

29th Annual Tax Forum
New Hampshire Tax Update: DRA Panel Discussion
November 18, 2011



Administration Division
Legal Bureau

Overview and 2011 Legal Updates

The Legal Bureau, Office of Revenue Counsel, provides legal advice and representation to the Department of Revenue Administration, serving as its general legal counsel. Revenue Counsel also coordinates the representation provided to the Department by the Department of Justice, provides assistance, and acts as co-counsel in certain cases. Revenue Counsel performs a wide range of other services which include: rendering advice and legal opinions to Department personnel and other government officials; managing bankruptcy cases; drafting and coordinating the adoption of administrative rules by the Commissioner; assisting with Department informational publications; handling Right-to-Know Law requests and requests for Declaratory Rulings; and providing assistance and advice in connection with audits, hearings before the Department's Hearings Bureau, and other stages of the enforcement and administration of tax laws.

A. OVERVIEW: Laws and Administrative Rules

The NH DRA Legal Bureau renders advice and legal opinions to the Department on, *inter alia*, the following statutes and administrative rules.

I. BUSINESS TAXES

Rules Chapter	Chapter No.	Statute Chapter	Statute No.
Business Enterprise Tax	Rev 2400	Business Enterprise Tax	RSA 77-E
Business Profits Tax	Rev 300	Business Profits Tax	RSA 77-A
Communications Services Tax	Rev 1600	Communications Services Tax	RSA 82-A
Electricity Consumption	Rev 2600	Electricity Consumption Tax	RSA 83-E

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Tax			
Interest and Dividends Tax	Rev 900	Taxation of Incomes	RSA 77
Gambling Winnings Tax	Rev 3100	Taxation of Incomes	RSA 77:38 through RSA 77:50
Meals and Rooms (Rentals) Tax	Rev 700	Meals and Rooms (Rentals) Tax (Includes Motor Vehicle Rentals)	RSA 78-A
Medicaid Enhancement Tax	Rev 2300	Medicaid Enhancement Tax	RSA 84-A
Nursing Facility Quality Assessment	Rev 2700	Nursing Facility Quality Assessment	RSA 84-C
Tobacco Tax	Rev 1000	Tobacco Tax	RSA 78

II. ADMINISTRATION

Electronic Funds Transfer	Rev 2500	Electronic Funds Transfer	RSA 21-J:3, XXI
Organizational Rules	Rev 100	Department of Revenue Administration	RSA 21-J
Procedural Rules	Rev 200	Administrative Procedure Act	RSA 541-A
		Appeals for Redetermination or Reconsideration	RSA 21-J:28-b
		Public Hearings on Administrative Rules and Declaratory Rulings	RSA 541-A
Administration, Returns and Taxpayer Records	Rev 2900	DRA Rulemaking Authority	RSA 21-J:13
		Confidentiality of Taxpayer Records	RSA 21-J:14
		Liens	RSA 21-J:28-c
		Distrain	RSA 21-J:28-d
		Statute of Limitations	RSA 21-J:29
		Penalty for Failure to File	RSA 21-J:31

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		Penalty for Underpayment of Estimated Tax	RSA 21-J:32
		Penalty for Failure to Pay	RSA 21-J:33
		Substantial Understatement Penalty	RSA 21-J:33-a
		Understatement of Taxpayer's Liability by Tax Preparer	RSA 21-J:33-b
		Penalties for Aiding and Abetting Understatement of Tax Liability	RSA 21-J:33-c
		Transferee Liability	RSA 21-J:38
		Taxpayer Bill of Rights	RSA 21-J:40 through RSA 21-J:44

