2004. The Exclusive Period initially was a minimum of 18 months long and was extended to a minimum of almost two years by various amendments.<sup>92</sup> The Interim Access Agreement refers to Petitioners' right and obligation to reconstruct the Premises, gives them access to the Premises to engage in design and pre-construction activities and allows Petitioners to give not less than 15 days' notice before beginning reconstruction work. However, nothing in the Record indicates that Petitioners gave any such notice. Moreover, because the Port Authority had to approve any plans and issue a building permit<sup>93</sup> before any construction could begin, the Port Authority had substantial control over when reconstruction could actually start. Finally, the term of the Interim Access Agreement ended when the Temporary PATH Facilities were substantially completed even if Petitioners had not given notice that they were ready to begin the reconstruction work.<sup>94</sup>

Looking at the Interim Access Agreement as a whole shows that no specificity regarding the Premises was necessary to the primary purpose of that agreement. Rather, the references to the Premises reflect an acknowledgment by all parties that, although Petitioners had continuing rights and the Rebuilding Obligation under the Leases, the Port Authority as

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<sup>92</sup> The Exclusive Period began July 2002 and ultimately was extended to at least May 31, 2004.

<sup>93</sup> Lease § 15.1; Tr. 43.

<sup>94</sup> The term of the Interim Access Agreement ended on the later of the end of the "PATH Facilities Work Period" or the end of the Exclusive Period, which in turn, ended on the earlier of the end of the PATH Facilities Work Period" or the date Petitioners gave notice that they were ready to begin reconstruction work. T. Ex. 16, §§1, Definitions, 2(b) and 3(a).

landlord was undertaking necessary repairs to the PATH facilities<sup>95</sup> at the entire WTC Site and temporarily assuming concomitant responsibility for the entire WTC Site, including the portions originally leased to Petitioners, and that the Port Authority would of necessity need to move about the entire WTC Site to do that work without concern as to whether the Port Authority's actions were inconsistent with Petitioners rights or obligations under the Leases.

Based on the foregoing, we do not believe the broad references to the Premises in the Interim Access Agreement support a conclusion that identifiable premises for CRT purposes continued to exist under the Leases after September 11, 2001.

Respondent cites Matter of Conboy, Hewitt, O'Brien & Boardman, New York City Tax Appeals Tribunal (December 31, 1996), *aff'd*, 249 A.D.2d 235 (1st Dept. 1998), in support of his contention that Petitioners' continued payment of rent under the Leases is sufficient to qualify them as tenants paying rent for taxable premises subject to the CRT even if they no longer occupied the Premises.<sup>96</sup> In that case, the taxpayer, a law firm, leased premises in the City for a term ending April 30, 1984. In a November 1982 modification to the original lease, the parties agreed that the taxpayer would vacate the premises as of May 1983 but would continue to pay rent until the original lease termination date of April 30, 1984. However, the parties further agreed that if the landlord succeeded in re-renting the premises before that date, the taxpayer's obligation to pay rent would end and the landlord and the taxpayer would split any profit over the rent previously paid by the taxpayer. The landlord did not re-rent the premises prior to April 30, 1984.

This Tribunal found that while the tenant no longer occupied the space, it continued to "use" it for a commercial purpose by retaining an interest in the possible profit from the

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<sup>95</sup> And the MTA was going to make comparable repairs to the subway lines at the WTC Site.

<sup>96</sup> Respondent's Brief at 27-30.

landlord's re-renting of the space. Respondent argues that as in Matter of Conboy, Hewitt, O'Brien & Boardman, Petitioners in the present case continued to make payments and had a continuing intent to use the Premises by subletting them after September 11, 2001.<sup>97</sup> However that case is clearly distinguishable from the one before us.

In that case, the tenant voluntarily relinquished occupancy of the space while retaining a valuable right to share in any profit from re-renting the space. The continued existence of the space available to be re-rented was not an issue (as it is in the case before us); nothing prevented the landlord from immediately re-renting the space. By contrast, in the present case, clearly Petitioners did not voluntarily vacate the Premises. While Petitioners continued to make payments under the Leases, doing so was purely a function of the terms of the Leases, which required payment regardless of any damage to or destruction of the Premises.<sup>98</sup> Petitioners expressly waived any right they may have had under New York Real Property Law section 227, or any similar provision of law, to cease paying rent and surrender the Premises if the Premises were destroyed.<sup>99</sup> While it is likely that Petitioners intend to sublet any replacement buildings in the future, no replacement space was identified or built during the Tax Years. A future intent to sublet premises that do not presently exist is not enough to support a finding that the CRT applied to payments made by Petitioners after September 11, 2001.

This is not a situation where a tenant is temporarily displaced from taxable premises by a casualty and either prompt restoration can be started or the lease suspended or terminated. Here, the Buildings were totally destroyed by a terrorist act resulting in thousands of deaths. The Leases by their terms could not be terminated or rent payments

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<sup>97</sup> *Id.*

<sup>98</sup> Lease § 15.1.4.

<sup>99</sup> *Id.*

suspended as generally permitted by New York Real Property Law section 227. However, for a variety of reasons not of the parties' making, the parties could not agree promptly on the nature or location of any replacement space, and the final design and construction of alternative replacements were delayed for years.<sup>100</sup>

We conclude that the circumstances surrounding the destruction of the Buildings and the inability of the Port Authority and Petitioners to agree during the Tax Years as to how and where replacement Premises would be built require us to conclude that while Petitioners continued to make payments designated as rent under the Leases, there were no identifiable premises covered by the Leases after September 11, 2001, and during the remainder of the Tax Years such that those rent payments could constitute base rent subject to the CRT.<sup>101</sup>

Our conclusion that there were no identifiable premises after September 11, 2001, does not end our inquiry in the present case. Respondent contends that even if the Premises covered by the Leases ceased to qualify as taxable premises after September 11, 2001, Petitioners owe, in the aggregate, \$6,420,388 in CRT plus interest for the period through September 10, 2001, because their deduction of business interruption insurance proceeds as subtenant rents was improper and the Initial Rent Payments should not be amortized.<sup>102</sup>

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<sup>100</sup> While nothing in the Record indicates that the parties agreed specifically that it was not "feasible, prudent and commercially reasonable" to rebuild the Twin Towers as and where they originally existed, statements by the Port Authority and governmental entities to the effect that a memorial would have to be built on the Twin Towers Footprints might have been cited by any of the parties to the Leases as a basis for invoking that provision in Lease section 15.1.

<sup>101</sup> We do not conclude, as did the ALJ, that the CRT does not apply during the Tax Years because Petitioners were deprived of their rights under the Leases by government action. ALJ Determination at 26. The City returned control over the WTC Site to the Port Authority in July 2002. Thereafter the Port Authority as landlord controlled the WTC Site and all subsequent agreements between the Port Authority and Petitioners clearly recognized Petitioners' continuing rights and obligations under the Leases. *See, e.g.*, T. Ex. 9 at 10; T. Ex. 10, ¶3; T. Ex. 11, ¶22 and T. Ex. 16, § 13.

<sup>102</sup> Respondent's Brief at 17, 61-62. The ALJ concluded that because no taxable premises subject to the CRT existed after September 11, 2001, it was unnecessary to address Petitioners' arguments regarding the deductibility of business interruption insurance proceeds or the proration of the Initial Rent Payments.

