

MARYLAND'S WITHHOLDING REQUIREMENTS

for Sales or Transfers of Real Property
and Associated Personal Property
by Nonresidents



Foreword

The scope of Chapter 203, Acts of 2003 was extensive. It covers such issues as accelerated withholding taxes for Maryland employers, withholding of income tax on nonresident contractors, and withholding of income tax on the sale of real property and associated personal property in Maryland by nonresidents that is explained in this guide, “Information on Maryland’s Withholding Requirements for Sales or Transfers of Real Property and Associated Personal Property by Nonresidents.”

The sum and substance of withholding tax on the sale of property by nonresidents needed to be developed as a new process and not as a modification to an existing tax processes. The Comptroller’s staff appreciates the efforts of the Clerks of the Circuit Courts, the Administrative Offices of the Courts, the Taxation and Real Property Sections of the Maryland State Bar Association, Gordon Feinblatt Rothman Hoffberger & Hollander LLC, LandAmerica - Commonwealth Land Title Insurance Company, the Maryland Bankers Association, Miles & Stockbridge PC, and Sentinel Title Corporation for their cooperation, assistance and suggestions in developing the procedures, forms and sample documents contained in this guide.

In addition to the agencies and firms listed above, this guide contains comments and suggestions from other too numerous to mention. We appreciate your continued contributions.

Table of Contents

Introduction	1
Tax – General Article, §10-912	4
COMAR 03.04.12.01-.08 (Emergency Regulation)	10
Frequently Asked Questions	17
Sample Formats/Language For:	24
• Recitals and Acknowledgements	
• Affidavits	
Forms Availability.....	26

Introduction

Section 10-912 of the Tax-General Article, Annotated Code of Maryland, provides for income tax withholding on sales or transfers of real property and associated tangible personal property in Maryland by nonresident individuals and nonresident entities. This code section was added by Chapter 203, Acts of 2003 (House Bill 935) and was effective October 1, 2003. This section was amended during the 2004 Legislative Session by Chapter 440, Acts of 2004 (House Bill 1277) and during the 2007 Special Session by Chapter 3, Acts of 2007 (Senate Bill 2).

In a sale or transfer of real property and associated tangible personal property in Maryland owned by a nonresident individual or a nonresident entity, the deed or other instrument of transfer may not be recorded with the clerk of the circuit court for a county (Clerk) or filed with the Department of Assessments and Taxation (Department) unless payment is made to the Clerk or Department in an amount equal to 7.5 percent of the total payment to a nonresident individual or 8.25 percent of the total payment to a nonresident entity. For purposes of this section, a nonresident entity means an entity that: (1) is not formed under the laws of Maryland, or (2) is not qualified by or registered with the Department to do business in Maryland.

The “total payment” on which the Maryland income tax withholding payment to the Clerk or Department is computed is the total sales price paid to the transferor less: (1) 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 (2) 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. It does not, however, 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. The total payment also includes the fair market value of any property transferred to the transferor.

The person responsible for closing is responsible for ensuring that sufficient funds are withheld at settlement and for paying the amount of withholding tax due to the Clerk or Department when the deed or other instrument of transfer is presented for recordation. The tax paid on behalf of the nonresident transferor must be reported on Form MW506NRS. The payment of tax is being made on behalf of the nonresident transferor and will be claimed by the transferor on the Maryland income tax return filed for the tax year in which the sale or transfer of the real property occurred.

If the amount paid to the Clerk or Department is in excess of the income tax due on the sale or transfer of the real property, a nonresident individual or corporation may file a Form MW506R, Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents. This application may be filed sixty (60) days after the date the tax is paid to the Clerk or Department, but no later than the last day of the taxable year in which the transaction occurred. A pass-through entity (i.e., S corporation, partnership, and limited liability company) may not file a Form MW506R. Any amounts paid on behalf of a pass-through entity must be

allocated to its owners at the end of the tax year and reported to its owners on a modified federal Schedule K-1 or Maryland statement. The owners will report their allocable share of income and tax paid to the Clerk or Department on their Maryland tax return for that tax year.

