

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

IN THE MATTER OF THE PETITION

FOR A DECLARATORY RULING

REDACTED

Document # 9440 Effective 3/25/09

Pursuant to RSA 541-A:1, IV, and RSA 541-A:16, II(b) and administrative rule Rev 209.01, the Petitioners request a declaratory ruling with respect to the real estate transfer tax.

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

Facts Presented by the Petitioners

Petitioner F and Petitioner G formed BCD, as a general partnership. BCD owned a commercial lot abutting a residential development project. BCD contracted with the residential project developer for the construction of an office facility on the commercial lot. Developer was unable to satisfactorily complete the facility. BCD contracted with another builder to complete the facility and sued the developer to recover excess costs. BCD was awarded a residential lot as damages. Developer transferred the residential lot to BCD.

Later, Petitioners changed their form of organization from a general partnership to a limited liability company. Petitioners formed a limited liability company, ABC, LLC. At the time of formation, petitioner F owned 51% of each company. Petitioner G owned the remaining 49% of each company. Petitioners authorized their legal counsel (“Counsel”) to transfer the two parcels owned by BCD to ABC, LLC, and to record the transactions with the Registry of Deeds. Petitioners believed these transactions occurred.

Petitioner G sold 10% of his ABC, LLC interest to a third party. Petitioner F proposed to sell his 51% interest in ABC, LLC to the other members. New legal counsel found that ABC, LLC only owned the residential lot and that the commercial lot was still owned by BCD.

Petitioners have submitted supporting documentation, including copies of deeds, land appraisals, town tax assessments and the applicable federal tax returns. Petitioners also submitted a transfer schedule describing the assets being transferred from BCD to ABC, LLC.

Determination Requested by the Petitioners

Petitioners request a ruling finding corrective deeds may be used to correct the description of the parties and the properties to clarify and confirm the commercial property currently titled in BCD will be titled to ABC, LLC, without being assessed any transfer tax.

Petitioners claim that if the transaction had been completed properly at the time in question, it would have been exempt from tax under RSA 78-B, XVII. They seek this ruling based on the following rationale:

1. The transfer of title was coincidental to a change in the transferring entity's form of organization to that of the transferee;
2. As a result of this change, the assets and liabilities of the transferor immediately following the change are identical to the assets and liabilities of the transferee immediately preceding the change; and
3. At the time of the transfer of title, the owner or owners of the transferor and the transferee and their ownership percentages are identical.

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, I(a) (1991)
RSA 78-B:1-a, V (1991)
RSA 78-B:2, XVII (Supp. 1996)
RSA 78-B:2, V (1991)

Other Laws or Rules

Chapter 158, Laws of 2001, Paragraph 27

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.

Discussion

RSA 78-B:1, I(a) (1991) states in relevant part that "[a] tax is imposed upon the sale, granting and transfer of real estate and any interest therein including transfers by operation of

law.” RSA 78-B:1-a, V (1991) defines "sale, granting and transfer" as including every contractual transfer of real estate from a person or entity to another person or entity whether or not the person or entity is controlled directly or indirectly by the other person or entity in the transfer. These general rules had two relevant exemptions during the period in question. First, RSA 78-B:2, XVII (1996) allowed a business entity to transfer real property to another business entity, coincidental to a change in form of organization, if certain listed criteria were met. Second, RSA 78-B:2, V (1991) allows for corrective deeds to be filed free of a transfer tax.

RSA 78-B:2, XVII (Supp. 1996) allowed an entity to transfer real property to another entity free of transfer tax if:

1. Both entities’ ownership interests are represented by transferable interests;
2. The transfer of title is coincidental to a change in the transferor entity’s form of organization to that of the transferee entity;
3. As a result of this change, the assets and liabilities of the transferor immediately following the change are identical to the assets and liabilities of the transferee immediately preceding the change; and
4. At the time of the transfer of title, the owner or owners of the transferor and the transferee and their ownership percentages are identical.

RSA 78-B:2, XVII (Supp. 1996) was repealed under Chapter 158, Laws of 2001, Paragraph 27, and the repeal became effective July 1, 2001. However, since the transactions in question took place after RSA 78-B:2, XVII (Supp. 1996) was enacted but before its repeal, it could apply to this transaction.

The interests of BCD and ABC, LLC are transferable. BCD was a general partnership and ABC, LLC, is a limited liability company. Petitioners claim their interests in BCD were transferable. Petitioners testified that their interests in ABC, LLC, are transferable and that part of those interests had been transferred to a third party.

Petitioners changed their form of business organization from a general partnership to a limited liability company by creating ABC, LLC, and transferring to it all of the assets and liabilities of BCD. The real estate transfers in question should have occurred when the other assets were transferred to ABC, LLC and were therefore coincidental to a change in the entity’s form of organization.

Petitioners submitted an assets and liabilities transfer schedule and Form 1065 partnership¹ when the other assets were transferred to ABC, LLC returns in order to show the assets and liabilities of the two entities were identical. The documents showed BCD’s assets and liabilities immediately prior to the change in entity organization were identical to the assets and liabilities of ABC, LLC immediately following the change.

Petitioners’ Schedule K-1, contained in Form 1065, state the percentage of each partner or member’s ownership interest. Petitioner F owned 51% of BCD immediately prior to the change in entity organization and 51% of ABC, LLC, immediately after the change. Petitioner G

¹ For the year in question

similarly owned 49% of each entity at the relevant times. For the reasons above Petitioners' transaction complied with RSA 78-B:2, XVII (Supp. 1996) and was therefore exempt from RSA 78-B:1, I(a) (1991).

RSA 78-B:2, V exempts the filing of corrective deeds, from the tax imposed by RSA 78-B:1, I(a) (1991). It is clear from Petitioners' submitted documentation and testimony that they intended to transfer the real estate from BCD to ABC, LLC. Petitioners also submitted town tax records for the real estate in question issued to ABC, LLC and BCD. Therefore, any deeds recorded to show ABC, LLC, owns the real estate in question, would be corrective in nature.

Ruling

Based on the facts represented by the petitioners, and the regulatory provisions discussed above, the department makes the following ruling:

The transfer of real estate from BCD to ABC, LLC, was exempt from the real estate transfer tax under RSA 78-B:2, XVII(a) (1996). Further, ABC, LLC, may file corrective deeds as necessary to clarify that the title to both parcels of real estate discussed above are owned by ABC, LLC, exempt from transfer tax, in accordance with RSA 78-B:2, V (1991).

Date

Kevin A. Clougherty,
Commissioner