

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

IN THE MATTER OF THE PETITION OF

ABC Associates

FOR A DECLARATORY RULING

REDACTED DOCUMENT

Document #10799 Effective 3-19-2015

Pursuant to RSA 541-A:1, V and RSA 541-A:16, II(b) and N.H. Code of Admin. Rules Rev 209.01, the Petitioner requests a declaratory ruling with respect to real estate transfer tax.

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

FACTS PRESENTED BY THE PETITIONER

ABC Associates (“Partnership”) is a general partnership created in to hold a single piece of real estate located in New Hampshire. The Partnership’s composition has varied over time, with sixteen (16) partners presently holding equal partnership interests.

The Partnership seeks to convert to a New Hampshire limited liability company, XYZ, LLC (“LLC”), via a statutory conversion pursuant to RSA 304-C:147 through 149, in accordance with the following representations:

1. Immediately following conversion, the current partners of the general partnership will hold all of the membership interest in the limited liability company business organization in the same percentage as existed pre-conversion.
2. The current partners of ABC Associates will receive no consideration, just replacement of their partnership interests with membership interests in the limited liability company business organization post-conversion.
3. The fair market value of the asset held by ABC Associates will be the fair market value of the asset owned by the limited liability company.

In addition to making the above representations, the Petitioner has submitted all of the statutory conversion documentation that will be executed to effectuate the conversion.

DETERMINATION REQUESTED BY THE PETITIONER

Petitioner requests the following ruling:

1. The conversion of ABC Associates, a New Hampshire general partnership, to XYZ, LLC, a New Hampshire LLC, under the provisions of RSA 304-C:147 through 149, shall not create a taxable transfer of the real estate owned by ABC Associates for purposes of the real estate transfer tax.

REVISED STATUTES ANNOTATED (RSA) AT ISSUE

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

RSA 78-B:1, I (2015)
RSA 78-B:1-a, II, IV, V and VI (2015)
RSA 304-A:6 (2015)
RSA 304-A:24 (2015)
RSA 304-A:25 (2015)
RSA 304-A:56, I (2015)
RSA 304-A:58 (2015)
RSA 304-C:147 (2015)
RSA 304-C:148 (2015)
RSA 304-C:149 (2015)

OTHER LAWS OR RULES

N.H. Code of Admin. Rules Rev 802.01
N.H. Code of Admin. Rules Rev 802.05

PETITIONER'S REPRESENTATIONS

To the best of the Petitioner's knowledge, the issue and the particular circumstances which are the subject of the 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

A. Real Estate Transfer Tax

Pursuant to RSA 78-B:1, I (a), the Real Estate Transfer Tax ("RETT") is "[a] tax...imposed upon the sale, granting and transfer of real estate and any interest therein including transfers by operation of law." "Sale, granting and transfer" is defined as "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." See RSA 78-B:1-a, V. "Contractual transfer" is defined as "a bargained-for exchange of all transfers of real estate or an interest therein..." See RSA 78-B:1-a, II. There is no statutory definition for "a bargained-for exchange." However, the New Hampshire Supreme Court has held that "a bargained-for exchange is an element of 'consideration.'" See *First Berkshire Bus. Trust v. Comm'r, N.H. Dep't of Revenue Admin.*, 161 N.H. 176, 180-181 (2010). RSA 78-B:1-a, IV defines "consideration" as "the amount of money, or other property and services, or property or services valued in money which is given in exchange for real estate, and measured at a time immediately after the transfer of the real estate." While *First Berkshire* only addresses the first portion of the definition of "consideration," the remaining portion of the definition is not necessary for this analysis.

The Petitioner represents that immediately following conversion, the current partners of the general partnership will hold all of the membership interest in the limited liability company business organization in the same percentage as existed pre-conversion. The Petitioner further represents that the current partners of ABC Associates will receive no consideration, just replacement of their partnership interests with membership interests in the limited liability company business organization post-conversion. Finally, the Petitioner represents that the fair market value of the asset held by ABC Associates will be the fair market value of the asset owned by the limited liability company. The analysis of whether the Petitioner will owe RETT as a result of the statutory conversion has two parts.

The first part of the analysis is whether the statutory conversion is a “contractual transfer,” which is a “bargained-for exchange of real estate.” As provided in *First Berkshire*, “a bargained-for exchange is an element of ‘consideration.’” Consideration means “the amount of money, or other property and services, or property or services valued in money which is given in exchange for real estate, and measured at a time immediately after the transfer of the real estate.” Here, the Petitioner’s mechanism for conducting the statutory conversion will result in no exchange of money, other property and services, or other consideration. Rather, the Petitioner represents that no consideration will be received for the membership interest exchanged. Accordingly, there is no consideration in the Petitioner’s interest exchange.

The second part of the analysis is whether the transfer of real estate is from one entity to another entity, as required in the definition of a “sale, granting or transfer.” The LLC statutory conversion provisions specifically state that “[a] statutory conversion is a procedure (I) which involves only a single business entity; and (II) under which the converting business entity, as defined in RSA 304-C:148, II: (a) converts its business organization form to a different business organization form; but (b) remains the same business entity after the business conversion as before.” See RSA 304-C:147. Likewise, the partnership statutory conversion provisions provide that “When a conversion takes effect: (a) All property owned by the converting partnership... remains vested in the converted entity.” RSA 304-A:58. Accordingly, if the property in question is owned by the Partnership and remains vested in the LLC, the transfer of real estate is not a transfer at all, but rather a statutory conversion that involves only a single business entity. RSA 304-A:58, II(a). In that instance, the Petitioner’s interest exchange would not be subject to RETT.

RULINGS

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

1. There is no RETT liability as a result of the conversion of ABC Associates, a New Hampshire partnership, to XYZ, LLC, a New Hampshire LLC, under the provisions of RSA 304-C:147 through 149 with respect to property owned by ABC Associates, in accordance with RSA 304-A:58, II(a).

Date

John T. Beardmore, Commissioner