There are a number of exemptions to the withholding requirement as follows:

1. A certification under penalties of perjury that the transferor is a Maryland resident is provided by each transferor in the recitals or the acknowledgement of the deed or other instrument of transfer or in an affidavit signed by the transferor or an agent of the transferor that accompanies and is recorded with the deed or other instrument of transfer;
2. A certification under penalties of perjury that the property being transferred is the transferor's principal residence, as determined under the Internal Revenue Code, is provided by each transferor in the recitals or acknowledgement of the deed or other instrument of transfer or in 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 transfer;
3. The property is transferred pursuant to a foreclosure or 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 certificate (Form MW506E) is issued by the Comptroller stating that:
 - a. No tax is due from the transferor in connection with the sale or exchange of the property;
 - b. A reduced amount of tax is due in connection with the sale or exchange and stating the reduced amount that should be collected by the Clerk or Department before recordation or filing; or
 - c. The transferor has satisfied the transferor's tax liability or has provided adequate security to cover such liability; or
6. Beginning October 1, 2004, the property is transferred pursuant to a deed or other instrument of writing that includes a statement of consideration required by §12-104 of the Tax-Property Article indicating that the consideration paid is zero.

Definitions of "Transfer pursuant to a Deed in Lieu of Foreclosure" and "Transfer Pursuant to a Foreclosure" were added by House Bill 1277.

To request the certificate issued by the Comptroller, a nonresident or nonresident entity may file an Application for a Certificate of Full or Partial Exemption (MW506AE) with the Comptroller no later than 21 days before the date of closing. This 21-day time period is required to permit the Comptroller to review the application and, if appropriate, issue a certificate before the date of closing. If an application is received within 21 days from the date of closing, the Comptroller cannot guarantee that a certificate will be issued before the date of closing.

Additional information may be obtained by calling 1-800-MDTAXES (1-800-638-2937) or 410-260-7980 in Central Maryland, or on the Comptroller's Web site at www.marylandtaxes.com.

Article - Tax – General

§ 10-912. Payments required on sale of property by nonresidents

(a) *Definitions.*–

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

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

1. 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

2. 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.

(ii) "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:

(i) is not formed under the laws of the State; and

(ii) is not qualified by or registered with the Department of Assessments and Taxation to do business in the State.

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

(i) is formed under the laws of the State; or

(ii) is formed under the laws of another state and is qualified by or registered with the Department of Assessments and Taxation 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:

(i) a transfer by the owner of the property to:

1. 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;

2. 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;

3. 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

(ii) a transfer by any of the persons described in item (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:

(i) with respect to the foreclosure of a mortgage:

1. 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:

A. the mortgagee or the assignee of the mortgage;

B. any designee, nominee, or assignee of the mortgagee or assignee of the mortgage; or

C. any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

2. a transfer by any of the persons described in item 1 of this subparagraph to a subsequent purchaser for value;

(ii) with respect to the foreclosure of a deed of trust:

1. 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:

A. the holder of the debt or other obligation secured by the deed of trust;

B. any designee, nominee, or assignee of the holder of the debt secured by the deed of trust; or

C. any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

2. a transfer by any of the persons described in item 1 of this subparagraph to a subsequent purchaser for value; and

(iii) with respect to the foreclosure of any other lien instrument:

1. a transfer by the party authorized to make the sale to:

A. the holder of the debt or other obligation secured by the lien instrument;

B. any designee, nominee, or assignee of the holder of the debt secured by the lien instrument; or

C. any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

2. a transfer by any of the persons described in item 1 of this subparagraph to a subsequent purchaser for value.

(b) *Description of payment.*-

(1) For every deed or other instrument of writing that effects a change of ownership on the assessment books under the Tax - Property Article and for which a payment is required under subsection (c) of this section, the total payment shall be described on the form that the Comptroller specifies by regulation.

(2) The form required under paragraph (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 property reporting person, as defined under § 6045 of the Internal Revenue Code.

(c) *Recordation following payment of certain part of total payment.*- 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, the deed or other instrument of writing that effects a change of ownership on the assessment books under the Tax - Property Article may not be recorded with the clerk of the circuit court for a county or filed with the Department of

Assessments and Taxation unless payment is made to the clerk of the circuit court for a county or the Department of Assessments and Taxation in an amount equal to:

- (1) 7.5 percent of the total payment to a nonresident; or
- (2) 8.25 percent of the total payment to a nonresident entity.