III. PROPERTY TAXES

Railroads and Private Car Companies	Rev 1500	Taxation of Railroads	RSA 82
Utility Property Tax	None	Utility Property Tax	RSA 83-F
Low & Moderate Income Homeowners Property Tax Relief	Rev 1200	Low & Moderate Income Homeowners Property Tax Relief	RSA 198:56 RSA 198:57
Credits and Exemptions from Property Taxes	Rev 400	Persons and Property Liable to Taxation	RSA 72
Excavation Tax and Tax of Excavation Area	Rev 500	Excavation Tax	RSA 72-B
Real Estate Transfer Tax	Rev 800	Real Estate Transfer Tax	RSA 78-B
Conservation Restriction Assessment	Rev 1800	Conservation Restriction Assessment	RSA 79-B
		Annual Inventory of Polls and Taxable Property	RSA 74
		Apportionment, Assessment, and Abatement of Taxes	RSA 76
		NH Accountancy Act	RSA 309-B

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Timber Tax	None	Timber Tax	RSA 79
Property Appraisal	Rev 600	Appraisal of Taxable Property	RSA 75
Equalization	Rev 2800	Equalization	RSA 21- J:14-c
Land and Community Heritage Investment Program (L-CHIP)	Rev 3000	Land and Community Heritage Investment Program	RSA 478:17

VI. BANKRUPTCY

Title 11 – Bankruptcy Code	
CHAPTER 1: General Provisions	11 U.S.C. §§ 101-112
CHAPTER 3: Case Administration	11 U.S.C. §§ 301-366
CHAPTER 5: Creditors, The Debtor, and The Estate	11 U.S.C. §§ 501-562
CHAPTER 7: Liquidation	11 U.S.C. §§ 701-784
CHAPTER 11: Reorganization	11 U.S.C. §§ 1101-1174
CHAPTER 13: Adjustment of Debts of an Individual with Regular Income	11 U.S.C. §§ 1301-1330
Federal Rules of Bankruptcy Procedure	
PART I: Commencement of Case: Proceedings Relating to Petition and Order for Relief	Rules 1002-1021
PART II: Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants	Rules 2001-2020
PART III: Claims and Distribution to Creditors and Equity Interest Holders; Plans	Rules 3001-3020
PART IV: The Debtor: Duties and Benefits	Rules 4001-4008
PART V: Bankruptcy Courts and Clerks	Rules 5001-5012
PART VI: Collection and Liquidation of the Estate	Rules 6001-6011
PART VII: Adversary Proceedings	Rules 7001-7087
PART VIII: Appeals to District Court or Bankruptcy Appellate Panel	Rules 8001-8020

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PART IX: General Provisions	Rules 9001-9037
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B. LEGAL UPDATE: Court Decisions Issued During FY 2011

*** The following is only a brief summary of court decisions. It is not intended to be relied upon as the full and complete text of the court decision. Please refer to the court decision itself for the full and complete text, to perform an analysis and to determine how this information applies to specific persons or situations.*

ADMINISTRATIVE PROCEDURE: International Leather Goods, LLC v. Department of Revenue Administration, Board of Tax and Land Appeals Docket No. 24728-10BP. The Petitioner brought this action to appeal a Final Order, dismissing its adjudicative proceeding because it failed to appear at the scheduled hearing before the Department’s Hearings Bureau. The Department moved for summary judgment, asserting that the Petitioner’s appeal should be dismissed because the Petitioner failed to appear at a duly scheduled hearing in violation of the Department’s rule requiring such an appearance. The Petitioner objected, claiming that there were disputed facts and that it was entitled to proceed with the appeal on the substantive tax issues, despite its admitted failure to appear at the hearing before the Department’s Hearings Bureau, because appeals to the BTLA are “de novo,” pursuant to RSA 21-J:28-b, IV. On August 27, 2010, the BTLA granted the Department’s motion and dismissed the appeal, finding that there were no material issues of genuine fact, as the Petitioner admitted that it did not attend the hearing, that the right to a “de novo” appeal does not mean that the Petitioner was free to decide whether or not to comply with the Department’s rules and, finally, that the Petitioner must exhaust its administrative remedies, which includes attending the Department hearing prior to appealing the substantive tax issues.

