

bill 2009
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Second Extraordinary Session, 2006

ENROLLED

Senate Bill No. 2009

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
BY REQUEST OF THE EXECUTIVE)

[Passed November 14, 2006; in effect ninety days from passage.]

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(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
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[Passed November 14, 2006; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §11-21-71b, relating to requiring certain amounts to be withheld and paid to the Tax Commissioner from total payments made for the sale or exchange of real property and associated tangible personal property owned by a nonresident or nonresident entity; providing exceptions; providing penalties; and providing for administration.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §11-21-71b, to read as follows:

ARTICLE 21. PERSONAL INCOME TAX.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

104 (i) The transferor of the property;

105 (ii) An agent of the transferor; or

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

108 (c) (1) Except as otherwise provided in this section, in
109 a sale or exchange of real property and associated
110 tangible personal property owned by a nonresident or
111 nonresident entity occurring on during taxable years
112 beginning on or after the first day of January, two
113 thousand eight, the real estate reporting person, as
114 defined under Section 6045 of the Internal Revenue
115 Code, shall withhold an amount equal to two and one-
116 half percent of the total payment to a nonresident or
117 nonresident entity. In lieu thereof, the real estate
118 reporting person may withhold an amount equal to six
119 and one-half percent of the estimated capital gain
120 derived from the sale or exchange. The amounts
121 withheld shall be paid to the Tax Commissioner by the
122 real estate reporting person within thirty days of the
123 date the amounts were withheld.

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

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

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

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

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

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

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

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

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

158 (3) The property transfer is:

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

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

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

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

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

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

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

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

185 (f) (1) Amounts collected under subsection (c) of this
186 section and paid over to the Tax Commissioner under
187 subsection (e) of this section shall be deemed to have
188 been paid to the Tax Commissioner on behalf of the
189 transferor from whom the amounts were withheld.

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

198 (g) The real estate reporting person is subject to the
199 requirements and penalties prescribed for the failure to
200 pay the amount of a tax prescribed by article ten of this

201 chapter for the failure to pay to the Tax Commissioner
202 amounts withheld pursuant to provisions of this
203 section.

204 (h) This section does not:

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

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

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

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

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee


.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within is approved..... this
the 30th Day of November....., 2006.


.....
Governor

PRESENTED TO THE
GOVERNOR

NOV 29 2006

Time 10:30am