Respondent's argument is based on Taxpayers' Exhibit 29, which is described in paragraph 18 of the Parties' Stipulation of Facts<sup>103</sup> as "calculations prepared by the public accounting firm of Friedman LLP, which illustrate the numerical consequences of various theories on which this matter might be resolved." Option 2 of Taxpayers' Exhibit 29 represents the amounts due if no post-September 11, 2001, rent payments are taxable and none of the business interruption insurance proceeds are deductible as subtenant rents. That computation includes all of the Initial Rent Payments as rent paid before September 11, 2001, as originally reported by Petitioners, and shows that Petitioners would owe \$6,420,388 in additional CRT, plus interest under Option 2.<sup>104</sup>

Petitioners argue that not only was their deduction of business interruption insurance proceeds as subtenant rents appropriate, but they also should have been allowed to prorate the Initial Rent Payments over either the entire 99-year term of the Leases or on a daily basis over the period beginning July 16, 2001, (the date the Initial Rent Payments were made) and ending May 31, 2002.<sup>105</sup> Petitioners contend that either proration method would eliminate any additional CRT liability for the Tax Years.

We will address the issue of the deductibility of the business interruption insurance proceeds first. Code section 11-701.7 defines base rent for CRT purposes as:

The rent paid for each taxable premises by a tenant to his or her landlord for a period, less the amounts received by or due such

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ALJ Determination at 30. The ALJ noted that she had considered all other arguments made by the Parties and found them unpersuasive. *Id.*, note 59.

<sup>103</sup> Tribunal's Exhibit 6.

<sup>104</sup> During oral argument, the Parties agreed that there was no dispute regarding the mathematical computations reflected in T. Ex. 29.

<sup>105</sup> Petitioners' Cross-Exception at 2-3.

tenant for the same period from any tenant of any part of such premises:

(i) as rent for premises which constitute taxable premises of such tenant. . . .

Therefore, to be deductible, subtenant rents must be paid or owed to the primary tenant (Petitioners in the present case) by a subtenant as rent for premises that constitute taxable premises of the subtenant.

Principles of statutory construction call for taxing statutes generally to be construed against the government and in favor of taxpayers where there is “doubt as to the construction” of the statute. McKinney’s Statutes § 313.c. This principle does not apply to exemptions or deductions. As a matter of statutory construction, because a deduction is a matter of legislative grace, “a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.” Matter of Grace v. New York State Tax Commission, 37 N.Y.2d 193, 197 (1975) (citations omitted.) Consequently, Petitioners bear the burden of proving their entitlement to the subtenant rent deduction for the business interruption insurance proceeds.

Code section 11-701.3 defines “[t]enant” as a “person paying or required to pay rent for premises as a lessee, sublessee, licensee or concessionaire.” Mr. Levy described Petitioners’ business interruption insurance proceeds as payments for lost subtenant rents. While Petitioners did not offer the insurance policies as evidence to support his testimony, Respondent did not contest Mr. Levy’s characterization of the business interruption insurance. Nevertheless, Mr. Levy’s testimony is insufficient to establish that the proceeds of that insurance represent rent paid by a subtenant as required by Code section 11-701.7. Code section 11-701.6 defines “[r]ent” as “consideration paid or required to be paid by a

tenant for the use or occupancy of premises. . . .” Petitioners did not offer any evidence that the insurers under the business interruption insurance policies entered into a landlord-tenant relationship with Petitioners nor did Petitioners establish that the insurance proceeds constituted rent paid for the use and occupancy of premises.<sup>106</sup>

Petitioners contend that the insurers under the business interruption policies stepped into the shoes of Petitioners’ subtenants.<sup>107</sup> Petitioners offer no support for that statement. Contrary to Petitioners’ contention, the equitable doctrine of subrogation:

entitles an insurer to “stand in the shoes” of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse.<sup>108</sup>

Under the doctrine of subrogation, the business interruption insurers stepped into Petitioners’ shoes, rather than those of their subtenants, acquiring Petitioners’ rights, if any, to collect post-September 11, 2001, rents. Mr. Levy testified that the insurers would not let Petitioners terminate the leases with their subtenants,<sup>109</sup> which would be consistent with an insurer’s desire to protect its subrogation rights.

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<sup>106</sup> Moreover, to be deductible, amounts paid by a subtenant must be paid as rent for taxable premises. As we have concluded that after September 11, 2001, there were no taxable premises for CRT purposes rented by Petitioners, it is impossible for any subtenant of Petitioners to pay rent to them for taxable premises after that date. And, because Petitioners could not have received any of the business interruption insurance proceeds attributable to periods before September 11, 2001, none of those proceeds could have been deductible as equivalent to subtenant rents paid for periods prior to September 11, 2001.

<sup>107</sup> Petitioners’ Memorandum of Law in Support of the Petitions (“Petitioners’ Memorandum”) at 22-23.

<sup>108</sup> ELRAC, Inc. v. Ward, 96 N.Y.2d 58, 75 (2001), *quoting* North Star Reins. Corp. v. Continental Ins. Co., 82 N.Y.2d 281, 294 (1993).

<sup>109</sup> Tr. 28-29.

Petitioners contend that had the insurance companies paid the proceeds directly to the Port Authority as an insured, those amounts would not be subject to the CRT, therefore, it is inappropriate to treat those insurance proceeds differently because Petitioners used those proceeds to pay the Port Authority.<sup>110</sup> We disagree. Code section 11-701.6 defines “[r]ent” as “consideration paid . . . by a tenant . . . valued in money, whether received in money or otherwise, including all credits and property or services of any kind. . . .” As money is fungible, the source of funds used by a tenant to pay rent is irrelevant to the question of whether those rent payments are subject to CRT. It also is irrelevant whether a tenant uses funds received from a third party to pay rent to its landlord or asks that third party to pay those funds directly to the landlord.

Our conclusion that business interruption insurance payments cannot be deducted as equivalent to subtenant rents is consistent with the federal tax treatment of such insurance proceeds. In Guthrie v. U.S., 323 F.2d 142 (6th Cir. 1963), the court held that a taxpayer could not claim a depletion allowance based on the sale price of coal with respect to business interruption insurance proceeds received by the taxpayer as compensation for lost coal sales. Similarly, in Newberry v. Commissioner, 76 T.C. 441 (1981), the U.S. Tax Court held that the IRS could not include in a sole proprietor’s earnings from self-employment for federal tax purposes business interruption insurance proceeds he received after his grocery store was destroyed by fire.

We now turn to Petitioners’ contention that they erroneously reported the Initial Rent Payments as rent for the first Tax Year attributable solely to the period prior to September 11, 2001, and that the Initial Rent Payments should have been prorated either over the entire

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<sup>110</sup> Petitioners’ Memorandum at 23, n.12.

99-year term of the Leases or on a daily basis over the period beginning July 16, 2001, and ending May 31, 2002.

Code section 11-701.6 defines rent as “consideration paid or required to be paid by a tenant for the use or occupancy of premises. . . .” Code section 11-703.a presumes that “all rent paid or required to be paid by a tenant is base rent until the contrary is established. . . .” Petitioners rely on Matter of Ted Bates Worldwide, Inc., New York City Tax Appeals Tribunal, Administrative Law Judge Division (March 31, 1994) for the proposition that payments made by a tenant that do not relate to a particular period of time are not included in base rent for CRT purposes.<sup>111</sup> However, that determination does not stand for that proposition. In that case, the taxpayer made a payment effectively to terminate a lease.<sup>112</sup> The administrative law judge concluded that the lease termination payment was not rent because it was not a payment for the right to occupy the premises in question. The administrative law judge did not rely on the fact that the payment did not relate to a particular period. Unlike the lease termination payment in that case, the Initial Rent Payments are described in Lease section 5.1 as paid “for the letting of the Premises.” Lease section 2.5 provides:

The Port Authority and the Lessee hereby acknowledge and agree that . . . the Initial Rent Payment and Rental are rents paid pursuant to the letting of the Premises. Neither the Lessee nor the Port Authority shall take or publish any position which is inconsistent with the immediately preceding sentence.

