

NH Real Estate Transfer Tax: A Statute with Ambiguity Part I

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This Part discusses the basic structure and operation of the real estate transfer tax and provides references to resources available for further information.

Background

In New Hampshire, in addition to local property taxes on real estate, a transfer tax is paid to the State whenever real estate is transferred, including transfers by operation of law. The Real Estate Transfer Tax or "RETT" is established and governed by Chapter 78-B of the New Hampshire Revised Statutes Annotated ("RSA"), which can be found online at <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-V-78-B.htm>.

The New Hampshire Department of Revenue Administration ("DRA") has also enacted rules which interpret and implement the statute, located online at http://www.gencourt.state.nh.us/rules/state_agencies/rev800.html. While tracking the statute, the rules provide particular guidance (not to be found in the statute) as to how DRA will treat certain transfers. Although the Real Estate Transfer Tax rules are set to expire on March 8, 2014, DRA has indicated that it intends to re-adopt and improve the rules. DRA is accepting public comment in advance of issuing proposed new rules until July 31, 2013. More information is available on DRA's website at <http://www.revenue.nh.gov/index.htm>.

Basic Operation of Real Estate Transfer Tax

All transfers of interests in real estate are presumed taxable unless specifically exempted. Taxable transfers are subject to the transfer tax at an effective rate of 1.5% of the price or consideration, with a minimum tax of \$40.00. The transferor and the transferee are each responsible for one-half of the transfer tax. For example, upon the sale of a house for \$250,000, the transfer tax would be \$3,750, with the seller and the buyer each paying \$1,875.

Several other nuances of the statute and, in some cases, DRA's interpretation of the statute, expand and complicate the application of the transfer tax:

- the transfer tax applies to transfers of any interest in real estate, not just a fee interest
- the transfer tax applies to transfers between commonly controlled entities, or between the controllers and the controlled entity
- the transfer tax applies not only to direct interests in real estate but also to transfers of interests in real estate holding companies and in entities that own real

estate holding companies – thus the actual real estate interest may be imbedded in several organizational layers

- the transfer tax applies regardless of whether monetary consideration was actually paid, and in some situations, to the full fair market value of the real estate even if the consideration was less than full market value
- the transfer tax applies where there is a change in the form of ownership, even if there is no change in effective ownership

Thus, examples of some transfers that would ordinarily be subject to the transfer tax include:

- Grant of a right-of-way or easement in real estate
- Grant of rights to harvest timber, soil or minerals
- Transfer of real estate via foreclosure, deed-in-lieu or sheriff's sale
- Transfer of real estate by a bankruptcy trustee
- Exchange of real estate for other real estate, personal property or intangible assets
- Transfers to or from revocable trusts, except where the revocable trust by administrative rule qualifies as a testamentary substitute for which the transfer in or out is subject only to a minimum transfer tax of \$40.00
- Transfer from an individual to an entity solely owned by that individual
- Transfer from one entity to another entity, even if owners are identical
- Transfer from an entity to its owners
- Conversion from one form of entity to a different form of entity

Exemptions

As noted above, a transfer is not subject to the transfer tax if there is a specific exemption for it. The following types of transfers are exempt by statute or rule from the transfer tax (or by rule subject only to a minimum transfer tax of \$40.00):

- A transfer to the State or a political subdivision of the State
- Mortgages, mortgage discharges, corrective deeds and tax collector deeds
- Transfers by devise (real property passing per terms of a will) and by operation of law to a surviving joint tenant
- Noncontractual transfers
- Transfers between spouses pursuant to divorce
- Leases for less than 99 years
- Transfers pursuant to a chapter 11 bankruptcy plan of reorganization
- Transfers to a revocable trust which acts as a will substitute and transfers to beneficiaries upon death of a grantor (subject only to minimum transfer tax of \$40.00)

The following entities are exempt from the transfer tax:

- the United States, and its agencies and instrumentalities, including Fannie Mae, Freddie Mac, and HUD

- the State and its political subdivisions
- the New Hampshire Housing Finance Authority

This Part is intended as a broad overview of the real estate transfer tax and any particular situation requires careful review of the statute, the rules, relevant cases and DRA's guidance. For further discussion of the ambiguities in the real estate transfer tax, see Part II of this article.