INTEREST & DIVIDENDS TAX: Lyme Timber Co. v. NH Dept. of Revenue Administration and Lyme Timber Co. NH Ltd Partners v. NH Dept of Revenue Administration, Supreme Court Docket No. 2010-0399. These are interrelated cases concerning whether the Interest and Dividends Tax should be imposed on the entity or the interest holders of the entity. The Petitioners appealed whether the interest holder possessed transferable shares in the entity. Cross partial motions for summary judgment were filed. On May 13, 2010, the Superior Court granted the Petitioners’ partial motion for summary judgment and denied the Department’s partial motion for summary judgment. The DRA appealed the Superior Court’s decision to the New Hampshire Supreme Court. On May 26, 2011, the Supreme Court issued an opinion, reversing the Superior Court’s decision in favor of the Department, finding that the interest holders possessed transferable shares based on the language in the partnership agreement, and remanded the case back to Superior Court for further proceedings.

REAL ESTATE TRANSFER TAX: 68 Technology Drive, LLC v. State of New Hampshire Department of Revenue Administration, Superior Court Docket No. 09-E-

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0450. The Petitioner challenged an assessment of Real Estate Transfer Tax for property transferred to it. The parties filed cross motions for summary judgment. The Superior Court issued an order in favor of the Petitioner, rescinding the tax assessment. The Department moved for reconsideration of the Superior Court's Order, which was denied.

REAL ESTATE TRANSFER TAX: First Berkshire Business Trust, et al. v. G. Philip Blatsos, Commissioner et al., Supreme Court Docket No. 2009-850. The Petitioners challenged an assessment of Real Estate Transfer Tax for properties transferred to limited liability companies. The parties filed cross motions for summary judgment. The Superior Court issued an order, upholding the Department's assessment of Real Estate Transfer Tax plus interest, but reversed the Department's assessment of penalties. The Petitioners filed a Motion for Reconsideration and the Department objected. The Superior Court denied the Petitioners' motion, and an appeal to the New Hampshire Supreme Court was filed by the Petitioners. On November 24, 2010, the Supreme Court issued an opinion, affirming the Superior Court's order and upholding the Department's assessment of Real Estate Transfer Tax plus interest because the transactions at issue constituted "bargained-for-exchanges" since they involved the exchange of "money, or other property and services, or property or services valued in money" for an interest in the subject property, pursuant to RSA 78-B:1-a, II, IV.

C. LEGAL UPDATE: Significant Cases Pending During FY 2011

*** The following is only a brief summary of the case status during FY 2011. It is not intended to be relied upon as the full and complete summary of the status of the case, as the following cases were in progress during FY 2011 and continue to be pending.*

BUSINESS PROFITS TAX: Capital One Auto Finance, Inc. v. Kevin A. Clougherty, Commissioner of the New Hampshire Department of Revenue Administration, Superior Court Docket No. 217-2010-CV-00708. The Petitioner filed an appeal, challenging the Department's assessment that increased the New Hampshire sales factor numerator due to the Petitioner's failure to include substantial receipts and claiming that it is not required to include such receipts as it was not conducting "business activity" related to such receipts in New Hampshire.

BUSINESS PROFITS TAX: Woodland Management Associates, LLC v. NH Dept of Revenue Administration, Grafton County Superior Court Docket No. 09-E-0032. This matter is related to the Lyme Timber cases, discussed above in Section B. Woodland Management Associates, LLC is the general partner of the Lyme Timber Company and this matter concerns the effect of options on gross business profits and compensation paid to the members of the LLC who are also limited partners of Lyme Timber Company.

GAMBLING TAX: Leighton, et al. v. State of New Hampshire, Merrimack Superior Court Docket No. 217-2010-CV-0300. The Petitioners filed a Petition for Declaratory Judgment, Permanent Injunction, Class Action Certification and Tax Refunds,

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challenging the constitutionality of the Gambling Tax (RSA Chapter 77). The parties have filed cross motions for summary judgment.

