ALERT
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IRREVOCABLE TRUST IS AN ORDINARY TRUST

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A divided panel of the Commonwealth Court rejected the position of the Department of Revenue and held that a transfer to an irrevocable trust qualified as a transfer to a living trust excluded from realty transfer tax. *Miller v. Commonwealth, No.* 757 F.R. 2007 (Pa. Commw. Apr. 8, 2010). A living trust is a qualifying trust intended as a will substitute. 72 P.S. §8101-C. A transfer to a qualifying living trust is excluded from tax. 72 P.S. §8102-C.3(8.1). The Department argued that only a revocable trust can qualify as a living trust. The court held otherwise, relying on §7.1(a) of the *Restatement (Third) of Property* (2003), which states that a will substitute is an arrangement established during a donor's life under which the right to possession or enjoyment of the property shifts outside of probate to the donee at the donor's death and substantial lifetime rights of possession or enjoyment are retained by the donor. Reviewing the terms of the trust, the court held that the trust met these requirements. Therefore it was a will substitute and qualified as an ordinary trust, notwithstanding that it was irrevocable. Consequently, the transfer to the trust was not subject to realty transfer tax.

ASSESSMENT BASED ON COMPARABLES AFFIRMED

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The Commonwealth Court affirmed a decision by the trial court that valued an industrial property based on comparables with no adjustment for certain substandard space because the taxpayer failed to provide evidence on the value of the space. *Carpenter Technology Corp. v. Berks County Board of Assessment Appeals,* No. 1569 C.D. 2007 (Pa. Commw. Apr. 6, 2010) (unreported). In prior proceedings, the Commonwealth Court remanded to the trial court for testimony on whether the value of properties offered as comparables did or did not include the value of certain basement and mezzanine space and if so at what values. The subject property had such space and the question had been raised what value, if any, to put on it. On remand, the expert for the taxpayer declined to provide an analysis of the substandard space of the comparable properties. The Commonwealth Court held that the trial court therefore correctly valued the property without an adjustment particular to the valuation of the substandard space because the taxpayer essentially failed to meet its burden of proof. The trial court did incorporate certain of the comparables offered by the taxpayer's expert and determined a value substantially less than that claimed by the tax authorities. The Commonwealth Court concluded that the taxpayer was entitled to no further relief.