(d) *Exceptions.*— 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:

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

(ii) 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 clerk of the circuit court for a county or the Department of Assessments and Taxation a certificate issued by the Comptroller stating that:

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

(ii) 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 clerk of the circuit court for a county or the Department of Assessments and Taxation before recordation or filing; or

(iii) the transferor has satisfied the transferor's tax liability described in subsection (c) of this section or has provided adequate security to cover such liability;

(3) the property transfer is:

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

(ii) 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:

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

(ii) 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 by § 12-104 of the Tax - Property Article indicating that the consideration payable is zero.

(e) *Time of collection and payment.* -

(1) Except as provided in this section, the amounts described in subsection (c) of this section shall be collected by the clerk of the circuit court for a county or the Department of Assessments and Taxation when the deed or other instrument of writing is presented for recordation or filing.

(2) Within 30 business days after the date the amount payable under subsection (c) of this section is paid, the clerk of the circuit court for the county or the Department of Assessments and Taxation shall pay over to the Comptroller the amount collected under subsection (c) of this section as prescribed by the Comptroller.

(f) *Payment credited to transferor.* -

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

(g) *Persons or entities not liable for payments.* - The transferee, title insurance producer, title insurer, settlement agent, closing attorney, lending institution, and real estate agent or broker in any transaction subject to this section are not liable for any amounts required to be collected and paid over to the Comptroller under this section.

(h) *Tax not imposed; lawful collection of taxes not prohibited.* - 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 Comptroller from collecting any taxes due from a transferor in any other manner authorized by law.

(i) *Comptroller establishes regulations and procedures.*—

(1) The Comptroller shall adopt regulations to administer this section.

(2) The Comptroller's regulations shall establish procedures for the issuance of the certificate referred to in subsection (d)(2) of this section.

(3) The Comptroller's regulations 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.

[2003, ch. 203, § 24; 2004, ch. 410.]

Title 03 COMPTROLLER OF THE TREASURY

Subtitle 04 INCOME TAX

Chapter 12 Nonresident Real Estate Withholding Tax

Authority: Tax-General Article, §§2-103 and 10-912, Annotated Code of Maryland; Ch. 203, Acts of 2003

.01 Applicability.

A. Effective Date. This chapter applies to all deeds and other instruments of transfer recorded with the clerks or filed with the Department on or after October 1, 2003.

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Clerk" means clerk of the circuit court for any county of the State or Baltimore City.

(2) "Debt incurred in contemplation of sale" means a debt secured by a mortgage, deed of trust, or other instrument on the property being sold with an effective date not earlier than 90 days before the date of sale.

(3) "Department" means the Department of Assessments and Taxation.

(4) "Installment sale" means any sale in which at least one payment is:

(a) Scheduled after the end of the tax year in which the transfer occurred; and

(b) Being treated as an installment sale for federal income tax purposes under §453 of the Internal Revenue Code (26 U.S.C §453).

(5) "Like-kind exchange" means an exchange of property within the provisions of §1031 of the Internal Revenue Code (26 U.S.C. §1031).

(6) "Net proceeds" means the total sales price paid to the transferor, less:

(a) Except debts incurred in contemplation of sale, 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

(b) 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.

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

(a) Is not formed under the laws of the State more than 90 days before the date of the sale of the property; and

(b) Is not qualified by or registered with the Department of Assessments and Taxation to do business in the State more than 90 days before the date of the sale of the property.

(8) "Principal residence" means a residence that:

(a) Has the same meaning as when used in §121 of the Internal Revenue Code (26 U.S.C. §121); and

(b) Is listed as an owner-occupied residence with the Department.

(9) "Resident" means an individual as defined in Tax-General Article, §10-101(h), Annotated Code of Maryland.

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

(a) Is formed under the laws of the State more than 90 days before the sale of the property; or

(b) Is formed under the laws of another state and is qualified by or registered with the Department to do business in the State more than 90 days before the sale of the property.

(11) "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.

.03 Withholding Requirements.

A. Except as provided in §B of this regulation, a deed or other instrument transferring title may not be:

(1) Recorded with the clerk; or

(2) Filed with the Department.