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<sup>111</sup> Petitioners’ Memorandum at 23. Petitioners also rely on Finance Letter Ruling (111)-CR-10/85 (October 24, 1985). We note that neither Matter of Ted Bates Worldwide, Inc., *supra*, an administrative law judge determination, nor the Finance Letter Ruling has any precedential value before this Tribunal. New York City Charter § 168(d); 19 RCNY § 16-05(a).

<sup>112</sup> The payment was structured as a sublease but the administrative law judge treated it according to the substance rather than the form of the transaction.

Thus it is clear that the parties to the Leases intended the Initial Rent Payments to be payments for use and occupancy of the Premises and prohibited Petitioners from taking any contrary position.<sup>113</sup>

The Leases call for several types of rent payments in addition to the Initial Rent Payments. Lease section 5.2 provides for “Base Rent” to be paid in accordance with Schedule 5.1(a) to the Leases “for each Lease Year . . . in equal monthly installments in advance . . . which amounts shall be prorated for any partial calendar months.” Similarly, Lease section 5.3 provides for the payment of “Additional Base Rent” in a fixed amount “for each full calendar year (which amount shall be prorated for any partial Lease Year) during the first thirty (30) Lease Years . . . in equal monthly installments in arrears. . . .” By contrast, Lease section 5.1 requires the Initial Rent Payment to be paid “on the Commencement Date [of the Lease] as adjusted for certain prorations and similar items set forth in the Contract to Lease.”<sup>114</sup> Nothing in the Leases describes the Initial Rent Payments as prepayments of rent for any future period or provides for any abatement or refund of those payments in the event the Leases are terminated early.

Petitioners have not pointed to any provision of the Leases to support their argument that the Initial Rent Payments apply to or should be prorated over the 99-year Lease term.<sup>115</sup>

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<sup>113</sup> If the Initial Rent Payments were not for use and occupancy of the Premises, they would have been subject to the City Real Property Transfer Tax, which applies to consideration for “the grant . . . of a leasehold interest in real property. . . .” Code § 11-2102.a.(10). *See* Code § 11-2102.a.(10)(iii).

<sup>114</sup> The Contract to Lease is defined in Lease section 1.77 as “the Agreement to Enter into Net Lease dated as of April 26, 2001, between the Port Authority and [each Petitioner].” Petitioners did not submit into evidence any of the Contracts to Lease.

<sup>115</sup> We note that Schedule 5.1(b) to each Lease allocates the Initial Rent Payments and the Base Rent payments under the Leases on an equal monthly basis over the entire 99-year term for purposes of IRC section 467. Note 1 to that schedule makes it clear that it is applicable only for that federal tax purpose and provides further that if the schedule doesn’t equal the “total fixed rent payable . . . for purpose [sic] of [IRC] Section 467 . . . then . . . this Schedule shall automatically . . . be deemed to be mathematically adjusted. . . .” Thus it is clear that Schedule 5.1(b) provides no support for prorating the Initial Rent Payments for other than the limited federal tax accounting requirement of IRC section 467. Nothing in the CRT statute applies federal tax principles to the CRT and Petitioners have not argued otherwise.

Mr. Levy testified that the Initial Rent Payments were viewed by the parties to the Leases as consideration for the entire 99-year term of the Leases.<sup>116</sup> While the ALJ found his testimony to be credible,<sup>117</sup> it is not supported by anything in the Leases or elsewhere in the Record.<sup>118</sup> Moreover, Mr. Levy's testimony is inconsistent with his signature on Petitioners' annual CRT returns, which reflected treatment of all of the Initial Rent Payments as attributable to the first quarter of the first Tax Year.<sup>119</sup>

Petitioners argue that they made the Initial Rent Payments "only upon their determination that the future stream of subtenant rents to be received by [Petitioners] would be greater than the amount of [the Initial Rent] Payments and the periodic payments to be made over the term of the Leases. Otherwise, it would not have been economically rational for [Petitioners] to enter into the Leases. . . ."<sup>120</sup> Code section 11-702.b states:

Nothing contained in this chapter shall be deemed to require payment of a double or multiple tax pursuant to this chapter on any part of any taxable premises.

According to Petitioners, the economics of the transactions dictate that the payments under the Leases, including the Initial Rent Payments, should be matched for CRT purposes with the subtenant rents anticipated to be received over the term of the Leases so as to avoid a

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<sup>116</sup> Tr. 27.

<sup>117</sup> ALJ Determination at 13.

<sup>118</sup> Mr. Levy's testimony regarding the Initial Rent Payments also is self-serving parol evidence that should not be given any weight. *See supra* note 83 for an explanation of the parol evidence rule.

<sup>119</sup> City's Exs. A, B, C and D. Those returns showed that CRT payments of \$10,953,275 were made on December 20, 2001. No quarterly CRT returns for the CRT quarter beginning June 1, 2001, and ending August 31, 2001, are included in the Record. However, those payments on December 20, 2001, and the payment with the annual returns of interest from September 20, 2001, the due date for any such quarterly return, suggest that Petitioners initially filed quarterly returns including the Initial Rent Payments in base rent for the period ending August 31, 2001.

<sup>120</sup> Petitioners' Memorandum at 24.

double or multiple tax. We find no support in the law for their position. Moreover, there is no evidence that a double or multiple tax was paid. Respondent did not disallow Petitioners' subtenant rent deduction for rents received from actual subtenants who might have been subject to the CRT.

Code section 11-702.b merely supports the subtenant deduction where a primary tenant and its subtenant are paying rent for the same premises and are both subject to the CRT on the rent each pays. Nothing in that section provides that if either tenant pays more for the premises than the other over the entire term of the lease, their rent payments should be matched so as to minimize the CRT due. Nor should Petitioners' expectations of profitability over a period of 99 years be controlling for CRT purposes. Nothing in the Leases guarantees Petitioners any profit from the transactions.

As an alternative argument, Petitioners suggest that the Initial Rent Payments be prorated on a daily basis over the period beginning July 16, 2001, when they were paid, and ending May 31, 2002, the end of the first Tax Year. This alternative also is unsupported by anything in the law or Record. The absence of any support for either position renders both as mere wishful thinking.

We now consider the penalties asserted in the Notices. Code section 11-715(j) imposes a penalty for any understatement of tax exceeding the greater of ten percent of the tax required to be shown on the return or \$5,000. The amount of any understatement of tax is reduced by any "portion of the understatement which is attributable to the tax treatment of any item by the taxpayer . . . with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return." *Id.* Disclosure is deemed adequate where a taxpayer provides information sufficient to enable the taxing authority to identify the potential controversy involved. Schirmer v.

Commissioner, 89 T.C. 277, 284–86 (1987), *see also* Matter of Fairchild Industries, Inc., New York State Tax Appeals Tribunal (Sept. 24, 1998), *aff'd on other grounds*, New York State Tax Appeals Tribunal (March 9, 2000).

