

Transfer Taxes in New Hampshire

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There are two recurring questions about transfer taxes in New Hampshire:

I am the sole member and manager of an LLC. The LLC owns real estate. I would like to transfer the real estate from the LLC to me. Do I need to pay transfer tax?

And,

I am transferring real estate from myself as an individual to myself as trustee. Do I need to pay transfer tax?

The answer to these questions is, respectively, no, probably not, and, yes, but only \$40.

Transfer tax

In New Hampshire, as in most states, the transfer of title to real estate is a taxable event. See RSA 78-B:1 and 78-B:1-a. In general, the amount of tax due is based on the sale price of the real estate, and is 1.5%, or \$1.50 per \$100 of sale price. It is customary in New Hampshire for the seller and buyer to split the transfer tax, although the parties are free to agree otherwise.

There are a number of exceptions to the transfer tax. See RSA 78-B:2. Common exceptions include:

Noncontractual transfers (IX)

Mortgages (III), and discharges of mortgages (IV)

Corrective deeds (V)

Transfers due to the death of the property owner (XI)

Transfers to the beneficiary of a partnership interest where the partnership dissolves by operation of law due to the death of a partner (XII)

Transfers of title between spouses pursuant to a final decree of divorce or nullity (XIII)

Transfers of title where no consideration is exchanged, the transfer is coincidental to a change in the transferor's form of organization, the assets and liabilities of the transferor and transferee are the same, and the owner(s) of the transferor and the transferee are identical (XXI)

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Transfers from the owners of an entity to the entity, or from the entity to the owners of the entity, provided that no consideration is exchanged for the transfer of the real estate, and the direct or indirect owners of the parties to the transfer remain the same before and after the transfer of the real estate, the respective ownership percentages of each are identical, and the combined assets and liabilities of the transferor and transferee remain the same except with respect to the real estate (XXII)

What does “noncontractual” mean? A contractual transfer is "a bargained-for exchange of all transfers of real estate or an interest therein." RSA 78-B:1-a, II. What then does “bargained-for exchange” mean? In the case of *First Berkshire Business Trust*, 161 N.H. at 181, the New Hampshire Supreme Court found that a bargained-for exchange is when the seller directly and tangibly benefitted from the transfer of real property.

What that means is, generally, the transfer is noncontractual if there was no purchase and sales agreement, and no money changed hands, and the seller received no benefit due to the transfer.

Transfer tax and LLCs

Given the above, if the transfer is from an LLC to the owner of the LLC (or vice versa), and there is no purchase and sales agreement, and no money or other benefit is exchanged, then is there transfer tax?

Note that not only is the transfer of real estate taxed, but the transfer of ownership in a company that owns real estate is likewise taxed.²

In the case of *Say Pease IV, LLC et al. v. NH DRA*, 163 N.H. 415 (N.H. 2012), one LLC (“A”) owned another LLC (“C”), and that LLC owned real estate. LLC “A” then created a third LLC (“C”), and then transferred ownership of LLC “B” to LLC “C”. Was any transfer tax due?

As LLC “B” owned real estate, it was possible that some transfer tax was due. The Court used the analysis from *First Berkshire Business Trust*, and the Court found that as the seller received no benefit from the transfer, the transfer was not contractual, and thus no transfer tax was due.

In general, if there is no purchase and sales agreement, and the LLC (seller) does not receive and money or other benefit from the sale, then no, there would be no transfer tax.

See also the other requirements of RSA 78-B:2, XXI and XXII.

Also of note, transfer tax does not apply to transfers under a plan of reorganization confirmed under 11 USC section 1129. See DRA Rule 803.02.

Transfer tax and trusts

² DRA rule 805.01.

Is there transfer tax when a person transfers real estate from himself as an individual to himself as trustee (or vice versa)?

First, under RSA 78-B:2, XXI, b, a trust is treated as an entity.

Second, there is a specific DRA rule that governs transfers to trustees, when the grantor and trustee are the same person, DRA Rule 802.02 (below).

Note that in general the amount of transfer tax is based on the sale price, or the fair market value of the real estate at the time of transfer. However, when it comes to a transfer from a grantor to a trustee, and the grantor and trustee are the same person, rule 802.02 provides that:

Rev 802.02 Revocable Trusts of Real Property.

(d) The department shall not presume the price or consideration to be fair market value of the property transferred for transfers under Rev 802.02(c) that are transferred:

- (1) Between a trust and grantor of the trust;
- (2) From a trust to the beneficiaries of the trust upon the death of the grantor of the trust;
- (3) From the trust to a beneficiary who is the natural object of the grantor's bounty; or
- (4) From a trustee to a successor trustee of the same trust.

What that means is that if you are transferring title to real estate from you as an individual to you as a trustee, then, yes, you do need to pay transfer tax, however, you need pay only the minimum, which is \$40.³

For more information

The instructions to the transfer tax form, CD-57, have more information about the transfer tax. That form can be found at:

<http://www.revenue.nh.gov/forms/2010/documents/cd-57-p.pdf>
<http://www.revenue.nh.gov/forms/2010/documents/cd-57-s.pdf>
<http://www.revenue.nh.gov/forms/2010/documents/cd-57-HC-P.pdf>
<http://www.revenue.nh.gov/forms/2010/documents/cd-57-HC-S.pdf>

More information about transfer tax can also be found at
http://www.revenue.nh.gov/faq/dra_800.htm

³ As of June, 2013.

The DRA rules for transfer tax can be found at
http://www.gencourt.state.nh.us/rules/state_agencies/rev800.html

Please do not hesitate to contact us with any questions. We can be reached at:

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