B. A deed or other instrument transferring title may be recorded with the clerk or filed with the Department if:

(1) Payment is made to the clerk or Department in an amount equal to the total payment multiplied by:

(a) 7.5 percent for nonresident individuals; or

(b) 8.25 percent for nonresident entities;

(2) The transferor certifies under the penalties of perjury in the transfer document or an attached affidavit that the transferor is a resident of the State;

(3) The transferor certifies under the penalties of perjury in the transfer document or an attached affidavit that the property being transferred is the transferor's principal residence;

(4) The transferor presents to the clerk or the Department:

(a) A Certificate of Full or Partial Exemption issued by the Comptroller in accordance with Regulation .04 of this chapter; and

(b) If a partial exemption is issued by the Comptroller, payment in the amount shown as due on the Certificate of Full or Partial Exemption;

(5) The transfer is by foreclosure, including:

(a) A transfer to a secured party, as defined in Maryland Rule 14-201 (b)(10), or a trustee; and

(b) A transfer from a secured party or a trustee to a third party bona fide purchaser;

(6) The transfer is by deed in lieu of foreclosure;

(7) The transferor is an agency or instrumentality of the United States; or

(8) The transferor is:

(a) The State;

(b) A unit of the State; or

(c) A political subdivision of the State.

.04 Certificate of Full or Partial Exemption.

A. The transferor may file an Application for Certificate of Full or Partial Exemption (MW 506 AE) with the Comptroller.

B. The transferor shall:

(1) File the application with the Comptroller at least 21 days before the settlement date;

(2) Indicate on the Application for Certificate of Full or Partial Exemption the reason or reasons the transfer qualifies for a full or partial exemption from the withholding tax; and

(3) Include with the Application for Certificate of Full or Partial Exemption sufficient documentation to support the request.

C. The Comptroller may issue a Certificate of Full or Partial Exemption (MW 506 E) for any of the following reasons:

(1) The tax due has been paid in full to the Comptroller;

(2) The transfer is to a corporation controlled by the transferor under §351 of the Internal Revenue Code (26 U.S.C. §351);

(3) The transfer is pursuant to a tax-free reorganization as described in §361 of the Internal Revenue Code (26 U.S.C. §361);

(4) The transfer is being made on an installment sale basis under §453 of the Internal Revenue Code (26 U.S.C. §453);

(5) The transfer is by a tax-exempt entity in accordance with §501(a) of the Internal Revenue Code (26 U.S.C. §501(a)) involving little or no unrelated business taxable income under §512 of the Internal Revenue Code (26 U.S.C. §512);

(6) The transfer is to a partnership in exchange for an interest in the partnership so that no gain or loss is recognized under §721 of the Internal Revenue Code (26 U.S.C. §721);

(7) The transfer is by a partnership to a partner of the partnership in accordance with §731 of the Internal Revenue Code (26 U.S.C. §731);

(8) The transfer is by a real estate investment trust under §857 of the Internal Revenue Code (26 U.S.C. §857);

(9) The transfer is a like-kind exchange under §1031 of the Internal Revenue Code (26 U.S.C. §1031);

(10) The transfer is occurring because of a condemnation and conversion into a similar property under §1033 of the Internal Revenue Code (26 U.S.C. §1033);

(11) The transfer is between spouses, or incident to a divorce in accordance with §1041 of the Internal Revenue Code (26 U.S.C. §1041);

(12) The transfer is by an S-corporation in accordance with §1368 of the Internal Revenue Code (26 U.S.C. §1368);

(13) The transfer is to a disregarded entity, classified as such under 26 CFR §301.7701-3, that is solely owned by the transferor; or

(14) The transfer is otherwise exempt as documented by the transferor.

D. The Comptroller's decision to issue or deny a Certificate of Full or Partial Exemption and the determination of the amount of tax to be withheld if a partial exemption is granted are final and not subject to appeal.

E. Like-Kind Exchange.

(1) Except as provided in §E(2) of this regulation, a like-kind exchange that qualifies under the provisions of §1031 of the Internal Revenue Code (26 U.S.C. §1031) and for which a Certificate of Full or Partial Exemption has been issued is not subject to the withholding requirements.

(2) If at the time of settlement it is known that the property does not qualify as a like-kind exchange under the provisions of §1031 of the Internal Revenue Code (26 U.S.C. §1031) or the transferor will receive taxable boot, then notwithstanding the issuance of the Certificate of Full or Partial Exemption, Regulation .03B(1) of this chapter applies to:

(a) The total payment; or

(b) The taxable boot.

F. Installment Sale.

(1) Except as provided in §F(2) of this regulation, an installment sale for which a Certificate of Full or Partial Exemption has been issued is not subject to the withholding requirements.

(2) Regulation .03B(1) of this chapter applies to that portion of the total payment that the transferor receives at or within 60 days of settlement.

.05 Responsibilities of Transferor and Transferee at Settlement.

