WEST VIRGINIA CODE: §11-21-71B

§11-21-71b. Withholding tax on West Virginia source income of nonresidents.

(a) (1) In this section the following words have the meanings indicated.

(2) (A) Except as provided in paragraph (B) of this subdivision, "net proceeds" means the total sales price paid to the transferor less:

(i) Debts of the transferor secured by a mortgage or other lien on the property being transferred that are being paid upon the sale or exchange of the property; and

(ii) Other expenses of the transferor arising out of the sale or exchange of the property and disclosed on a settlement statement prepared in connection with the sale or exchange of the property, not including adjustments in favor of the transferee.

(B) "Net proceeds" does not include adjustments in favor of the transferor that are disclosed on a settlement statement prepared in connection with the sale or exchange of the property.

(3) "Nonresident entity" means an entity that:

(A) Is not formed under the laws of the state; and

(B) Is not qualified by or registered with the Tax Commissioner to do business in the state.

(4) "Resident entity" means an entity that:

(A) Is formed under the laws of the state; or

(B) Is formed under the laws of another state and is qualified by or registered with the Tax Commissioner to do business in the state.

(5) "Total payment" means the net proceeds of a sale actually paid to a transferor, including the fair market value of any property transferred to the transferor.

(6) "Transfer pursuant to a deed in lieu of foreclosure" includes:

(A) A transfer by the owner of the property to:

(i) With respect to a deed in lieu of foreclosure of a mortgage, the mortgagee, the assignee of the mortgage, or any designee or nominee of the mortgagee or assignee of the mortgage;

(ii) With respect to a deed in lieu of foreclosure of a deed of trust, the holder of the debt or other obligation secured by the deed of trust or any designee, nominee, or assignee of the holder of the debt or other obligation secured by the deed of trust;

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(iii) With respect to a deed in lieu of foreclosure of any other lien instrument, the holder of the debt or other obligation secured by the lien instrument or any designee, nominee, or assignee of the holder of the debt secured by the lien instrument; and

(B) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value.

(7) "Transfer pursuant to a foreclosure of a mortgage, deed of trust, or other lien instrument" includes:

(A) With respect to the foreclosure of a mortgage:

(i) A transfer by the mortgagee, the assignee of the mortgage, the attorney named in the mortgage, or the attorney or trustee conducting a foreclosure sale pursuant to the mortgage to:

(I) The mortgagee or the assignee of the mortgage;

(II) Any designee, nominee, or assignee of the mortgagee or assignee of the mortgage; or

(III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

(ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value;

(B) With respect to the foreclosure of a deed of trust:

(i) A transfer by the trustees, successor trustees, substituted trustees under the deed of trust, or trustees conducting a foreclosure sale pursuant to the deed of trust to:

(I) The holder of the debt or other obligation secured by the deed of trust;

(II) Any designee, nominee, or assignee of the holder of the debt secured by the deed of trust; or

(III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

(ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value; and

(C) With respect to the foreclosure of any other lien instrument:

(i) A transfer by the party authorized to make the sale to:

(I) The holder of the debt or other obligation secured by the lien instrument;

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(II) Any designee, nominee, or assignee of the holder of the debt secured by the lien instrument; or

(III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

(ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value.

(b) (1) For every deed or other instrument of writing that effects a change of ownership on the land books of a county assessor and for which an amount is required to be withheld under subsection (c) of this section, the total payment shall be described on the form prescribed by the Tax Commissioner.

(2) The form required under subdivision (1) of this subsection shall be signed under oath by:

(i) The transferor of the property;

(ii) An agent of the transferor; or

(iii) The real estate reporting person, as defined under Section 6045 of the Internal Revenue Code.

(c) (1) Except as otherwise provided in this section, in a sale or exchange of real property and associated tangible personal property owned by a nonresident or nonresident entity occurring on during taxable years beginning on or after January 1, 2008, the real estate reporting person, as defined under Section 6045 of the Internal Revenue Code, shall withhold an amount equal to two and one-half percent of the total payment to a nonresident or nonresident entity. In lieu thereof, the real estate reporting person may withhold an amount equal to six and one-half percent of the estimated capital gain derived from the sale or exchange. The amounts withheld shall be paid to the Tax Commissioner by the real estate reporting person within thirty days of the date the amounts were withheld.

