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Important changes to New Hampshire’s transfer tax creates opportunity

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The New Hampshire legislature continues to demonstrate its interest in helping the business and real estate community. The latest example is some long overdue and significant exemptions to the real estate transfer tax.

New Hampshire imposes a tax on all transfers of real estate (and of ownership interests in real estate holding companies). The tax rate is 1.5% of the value of the real estate (the purchase price in a typical transaction). Although gifts and a limited number of other types of transactions (e.g., transfers to governmental entities or pursuant to a divorce decree) are exempt, a number of transactions that do not involve an arms-length sale or the payment of any consideration have been treated as taxable transfers. In many cases, this has limited the ability of real estate owners to hold their property in the most effective manner.

Effective June 21, with Chapter Law 288 (HB 1656), the legislature fixed three of the worst problems with the transfer tax statute.

First, prior to the new law, if an entity owned real estate and wanted to change its form of ownership (e.g., from a partnership to a limited liability company), the reorganization would be subject to the transfer tax. Although the Department of Revenue Administration modified its regulations in 2014 to clarify that a conversion of a business entity into an LLC is subject to the minimum, $40 tax, it was still a taxable transfer. Chapter 288 creates a new statutory exception for any real estate transaction "coincidental" to a change in an entity's form of organization, so long as the ownership, assets, and liabilities of the transferor and transferee are identical before and after.

This will allow business organizations a great deal of structural flexibility, without having to account for a transfer tax that often made internal reorganizations prohibitively costly. Entities will still need to be cautious, however, as the exemption is carefully crafted. For example, a reorganization that results in a cash-out of a business partner or changes the percentage ownership of the entity's principals will not meet the requirements of the exemption and will trigger a transfer tax.

The second new exemption will have an even broader impact. Before the new law, a transfer of real estate from an individual into his own business organization or from a corporation into a wholly-owned subsidiary would be subject to the transfer tax. Worse, the tax would be calculated on the full value of the property, even though no actual consideration was exchanged and the ownership effectively remained the same.

Under the new legislation, this is no longer the case. A transfer of title from an owner of an entity to that entity, and vice versa, is not subject to the tax if there is no consideration paid, the owner (directly or indirectly) remain the same before and after, there is no change in percentage ownership, and the combined assets and liabilities of the transferor and transferor are unchanged. This allows for a number of structuring options that previously would have resulted in substantial tax liability.

Finally, the new law provides some relief for borrowers, who are often required as a condition of financing to transfer real estate collateral into single purpose entities. This also occurs in the residential context, where a lender will sometimes require property to be moved from a borrower's estate planning trust into his individual name. Prior to the legislative action, these transfers were considered as contractual transfers, subject to the transfer tax, although no consideration was exchanged. The statute now provides a safe harbor for a transfer "made solely to obtain financing or refinancing, as required by a lending institution, and that accomplish no other business purposes." Under those circumstances, the transfer is not contractual in nature and therefore is not subject to the tax.

While Chapter 288 represents meaningful reform by providing a number of helpful planning opportunities for businesses and real estate owners, the new exemptions are not without ambiguity, and the transfer tax rules remain complex. We will need to wait for regulatory guidance from the Department of Revenue Administration to see how the new law will be applied to a number of individual situations. Given the uncertainty and complexity, you should include legal and tax professionals in the planning of any significant transaction involving real estate or a real estate holding company.

Keep in mind, too, that what the legislature gives, it may take away. While we are hopeful that the promising developments embodied in the new law will remain in place for years to come, the ever-changing political landscape and the state's fiscal situation may make these exemptions short-lived. Property owners that are contemplating transactions that fall within the new exemptions may want to take advantage of the opportunity without delay.

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