

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 176

By Senator Trump

[Introduced January 13, 2023; referred
to the Committee on Government Organization]

1 A BILL to amend and reenact §11-21-71b of the Code of West Virginia, 1931, as amended, relating
 2 to allowing the Tax Commissioner to process certain early refunds; and providing a certain
 3 effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PERSONAL INCOME TAX.

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

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

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

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

6 (ii) Other expenses of the transferor arising out of the sale or exchange of the property and
 7 disclosed on a settlement statement prepared in connection with the sale or exchange of the
 8 property, not including adjustments in favor of the transferee.

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

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

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

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

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

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

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

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

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

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

23 (i) With respect to a deed in lieu of foreclosure of a mortgage, the mortgagee, the assignee
24 of the mortgage, or any designee or nominee of the mortgagee or assignee of the mortgage;

25 (ii) With respect to a deed in lieu of foreclosure of a deed of trust, the holder of the debt or
26 other obligation secured by the deed of trust or any designee, nominee, or assignee of the holder
27 of the debt or other obligation secured by the deed of trust;

28 (iii) With respect to a deed in lieu of foreclosure of any other lien instrument, the holder of
29 the debt or other obligation secured by the lien instrument or any designee, nominee, or assignee
30 of the holder of the debt secured by the lien instrument; and

31 (B) A transfer by any of the persons described in subparagraph "i) of this paragraph to a
32 subsequent purchaser for value.

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

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

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

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

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

40 (III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted
41 purchaser of the foreclosed property; and

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

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

45 (i) A transfer by the trustees, successor trustees, substituted trustees under the deed of
46 trust, or trustees conducting a foreclosure sale pursuant to the deed of trust to:

- 47 (I) The holder of the debt or other obligation secured by the deed of trust;
- 48 (II) Any designee, nominee, or assignee of the holder of the debt secured by the deed of
49 trust; or
- 50 (III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted
51 purchaser of the foreclosed property; and
- 52 (ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a
53 subsequent purchaser for value; and
- 54 (C) With respect to the foreclosure of any other lien instrument:
- 55 (i) A transfer by the party authorized to make the sale to:
- 56 (I) The holder of the debt or other obligation secured by the lien instrument;
- 57 (II) Any designee, nominee, or assignee of the holder of the debt secured by the lien
58 instrument; or
- 59 (III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted
60 purchaser of the foreclosed property; and
- 61 (ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a
62 subsequent purchaser for value.
- 63 (b) (1) For every deed or other instrument of writing that effects a change of ownership on
64 the land books of a county assessor and for which an amount is required to be withheld under
65 subsection (c) of this section, the total payment shall be described on the form prescribed by the
66 Tax Commissioner.
- 67 (2) The form required under subdivision (1) of this subsection shall be signed under oath
68 by:
- 69 (i) The transferor of the property;
- 70 (ii) An agent of the transferor; or
- 71 (iii) The real estate reporting person, as defined under Section 6045 of the Internal
72 Revenue Code.

73 (c) (1) Except as otherwise provided in this section, in a sale or exchange of real property
74 and associated tangible personal property owned by a nonresident or nonresident entity occurring
75 on during taxable years beginning on or after January 1, 2008, the real estate reporting person, as
76 defined under Section 6045 of the Internal Revenue Code, shall withhold an amount equal to two
77 and one-half percent of the total payment to a nonresident or nonresident entity. In lieu thereof, the
78 real estate reporting person may withhold an amount equal to six and one-half percent of the
79 estimated capital gain derived from the sale or exchange. The amounts withheld shall be paid to
80 the Tax Commissioner by the real estate reporting person within thirty days of the date the
81 amounts were withheld.

82 (2) The Tax Commissioner may propose alternatives to the percentages of payments or
83 capital gains set forth in this section that may, based upon experience and application of this
84 section, more accurately represent the value of capital gains subject to taxation in this state and,
85 upon enactment of any such rules, those alternatives to the percentages shall supersede the
86 percentages set forth in this subsection.

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

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

90 (A) The recitals or the acknowledgment of the deed or other instrument of writing
91 transferring the property to the transferee; or

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

94 (2) The transferor presents to the real estate reporting person, as defined under Section
95 6045 of the Internal Revenue Code, a certificate issued by the Tax Commissioner stating that:

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

97 (B) A reduced amount of tax is due from that transferor in connection with that sale or
98 exchange of property and stating the reduced amount that should be collected by the real estate

99 reporting person, as defined under Section 6045 of the Internal Revenue Code, before recordation
100 or filing; or

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

103 (3) The property transfer is:

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

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

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

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

111 (A) The recitals or the acknowledgment of the deed or other instrument of writing
112 transferring the property to the transferee; or

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

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

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

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

124 (2) The transferor shall be credited with having paid the amounts for the taxable year in

125 which the transaction that is the subject of the tax occurred against any tax owed by the transferor
126 to the State of West Virginia on gains resulting from the transaction and is entitled to a refund from
127 the Tax Commissioner of any amount in excess of the amount owed, except as provided in
128 subsection (i) of this section.

129 (g) The real estate reporting person is subject to the requirements and penalties prescribed
130 for the failure to pay the amount of a tax prescribed by article ten of this chapter for the failure to
131 pay to the Tax Commissioner amounts withheld pursuant to provisions of this section.

132 (h) This section does not:

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

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

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

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

141 (3) The Tax Commissioner shall establish a procedure by which a transferor may apply for
142 an early refund of the tax collected under this section if the transferor establishes that no tax will be
143 owed or less tax than collected will be owed. The Tax Commissioner shall accept and process
144 applications for an early refund beginning no later than 30 days after the real estate reporting
145 person has paid the withholding to the Tax Commissioner, and the acceptance and processing of
146 early refund applications shall in all cases continue until July 15th of the year following the year in
147 which the transaction occurred for which the tax was withheld and remitted to the Tax
148 Commissioner under this section by the real estate reporting person, as defined under Section
149 6045 of the Internal Revenue Code.

150 (4) If the amount withheld and paid to the Tax Commissioner under this section equals or

151 exceeds the amount of tax owed by the transferor, the transferor may, at his or her discretion, not
152 file the return required by this article: *Provided*, That failure to file a return or an application for an
153 early refund as provided in subsection (i) (3) of this section is deemed to be a final decision to not
154 claim a refund for an overpayment of the tax imposed by this article, and no claim for refund shall
155 be granted and no refund paid with relation to tax withheld pursuant to this section for which no
156 return was filed by the taxpayer.

157 (j) The amendments made to this section made during the regular session of the
158 Legislature in the year 2023 shall apply retrospectively, but only to transfers of real estate
159 occurring on or after January 1, 2022.

NOTE: The purpose of this bill is to allow the Tax Commissioner to process certain tax refunds early.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.