

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION**

IN THE MATTER OF THE PETITION OF

(“The Petitioners – A and B”)

FOR A DECLARATORY RULING

Doc # 8618

Pursuant to RSA 541-A:1, IV and RSA 541-A:16, II(b) and N.H. Code of Admin. Rules Rev 209.01, the Petitioners request a declaratory ruling which finds: that a nominee trust is not an “entity” within the meaning and intent of RSA 78-B:1-a, and the trustee of a nominee trust should be considered merely an agent of the beneficiaries for purposes of RSA 78-B.

Pursuant to N.H. Code of Admin. Rules Rev 209.02, this declaratory ruling is issued to the Petitioners, with respect to the particular transactions and facts discussed herein and represents a holding of the department on those transactions and facts for those petitioners only.

Facts Presented by the Petitioners

The Petitioners, A and B, each own an undivided fifty percent interest as tenants in common in certain real property in New Hampshire (the “Real Estate”). The Petitioners propose to transfer their respective interests in the Real Estate to a so-called nominee trust (the “Nominee Trust”) under which the trustees will have no power or authority to act with respect to the Real Property without the consent and approval of the beneficiaries of the Nominee Trust. The trustees of the Nominee Trust will be the Petitioners.

The initial beneficiaries of the Nominee Trust will hold the following interests:

- | | |
|--------------------------|-------|
| a. The A Family Trust | 12.5% |
| b. Joe Smith | 12.5% |
| c. Jim Smith | 12.5% |
| d. Bill Smith | 12.5% |
| e. The B Revocable Trust | 50.0% |

The A Family Trust and the B Revocable Trusts are revocable trusts, created and funded for estate planning purposes as testamentary substitutes. The beneficial interests in the trusts are not represented by transferable shares.

Determination Requested by the Petitioners

On the facts of the proposed transaction, Petitioners request the following rulings:

- a. That the transfers to the Nominee Trust by Petitioner A for the benefit of Joe Smith, Jim Smith and Bill Smith are non-contractual transfer under RSA 78-B:1-a, III, because transfers of interest in the Real Estate, by Petitioner A, directly to the sons would qualify as non-contractual transfers.
- b. That the transfer to the Nominee Trust by Petitioner A for the benefit of the A Family Trust is a contractual transfer subject to the minimum transfer tax, because transfer of an interest in the Real Estate, by Petitioner A, directly to the A Family Trust would qualify as a transfer to a revocable trust under Rev 802.02.
- c. That the transfer to the Nominee Trust by Petitioner B for the benefit of the B Revocable Trust is a contractual transfer subject to the minimum transfer tax, because transfer of an interest in the Real Estate, by Petitioner B, directly to the B Revocable Trust would qualify as a transfer to a revocable trust under Rev 802.02.

Revised Statutes Annotated (RSA) at Issue

The following New Hampshire statutes are relevant to the Petitioners' request for a declaratory ruling:

RSA 78-B:1 RSA 78-B:1-a, II RSA 78-B:1-a, III RSA 78-B:2, IX

Administrative Rules at Issue

Rev 802.02

Petitioners' Representations

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

- a. Are not under examination by the Department;
- b. Have not been examined by the Department;
- c. Are not under consideration by the Department in connection with a return of a prior period; and
- d. Are not pending in litigation.

Findings

The Petitioners pose this question: “Does the use of a nominee trust as a vehicle to hold real estate alter the taxability of the underlying transactions under RSA 78-B?” This question is overbroad for determination through a declaratory ruling and the Department declines to answer it as stated. The Petitioners have presented a series of transactions that involve the use of a nominee trust as an estate planning device where, if the grantors had transferred their property interests directly to the beneficiaries, no tax, or only the statutory minimum tax, would be due. This declaratory ruling is limited to the specific facts and representations made in the petition.

The nominee trust is a special purpose trust used in the instant proposed transactions as an estate planning device. Such trusts are often used to avoid probate with privacy and to facilitate transfers of trust property. A nominee trust is a vehicle for holding title to real estate so that the identity of trust beneficiaries may remain undisclosed. Morrison v. Lennett, 415 Mass. 857, 860 (1993). Essentially, these vehicles establish principal/agent relationships between the trustees and the beneficiaries, with the trustees acting at the behest of the beneficiaries. Dwire v. Sullivan, 138 N.H. 428, 430-31 (1994). “A passive or nominee trust exists when the trustees have no discretionary duties to perform.” Robbins & al. v. Johnson & al., 147 N.H. 44, 46 (2001); citing, Wilkins v. Miltmore, 95 N.H. 17, 19 (1948)(Duggan, J., concurring specially). There really is no trust relationship in the conventional sense. See, Dwire, at 431.

The real estate transfer tax is imposed on the sale, granting and transfer of real estate and any interest therein. RSA 78-B:1. Each sale, grant and transfer of an interest in real property is presumed to be taxable unless it is specifically exempt under RSA 78-B:2. Id. The transactions proposed by the Petitioners are subject to RSA 78-B.

In the proposed transactions, the Nominee Trust is serving as a conduit for the transfer of the Petitioners’ interest in the Real Estate to the beneficiaries, with the trustees (who are also the grantors) functioning as agents for the beneficiaries. All the beneficiaries are identified. This is an important element in the treatment of the transactions, because the “trust” is disregarded as a conduit and the transfers are viewed as direct transfers from the grantors to the beneficiaries. See, e.g., Federal Deposit Insurance Corp. v. Porter, 46 Mass. App. Ct. 241, 244 (1999) (relationship created by a nominee trust is in the nature of a partnership and not a trust, trustees are merely agent for the beneficiaries’ convenience); and Morrison v. Lennett, 415 Mass. 857, 862 (1993)(beneficiaries of nominee trust can reasonably be regarded as true owners). Therefore, taxability of a nominee trust under RSA 78-B depends on the relationships between the grantors and the beneficiaries.

Under RSA 78-B, direct transfers from Petitioner A to the sons Joe, Jim, and Bill would be exempt as non-contractual gifts. See, RSA 78-B:2, XI and RSA 78-B:1-a, III. Likewise, the transfers from Petitioner A to the sons through the nominee trust are exempt as non-contractual gifts.

Under N.H. Code of Admin. Rules, Rev 802.02, direct transfers from each Petitioner to each respective revocable trust would be contractual transfers under RSA 78-B:1-a, II, not presumed to be taxed at fair market value, and therefore subject to the minimum tax under RSA 78-B:1, I(b). Likewise, the transfer from Petitioner A to the A Family Trust, and the transfer from Petitioner B to the B Revocable Trust, through the nominee trust are subject to the minimum real estate transfer tax.

Rulings

Based on the facts as represented by the Petitioners and the authority discussed above, the department makes the following rulings:

- (1) The transfers of interests in Real Estate from Petitioner A to the Nominee Trust for the benefit of the sons Jim Smith, Joe Smith, and Bill Smith are non-contractual gifts, exempt from real estate transfer tax under RSA 78-B:2, IX and RSA 78-B:1-a, III.
- (2) The transfer of an interest in Real Estate from Petitioner A to the Nominee Trust for the benefit of the A Family Trust is a contractual transfer, subject to the minimum real estate transfer tax under RSA 78-B:1, I(b). See N.H. Code of Admin. Rules, Rev 802.02.
- (3) The transfer of an interest in Real Estate from Petitioner B to the Nominee Trust for the benefit of the B Revocable Trust is a contractual transfer, subject to the minimum real estate transfer tax under RSA 78-B:1, I(b). See N.H. Code of Admin. Rules, Rev 802.02.

Date: _____

G. Philip Blatsos
Commissioner