

**IN THE MATTER OF THE PETITION OF R. and D.**

**FOR A DECLARATORY RULING**

**Document #7610, Effective 12/10/01**

Pursuant to RSA 541-A: 1, IV, RSA 541-A:2, I(d) and Rev 209.01 et seq., R. and D. (Petitioners), petitioned the Department of Revenue Administration (Department) with respect to the method used to determine the amount of real estate transfer taxes when: (1) transferring real estate to a revocable trust and (2) immediately transferring the same real estate from a revocable trust to a limited liability company.

**DETERMINATION REQUESTED BY THE PETITIONERS**

Under the proposed transaction, the Petitioners would transfer 3 pieces of real estate to a revocable trust which would, in turn, transfer the real estate to a limited liability company. The Petitioners request that, since the transfers are for zero consideration, the New Hampshire Department of Revenue Administration should assess the real estate transfer tax at the minimum amount of \$40 for each transfer.

Petitioners request a response to the following question:

1. When real estate is transferred from individuals to a revocable trust for zero consideration, and then subsequently the real estate is transferred from the trust to a limited liability company for zero consideration, should the actual price or consideration for the transfer be used rather than the market value in determining the real estate transfer tax?

**FACTS PRESENTED BY THE PETITIONERS**

The Petitioners made the following representations of relevant facts:

1. The Revocable Trust - 2001 was executed for the purposes of estate planning with an original fund of \$1.00. The trust meets the requirements of a revocable trust: normal discretionary powers vested in a trustee and not requiring beneficiary consent, management and use of the property by the trustee for the use and benefit of the beneficiaries, it does not provide for the transfer of any beneficial interest and it was created for estate planning. The trustee of the trust is R. Upon his death, the trust becomes irrevocable.

2. The Petitioners, intend to convey, by quitclaim condominium deed to the Revocable Trust - 2001, three (3) pieces of property known as 1, 2 and 3 located in NH.

3. The trustee, R., intends to convey, by quitclaim condominium deed, the same 3 pieces of property from the Revocable Trust to a LLC in NH. R. is the manager and has an attorney as the registered agent for the LLC.

4. The proposed transaction consists of 2 transfers.

5. The business reason for the proposed transaction would be to provide limited liability to the taxpayers and ease of property management for estate planning purposes.

## **REVISED STATUTES ANNOTATED [RSA] AT ISSUE**

NH RSA 78-B:1  
NH RSA 78-B:2  
NH RSA 78-B:9

## **RULES AT ISSUE**

N.H. Code Admin. R. Rev 802.02

## **PETITIONERS= REPRESENTATIONS**

To the best of Petitioners= knowledge, the issues that are the subject of this petition:

- 1) Are not under examination by the department;
- 2) Have not been examined by the department;
- 3) Are not under consideration by the department in connection with a return of a prior period; and
- 4) Are not pending in litigation.

## **FINDINGS**

RSA 78-B:1, I. (a) imposes a tax upon the sale, granting and transfer of real estate and any interest therein including transfers by operation of law. There is a presumption under the statute that every transfer is taxable unless it is specifically exempt from taxation under the exceptions provided in the statute. RSA 78-B:2 provides the exemptions authorized by the legislature.

Rev 802.02 provides that transfers to or from a revocable trust are contractual transfers, and that under certain circumstances the department shall not presume that the price or consideration paid is the fair market value of the property transferred as authorized by RSA 78-B:9, III. One of the requirements is that the trust must be created and funded for estate planning circumstances as a testamentary substitute.

Additionally, RSA 78-B:9, II provides that the if there is occasion to determine if there has been a sale, grant or transfer of real estate within this state, the commissioner shall look to the substance of the transaction or series of transactions to determine if a sale, grant or transfer of real estate has occurred.

The trust itself was created for the purposes of estate planning as a testamentary substitute. However, under the proposed transactions, the funding of the trust with real estate that is to be immediately transferred to a limited liability company, the

trust is not intended to act as a testamentary substitute but rather a conduit to accomplish the transfer of the real estate to the limited liability company. The transfers are to achieve the business purpose of limiting liability. The transfers do not satisfy the requirement found in Rev 802.02(c)(2) that the trust be funded as a testamentary substitute. Therefore, the commissioner shall determine the actual price or consideration based upon the fair market value of the property under RSA 78-B:9,III.

The substance of the series of transactions is the transfer of real estate by R. and D. to the limited liability company of which R. is the sole member. RSA 78-B:1-a, II, (c) specifically states that transfers to or from any interest holder to an interest in which he holds an interest is a contractual transfer that is subject to tax. If the department looks past the form of the transactions to their substance as authorized by RSA 78-B:9, II, then the transfers are taxable and subject to tax based upon the fair market value of the property.

## **RULINGS**

Based on the facts as represented by the petitioners and the statutory provisions discussed above, the Department makes the following rulings:

- (1) The transfers are contractual and subject to tax.
- (2) The transfer of the real estate to the trust was not for the purposes of acting as a testamentary substitute.
- (3) The series of transactions are in substance a transfer of real estate from an interest holder in an organization to the organization in which he owns an interest.
- (4) The minimum tax shall be imposed on the transfer of the real estate to the trust.
- (5) The measure of the price or consideration on the transfer of the real estate from the trust to the limited liability company shall be the fair market value of the property.

Stanley R. Arnold, Commissioner