In the present case, Respondent asserted a penalty under Code section 11-715(j) for a substantial understatement of CRT based on Petitioners' deduction of business interruption insurance proceeds as subtenant rents. Attached to Petitioners' CRT returns for the period ending May 31, 2002, is the following statement:

The "Rent received from SUBTENANT" provided on line 4 of this CR-A return includes both the aggregate Rents received from SUBTENANTS provided on the attached Schedule, as well as . . . proceeds paid pursuant to business interruption policies during the June 1, 2001 – May 31, 2002 year on account of the events of September 11, 2001, which proceeds are calculated by reference to amount which otherwise would have constituted rents received or due from subtenants during that annual period for purposes of the commercial rent tax.<sup>121</sup>

Petitioners' deduction of business interruption insurance proceeds on line 4 of the CRT returns was clearly described in the statements attached to the returns. Petitioners' disclosure contains relevant and correct information that sufficiently identifies the controversy regarding the subtenant deduction that was the basis for the penalty. Because the substantial understatement penalty is the only penalty asserted against Petitioners, we hereby abate all penalties asserted in the Notices.

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<sup>121</sup> City's Ex. A. Virtually identical statements were attached to all of Petitioners' CRT returns included in the Record.

Based on the foregoing, we hereby modify the ALJ Determination and reduce the CRT deficiency asserted against 1 World Trade Center LLC for the portion of the first Tax Year ending September 10, 2001, to \$3,022,765, plus interest, the CRT deficiency asserted against 2 World Trade Center LLC for that period to \$2,910,964, plus interest, the CRT deficiency asserted against 4 World Trade Center LLC for that period to \$166,928, plus interest, and the CRT deficiency asserted against 5 World Trade Center LLC for that period to \$319,731, plus interest. We affirm the ALJ's cancellation of the CRT deficiencies for the Tax Years beginning June 1, 2002, 2003, 2004 and 2005. We also cancel all penalties asserted in the Notices. Commissioner Firestone concurs in part and dissents in part in a separate opinion.

Dated:           October 12, 2011  
                  New York, New York

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GLENN NEWMAN  
President and Commissioner

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ELLEN E. HOFFMAN  
Commissioner

Commissioner Firestone concurring in part and dissenting in part:

I join those parts of the majority opinion holding that the business interruption insurance proceeds are not deductible as subtenant rent for purposes of the CRT, that Petitioners properly reported the Initial Rent Payments on their CRT returns, and that they should not be prorated over the 99-year Lease term or on a daily basis for the period beginning July 16, 2001, and ending May 31, 2002. Petitioners, thus, owe \$6,420,388 in additional CRT, plus applicable interest for the period through September 10, 2001. I also join the majority in abating the penalties asserted in the Notices.

Although I disagree with the majority's conclusion that there were no "premises" for CRT purposes after the destruction of the Buildings on September 11, 2001, I agree that the Twin Towers Footprints ceased to be premises for those purposes when Petitioners executed a letter agreement on December 1, 2003,<sup>122</sup> committing Petitioners to amend the Leases removing them from the Premises as defined therein. For reasons which differ from the majority's, and which I will explain more fully below, I also agree that the CRT does not apply to the period beginning September 11, 2001, and ending July 1, 2002. Although in my opinion, and contrary to the majority's view, the Premises on which Petitioners continued to pay rent were "premises," within the meaning of Code section 11-701.4, they ceased to be "taxable premises" within the meaning of Code section 11-701.5 during that period.

Having identified the areas in which I am in agreement with either the holding or the result of the majority's decision, I disagree with the majority's view that CRT does not apply to the period beginning July 1, 2002, and ending December 1, 2003, and, therefore, I respectfully dissent.

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<sup>122</sup>T. Ex. 9. Except as otherwise indicated in my dissent or otherwise inconsistent with my discussion of the facts, I generally adopt the majority's Findings of Fact.

## Summary

I differ with the majority on two crucial points. The first is the majority's factual finding that when control over the WTC Site was returned to the Port Authority on July 1, 2002, the Port Authority did not expect Petitioners to rebuild the Twin Towers on the original footprints.<sup>123</sup> I believe that the record clearly establishes the opposite conclusion.

The Interim Access Agreement between the Port Authority and Petitioners goes into significant detail as to how the Port Authority would coordinate its work on the PATH lines with Petitioners' design, pre-construction and actual construction work in rebuilding the Premises on the original footprints. It expressly provides that Petitioners are to give notice to the Port Authority when they are ready to begin rebuilding on those original locations. If the Port Authority, at that time, had intended a memorial to be built there instead, it would have been absurd for the Port Authority to have provided with such specificity how the various steps in rebuilding on the original footprints would be coordinated, going so far as to provide a mechanism for Petitioners to notify the Port Authority when they were ready to begin the actual construction work on the original footprints.

Mr. Levy's testimony does not contradict the Interim Access Agreement. Although he testified that Petitioners became aware from statements by the Port Authority and other governmental agencies that a memorial would be built on the Twin Towers Footprints, nothing in his testimony fixes a date for when Petitioners had such an understanding, except for the February 2003 date when Daniel Libeskind's design concept was accepted. Mr. Levy also testified about a design competition held in the Spring of 2002. However his testimony, when considered together with his affidavit, describes the competition as being in a

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<sup>123</sup>Decision at 23.

preliminary stage, soliciting feedback from the general public, with no indication that there was any intention at that time to replace the Twin Towers anywhere but on the Twin Towers Footprints.

I believe that the mutual understanding to change the location of the Premises was a process that evolved over time. First the Port Authority decided not to rebuild on the Twin Towers Footprints, followed by a bargaining process with Petitioners to offer them alternative space in locations acceptable to them and, finally, culminating in the December 1, 2003 letter agreement (the “Letter Agreement”) where Petitioners agreed to remove the Twin Towers Footprints from the definition of Premises under the Leases.

Had the Record clearly showed that when control of the Premises was returned to the Port Authority on July 1, 2002, Petitioners and the Port Authority had an unwritten understanding that a memorial would be built on the Twin Towers Footprints and that acceptable space at an acceptable alternative location would be provided to Petitioners, although with some of the details still to be negotiated, I would have likely agreed with the majority’s result; but under a different legal theory.<sup>124</sup> That is my second point of disagreement with the majority opinion.

The majority holds that after September 11, 2001, the location of the Premises covered by the Leases was sufficiently uncertain such that there were no identifiable premises for purposes of the CRT. The majority’s legal conclusion, therefore, is that there were no “premises” within the meaning of Code Section 11-701.4. Even if I agreed with the predicate facts found by the majority which form the grounds for this legal conclusion, I could not conclude that there were no premises for purposes of the CRT. After the Buildings were

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<sup>124</sup>Provided that the Interim Access Agreement was silent about rebuilding on the original footprints.

destroyed, Petitioners continued to rent identifiable real property, i.e., the original footprints and the air rights over them, within which Petitioners were required to rebuild the Premises pursuant to the Rebuilding Obligation under the Leases. However if the facts were as I stated in the preceding paragraph, I would have likely concluded that the “premises” were not “taxable premises” within the meaning of Code Section 11.701.5.

Had the facts been as I described above, Petitioners would have had no expectation of rebuilding on the original footprints because the Port Authority would have assured them of acceptable substitute Premises elsewhere. In that case Petitioners could not have intended to rebuild and sublease the Premises on the original footprints, and the Premises would not have become taxable after the City returned control over them to the Port Authority. Those are not the facts of this case, however. The Port Authority intended the replacement Premises to be rebuilt on the original footprints when it executed the Interim Access Agreement with Petitioners on July 18, 2002.