INTEREST & DIVIDENDS TAX: Wennin, LLC, et al. v. State of NH, Department of Revenue Administration, Northern District of Hillsborough County Superior Court; Docket Number 10-E-0048. The Petitioners filed a Petition for Declaratory Judgment and Request for Class Action Certification challenging the constitutionality of the amendments to the Interest and Dividends Tax (RSA Chapter 77), relating to distributions from limited liability companies, partnerships, and associations. On February 25, 2011, the Petitioners moved to voluntarily non-suit the case, which the Superior Court granted.

REAL ESTATE TRANSFER TAX: Say Pease IV, LLC, et al. v. New Hampshire Department of Revenue Administration, Superior Court Docket No. 09-E-0330. The Petitioners challenged assessments of Real Estate Transfer Tax for property transferred between them. The parties filed cross motions for summary judgment. The Superior Court issued an order in favor of the Petitioner, finding that the transfer was not a “contractual transfer” and not taxable pursuant to RSA Chapter 78-B. The Department moved for reconsideration of the Superior Court’s Order, which was denied. The Department has appealed the Superior Court’s Order to the New Hampshire Supreme Court, which is pending as Docket No. 2011-0174.

D. RULES UPDATE: Administrative Rulemaking During FY 2011

Source Number	Rule Number and Content	Effective Date	Expiration Date
9825-A	Rev 201.01(d) (Definition of Department)	11/25/2010	N/A
9825-B	Rev 207.05, 207.06, 207.13, 207.14 & 207.15 (Procedural Rules; General Information and Definitions; Specific Rules of Practice and Procedure)	11/25/2010	11/25/2018
9826	Rev 1904.01, 1904.02, 1904.03, 1907 (Requirements of Auditors/Forms)	11/25/2010	11/25/2018
9843	Rev 901, 902, 903 (various sections – Interest & Dividends Tax)	12/23/2010	12/23/2018
9841	Rev 1400 (Utility Property Tax)	12/23/2010	12/23/2018
9913	Rev 2300 (Medicaid Enhancement Tax)	4/21/2011	4/21/2019
9926	Rev 500 (Excavation Tax)	5/17/2011	5/18/2019
9930	Rev 2904.05 (Electronic Signatures)	5/26/2011	5/26/2019
9946	Rev 1200 (Low and Moderate Income Homeowners Property Tax Relief)	6/23/2011	6/23/2019

The complete text of the above Adopted Rules can be found on the Department’s website at <http://www.nh.gov/revenue/laws/index.htm>.

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E. RULES UPDATE: Upcoming Rulemaking During FY 2012

The Department has either submitted the following rule amendments to JLCAR or is reviewing the following rules for update during FY 2012.

Rule Number	Content
Rev 903.05	<u>Interest & Dividends</u> : amended to effectuate the amendment to RSA 77:4-g.
Rev 2301.05 and 2301.07	<u>Medicaid Enhancement Tax</u> : technical corrections to the definitions of “hospital” and “net patient services revenue” that were recently amended in the statutes.
Rev 807 and 809	<u>Real Estate Transfer Tax</u> : amended to effectuate the amendment to RSA 78-B:10, regarding the Form CD-57 separation between transferee and transferor.
Rev 303.01	<u>Business Profits Tax</u> : Compensation for Personal Services of Proprietor, Partner or Member under review to effectuate the amendments to RSA 77-A:4, III; RSA 77-A:11, I and RSA 21-J:28-b, pursuant to Senate Bill 125.
Chapter Rev 700	<u>Meals & Rentals</u> : under review, as rules expire in June 2012.
Chapter Rev 1600	<u>Communications Services Tax</u> : under review, as rules expire in September 2012.
Chapter Rev 1700	<u>Financial Accounting for Cities and Towns</u> : under review, as rules expire in September 2012.
Chapter Rev TBD	<u>Timber</u> : under review, as rules needed.