

CHAPTER 291
FORMERLY
HOUSE BILL NO. 349

AN ACT TO AMEND TITLES 9 AND 30 OF THE DELAWARE CODE RELATING TO
WITHHOLDING OF TAX ON GAINS FROM REAL ESTATE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE STATE
OF DELAWARE:

Section 1. Amend Title 30 of the Delaware Code by adding a new Section 1126 to read as follows:

“§ 1126 Withholding of income tax on sale or exchange of real estate by nonresident individuals.

(a) *Definitions.* –

(1) “Director” means the Director of the Division of Revenue or the Secretary of Finance of the State.

(2) “Nonresident individual” means, for purposes of this Section, an individual who is not a resident individual of this State for the individual’s entire tax year.

(3) “Recorder” means the official with the duty to record deeds and similar instruments.

(b) *Estimated tax return; alternative forms.* –

Every nonresident individual who sells or exchanges Delaware real estate shall file with the Recorder:

(1) a “Declaration of Estimated Income Tax” for the quarter in which the sale or exchange is settled, applying the highest marginal rate under § 1102 of this Title to an estimate of the gain recognized on the sale or exchange, or

(2) an alternative form prepared by the Director to calculate income tax at the highest marginal rate under § 1102 of this Title, applied to the difference between the total amount realized by the transferor and the net balance due at the time of settlement of all recorded liens encumbering the real estate, or

(3) an alternative form prepared by the Director to declare under penalties of perjury (i) that the sale or exchange of real estate is exempt from recognition of capital gain with respect to the tax year of the sale or exchange, or (ii) that all or a part of the gain realized that may be excluded from income with respect to the tax year of the sale or exchange, with a statement of the facts and a citation to the provision(s) of the Internal Revenue Code (Title 26, U.S.C.) relied upon for such exemption or exclusion.

(c) *Due date of estimated tax return, payment.* – The return or form provided for in subsection (b), and the estimated tax reported due, shall be remitted with the deed to the Recorder before the deed shall be recorded.

(d) *Payment credited to transferor.* – The estimated tax remitted under subsection (c) shall be deemed to have been paid to the Director on behalf of the nonresident transferor and the nonresident transferor shall be credited for purposes of §§ 1169 and 1170 of this Title as a payment made on the date remitted to the Recorder.

(e) *Persons or entities not liable for payments.* – Neither the transferee, title insurance producer, title insurer, settlement agent, closing attorney, lending institution, nor the real estate agent or broker in a transaction subject to this section shall be liable for any amounts required to be collected and paid over to the Recorder or Director under this section.

(f) *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 Director from collecting any taxes due from a transferor in any other manner authorized by law.”

Section 2. Amend Title 30 of the Delaware Code by adding a new Section 1606 to read as follows:

“§ 1606 Withholding of income tax on sale or exchange of real estate by nonresident pass-through entities.

(a) *Definitions.* –

(1) “Director” means the Director of the Division of Revenue or the Secretary of Finance of the State.

(2) “Nonresident pass-through entity” means, for purposes of this section, a pass-through entity having one or more members who are non-resident individuals or non-resident corporations.

(3) “Recorder” means the official with duty to record deeds and similar instruments.

(b) Estimated tax return; alternative forms. –

Every nonresident pass-through entity that sells or exchanges Delaware real estate shall file with the Recorder for and on behalf of each of its nonresident members:

(1) a “Declaration of Estimated Income Tax” or a “Delaware Corporate Tentative Tax Return” for the quarter in which the sale or exchange is settled, applying the highest marginal rate of each of its nonresident members under § 1102 or § 1902 of this Title, as the case may be, to an estimate of the nonresident member’s distributive share of the gain recognized on the sale or exchange, or

(2) an alternative form prepared by the Director to calculate income tax at the highest marginal rate under § 1102 or § 1902 of this Title, applied to the nonresident member’s distributive share of the difference between the total amount realized by the transferor and the net balance due at the time of settlement of all recorded liens encumbering the real estate, or

(3) an alternative form prepared by the Director to declare under penalties of perjury that the sale or exchange of real estate is exempt from recognition of capital gain with respect to the tax year of the sale or exchange, with a statement of the facts and a citation to the provision(s) of the Internal Revenue Code (Title 26, U.S.C.) relied upon.