**The business arrangement.**

The business arrangement contemplated by Petitioners and the Port Authority under the Leases was intended to generally shift all of the anticipated risks for the total or partial destruction of the Buildings to Petitioners and their insurers, whether for acts of terrorism or any other cause, for practically all<sup>125</sup> of the 99-year term of each Lease. Under this arrangement, the Port Authority was to receive uninterrupted rental payments from Petitioners during the 99-year Lease terms, and Petitioners were to continually sublease the Buildings and receive the rents during the same 99-year period.

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<sup>125</sup>Under the limited circumstances described in § 15.1.1 of the Leases, Petitioners could terminate a Lease during the last fifteen years of the 99-year Lease term (generally where damage to or destruction of the Building exceeds 10% of the full insurable value of the Building before such damage or destruction). T. Ex. 1, § 15.1.1.

Petitioners' 99-year commitment to sublease the Buildings would make no sense, and the Port Authority's anticipated 99-year revenue streams would not survive the destruction of the Buildings, unless Petitioners were given both the right and the obligation to rebuild the Buildings and sublease them. Petitioners' obligation to continually pay rent under this business arrangement, therefore, carried with it Petitioners' continual intent to sublease the Buildings and, if destroyed, to rebuild them for that purpose.

The Port Authority anticipated the possibility of a terrorist attack and the total destruction of the Buildings and provided for that possibility in the Leases. In all events, the Leases intended the landlord-tenant relationship to remain intact. Petitioners had the unconditional obligation to continue paying rent, even if the Buildings were completely destroyed, and waived their rights under Section 227 of the Real Property Law to surrender the Premises upon their destruction.<sup>126</sup>

The financial risk of Petitioners' ongoing rental payments to the Port Authority in the event the Buildings were destroyed was, for the most part, to be borne by Petitioners' insurers. Petitioners were required to purchase business interruption insurance to protect the Port Authority from the loss of Petitioners' rent payments during the period the Buildings were out of operation (covering a minimum of three years) "with no exclusion for terrorist acts."<sup>127</sup> The actual amount of these business interruption insurance proceeds reported by Petitioners on their CRT returns during the Tax Years ending 2002, 2003 and 2004 was more than double the amount Petitioners paid in rent during that same three-year period after the September 11<sup>th</sup> attacks.<sup>128</sup>

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<sup>126</sup>T. Ex. 1, § 15.1.4 (quoted in the majority's opinion).

<sup>127</sup>T. Ex. 1, §§ 14.1.1 and 14.1.2.

<sup>128</sup>City's Ex. A, B, C, D. For example, on CRT returns filed for 1 World Trade Center LLC, Petitioners deducted business interruption insurance proceeds of \$115,931,336 in 2002, \$130,041,665 in 2003, and \$82,590,576 in 2004. Excluding the Initial Rent Payment of \$231,304,040, the reported annual

The Record, therefore, contradicts Mr. Levy's statement, recited in the majority opinion, that Petitioners continued to pay rent after the destruction of the Buildings because they were afraid that "if they stopped making payments under the Leases . . . they could lose all their rights to build on alternative locations."<sup>129</sup> Petitioners have taken the position on their CRT returns, and Mr. Levy testified, that the business interruption insurance proceeds were used to pay Petitioners' rent to the Port Authority.<sup>130</sup> Petitioners, therefore, continued to pay rent to the Port Authority after the destruction of the Buildings, both, because they had no out-of-pocket cost, and because they had no real choice as the business interruption insurance was dedicated to that purpose.

Under the Rebuilding Obligation<sup>131</sup> Petitioners were required to rebuild the Buildings in the event that they were "damaged or destroyed by fire, the elements, the public enemy or other casualty, or by reason of any cause whatsoever and whether partial or total. . ." (Emphasis added.) Petitioners' Rebuilding Obligation was unconditional, and was to be performed by Petitioners without regard to "whether or not such damage or destruction is covered by insurance proceeds sufficient for the purpose."<sup>132</sup> Petitioners' insurer was to fund the cost to rebuild. The Leases required Petitioners to purchase fire and property damage insurance covering the Buildings also "with no exclusion for terrorist acts."<sup>133</sup>

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rent paid for each year was \$50,073,667 in 2002, \$55,946,197 in 2003, and \$52,600,411 in 2004. City's Ex. A and T. Ex. 1. Petitioners have, similarly, claimed deductions for business interruption insurance proceeds on the other Buildings substantially in excess of the annual gross rents received (exclusive of the Initial Rent Payments).

<sup>129</sup>Decision at 15.

<sup>130</sup>City's Ex. A, B, C, D; Tr. 56-57.

<sup>131</sup>T. Ex. 1, § 15.1.

<sup>132</sup>*Id.*

<sup>133</sup>T. Ex. 1, § 14.1.1.

Petitioners did not have unfettered use of the Premises. Section 4 of the Leases provided that: “The Lessee shall use, operate and maintain the Premises, subject to all provisions of this Agreement, as an office building. . . .”<sup>134</sup>

When the various provisions of the Leases are considered in their totality, the Port Authority received the unconditional right to a 99-year payment stream from Petitioners for renting the Premises, and Petitioners received the unconditional right to the Premises for the 99-year term of the Leases for the sole purpose of subleasing them to commercial tenants. Based upon these various Lease provisions, it is clear that the parties to the Leases intended neither that Petitioners would be divested of their interest in the Premises (including their right and obligation to rebuild and sublease them) in the event the Buildings were to be totally destroyed nor that the Port Authority would be divested of its right to 99-years of rental payments.

### **Did Petitioners’ Premises constitute “premises” for purposes of the CRT?**

The first issue before us is whether Petitioners continued to pay rent for “premises” within the meaning of Code Section 11-701.4 after the Buildings were completely destroyed in the terrorist attack on September 11, 2001. The majority answered this question in the negative, holding that “there were no identifiable premises covered by the Leases after September 11, 2001.”

Code Section 11.701.4 defines “premises” as “[a]ny real property or part thereof, and any structure thereon or space therein.” Petitioners, therefore, continued to pay rent for “premises” after the Buildings were destroyed if they rented “any real property or part

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<sup>134</sup>T. Ex. 1, § 4.

thereof.” The relevant question, then, is what, if anything, remained of the Premises defined in the Leases after the Buildings were destroyed?

Although the existing Buildings were clearly the focal point of the Leases, the Premises were defined more broadly to include a volume of space with a metes and bounds description. Section 2.1 of the Leases begins by defining the “volume of space” leased by Petitioners in terms of the existing Buildings. Thus, Petitioners leased “all that certain volume of space occupied by the Building and any replacements thereof.”<sup>135</sup> If that narrow definition of the leased volume of space controlled, the destruction of the Buildings would appear to end Petitioners’ interest in that leased volume of space, at least until Petitioners constructed a replacement building.

The Premises, however, are also defined more broadly under a metes and bounds description that is independent of the existence of any Buildings: “the exterior limits of any horizontal plane which lies within said volume of space being more particularly bounded and described on Exhibit A” to the Leases.<sup>136</sup> Exhibit A then provides the metes and bounds description of the “exterior limits” of the volume of space leased by Petitioners.<sup>137</sup>

The Premises, therefore, were intended to survive the destruction of the Buildings. Petitioners’ rights to the Premises extended beyond the existing Buildings (or any replacement buildings) and, in the event the Buildings were destroyed, Petitioners had, both, the right and the obligation to rebuild them within that defined volume of space.

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<sup>135</sup>T. Ex. 1, § 2.1.

<sup>136</sup>T. Ex. 1, § 2.1.