A. Unless the transfer is fully exempt from the withholding requirements of this chapter, the transferee or settlement officer shall:

(a) Withhold at settlement the tax required under Regulation .03B(1) of this chapter; and

(b) Remit the tax to the clerk or to the Department in accordance with Regulation .06 of this chapter.

B. A Return of Income Tax Withholding for Nonresident Sale of Real Property (MW 506 NRS) is required for each transferor for each transfer in which tax was withheld.

.06 Additional Requirements for Recordation or Filing.

If a payment is required pursuant to Regulation .03B(1) of this chapter, the person presenting the deed or other instrument of transfer shall present the following additional documents to the clerk or the Department:

A. Copies A and B of Form MW 506 NRS;

B. If issued by the Comptroller, the Certificate of Full or Partial Exemption; and

C. A separate check in the amount of the tax required to be withheld that is made payable to the clerk or to the Department.

.07 Duties of the Clerk or the Department.

A. The clerk or the Department shall review the documents presented for recordation or filing for compliance with the requirements of this chapter.

B. If applicable, the clerk or the Department shall collect any tax due on the transfer.

C. On or before the 21st day of the month following the month in which the clerk or the Department receives the payment of tax under Regulation .03B(1) of this chapter, the clerk or the Department shall:

(1) Pay over to the Comptroller the amount of tax collected;

(2) Submit to the Comptroller:

(a) The Monthly Reconciliation Report for Sales of Real Property by Nonresidents (Form MW 508 NRS);

(b) The Sales of Real Property by Nonresidents Schedule of Withholding Receipts that includes the:

- (i) Name of the transferor;
 - (ii) Address of the transferor;
 - (iii) Social Security number or federal employer identification number of the transferor;
 - (iv) Validation number of the transfer; and
 - (v) Amount of tax collected; and
- (c) Copy A of each Form MW 506 NRS.

.08 Procedures for Requesting Early Refunds.

A. An individual or a corporation that has paid withholding tax in excess of the amount owed may file an Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents (MW 506 R) with the Comptroller 60 days after the date the tax was paid to the clerk or the Department, but no later than November 1 of the calendar year in which the tax was paid.

B. A pass-through entity or a partner, member, or shareholder of a pass-through entity may not file an Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents.

C. An individual or a corporation shall attach copy C of the Return of Income Tax Withholding for Nonresident Sale of Real Property (MW 506 NRS) to the application.

D. The Comptroller's decision to deny or grant in part an Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents is final and not subject to appeal.

E. The filing of the Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents does not relieve an individual or a corporation of the requirement to file an income tax return.

Administrative History

Effective date:

Regulations .01—.08 adopted as an emergency provision effective October 1, 2003 (30:22 Md. R. 1574)

Frequently Asked Questions

- Q.** I am about to settle on the sale of real property that I own in Maryland and was told by my real estate agent that Maryland tax will be withheld from the proceeds of the sale because I am a nonresident of Maryland. Is this true? I sold a piece of property in Maryland several years ago and I did not have any Maryland tax withheld from the sale.
- A.** Yes, it is true. During the 2003 legislative session, the Maryland General Assembly passed House Bill 935 which requires that tax be withheld from the total payment on the sale of real property located in Maryland by a nonresident individual or nonresident entity.
- Q.** What is the effective date of the requirements of the new Maryland law?
- A.** The provisions of §10-912 of the Tax-General Article apply to deeds or other instruments of transfer filed with the clerk of the circuit court of a county (clerk) or the Department of Assessments and Taxation (Department) on or after October 1, 2003.
- Q.** Do these provisions apply to deeds or other instruments of transfer signed before October 1, 2003 but not filed until after that date?
- A.** Yes, these provisions apply to deeds or other instruments of transfer presented to the clerk or Department for recordation on or after October 1, 2003.
- Q.** What happens if the payment is not made to the clerk or Department when the deed is presented for recordation?
- A.** Unless an exemption applies and the deed contains the required recitation, acknowledgement, or attached affidavit, the clerk or Department may not accept the deed or other instrument of transfer for recordation.
- Q.** How is the amount to be withheld determined?
- A.** Section 10-912 of the Tax-General Article provides for withholding from the total payment at a rate of 7.5 percent of the total payment for a nonresident individual and 8.25 percent for a nonresident entity. The total payment is the total sales price paid to the transferor/seller less 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 other expenses arising out of the sale or exchange of the property and disclosed on a settlement statement prepared in connection with the property, plus the fair market value of any property transferred to the transferor.