(c) Due date of estimated tax return, payment. – The return or form provided for in subsection (b), and the estimated tax reported due, shall be remitted with the deed to the Recorder before the deed shall be recorded.

(d) Payment credited to transferor. – The estimated tax remitted under subsection (c) shall be deemed to have been paid to the Director on behalf of the nonresident members of the pass-through entity and the nonresident members shall be credited for purposes of §§ 1169 and 1170 or § 1905 of this Title as a payment made on the date remitted to the Recorder.

(e) Persons or entities not liable for payments. – Neither the transferee, title insurance producer, title insurer, settlement agent, closing attorney, lending institution, nor the real estate agent or broker in a transaction subject to this section shall be liable for any amounts required to be collected and paid over to the Recorder or Director under this section.

(f) 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 Director from collecting any taxes due from a transferor in any other manner authorized by law.”

Section 3. Amend Title 30 of the Delaware Code by adding a new Section 1909 to read as follows:

“§ 1909 Withholding of income tax on sale or exchange of real estate by nonresident corporations.

(a) Definitions. –

(1) “Director” means the Director of the Division of Revenue or the Secretary of Finance of the State.

(2) “Nonresident corporation” means, for purposes of this section, a corporation that:

A. Is not organized under the laws of this State, and

B. Is not qualified or registered with the Secretary of State to do business in this State.

(3) “Recorder” means the official with the duty to record deeds and similar instruments.

(b) Estimated tax return; alternative forms. –

Every nonresident corporation that sells or exchanges Delaware real estate shall file with the Recorder:

(1)a “Delaware Corporate Tentative Tax Return” due for the quarter in which the sale or exchange is settled, applying the tax rate provided under § 1902 of this Title to an estimate of the gain recognized on the sale or exchange, or

(2)an alternative form prepared by the Director to calculate income tax at the tax rate provided under § 1902 of this Title, applied to the difference between the total amount realized by the Transferor and the net balance due at the time of settlement of all recorded liens encumbering the real estate, or

(3)an alternative form prepared by the Director to declare under penalties of perjury that the sale or exchange of real estate is exempt from recognition of capital gain with respect to the tax year of the sale or exchange, with a statement of the facts and a citation to the provision(s) of the Internal Revenue Code (Title 26, U.S.C.) relied upon.

(c) *Due date of estimated tax return, payment.* – The return or form provided for in subsection (b), and the estimated tax reported due, shall be remitted with the deed to the Recorder before the deed shall be recorded.

(d) *Payment credited to transferor.* – The estimated tax remitted under subsection (c) shall be deemed to have been paid to the Director on behalf of the nonresident transferor and the nonresident transferor shall be credited for purposes of § 1905 of this Title as a payment made on the date remitted to the Recorder.

(e) *Persons or entities not liable for payments.* – Neither the transferee, title insurance producer, title insurer, settlement agent, closing attorney, lending institution, nor the real estate agent or broker in a transaction subject to this section shall be liable for any amounts required to be collected and paid over to the Recorder or Director under this section.

(f) *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 Director from collecting any taxes due from a transferor in any other manner authorized by law.”

Section 4. The Director of Revenue shall adopt regulations to administer Sections 1126, 1606, and 1909 of Title 30.

Section 5. Amend Section 9607, Title 9 of the Delaware Code by renaming said section, “§ 9607. Collection of recording fees; Certain Taxes; Housing Development Fund surcharge; Delaware Cultural Access Fund fee.”, and by adding a new subsection “(e)” to read as follows:

“(e) (1) Pursuant to sections 1126, 1606 and 1909 of Title 30 of the Delaware Code, before the Recorder shall record a deed conveying title in Delaware real estate by a nonresident individual, a nonresident pass-through entity, or a nonresident corporation, as those terms are defined the relevant sections of Title 30, the Recorder shall receive the tax return or report, and collect the estimated income tax reported due, if any. The estimated taxes collected under this subsection shall be accounted for and remitted with the tax return or report to the Secretary of Finance no later than the 20th day of the month following the recording of the deed.

(2) The tax returns or reports and the amounts of tax collected pursuant to Title 30 of the Delaware Code, Sections 1126, 1606 or 1909, and the Recorders and their employees or agents, shall be subject to the secrecy provisions and penalties of Title 30 of the Delaware Code, Section 368.”

Section 6. This Act shall be effective for tax periods commencing after December 31, 2010.

Approved June 11, 2010