<sup>137</sup>T. Ex. 1, Exhibit A.

Under the Rebuilding Obligation, Petitioners were required to first “remove all debris resulting from such damage or destruction,” an activity that would take place at the ground-level of the footprints of the former Buildings, “and shall rebuild, restore, repair and replace the Premises” an activity that would also take place beginning at ground-level and extend up into the airspace above.<sup>138</sup> Following the destruction of the Buildings, therefore, Petitioners continued to have both the right and the obligation under the Leases to use and occupy the Premises, including the footprints and the vertical airspace within which Petitioners were required to rebuild the Buildings.

Petitioners also remained potentially liable in the event a construction worker or anyone else should get injured while on Petitioners’ site.<sup>139</sup> Mr. Levy listed the protection against this kind of liability as a primary reason Petitioners entered into an Interim Access Agreement<sup>140</sup> with the Port Authority allowing it to work on the PATH and subway lines.<sup>141</sup> After the Buildings were destroyed Petitioners’ “site” was the original footprints, premises sufficiently identifiable for Petitioners to be sued in the event an injury occurred there.

The ground-level footprints remaining after the Buildings were destroyed, therefore, were identifiable premises. Although Petitioners did not lease the land, their continuing rights to use and occupy the ground-level footprints on which they were to rebuild the Buildings were clearly “real property or part thereof” within the meaning of Code Section 11-701.4.

As explained above, Petitioners also leased the right to rebuild the Buildings into the vertical airspace above the footprints. Petitioners’ lease of these “air rights” are real property,

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<sup>138</sup>T. Ex. 1, § 15.1.

<sup>139</sup>Tr. 54-56.

<sup>140</sup>T. Ex. 16.

<sup>141</sup>Tr. 55-56.

which includes not only the land but mineral rights below the ground and the air rights above the ground.<sup>142</sup>

### **Were Petitioners' Premises “taxable premises” for purposes of the CRT?**

Therefore, identifiable premises continued to exist for purposes of the CRT after the complete destruction of the Buildings on September 11, 2001. Almost immediately after the terrorists struck the Twin Towers, however, the City took complete control of the entire World Trade Center site to conduct rescue, recovery and cleanup operations.<sup>143</sup> The City continued in control over the site until July 1, 2002.<sup>144</sup> Petitioners, in turn, had no control over the site and only limited access during that period.<sup>145</sup>

Code Section 11-701.5, in relevant part, defines “taxable premises” as:

Any premises in the city occupied, used or intended to be occupied or used for the purposes of carrying on or exercising any trade, business, profession, vocation or commercial activity, including any premises so used even though it is used solely for the purposes of renting, or granting the right to occupy or use, the same premises in whole or in part to tenants. (Emphasis added.)

During the period beginning September 11, 2001, and ending July 1, 2002, (a period of ten months) the City was in complete control of the Premises conducting rescue, recovery and cleanup operations and Petitioners were divested of control and access to the Premises.

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<sup>142</sup>United States v. Causby, 328 U.S. 256, 265 n. 10 (1946); Butler v. Frontier Telephone Co., 186 N.Y. 486, 491 (1906) (“ . . . space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, and separable from the soil, . . . ”); Macmillan, Inc. v. CF Lex Associates, 56 N.Y.2d 386, 392-393 (1982).

<sup>143</sup>Tr. 29; T. Ex. 16, Recitals.

<sup>144</sup>T. Ex. 16.

<sup>145</sup>Tr. 29-31.

Petitioners, therefore, could not have realistically “intended” to rebuild the Premises for the purpose of subleasing them during that extended period.

On July 1, 2002, however, the City returned control of the site to the Port Authority.<sup>146</sup> The Port Authority was Petitioners’ landlord, the Leases had not been amended and, therefore, Petitioners’ obligations under the Leases to rebuild and sublease the Buildings while continuing to pay rent remained in force. Petitioners were no longer divested of control of the Premises by the City, and Petitioners’ continuing Lease obligations would appear to have been determinative regarding Petitioners’ “intent” to rebuild and sublease the Premises.

As of July 1, 2002, therefore, the Premises were again “taxable premises” under the CRT, and continued to be so until December 1, 2003, when Petitioners executed the Letter Agreement committing them to amend to Leases to remove the Twin Towers Footprints from the definition of Premises.<sup>147</sup>

The majority holds, however, that after the Buildings were destroyed on September 11, 2001 there were no “premises” for CRT purposes. In reaching its conclusion that “there were no identifiable premises covered by the Leases after September 11, 2001,”<sup>148</sup> the majority relies primarily on testimony by Michael Levy, on its reading of the Leases and on the fact that, looking forward, Petitioners eventually amended the Leases to remove the Twin Towers Footprints from the Premises as defined therein. I will address each in turn.

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<sup>146</sup>Tr. 30.

<sup>147</sup>The Leases were amended to that effect on December 15, 2003. T. Ex. 10.

<sup>148</sup>Decision at 30.

**Mr. Levy's testimony.**

The majority relies on testimony by Mr. Levy to the effect that:

[A]fter September 11, 2001, Petitioners understood that because of the 'huge loss of life' a memorial to the victims would have to be built on the Twin Towers Footprints and Petitioners would not be permitted to rebuild the Twin Towers at their original locations.<sup>149</sup>

Nowhere in Mr. Levy's testimony, however, does he specify precisely when, after September 11, 2001, Petitioners understood this. On the day the Twin Towers were destroyed? Two weeks later? One year later? The precise date of Petitioners' understanding would appear to be significant to the majority's holding. According to the majority's view, Petitioners' understanding carries with it significant legal consequences. The majority holds that it causes "the location and nature of the Premises covered by the Leases" to be thrown into sufficient doubt that the Premises described under the Leases were no longer identifiable.<sup>150</sup> I realize that the majority inserts the words "for purposes of the CRT," but it is equally explicit that its legal conclusion pertains to the "Premises covered by the Leases."<sup>151</sup> In practical effect the majority holds that, at some unspecified point in time, Petitioners understood that they no longer had the right to specific Premises at the location described in the Leases. Petitioners' understanding, thus, had the effect of unilaterally overriding written Lease provisions granting Petitioners rights to use and operate specific real property for 99-years, offering them nothing to replace it; no promise, no details as to what, if anything, Petitioners would receive in return.

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<sup>149</sup>Decision at 22.

<sup>150</sup>Decision at 23.

<sup>151</sup>*Id.*

Mr. Levy testified that:<sup>152</sup>

After 9/11, it was clear to us that you would not be able to rebuild those buildings on those [the original] sites.

He continued:<sup>153</sup>

Because of the huge loss of life it became clear that – and the way the government was talking at that time – government could be defined as the State of New York, LMDC, the City of New York, the Port Authority – that there would be a memorial built there and those sites would not be able to be built on again.

Based on Mr. Levy's testimony, Petitioners became aware, through oral communications by the State, the City, the LMDC and the Port Authority, the precise date or dates of which are unclear, that they could not build on the Twin Towers Footprints. Even if we were to assume that Petitioners' rights to the Premises defined in the Leases could be effectively amended by an oral communication, the only relevant government entity referenced in Mr. Levy's testimony is the Port Authority, both, because it was Petitioners' landlord under the Leases and, as Mr. Levy testified: "The Port Authority can do what it wants on its own site without the City having to consent."<sup>154</sup>

The only date in Mr. Levy's testimony definitively linked to when Petitioners became aware that a memorial would be built on the Twin Towers Footprints was in 2003, when Daniel Libeskind was chosen as the designer in the design competition.<sup>155</sup> Reference to Mr.