- Q.** At settlement, a part of the proceeds of the sale is being used to pay off the balance on my consumer credit card. This amount will be reported on the settlement statement prepared at closing. Is this a deductible expense?
- A.** No. Even though the amount that will be used to pay off a consumer credit card is being reported on the settlement statement prepared at closing, it is not an expense “arising out of the sale or exchange of the property.”
- Q.** A month before the date of sale, I took out a second mortgage on the property, which will be paid off at settlement. Can I subtract the amount of this debt from the total sales price when I calculate the total payment?
- A.** No, because the second mortgage is presumed to be a “debt incurred in contemplation of sale”, which means a debt secured by a mortgage, deed of trust or other instrument on the property being sold with an effective date of not more than 90 days before the date of sale.
- Q.** Is withholding required when there are multiple owners and some of the owners are nonresidents?
- A.** Yes. The residency of the owners of the property will be determined separately. Withholding is required from each of the nonresident owners based on the percentage of the total payment that represents the ownership percentage of each of the nonresident individuals or nonresident entities.
- Q.** I am a resident of Maryland but I did not include that fact in a deed recital, acknowledgement or an affidavit attached. Why won't the clerk or Department accept the deed for recordation without a payment of the tax?
- A.** In order for an exemption from the withholding requirement to apply, a transferor must affirmatively set forth the exemption by satisfying the requirements of the statute. A resident must provide a certification under penalties of perjury that transferor is a resident of Maryland or a resident entity in the recital or the acknowledgement of the deed or in an affidavit that accompanies and is recorded with the deed.
- Q.** The transfer of the property will qualify as a like-kind exchange under §1031 of the Internal Revenue Code. Withholding part of the proceeds of the sale and paying this amount to the clerk or Department will have adverse tax consequences for federal income tax purposes. How can I avoid the withholding requirement on the like-kind exchange?
- A.** You may file Form MW506AE, Application for a Certificate of Full or Partial Exemption, with the Comptroller at least 21 days before the settlement date. This form recognizes like-kind exchanges under §1031 of the Internal Revenue Code and numerous other transactions that are totally or partially exempt from income tax. Provided sufficient information is submitted with the application, the Comptroller will issue a Certificate of

Full or Partial Exemption (MW506E). This certificate must be presented to the person responsible for closing at the settlement and to the clerk or Department when the deed is presented for recordation. This will result in no tax or a reduced amount of tax that is required to be paid to the clerk or Department. If a reduced amount of tax is being paid, a completed Form MW506NRS (Copies A and B) must be provided to the clerk or Department when the deed is presented for recordation.

Q. If the sale is subject to the withholding requirement, what tax forms have to be presented to the clerk or Department when the deed is presented for recordation?

A. Copies A and B of a completed Form MW506NRS, Return of Income Tax Withholding for Nonresident Sale of Real Property, must be presented for each nonresident transferor, along with a separate check in the total amount of the tax required to be withheld. The check should be made payable to the clerk or Department, as appropriate. If the sale is partially exempt from the withholding requirement, a Form MW506E, Certificate of Full or Partial Exemption, issued by the Comptroller, also must be presented for each nonresident transferor.

Q. Am I required to file a Maryland nonresident income tax return for the year in which the sale occurred if I have paid the withholding with Form MW506NRS at the time of the sale?

A. Yes. The filing of Form MW506NRS with a payment of the tax withheld does not relieve a nonresident individual or nonresident entity from the requirement to file an end of the year income tax return with Maryland for the year in which the sale occurred.

Q. If a Maryland resident relocates to another state and buys another residence, does his Maryland residence cease to be his principal residence for purposes of collecting the Maryland nonresident real estate withholding tax?

A. In order to be exempt from the withholding requirement, the property must be the principal residence of the transferor/seller for purposes of the income exclusion under the Internal Revenue Code, and the property must be listed as a principal residence with the Maryland Department of Assessments and Taxation. As long as the property qualifies as a principal residence under the Internal Revenue Code, and is shown as a principal residence in the assessment records, the exemption from Maryland withholding applies. The transferor/seller must provide a certification under penalties of perjury that the property being transferred is the transferor's principal residence, in the recitals or acknowledgement of the deed or other instrument of transfer, or in an affidavit that accompanies and is recorded with the deed or other instrument of transfer.

