

**IN THE MATTER OF THE PETITION OF TAXPAYERS
("The Petitioners")
FOR A DECLARATORY RULING
Doc. No. 7934**

Pursuant to RSA 541-A:1, V, 541-A:24 and Rev 209.01 et seq., A Taxpayers @ , petitioned the Department of Revenue Administration with respect to the New Hampshire Tax on Transfer of Real Property, and the legal definition of contractual transfer as applied to real properties being transferred to LLCs.

DETERMINATION REQUESTED BY THE PETITIONER

Under two proposed transactions, "Taxpayers" would propose to transfer their fee interests in the real properties to the LLCs.

Petitioner requests a response to the following questions:

1. Would the transfers of Property A to LLC 1 and Property B to LLC 2 be contractual transfers within the meaning of RSA 78-B:1-a, II?
2. If the transfers of Property A to LLC 1 and Property B to LLC 2 are contractual transfers within the meaning of RSA 78-B:1-a, II, will the transfer tax be equal to the minimum tax or be based upon some other measure?

FACTS PRESENTED BY THE PETITIONERS

The petitioners made the following representations of relevant facts:

The A Taxpayers @ currently hold the entire fee interest in two parcels of property located in New Hampshire. The Taxpayers hold the property as joint tenants with rights of survivorship. One of the properties, Property A, has a fair market value of \$X and is subject to an outstanding mortgage. The other Property, Property B, has a fair market value of \$Y and does not have an outstanding mortgage.

Each Taxpayer is the sole trustee and sole beneficiary of a revocable trust. In 2003, both Taxpayers acting as Trustees for their respective trusts formed two NH limited liability companies by contributing equally from their respective trust funds. Both operating agreements have each individual A Taxpayer @ listed as a Manager and each trustee as a Member.

Taxpayers propose to transfer their fee interests in the properties to the LLCs. LLC 1 will receive Property A subject to the mortgage, but LLC 1 will not affirmatively assume the mortgage. LLC 2 will receive Property B. Taxpayers represent that there will be no consideration for the transfers. Upon the transfer of Property A to LLC 1 and Property B to LLC 2, the membership interests in LLC 1 and LLC 2 will remain unchanged, with each Taxpayer, as trustee of their respective trusts, owning fifty percent of each LLC. The purpose of the proposed transactions is to provide liability protection to the Taxpayers and to facilitate the management of Taxpayers = real estate.

REVISED STATUTES ANNOTATED [RSA] AT ISSUE

- RSA 78-B:1-a, II
- RSA 78-B:9, II
- RSA 78-B:9, III

RULES AT ISSUE

None.

PETITIONER'S REPRESENTATIONS

To the best of petitioner's 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 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.

The definition of contractual transfer found in RSA 78-B:1-a, II. (d) includes a bargained-for exchange of interests in real estate from an individual to a business entity. In this case, the proposed transfers are transfers of interests in real estate from the individual taxpayers to the limited liability companies. The limited liability companies are business entities. Therefore, the transfers are contractual transfers that are subject to the tax.

Further evidence of the legislative intent to make these type of transactions taxable may be found in RSA 78-B:1-a, V. RSA 78-B:1-a, V provides that A sale, granting and transfer @ means every contractual transfer of real estate, or any interest in real estate from a person or entity to another person or entity, whether or not either person or entity is controlled directly or indirectly by the other person or entity in the transfer. @ In this case, the transfer is from the Taxpayers who indirectly control the LLCs through the ownership of beneficial interests in the trusts which own the membership interests in the LLCs. The definition makes it clear that the fact that the individuals who transfer the real estate directly or indirectly control the entity to which the transfer is being made does not make a transfer non-taxable.

With respect to the request for the ruling regarding what is the measure of the tax, RSA 78-B:9, II provides that 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 has occurred. The substance of the proposed transactions is that the Taxpayers will receive membership interests in the LLCs in exchange for the interests in real estate that are being transferred to the LLC. The fact that this is accomplished through revocable trusts and a series of transactions which will not occur simultaneously does not change the substance of the transactions.

Under circumstances such as these that involve a contractual transfer of an interest in real estate in exchange for property, the amount of the transfer tax due will be calculated based upon the fair market value of the real estate. This is because RSA 78-B:9, III provides as follows:

If there is occasion to determine if the stated price or consideration is the actually paid or required to be paid price or consideration, then the commissioner shall have the power, barring specific proof to the

contrary, to determine the actual price or consideration by the fair market value of the property.

In the case of Property A, the fair market value of the entire fee interest is \$X. In the case of Property B the fair market value of the fee interest is \$Y. Therefore, the tax should be based upon those amounts.

RULINGS

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

- 1) The two properties transferred are being transferred from individuals to business entities;
- 2) The business entities are directly or indirectly controlled by the Taxpayers;
- 3) The transfers fall within the definition of contractual transfer in RSA 78-B: 1-a, II (d);
- 4) The series of transactions will be in substance transfers of real estate in exchange for membership interests in two LLCs;
- 5) The actual consideration which will be received will be based upon the fair market value of the interests in real estate that are being transferred pursuant to RSA 78-B: 9, III;
- 6) The actual consideration which will be received in exchange for Property A will be \$X; and
- 7) The actual consideration which will be received in exchange for Property B will be \$Y.

G. Philip Blatsos Commissioner