(2) The Tax Commissioner may propose alternatives to the percentages of payments or capital gains set forth in this section that may, based upon experience and application of this section, more accurately represent the value of capital gains subject to taxation in this state and, upon enactment of any such rules, those alternatives to the percentages shall supersede the percentages set forth in this subsection.

(d) Subsection (c) of this section does not apply when:

(1) A certification under penalties of perjury that the transferor is a resident of the state or is a resident entity is provided by each transferor in:

(A) The recitals or the acknowledgment of the deed or other instrument of writing transferring the property to the transferee; or

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(B) An affidavit signed by the transferor or by an agent of the transferor that accompanies and is recorded with the deed or other instrument of writing transferring the property;

(2) The transferor presents to the real estate reporting person, as defined under Section 6045 of the Internal Revenue Code, a certificate issued by the Tax Commissioner stating that:

(A) No tax is due from that transferor in connection with that sale or exchange of property;

(B) A reduced amount of tax is due from that transferor in connection with that sale or exchange of property and stating the reduced amount that should be collected by the real estate reporting person, as defined under Section 6045 of the Internal Revenue Code, before recordation or filing; or

(C) The transferor has provided adequate security to cover the amount required to be withheld under subsection (c) of this section;

(3) The property transfer is:

(A) A transfer pursuant to a foreclosure of a mortgage, deed of trust, or other lien instrument; or

(B) A transfer pursuant to a deed in lieu of foreclosure;

(4) The property is transferred by the United States, the state, or a unit or political subdivision of the state;

(5) A certification under penalties of perjury that the property being transferred is the transferor's principal residence is provided by each transferor in:

(A) The recitals or the acknowledgment of the deed or other instrument of writing transferring the property to the transferee; or

(B) An affidavit signed by the transferor or by an agent of the transferor that accompanies and is recorded with the deed or other instrument of writing transferring the property; or

(6) The property is transferred pursuant to a deed or other instrument of writing that includes a statement of consideration required in section six, article twenty-two of this code indicating that the consideration payable is zero.

(e) Except as provided in this section, the amounts described in subsection (c) of this section shall be collected by the real estate reporting person before the deed or other instrument of writing is presented for recordation or filing.

(f) (1) Amounts collected under subsection (c) of this section and paid over to the Tax Commissioner under subsection (e) of this section shall be deemed to have been paid to the

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Tax Commissioner on behalf of the transferor from whom the amounts were withheld.

(2) The transferor shall be credited with having paid the amounts for the taxable year in which the transaction that is the subject of the tax occurred against any tax owed by the transferor to the State of West Virginia on gains resulting from the transaction and is entitled to a refund from the Tax Commissioner of any amount in excess of the amount owed, except as provided in subsection (i) of this section.

(g) The real estate reporting person is subject to the requirements and penalties prescribed for the failure to pay the amount of a tax prescribed by article ten of this chapter for the failure to pay to the Tax Commissioner amounts withheld pursuant to provisions of this section.

(h) This section does not:

(1) Impose any tax on a transferor or affect any liability of the transferor for any tax; or

(2) Prohibit the Tax Commissioner from collecting any taxes due from a transferor in any other manner authorized by law.

(i) (1) The Tax Commissioner shall propose legislative rules for promulgation in accordance with the provisions of article three, chapter twenty-nine-a of this code to implement and administer this section.

(2) The Tax Commissioner shall establish procedures for the issuance of the certificate referred to in subdivision (2), subsection (d) of this section.

(3) The Tax Commissioner shall establish a procedure by which a transferor may apply for an early refund of the tax collected under this section if the transferor establishes that no tax will be owed or less tax than collected will be owed.

(4) If the amount withheld and paid to the Tax Commissioner under this section equals or exceeds the amount of tax owed by the transferor, the transferor may, at his or her discretion, not file the return required by this article: Provided, That failure to file a return is deemed to be a final decision to not claim a refund for an overpayment of the tax imposed by this article, and no claim for refund shall be granted and no refund paid with relation to tax withheld pursuant to this section for which no return was filed by the taxpayer.

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