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

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Part I of this article discussed the basic structure and operation of the real estate transfer tax. This part discusses the exemption for non-contractual transfers, perhaps the most misunderstand exemption. This term is statutorily defined as a transfer that satisfies the 3 elements of a gift: donative intent, actual delivery and immediate relinquishment of control. In contrast, a "contractual transfer" means "a bargained-for exchange of all transfers of real estate or an interest therein."

Part of the confusion lies in the way the statute is structured. The statute provides that the transfer tax applies to the "sale, granting and transfer" of interests in real estate. It then defines "sale, granting and transfer" as every "contractual transfer" of an interest in real estate, which as stated above, is in turn defined as a "bargained-for exchange."

Stopping here, it seems unnecessary to then exempt "non-contractual transfers" – shouldn't a "non-contractual transfer" be the negative of a "contractual transfer" and thus not taxable in the first place? Yet, the statute goes on to not only expressly exempt "non-contractual transfers", but to define "non-contractual transfers" essentially as gifts.

This statutory structure gives rise to several ambiguities. Are the terms "contractual transfer" and "non-contractual transfer" intended to be mutually exclusive? Or is there some possible overlap between "contractual transfer" and "non-contractual transfer"? Otherwise, why the exemption? Are the terms "contractual transfer" and "non-contractual transfer" intended to encompass all types of transfers, or are there some transfers that don't fit into either category? And what does the statute mean by "bargained-for exchange"?

This ambiguity was highlighted in 2012 in a case decided by the New Hampshire Supreme Court, Say Pease IV, LLC et al. v. N.H. Dep't of Revenue, 163 N.H. 415 (2012).

In Say Pease IV, Say Pease, LLC owned a 47.5% interest in TIG, LLC, a real estate holding company. All of the members of Say Pease organized a new limited liability company, Say Pease IV, LLC, and then transferred Say Pease's interests in TIG to the new company. This was done in order to satisfy lender requirements and enable TIG to obtain financing.

In determining whether the transfer was subject to the real estate transfer tax, the Supreme Court focused on whether the transfer was a "contractual transfer," which required a "bargained-for exchange." At the outset, the Court noted its holding in a similar 2010 case, also involving a transfer of a real estate holding company, that a bargained-for exchange requires that the transferor receive consideration as a result of the transfer. See First Berkshire Business Trust v. N.H. Dep't of Revenue, 161 N.H. 176 (2010).

However, the Court then distinguished First Berkshire Business Trust, where the transferor's owner had directly benefited because the transfer allowed it to obtain financing. In Say Pease, the benefit of the transfer was that TGI, the transferred entity, was able to obtain financing and Say Pease, the transferor, benefited only indirectly by virtue of its owners also being the owners of Say Pease IV, the transferee. As a result of this distinction, the Supreme Court held that the benefit to the transferor was too attenuated to constitute the consideration required for a bargained-for exchange.

In her dissent, Chief Justice Dalianis rejected the majority's approach, instead focusing on the statutory construction to find that the legislature intended to divide transfers into two mutually exclusive, comprehensive categories – non-gift transfers ("contractual") and gift transfers ("non-contractual"). In doing so, she recognized that this construction required an expansion of the common law understanding of the term "bargained-for exchange." The Chief Justice opined that such a deviation was necessary, however, because the legislature clearly intended to tax transfers between entities with identical ownership as "contractual" transfers, and such transfers involved no bargaining.

The Chief Justice concluded, then, that in situations where there is no relinquishment of control – one of the necessary elements of a gift – the transfer is not a gift and thus is a "contractual transfer" presumed to be taxable. Applying this construction to the facts of Say Pease, the Chief Justice argued that there was no relinquishment of control because the entities and/or individuals that ultimately controlled the 47.5% interest in TIG prior to the transfer continued to control the 47.5% interest in TIG after the transfer.

In summary, the majority held that the transfer was not a "contractual transfer" because it lacked a necessary element of a bargained-for exchange - consideration; while the dissent held that the transfer must be a "contractual transfer" because it lacked a necessary element of a gift - relinquishment of control. This case and the differences in these opinions perfectly illustrate the ambiguities raised earlier in this article.

As noted in Part I, DRA's current rules providing guidance on the real estate transfer tax are set to expire in 2014, and DRA will be developing new rules in the coming months. Given the ambiguity in this area, DRA certainly has its work cut out!