

**New Hampshire Department of Revenue Administration
109 Pleasant Street, Concord, NH 03301**

**TECHNICAL INFORMATION RELEASE
TIR 2018-004 Date: November 9, 2018**

A Technical Information Release is designed to provide immediate information regarding tax laws administered by the Department or the policy positions of the Department as a service to taxpayers and practitioners. A Technical Information Release represents the position of the Department on the limited issues discussed herein based on current law and Department interpretation. For the current status of any tax law, practitioners and taxpayers should consult the source documents (i.e., Revised Statutes Annotated, Rules, Case Law, Session Laws, etc.). Questions should be directed to Taxpayer Services at (603) 230-5920.

This TIR 2018-004 supersedes and replaces former TIR 2008-008. It is limited to the rental use and subsequent sale of a home with respect to the Business Profits Tax.

Rental Use and Subsequent Sale of a Home

If you use or have used any part of your New Hampshire home (whether your main home or an additional home) for rental purposes, you may be a business organization which is engaged in business activity within this state for purposes of the Business Profits Tax, RSA 77-A (“BPT”). Additionally, your home may be a business asset at the time of subsequent sale. Therefore, with respect to any taxable period, if you derive gross rents from the rental use of your home¹ or gross proceeds from the subsequent sale of your home, or both, in excess of the filing threshold provided in RSA 77-A:6, I, you may be required to file a BPT return and pay any BPT due.

However, with respect to any subsequent sale of your home which you use or have used for rental purposes, the question of whether it is a business asset at the time of sale is a fact intensive determination. There is no bright line rule, except as provided below, because it depends on the unique set of facts and circumstances at the time of sale to determine whether the sale is one of a business asset for purposes of the BPT.

The Department will not consider the sale of your home subject to the BPT in the following non-exhaustive circumstances:

- (1) You never used the home (whether your main home or an additional home) for rental purposes for more than fourteen days in any twelve-month period during the five years preceding the date of sale;
- (2) You lived in the home as your main home except during a single period of incidental rental use at the time of sale, during which period:
 - (a) You were actively marketing the home for sale; and

¹ If you derive gross rents from the rental use of your home, you are required to register and obtain a Meals and Rooms (Rentals) Tax (RSA 78-A) (“M&R Tax”) license, and collect and remit the M&R Tax due with monthly returns, whether or not you are required to file a BPT return.

- (b) You did not deduct for federal tax purposes any rental expenses such as, but not limited to, maintenance, depreciation, or repairs that would not have been deductible as itemized deductions had the home continued to have been used for personal purposes; or
- (3) You used only a portion of the home, specifically, your main home (and not an additional home), for rental purposes, which space was within your living area of the home.²

In contrast, despite the fact that the gains from the subsequent sale of your home may not be subject to the BPT, as described above, that is not the case with respect to the gross rents from the rental use of your home. You may still be required to file a BPT return and pay any BPT due.

The rental use and subsequent sale of your home may be subject to BPT as follows:

Individuals May Be a Business Organization

RSA 77-A:1, I defines a “business organization” subject to the BPT as “any enterprise, whether corporation, partnership, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code as defined in RSA 77-A:1, XX.” A proprietorship is a business in which one individual owns all the assets, owes all the liabilities, and operates in his or her own personal capacity. It does not have a separate identity from the individual who owns it. In other words, the individual is legally the same as the proprietorship it owns. Similarly, a group of individuals, or a trust, whether or not it has a separate identity from the individual grantor(s), may also be a “business organization” within the meaning of RSA 77-A:1, I, “if carrying on any business activity within the state.”

Rental Use of Home May Be Business Activity

The Business Profits Tax is imposed on every business organization which derives business profits from business activity within this state. RSA 77-A:1, XII provides in pertinent part: “‘Business activity’ includes, but is not limited to, a group of actions performed by a business organization for the purpose of earning income or profit from such actions and includes every operation which forms a part of, or a step in, the process of earning income or profit from such group of actions. The actions ordinarily include, but are not limited to, the employment of business assets, the receipt of money, property, or other items of value and the incurring or payment of expenses.” The definition of “business activity” is broad. It includes any action or operation “for the purpose of earning income or profit,” including the rental use of a home.

² An example of a space within your living area is a rental spare bedroom. Examples of space not within your living area include a first-floor storefront with an attached residence; a rented apartment in a duplex or guest house; or a working farm with a farmhouse on the property.

If an individual (or group of individuals, trust, or other form of organization, as the case may be) uses any part of his or her home as rental property “for the purpose of earning income or profit,” the individual engages in business activity regardless of whether the individual actually earns profit. The individual in that case employs his or her home to earn profit from a rental, which amount may be subject to the BPT. Likewise, if the individual subsequently sells his or her home, the individual may be subject to the BPT on gains from the sale, provided that the home is a business asset at the time of sale.

Home Used for Rental Purposes May Be a Business Asset

The sale of a business asset is subject to the BPT. RSA 77-A:1, XI defines “business asset” as “any tangible or intangible property, whether real or personal, *previously used, currently used, or available for use* in any business activity.” (Emphasis added). A home is tangible real property, and, assuming an individual once used it to produce rental income, it may be a “business asset” within the meaning of RSA 77-A:1, XI.

Furthermore, a home’s character as a business asset is not necessarily determined at the time of sale, or at any other specific point in time for that matter. If an individual previously used his or her home for rental purposes, the fact that the individual was instead using it for personal purposes at the time of sale does not automatically change the home’s character as a business asset. For instance, in Johns-Manville Prods. Corp. v. Commissioner of Revenue Admin., 115 N.H. 428 (1975), the New Hampshire Supreme Court held that income from the sale of real property which was previously used as part of the plaintiff’s business was subject to the BPT. The Court found that the fact that property was not sold until six years later did not change its character as a business asset, because it was used for the business purpose of producing profits.

Individuals who need auxiliary aids for effective communication in programs and services of the Department of Revenue Administration are invited to make their needs and preferences known to the N.H. Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301 or by contacting them at (603) 230-5000.