

IV. Tax-General § 10-912 – Withholding for Maryland Income Tax from Sales of Real Property by Nonresidents

The four questions that must be addressed in the following order:

A. FIRST, is the instrument one which effects a transfer on the assessment books?

— If NO – TG § 10-912 does not apply and nothing further is required thereunder

– For example, a deed or other assignment that transfers the fee simple interest of a ground lessor is not subject to TG § 10-912 (the property would continue to be listed in the assessment books under the name of the ground lessee, so a transfer of the ground lessor's interest wouldn't affect that)

— If YES – continue on to the second question

B. SECOND, is the instrument exempt under any one of the following six exemptions:

1. The instrument states that it is for "**zero consideration**" (and, per the Comptroller's Office, even if the instrument actually is for consideration consisting of assumed debt, for purposes of TG § 10-912, it would still qualify as "zero consideration") [TG § 10-912(d)(6)]

- OR -

2. The instrument states (in the recitals or the acknowledgment of the instrument, or in an affidavit attached to the instrument) that each transferor is a "**resident**" or "**resident entity**" [TG § 10-912(d)(1)]

NOTE: each of the following persons may certify that such person is a "resident" of the State of Maryland for purposes of TG § 10-912(d)(1):

(a) a natural person who either (i) is domiciled in the State of Maryland as of the effective date of the deed, or (ii) has maintained a place of abode in the State of Maryland for at least 6 months prior to and including the effective date of the deed; or

- (b) a person (whether natural or artificial), sometimes called a "resident fiduciary," who is:
 - (i) a personal representative of an estate, if the decedent was domiciled in the State of Maryland on the date of the decedent's death;
 - (ii) a fiduciary (other than a personal representative), if the trust was created, or consists of property transferred, by the will of a decedent who was domiciled in the State of Maryland on the date of the decedent's death;
 - (iii) a fiduciary (other than a personal representative), if the creator or grantor of the trust is a current "resident" of the State of Maryland; and
 - (iv) a fiduciary (other than a personal representative), if the trust is principally administered within the State of Maryland.

[see TG § 10-101(e)&(h); Memorandum of Advice from Bruce Benshoof, Asst. Att'y Gen., to Clerks of the Circuit Courts (Sept. 20, 2004)]

NOTE: an authorized person may certify on behalf of each of the following entities that such entity is a "resident entity" of the State of Maryland for purposes of TG § 10-912(d)(1):

- (a) an entity that is formed under the laws of Maryland; or
- (b) an entity that is formed under the laws of another state, but is qualified by or registered with SDAT to do business in Maryland

[see TG § 10-912(a)(4)]

- OR -

- 3. The instrument states (in the recitals or the acknowledgment of the instrument, or in an affidavit attached to the instrument) that the property being transferred is the transferor's "**principal residence**" [TG § 10-912(d)(5)]

NOTE: "principal residence" is defined by the Comptroller's Office as property that is "listed as owner-occupied" by SDAT and fits within the meaning of "principal residence" as used [but not

explicitly defined] in § 121 of the Internal Revenue Code [26 U.S.C. § 121] – which provides a number of situations in which a transferor can claim a property as his or her "principal residence" even when he or she no longer lives there [TG § 10-912(d)(5) + COMAR Title 3, § 04.12.02B(8)]

NOTE: the burden of determining whether this exemption applies falls on the person claiming the exemption – **not on the Clerk**

- OR -

4. The instrument is transferring property from the United States, the State of Maryland, any county or city of Maryland, or any other unit or political subdivision of the State of Maryland [TG § 10-912(d)(4)]

- OR -

5. The instrument (in the recitals or the acknowledgment of the instrument, or in an affidavit attached to the instrument) that the property is being transferred pursuant to:

- a foreclosure of a mortgage, deed of trust, or other lien instrument;
- a deed in lieu of foreclosure; or
- a deed from the holder of the foreclosed debt (or designee, nominee or assignee of the holder of the foreclosed debt) to a subsequent purchaser for value (*i.e.* if the bank takes the property by foreclosure or deed-in-lieu, the bank can still claim this exemption when transferring to a subsequent "real" purchaser of the property)

[TG § 10-912(d)(5) + (a)(6)-(7)]

- OR -

6. The instrument is accompanied by a Certificate of Full Exemption issued by the Comptroller [TG § 10-912(d)(2)(i)]

— If EXEMPT UNDER ANY ONE – nothing further required under TG § 10-912

— If NOT EXEMPT UNDER ANY – continue on to the third question

C. THIRD, is the instrument accompanied by a Certificate of Partial Exemption issued by the Comptroller? [TG § 10-912(d)(2)(ii)]

— If YES – collect the withholding amount shown on the Certificate of Partial Exemption, together with:

(i) two copies (or one original and one copy) of the Certificate of Partial Exemption (one original or copy goes to the Comptroller with Copy A of Form MW506NRS, and the other copy goes into the Clerk's file with Copy B of Form MW506NRS), and

(ii) an executed original of Copy A of Form MW506NRS and Copy B of Form MW506NRS (each completed in conformity with the values set forth on the Certificate of Partial Exemption),

and then TG § 10-912 is satisfied

— If NO – continue on to the fourth question

D. FOURTH, is the instrument accompanied by an executed and completed original of Copy A of Form MW506NRS, a completed Copy B of Form MW506NRS, and payment to the Clerk of the withholding amount calculated on Form MW506NRS?

— If YES – collect Copies A & B of Form MW506NRS and the payment of the withholding amount, and then TG § 10-912 is satisfied

— If NO – instrument should not be recorded until it complies with TG § 10-912