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<sup>152</sup>Tr. 31-32.

<sup>153</sup>*Id.*

<sup>154</sup>Tr. 43.

<sup>155</sup>Tr. 33.

Levy's affidavit is necessary to fill in the month, February of 2003.<sup>156</sup> Although Mr. Levy mentions a memorial several times in his testimony, this is the only point where, supplemented by his affidavit, he connects it with a month and year. That approximate date, however, is seven months after the City returned control of the Premises to the Port Authority.

The majority also relies on Mr. Levy's testimony that in 2002, a design competition was held.<sup>157</sup> Filling in the precise month for this event from his affidavit is a little more difficult because differences in the wording between his testimony and his affidavit suggests that it was more of a process over a period of time than a single event.<sup>158</sup> The most we can state with some confidence from reading his testimony against his affidavit is that in the Spring of 2002, the Port Authority and the LMDC requested design proposals in a very preliminary stage of a larger process before the public had even had an opportunity to give its input. At that preliminary stage it would have been unlikely that anyone really knew that building on the Twin Towers Footprints would be off limits, or if it was, we cannot discern that from this record. But we do know that both the Port Authority and Petitioners had a powerful financial incentive, not to mention an overriding legal obligation under the Leases, to allow the rebuilding to proceed in a timely manner.

### **The Interim Access Agreement.**

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<sup>156</sup>Tr. 33; T. Ex. 31, ¶ 8.

<sup>157</sup>Tr. 33.

<sup>158</sup>For example, the affidavit states that the Port Authority and LMDC requested design proposals in the Spring of 2002, then there was a competitive process with substantial public input, culminating in the State and City joining the Port Authority and LMDC to announce the final design concept. T. Ex. 31, ¶ 8. His testimony, however, states that "the various government agencies had arranged for a competition in a public referendum". Tr. 33. By "various government agencies" he appears to be referring to the four government entities he had previously defined on the preceding page of the transcript. Tr. 32. The most we can take away from this is that, in the Spring of 2002, the Port Authority and the LMDC requested design proposals in a very preliminary stage of the process, before the public even had a chance to give its input.

Any hint or suggestion taken from Mr. Levy's testimony that the Port Authority did not intend Petitioners to build on the Twin Towers Footprints when the City returned control to it on July 1, 2002, is specifically refuted by the Interim Access Agreement Petitioners entered into with the Port Authority effective that same date.<sup>159</sup>

Mr. Levy testified that, pursuant to that agreement, Petitioners "agreed to permit the Port Authority to be on our site"<sup>160</sup> to conduct work necessary to restore PATH and subway service to lower Manhattan.<sup>161</sup> Thus, according to Mr. Levy's testimony (1) Petitioners continued to have rights under their Leases to Premises ("our site") such that the Port Authority felt compelled to ask Petitioners for written consent to access their site; and (2) the location of those Premises (again "our site") was known and readily "identifiable" to the parties as the original site of the Buildings before they were destroyed.<sup>162</sup>

Also according to Mr. Levy's testimony, Petitioners received a number of valuable benefits from the Port Authority in exchange for granting it written consent to access Petitioners' Premises: an indemnity from the Port Authority in the event of injuries on the site, inclusion in the Port Authority's liability insurance policy, the Port Authority's agreement to put up a fence around the site and pay for security, and to "pay for the day-to-day cost of maintaining a site of this size."<sup>163</sup> The substantiality of the consideration offered by the Port

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<sup>159</sup>T. Ex. 16. The Interim Access Agreement was executed on July 18, 2002.

<sup>160</sup>Tr. 54.

<sup>161</sup>Tr. 53.

<sup>162</sup>Any doubt as to the location of the site referenced by Mr. Levy is dispelled by the Interim Access Agreement which defines the "Premises" by reference to the original Leases "dated as of July 16, 2001. . . pursuant to which the Port Authority leased to each Lessee a portion of the former World Trade Center site more particularly described in each such Lease as the 'Premises' thereunder . . . ." (Emphasis added.) The Premises were clearly those defined and specified in the original Leases representing a portion of the "former World Trade Center site", i.e., before September 11, 2001. T. Ex. 16.

<sup>163</sup>Tr. 54-55.

Authority as an inducement to Petitioners to enter into the Interim Access Agreement indicates that the execution of that agreement was not a mere formality, but more in the nature of a written amendment or modification to Petitioners' (and the Port Authority's) rights in the Premises under the Leases.

A review of the various provisions of the Interim Access Agreement indicates that its purpose was to, both, (1) allow the Port Authority to proceed with essential PATH and subway work and, (2) to coordinate that work with Petitioners' rebuilding of the Premises which the Interim Access Agreement clearly contemplated would proceed alongside that work.

Sections 1, 2(b) and (e), and 5 of the Interim Access Agreement<sup>164</sup> appear to be helpful in ascertaining whether, at the time that agreement was executed, the Port Authority intended Petitioners to rebuild the Premises on the original locations.

Section 2(e) of the Interim Access Agreement states that Petitioners' obligation to restore the Premises (i.e., the Rebuilding Obligation) "pursuant to Section 15 of each Lease . . . remain[s] in full force and effect."<sup>165</sup>

Under Section 2(b) of the Interim Access Agreement:<sup>166</sup>

[A]ny Lessee may deliver written notice to the Port Authority, that . . . such Lessee . . . is ready to commence construction in connection with the restoration of [its] Premises . . . pursuant to the applicable Lease . . . (the "Lessees' Restoration Work") on

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<sup>164</sup>T. Ex. 16, §§ 1, 2(b), and 5.

<sup>165</sup>T. Ex. 16, § 2(e).

<sup>166</sup>T. Ex. 16, § 2(b).

the date specified in such notice, which date shall be no earlier than fifteen (15) days following the giving of such notice (such date as set forth in such notice, whether or not the Lessees' Restoration Work actually commences on such date, the "Lessees' Restoration Work Commencement Date").<sup>167</sup>

The Port Authority, thus, provided a mechanism for Petitioners to give formal written notice 15 days in advance of when they were prepared to begin the actual construction work to rebuild the Premises on the original site, such date appropriately named the "Lessees' Restoration Work Commencement Date." If, as the majority concludes, the Port Authority had previously determined that it would not permit Petitioners to rebuild the Premises on the original footprints it would have been absurd for the Port Authority to insert such a provision in the agreement. In fact, subsequent extensions to the Interim Access Agreement executed on and or after December 23, 2003,<sup>168</sup> after Petitioners had entered into the December 1, 2003 Letter Agreement to remove the Premises from the original footprints, make no such reference to the Lessees' Restoration Work, undoubtedly because it was a moot point once the Premises no longer existed.

The majority addresses this notice provision in its discussion of the Interim Access Agreement, but concludes: "However, nothing in the Record indicates that Petitioners gave any such notice."<sup>169</sup> The majority's reasoning, however, while relevant to whether Petitioners had progressed to the point of rebuilding on the original site (and we can readily infer from this record that they did not) is not relevant to whether the Port Authority intended Petitioners to rebuild there at the time it executed the Interim Access Agreement.

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<sup>167</sup>The language omitted from this quote refers to the Net Lessees' Association.

<sup>168</sup>T. Ex. 17 & 18.

<sup>169</sup>Decision at 27.