- Q. How do I report the withholding on my Maryland income tax return?**
- A. Generally, the amount of withholding paid is reported as an estimated income tax payment on your income tax return. The method of reporting is different if you are an owner (partner, shareholder or member) of a pass-through entity. Copy C of the Form MW506NRS provides specific instructions for reporting the tax withheld on the individual and business tax returns. The amount withheld can be found in the box on line 8i. of the Form MW506NRS.
- Q. If tax is withheld from a nonresident entity which is a partnership, S corporation, or limited liability company, how does the seller report the withholding?**
- A. The pass-through entity seller must allocate and pass through the withholding credit in the same manner as it passes through its income. Each partner's, shareholder's, or member's share of the withholding should be reported on a modified federal Schedule K-1 or Maryland statement with a schedule showing the allocation, and each partner, shareholder or member should be provided with a copy of the original withholding statement (MW506NRS) submitted to the clerk or Department with payment of the tax. The partner, shareholder, or member should claim credit for their share of the withholding on their Maryland income tax return, and attach a copy of the Schedule K-1 or Maryland statement. If the pass-through entity files a composite return on behalf of its electing nonresident individual owners, it may claim a credit for the withholding on the composite return (Form 505). The withholding may only be claimed for that portion attributable to the partners, shareholders, or members who are included on the composite return.
- Q. If all of the transferors/sellers have an exemption from the withholding requirement, is it still necessary to describe the total payment either in the deed or an attached affidavit?**
- A. Effective October 1, 2004, it is no longer necessary to describe the total payment in the deed or on an attached affidavit. Section 10-912(b) now requires that for every deed or other instrument of writing that effects a change in ownership on the assessment books under the Tax-Property Article and for which a payment of tax is required, the total payment shall be described on a form specified by the Comptroller. The required form is the Form MW506NRS. This form must be signed under oath by the transferor of the property, an agent of the transferor, or the real property reporting person.
- Q. If the deed recites that the transfer is for zero consideration, is it necessary to describe the total payment on the Form MW506NRS?**
- A. No, effective October 1, 2004, a new exemption from the requirement to withhold and remit the tax is available if the deed contains a statement of consideration as required by § 12-104 of the Tax-Property Article indicating that the consideration payable is zero.

- Q.** If the deed recites that the transfer is for zero consideration, and the zero total payment is described either in the deed or an attached affidavit, is anything else necessary to comply with the requirements of §10-912 of the Tax-General Article?
- A.** There are instances when a deed or other instrument of transfer will contain in a recital, acknowledgment or affidavit that the total payment amount is zero (i.e. gifts, husband adding wife, wife adding husband, husband dropping wife, wife dropping husband, parents adding children, etc.). In cases when the total payment is zero, the clerk can accept the deed or other instrument of transfer for recordation without either: (1) a Certificate of Full or Partial Exemption issued by the Comptroller or (2) a certification of residency.
- Q.** Does a deed which transfers a ground rent have to comply with the requirements of §10-912 of the Tax-General Article?
- A.** No, a ground rent deed does not fall under the requirements of §10-912 of the Tax-General Article, because the requirements only apply to a deed or other instrument of writing that effects a change of ownership on the assessment books under the Tax-Property Article. Recording a deed which transfers a ground rent does not result in a change of ownership on the assessment books.
- Q.** Is there any provision in §10-912 of the Tax-General Article for allowing the withholding amount to be calculated using the actual capital gain on the sale of the property, instead of using the total payment to calculate the amount to be withheld?
- A.** Yes, a nonresident transferor/seller can submit an Application for Certificate of Full or Partial Exemption (Form MW506AE) to the Comptroller requesting that the withholding amount be calculated based on the capital gain. The application must be received by the Comptroller no less than 21 days before the closing date for the sale of the property. Supporting documentation must be included to verify all of the figures used to arrive at the capital gain claimed on the application. The only acceptable documentation for improvements is copies of invoices or receipts which clearly indicate that the work was performed at the address of the property shown on the application. The Comptroller's decision to issue or deny a Certificate of Full or Partial Exemption, and the determination of the amount of tax to be withheld if a partial exemption is granted, are final and not subject to appeal.
- Q.** If the personal representative of an estate does not live in Maryland, does that mean that the estate is subject to the withholding requirement when it sells real property located in Maryland?

