

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

**IN THE MATTER OF THE PETITION OF
ABC REALTY TRUST**

FOR A DECLARATORY RULING

REDACTED VERSION

Doc 8724

Pursuant to RSA 541-A:1, V; 541-A:9, I(f) and Rev 209.01 et seq., the ABC Realty Trust (the “Trust” or “Petitioner”), by and through its attorney, petitioned the Department of Revenue Administration with respect to the applicability of the New Hampshire Real Estate Transfer Tax, RSA 78-B, to a proposed transaction.

DETERMINATION REQUESTED BY THE PETITIONER

Under a proposed transaction, the Trust, established under another state’s common law to hold title and to operate the Buildingl (the “Building”), will effectuate a statutory conversion of its business organization to that of a limited liability company (“LLC”) under another state’s statutory conversion law. The Trust has requested a determination that the Trust’s statutory conversion:

- (a) Will not give rise to a “transfer” nor to any “sale” nor “grant” within the meaning of RSA 78-B:1,I; and
- (b) Will not subject either the Trust or the LLC into which it was converted to liability under RSA 78-B:1, I(a).

FACTS PRESENTED BY THE PETITIONERS

The petitioners made the following representations of relevant facts:

The Trust owns and operates the Building located in New Hampshire. The Trust wants to make a statutory conversion of its business organization form to that of a limited liability company in order to provide the trustees and beneficiaries of the Trust with a statutory liability shield if there is ever a claim against the Trust on the grounds of negligence or otherwise. It would conduct the conversion under another state's statutory conversion law.

REVISED STATUTES ANNOTATED [RSA] AT ISSUE

RSA 78-B:1, I(a);
RSA 78-B:1-a, II;
RSA 78-B:1-a, V; and
RSA 78-B:2.

RULES AT ISSUE

N.H. Code Admin. R. Rev 802.01(a); and
N.H. Code Admin. R. Rev 802.06.

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 under the statute that every transfer is taxable unless it is specifically exempt from taxation under the exceptions provided in the statute. N.H. Admin R. Rev 802.01(a). RSA 78-B:2 provides the exemptions authorized by the legislature.

The central issue raised by the Petitioner's request is whether the statutory conversion from the Trust to an LLC involves a transfer of real estate or interest therein that the Legislature intended to subject to tax. As a preliminary matter, it should be noted that whether a statutory conversion results in transfer that is subject to the real estate transfer tax is governed by New Hampshire law and not another state's law. There are two reasons for New Hampshire law governing the taxability of the transaction. First, the validity and effect of conveyances are determined by the law of the state where the real estate is located.

Worcester North Savings Institution v. Somerville Mill Co., 101 N.H. 307, 308 (1958). New Hampshire law governs because the real estate in this case is located in New Hampshire. It is immaterial that the Trust is organized pursuant to another state's law and proposes to convert to another states LLC. Secondly, the power of taxation is an essential power of a sovereign state. Each state's legislature determines what transactions are subject to taxation. The legislative actions of a foreign state cannot control the taxability of the transactions in New Hampshire.

The history of actions taken by the legislature provides clear evidence of its intent with respect to statutory conversions. In 1993, New Hampshire enacted legislation providing for the creation of LLCs in this State. See RSA 293-B. In 1994, the legislature enacted an exemption for transfers or interests in real estate in connection with changes in the form of entity. See RSA 78-B:2, XVII (Supp. 2000); 1994 N.H. Laws 325:5. Subsequently, this exemption was repealed in 2001. 2001 N.H. Laws 158. Before its repeal, RSA 78-B:2, XVII read as follows:

RSA 78-B:2. The tax imposed by this chapter shall not apply:

XVII. (a) To a transfer of title from an entity, the ownership of which is represented by transferable interests, to another entity, the ownership of which is represented by transferable interests, provided that:

(1) The transfer of title is coincidental to a change in the transferor entity's form of organization to that of the transferee entity;

(2) As a result of the change in the transferor entity's form of organization, the assets and the liabilities of the transferor entity immediately preceding the change in form of organization and the assets and liabilities of the transferee entity immediately following the change in form of the organization are the same; and

(3) At the time of the transfer of title, the owner or owners of the transferor and the owner or owners of the transferee, and their respective ownership percentages of each, are identical.

(b) This paragraph shall not apply any transfer of title from or to a sole proprietorship or any entity the ownership of which is not represented by transferable interests.

(c) For the purpose of this paragraph, a beneficial interest in a trust shall be considered an ownership interest in such trust.

It is clear that the exemption that the legislature enacted in 1994, would have

exempted the imposition of tax from the Trust's proposed conversion to an LLC. The Supreme Court has stated that when interpreting statutes, it will presume that the legislature did not enact nonsensical and unnecessary provisions, *DeWees v. N.H. Bd. of Pharmacy*, 130 N.H. 396, 403 (1988). If the legislature had intended that a statutory conversion would not result in a real estate transfer tax liability, it would have been unnecessary to exempt such transactions under the former RSA 78-B:2, VII. Further, the subsequent repeal of that exemption in 2001, would have been nonsensical and unnecessary if the legislature had never intended the real estate transfer tax to apply to statutory conversions. Therefore, the enactment of RSA 78-B:2, VII and its subsequent repeal indicate that the legislature intended for statutory conversions such as the one proposed by the Trust to result in transfers that are subject to the real estate transfer tax.

RULINGS

Based on the facts as represented by the Petitioner and the statutory and administrative rule provisions discussed above, the department rules that the proposed statutory conversion from a trust to another states LLC will result in a transfer that is subject to the real estate transfer tax. The amount of the consideration will be presumed to be the fair market value of the real estate. N.H. Code Admin. R. Rev 802.06. Application of this ruling to any other situation is not binding on the Department.

Date

G. Philip Blatsos
Commissioner