If, as is indicated by the Interim Access Agreement, the Port Authority intended Petitioners to rebuild on the original footprints, the Interim Access Agreement refutes any suggestion in Mr. Levy's testimony to the contrary, testimony on which the majority relies. The Interim Access Agreement is also determinative of Petitioners' "intended" use of the Premises for purposes of the CRT, which, pursuant to the Leases would be to promptly rebuild and sublease the Premises on the original footprints. The Premises, therefore, became "taxable premises" on July 1, 2002, the effective date of the Interim Access Agreement.

One of the more central provisions in the Interim Access Agreement is Section 5, entitled "Coordination and Cooperation."<sup>170</sup> In that section the Port Authority is given control over the Premises during a period called the "Exclusive Period,"<sup>171</sup> and is responsible for coordinating access to the Premises so as to allow both the Port Authority's work on the PATH and subway lines and Petitioners' work to rebuild the Premises, both in the pre-construction and design phase, as well as the actual construction work. This provision is quoted by the majority in its opinion<sup>172</sup> and I will not repeat it here.

Notably, and consistent with Mr. Levy's testimony, Petitioners did not have unfettered access to the Premises while the Port Authority was in control.<sup>173</sup> Nevertheless, the Port Authority was to give Petitioners' architects, engineers and other personnel access sufficient to perform all aspects of the design and pre-construction work, "and for the performance of the Lessee Restoration Work", i.e., the actual rebuilding of the Premises on the original

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<sup>170</sup>T. Ex. 16, § 5.

<sup>171</sup>T. Ex. 16, § 1, defines the Port Authority's Exclusive Period as ending on the earlier of (1) the date Petitioners give notice that they are ready to begin rebuilding or (2) the date the Port Authority completes its work, but no earlier than January 1, 2004.

<sup>172</sup>Decision at 7.

<sup>173</sup>Regarding a later period, Mr. Levy testified that if Petitioners' architects or engineers wanted access to the site, the Port Authority would have to escort them. Tr. 41-42.

location.<sup>174</sup> According to Mr. Levy, such “controlled” access did not hinder Petitioners from designing the Freedom Tower, twice, at a later date in 2004.<sup>175</sup>

The majority also states that, even if Petitioners had given the requisite notice to commence rebuilding pursuant to the terms of the Interim Access Agreement, the Port Authority could have simply refused to issue a building permit, or at least could have delayed its issuance.<sup>176</sup> But even if the Port Authority later decided not to rebuild on the original footprints (and it did eventually decide not to rebuild there), that would be irrelevant to the Port Authority’s intent at the time it entered into the Interim Access Agreement. On July 18, 2002, the Port Authority clearly intended Petitioners to rebuild on the original footprints by expressly allowing Petitioners’ to give notice when they were ready to commence rebuilding. Nevertheless, and contrary to the majority’s reasoning, the Port Authority could not simply withhold a “Construction Permit” in that manner without violating express provisions in the Leases. Under §§ 19.4.2(b) and (c) of the Leases, the Port Authority’s Code Compliance Office can reject an application for a Construction Permit only on the grounds that the application fails to comply with the “Port Authority Manual,” and it is held to a specific review timetable.<sup>177</sup>

The Interim Access Agreement, therefore, clarifies that the relevant date on which Petitioners understood from statements by the Port Authority that a memorial would be built on the Twin Towers Footprints was necessarily sometime after July 18, 2002, (the actual date the Interim Access Agreement was executed).<sup>178</sup>

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<sup>174</sup>T. Ex. 16, Section 5.

<sup>175</sup>Tr. 41-42.

<sup>176</sup>Decision at 27.

<sup>177</sup>T. Ex. 1, Section 19.4.2(b) & (c).

<sup>178</sup>T. Ex. 16. The agreement was executed on July 18th but made retroactive to July 1st.

The Twin Towers Footprints were not removed from the definition of Premises under the Leases until the parties did so in writing by executing the Letter Agreement on December 1, 2003.<sup>179</sup> Until that date, Petitioners had “premises” which were “taxable premises” within the meaning of the CRT. Neither Mr. Levy’s testimony regarding the memorial, nor the design competition in the Spring of 2002 was relevant to the parties’ intentions to rebuild as of July 1, 2002, when the City returned control of the WTC Site back to the Port Authority.

Petitioners did not give up their right and obligation to rebuild the Premises on the original footprints until they did so in writing, amending their rights and obligations under the Leases in December 2003. When, in February 2003, Daniel Libeskind’s design concept was approved, the occurrence of that event did not automatically divest Petitioners of their rights in the Premises, including their rights to rebuild and sublease them. It did not amend the Leases, taking away Petitioners’ rights without giving them anything in return. The selection of Libeskind’s design in February 2003 merely set the stage for future negotiations culminating in the Letter Agreement executed on December 1, 2003, in which Petitioners received substitute Premises that were “generally mutually acceptable to the parties hereto.”<sup>180</sup>

The majority acknowledges that changes to the location of the Premises under the Leases must be in writing. The majority, however, construes certain language under the Rebuilding Obligation in the Leases<sup>181</sup> to mean that, even before the Leases were amended in writing by the parties, the “replacements” for the Buildings destroyed on September 11, 2001 can no longer be deemed to be on the original footprints as described in the Leases.<sup>182</sup> Without repeating the majority’s analysis on this point, I acknowledge that the “replacement”

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<sup>179</sup>T. Ex. 9.

<sup>180</sup>T. Ex. 9, at 5.

<sup>181</sup>T. Ex. 1., Section 15.1.

<sup>182</sup>Decision at 21-23.

Premises under the Leases can be moved by the parties to another location if they both agree to it in writing. But I disagree with the majority's conclusion that: "After September 11, 2001, the location and nature of the Premises covered by the Leases were thrown into sufficient doubt . . . ." (Emphasis added.)

There was never any doubt as to the "nature and location of the Premises covered by the Leases." Petitioners' Premises were located on the original footprints, as provided in the Leases, until the Port Authority offered Petitioners acceptable alternative space at an acceptable alternative location to induce them to abandon the original footprints. The record supports a relatively long negotiating process before Petitioners were willing to give up the Twin Towers Footprints for an acceptable alternative location, from at least February through December of 2003, i.e., at least ten months. In essence, the majority construes the Leases to remove the Twin Towers Footprints from the definition of Premises under the Leases without agreement between the parties and without giving Petitioners anything in return. I cannot accept the majority's conclusion that the location of Petitioners' Premises "covered by the Leases" was thrown into doubt and that there came a point in time (before the December 2003 Letter Agreement) that Petitioners could no longer count on the location of their Premises as being exactly as described in their Leases. Petitioners did not forfeit any rights to have the Premises located on the Twin Towers Footprints until they gave those rights up in a negotiation in which they received something "mutually acceptable" in return.

The majority also looks to the December 1, 2003 Letter Agreement, in which Petitioners eventually agreed to amend the Leases to remove the Twin Towers Footprints from the definition of Premises, to validate its conclusion that the location of the Premises covered by the Leases was "uncertain" before that date.<sup>183</sup> The majority was incorrect in taking this

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<sup>183</sup>Decision at 22.

fact into account. The tax consequences of transactions during a period do not change retroactively, in hindsight, by subsequent events.

I would, therefore, hold that<sup>184</sup> during the period beginning July 1, 2002, and ending December 1, 2003, Petitioners had Premises which were taxable premises, and were subject to the CRT on the rent they paid the Port Authority during that period.

Dated:           October 12, 2011  
                  New York, New York

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ROBERT J. FIRESTONE  
COMMISSIONER

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<sup>184</sup>In addition to the amount found due by the majority.