A. The personal representative is a fiduciary under the law and acts on behalf of the estate. A resident fiduciary is defined in §10-101(h) of the Tax-General Article. The determining factor is where the decedent was domiciled on the date of death. If the decedent was domiciled in Maryland on the date of death, the fiduciary is a resident fiduciary and the personal representative can sign an affidavit of residence, thereby exempt from the withholding requirement. The residence of the personal representative is not an issue. If the decedent was not domiciled in Maryland on the date of death, the fiduciary is a nonresident fiduciary and is subject to the withholding requirement, regardless of where the personal representative lives.

Q. When an estate is selling real property located in Maryland, and the decedent was not domiciled in Maryland on the date of death, can the decedent's estate become a resident entity by opening an ancillary proceeding in the Maryland county where the real property is located?

A. No, if the decedent was not domiciled in Maryland on the date of death, the fiduciary is a nonresident fiduciary and is subject to the withholding requirement. Opening an ancillary proceeding in Maryland does not make the Personal Representative a resident fiduciary.

Q. If the nonresident seller is financing the buyer's purchase, does the withholding amount have to be calculated using the full contract sale price?

A. If at least one payment is scheduled after the end of the tax year in which the transfer occurs, and the sale is treated as an installment sale for federal income tax purposes, the nonresident seller can submit an Application for Certificate of Full or Partial Exemption (Form MW506AE) to the Comptroller requesting that the withholding amount be calculated based on that portion of the total payment that the seller receives at or within 60 days of settlement. The application must be received by the Comptroller no less than 21 days before the closing date for the sale of the property. Supporting documentation must be included to verify all the figures used to arrive at the taxable amount claimed on the application. The Comptroller's decision to issue or deny a Certificate of Full or Partial Exemption, and the determination of the amount of tax to be withheld if a partial exemption is granted, are final and not subject to appeal.

Q. If the transferor/seller is an entity formed under the laws of another state, and it is qualified by or registered with the Maryland Department of Assessments and Taxation to do business in Maryland, how can it get an exemption from the withholding requirement?

A. The entity can certify under penalties of perjury that it is a resident entity either in: (1) the recitals or the acknowledgment of the deed or other instrument transferring the property; or (2) an affidavit of residence that accompanies the deed or other instrument transferring the property.

Q. How can I obtain additional information on the withholding requirements?

A. Additional information may be obtained by calling 1-800 MDTAXES (1-800-638-2937) or 410-260-7980 from Central Maryland, or on the Comptroller's website at www.marylandtaxes.com.

Sample Formats/Language for

- Recitals and Acknowledgements
- Affidavits

2009

MARYLAND
FORM

Certification of Exemption from Withholding Upon Disposition of Maryland Real Estate Affidavit of Residence or Principal Residence

Based on the certification below, Transferor claims exemption from the tax withholding requirements of §10-912 of the Tax-General Article, Annotated Code of Maryland. Section 10-912 provides that certain tax payments must be withheld and paid when a deed or other instrument that effects a change in ownership of real property is presented for recordation. The requirements of §10-912 do not apply when a transferor provides a certification of Maryland residence or certification that the transferred property is the transferor's principal residence.

1. Transferor Information

Name of Transferor

2. Reasons for Exemption

**Resident
Status**

- I, Transferor, am a resident of the State of Maryland.
- Transferor is a resident entity as defined in Code of Maryland Regulations (COMAR) 03.04.12.02B(11), I am an agent of Transferor, and I have authority to sign this document on Transferor's behalf.

**Principal
Residence**

- Although I am no longer a resident of the State of Maryland, the Property is my principal residence as defined in IRC 121 and is recorded as such with the State Department of Assessments and Taxation.

Under penalty of perjury, I certify that I have examined this declaration and that, to the best of my knowledge, it is true, correct, and complete.

3a. Individual Transferors

Witness

Name

Signature

3b. Entity Transferors

Witness/Attest

Name of Entity

By

Name

Title

Forms

The following forms are available in ADOBE.PDF format on the Comptroller's Web site at www.marylandtaxes.com. They have been formatted with a fill-in feature that allows you to type information in on your computer and then print out a paper copy:

- Form MW506AE - Application for Certificate of Full or Partial Exemption.
- Form MW506NRS - Return of Income Tax Withholding for Nonresident Sale of Property.
- Form MW506R - Application for Tentative Refund of Withholding on Sales of Real Property by Nonresidents.