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Serving the People

MARYLAND'S
WITHHOLDING REQUIREMENTS
for Sales or Transfers of Real Property
and Associated Personal Property
by Nonresidents

FINAL 10/22/18

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Introduction

In 2003, the General Assembly enacted Section 10-912 of the Tax-General Article, Annotated Code of Maryland, which 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 law went into effect on October 1, 2003. There were subsequent amendments to the law in 2004 and 2007.

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 a title company for example, 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 and will be prepared by the person handling closing. The payment of tax is made on behalf of the nonresident transferor and is recorded with the deed. The transferor must file a Maryland income tax return for the tax year in which the sale or transfer of the real property occurred to report the gain or loss on the sale and will claim the withholding payment made with Form MW506NRS.

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, in the year the withholding payment was made. This does not relieve the transferor of the responsibility to file a Maryland income tax return reporting the sale of the property and any related gain or loss. The MW506R may be filed sixty (60) days after the date the tax is paid to the Clerk or Department, but not if the transfer or closing occurs after November 1. If later than November 1, the transferor may request a refund on the income tax return filed to report the sale. 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 individual 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 that is provided by each transferor in the recitals or the acknowledgment 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, and is recorded as such with the Department of Assessments and Taxation. This must be provided by each transferor in the recitals or acknowledgment 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. 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;
6. 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.

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 on the Comptroller's Web site at www.marylandtaxes.gov by calling 1-800-MDTAXES (1-800-638-2937) or 410-260-7980 in Central Maryland.

Comptroller's Quick Ten

Our Most Frequently Asked Questions

- Q. I just went to settlement and was surprised that I had funds withheld because I'm a nonresident. Why were those funds withheld and will I get those funds back?**
- A. First, keep in mind this is only a withholding payment, not actual tax that was due at the time of your settlement. By law, tax must be withheld from the total payment on any sale of Maryland real property sold by a nonresident. The funds are withheld as an estimated payment on your behalf to cover any possible tax implications incurred as a result from a gain on the sale. The sale of any Maryland real property has to be reported on a Maryland nonresident tax return as Maryland source income or loss. The withholding taken at closing is then applied to the tax due and a refund of the difference is issued, if appropriate. We also have an application for a tentative refund (MW506R) that may be filed 60 days after settlement, and applies to all closing that occur on or before November 1st of the year in which the property was sold. This application is an opportunity to recoup some of those funds back a little early, prior to the mandatory income tax return filing requirement at the end of the year.
- Q. What qualifies my home as my primary residence to exempt me from the withholding?**
- A. You must have lived in that property for two of the past five years, filing Maryland resident returns from that address, and your capital gain must be under \$250,000 if a single individual selling the property, or \$500,000 if a married couple. You have to file the application for exemption (MW506AE) at least 21 days prior to the settlement date to have this type of exemption considered.
- Q. My sister and I were added to the deed just in case something ever happened to our parents. We hold no interest in it, and aren't going to be receiving any of the proceeds. When they sell the property, are we going to be subject to the nonresident withholding?**
- A. Yes, whereas you may not be receiving any proceeds, you are still considered one of the deeded owners on record, and are therefore subject to the withholding. An exemption is available through form MW506AE for a zero proceeds claim. You would attach a copy of a letter from yourself to the title company advising that you are to receive zero proceeds and that all proceeds would be going to your parents. A copy of a letter of acknowledgment from the title company addressed to you reiterating the fact needs to be attached.
- Q. What is considered a capital improvement?**
- A. An improvement, addition, or renovation that has been done that has added value to your physical tangible property. We follow IRS guidelines on which capital improvements are allowable expenses. Examples of these are as follows: Additions (bedroom, bathroom, deck, garage, porch, patio,) lawn & grounds (landscaping, driveway, walkway, fence, retaining wall, sprinkler system, swimming pool,) heating & air conditioning (heating system, central air conditioning, furnace, duct work, central humidifier, filtration system,) plumbing (septic system, water heater, soft water system, filtration system,) interior improvements (built in appliances, kitchen modernization, flooring, wall to wall carpeting,) insulation (attic, walls, floor, pipes, ductwork,) storm windows, doors, new roof, central vacuum, wiring upgrades, satellite dish, and security systems. Painting, furniture, pest treatments, common household repairs, gas in the vehicles, and meals for the contractors, are not capital improvements as these do not add value to the property.

Q. Does it matter that I have been renting my property if I want to complete any of the applications?

A. We will not process the application for exemption or the application for a tentative refund unless tax returns have been filed with the State of Maryland reporting all rental activity for the years the property have been rented.

Q. What is the withholding requirement for a property that is being transferred back to the bank because of foreclosure?

A. None, as long as it states such in the language of the deed.

Q. Who can I contact if my deed has gone unrecorded or have problems with unpaid withholding once my property was sold?

A. You may contact:

Maryland Insurance Administration
Attn: Property & Casualty Complaint
Unit 525 St. Paul Place
Baltimore, MD 21202
www.mdinsurance.state.m
d.us Direct: 410-468-
2305
Fax: 410-468-2334

Q. How can I find out the value of the property if it was inherited?

A. You may use the value from a certified appraisal at or around the date of death, the assigned value from the Register of Wills/Orphans Court, or the assessed value of the property from that time period (date of death) from the State Department of Assessments and Taxation.

Q. I just found out about this withholding and I was told I could file for an exemption, but it's under the 21 day requirement. Can I still apply?

A. If you submit an application for exemption (MW506AE) under 21 days prior to settlement, we cannot guarantee that your request will be processed in time for settlement, and we may return the package directly to the seller depending on the time frame allotted.

Q. Can I bring all of my paperwork to your office to get it processed and expedited?

A. You are always welcome to visit our offices to drop off paperwork, or for a consultation. However, the forms will not be processed while you wait. They are completed in the order in which they are received.

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. Is there anything I can do to avoid this withholding?**
- 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. Yes, if one of the exemptions applies to you, you may not be subject to the withholding. Otherwise, you may review and apply for an exemption certificate by using Form MW506AE.
- Q. How long has this withholding requirement been in effect?**
- A.** Since 2003. 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. 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, acknowledgment, or attached affidavit, the Clerk or Department will 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 75 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/seller 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, acknowledgment or an affidavit attached. Why won't the Clerk or Department accept the deed for recordation without a payment of the tax?

A. Under the law, 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 acknowledgment 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 the 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. The 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 a 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 or filing Form MW506R and receiving a tentative refund 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 without having to file Form MW506AE for an exemption, 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 (SDAT). 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 acknowledgment 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. If the property is no longer listed as the principal residence with SDAT, the transferor must file Form MW506AE at least 21 days before closing to be exempt from withholding.

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 a 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. You should attach a copy of the MW506NRS to your return when claiming this payment.

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. No, 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, an 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 (WH-AR), 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 (WH-AR) that accompanies the deed or other instrument transferring the property.

HELPFUL LINKS

Forms Information: www.marylandtaxes.gov

Tax-General Article Section 10-912: www.mlis.state.md.us

Regulations for Nonresident Withholding for Sale of Maryland Property:
www.dsd.state.md.us/comar