

IN THE MATTER OF THE PETITION OF "THE BANK"

FOR A DECLARATORY RULING

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Pursuant to RSA 541-A:1, IV, 541-A:2, I(d) and Rev 209.01 et seq., The Bank, Acme Inc. and C Inc. hereinafter referred to as "Petitioners" petitioned the Department of Revenue Administration with respect to the application of the real estate transfer tax to the transfer of several properties between the related parties through a consolidation and liquidation of Acme Inc. and C Inc..

DETERMINATION REQUESTED BY THE PETITIONER

Under a proposed transaction, property owned by Acme Inc. and identified as:

- (1) A's
 - (a) Foreclosed Lot;
 - (b) Lot;
 - (c) B Lot; and
 - (d) D Lot
- (2) E, NH; and
- (3) F Street;

would be transferred to the Bank by Acme, Inc. through a liquidation of the subsidiary into its parent, the Bank. The real estate would then be transferred from the Bank into a newly formed wholly-owned subsidiary of the Bank in exchange for all of the voting stock of the subsidiary. The transactions would qualify as a reorganization under Internal Revenue Code ' 368 (a) and a liquidation of a subsidiary under Internal Revenue Code ' 332.

The Petitioners request that the transaction be exempt from the real estate transfer tax [RSA 78-B] under the exemption provided by RSA 78-B:2, XIV or 78-B:2, XVII.

Petitioner requests a response to the following question:

1. Do the transfers of the realty from Acme, Inc. to the Bank in a liquidation of the subsidiary into its parent qualify as a non-taxable transfer under RSA 78-B:2; and
2. Do the transfers of the realty from the Bank to the newly formed and wholly-owned subsidiary in exchange for its voting stock qualify as a non-taxable transfer under RSA 78-B:2.

FACTS PRESENTED BY THE PETITIONERS

The petitioners made the following representations of relevant facts:

1. The Bank is located in NH and is a NH chartered mutual savings bank with a wholly-owned first tier subsidiary, Acme Inc. and a wholly-owned second tier subsidiary, C, Inc..

2. Acme Inc. owns the following properties:

(a) A's

I. Foreclosed Lot;

II. Lot;

III. B Lot

IV. D Lot;

(b) E, NH; and

(c) F Street.

3. Acme, Inc. and C, Inc. will be liquidated under Internal Revenue Code ' 332 into its respective parent corporation with no gain or loss being recognized for federal income tax purposes.

4. The Bank will form a new wholly-owned subsidiary and will contribute the various properties identified in 2. above to the subsidiary in exchange for all of the voting stock of the new subsidiary.

5. The tax and book basis for the properties will not change as a result of these transactions.

6. The Bank will control 100% of the assets in these corporations both before and after the transactions occur.

REVISED STATUTES ANNOTATED [RSA] AT ISSUE

1. 78-B:1, I. (a)

2. 78-B:1-a, II. (a)

3. 78-B;1-a, IV;

4. 78-B:1-a, V

5. 78-B:2, XIV; and

6. 78-B:2, XVII

RULES AT ISSUE

1. N.H. Code Admin. R. Rev 802.01 (a); and
2. N.H. Code Admin. R. Rev 803.02

OTHER LAWS OR RULES

Chapter 158, Laws of 2001 , Paragraphs 27 and 110, XI.

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 transfer by operation of law. The statute presumes 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 statutory language, RSA 78-B:1-a, V., 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. A contractual transfer, defined at RSA 78-B:1-a, II., includes any bargain-for exchange of all transfers of real estate from a corporation to its shareholder or from a shareholder to its corporation.

Prior to July 1, 2001, RSA 78-B:2 contained an exception to a taxable transfer that applied to the scenario contemplated by the Petitioners. RSA 78-B:2, XIV, exempted " ...a transfer of title pursuant to a merger, consolidation or other reorganization qualifying as a tax-free reorganization as defined under the United States Internal Revenue Code of 1986, section 368, as amended".

The Legislature repealed the provisions of RSA 78-B:2, XIV and XVII under Chapter 158, Laws of 2001. The effective date of the repeal is July 1, 2001. The statutory change applies to transfers occurring on or after July 1, 2001. The result of this change is to make the transfers involved in mergers, consolidations or other reorganizations subject to the provisions of the real estate transfer tax.

Since department rules cannot contradict statutory provision, the provisions of Rev 803.02 will not provide an exemption from the tax although the provision has not yet been repealed by the department. The rule will be repealed to be in conformity with the statutory change.

RULINGS

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

1. Any transfer of real estate between Acme, Inc and the Bank shall be subject to the provisions of RSA 78-B;
2. Any transfer of real estate between the Bank and a newly-formed and wholly-owned subsidiary shall be subject to the provisions of RSA 78-B;
3. The transfers of property between the related entities shall be a contractual transfer as defined in RSA 78-B: 1-a, II;
4. The transfer tax shall be computed on the price or consideration given for the real estate; and
5. The price or consideration shall be the fair market value of the real estate at the time immediately after the transfer of the real estate.

Stanley R. Arnold, Commissioner