



SPONSOR: Rep. Gilligan & Sen. DeLuca

HOUSE OF REPRESENTATIVES
145th GENERAL ASSEMBLY

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:

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

2 “§ 1126 Withholding of income tax on sale or exchange of real estate by nonresident individuals.

3 (a) *Definitions.* –

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

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

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

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

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

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

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

18 (3) an alternative form prepared by the Director to declare under penalties of perjury (i) that the
19 sale or exchange of real estate is exempt from recognition of capital gain with respect to the
20 tax year of the sale or exchange, or (ii) that all or a part of the gain realized that may be
21 excluded from income with respect to the tax year of the sale or exchange, with a statement of

22 the facts and a citation to the provision(s) of the Internal Revenue Code (Title 26, U.S.C.)
23 relied upon for such exemption or exclusion.

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

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

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

34 (f) *Tax not imposed; lawful collection of taxes not prohibited.* – This section does not:

- 35 (1) impose any tax on a transferor or affect any liability of the transferor for any tax; or
36 (2) prohibit the Director from collecting any taxes due from a transferor in any other manner
37 authorized by law.”

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

39 “§ 1606 Withholding of income tax on sale or exchange of real estate by nonresident pass-through entities.

40 (a) *Definitions.* –

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

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

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

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

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

- 49 (1) a “Declaration of Estimated Income Tax” or a “Delaware Corporate Tentative Tax Return” for
50 the quarter in which the sale or exchange is settled, applying the highest marginal rate of each of

51 its nonresident members under § 1102 or § 1902 of this Title, as the case may be, to an estimate
52 of the nonresident member's distributive share of the gain recognized on the sale or exchange, or
53 (2) an alternative form prepared by the Director to calculate income tax at the highest marginal rate
54 under § 1102 or § 1902 of this Title, applied to the nonresident member's distributive share of
55 the difference between the total amount realized by the transferor and the net balance due at the
56 time of settlement of all recorded liens encumbering the real estate, or
57 (3) an alternative form prepared by the Director to declare under penalties of perjury that the sale or
58 exchange of real estate is exempt from recognition of capital gain with respect to the tax year of
59 the sale or exchange, with a statement of the facts and a citation to the provision(s) of the
60 Internal Revenue Code (Title 26, U.S.C.) relied upon.

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

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

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

71 (f) *Tax not imposed; lawful collection of taxes not prohibited.* – This section does not:

- 72 (1) impose any tax on a transferor or affect any liability of the transferor for any tax; or
73 (2) prohibit the Director from collecting any taxes due from a transferor in any other manner
74 authorized by law.”

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

76 “§ 1909 Withholding of income tax on sale or exchange of real estate by nonresident corporations.

77 (a) *Definitions.* –

- 78 (1) “Director” means the Director of the Division of Revenue or the Secretary of Finance of the
79 State.
80 (2) “Nonresident corporation” means, for purposes of this section, a corporation that:

- 81 A. Is not organized under the laws of this State, and
82 B. Is not qualified or registered with the Secretary of State to do business in this State.

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

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

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

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

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

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

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

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

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

106 (f) *Tax not imposed; lawful collection of taxes not prohibited.* – This section does not:

107 (1) impose any tax on a transferor or affect any liability of the transferor for any tax; or

108 (2) prohibit the Director from collecting any taxes due from a transferor in any other manner
109 authorized by law.”

110 Section 4. The Director of Revenue shall adopt regulations to administer Sections 1126, 1606, and 1909 of Title
111 30.

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

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

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

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

SYNOPSIS

Resident individuals and corporations are currently required to estimate, report, and pay the tax due on income, including gains recognized from the sale of real estate, in the quarter during which the sale occurs.

This Bill will require nonresident persons, corporations or pass-through entities that sell real estate owned in this State to declare and pay their estimate of the tax due on the gain recognized from the sale before the deed will be recorded.

The Bill does not apply to estates or to entities classified as a trust for federal income tax purposes, but does apply to the members, beneficiaries or grantors of entities disregarded for federal income tax purposes.

This Bill will facilitate the reporting and collection of the tax, and the administration of the tax code.