



State of Georgia Department of Revenue

Withholding Requirements For Sales or Transfers of Real Property by Nonresidents

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INTRODUCTION

O.C.G.A. Section 48-7-128 provides for income tax withholding at a rate of 3 percent on sales or transfers of real property and associated tangible personal property by nonresidents of Georgia. This Code Section is applicable to any sale or transfer occurring on or after January 1, 1994. For the purpose of this Code Section, nonresidents include individuals, trusts, partnerships, corporations, limited liability companies, limited liability partnerships, and unincorporated organizations. The person or entity identified as the seller on the settlement statement shall be considered the seller for all purposes regarding the aforementioned Code section, including but not limited to, executing and delivering to the buyer or transferee all forms or other documents incident to determining the appropriate amount of tax to be withheld or the appropriate amount exempt from withholding requirements.

The rate of withholding is 3 percent of the sales price. An alternative for calculating the withholding is to use the seller's gain. In order to apply the withholding to the gain, the seller must complete form IT-AFF2 (Affidavit of Seller's Gain) attesting to the amount of the taxable gain. The seller is responsible for the calculation of the gain. It is required that the IT-AFF2 be sent to the Department of Revenue if there is a balance due. This form along with an explanation of the cost basis and expenses must be kept with the closing file. The closing attorney may rely on the Seller's affidavit with the above mentioned explanation. If the calculated amount for the withholding is more than the cash received at closing, the buyer must withhold and remit only the net proceeds otherwise payable to the seller.

There are a number of exemptions to the withholding requirement. If the property qualifies as a principal residence under the Internal Revenue Code, the exemption from withholding applies for the gain that is excluded from Federal AGI under the Internal Revenue Code.

Other exemptions are as follows:

- A. \$20,000 Threshold – Withholding is not required on transactions where the purchase price is less than \$20,000.
- B. \$600 Threshold – If the purchase price exceeds \$20,000, the tax liability is less than \$600, and the seller signs an affidavit certifying the gain, the buyer will not be required to withhold.
- C. Foreclosures – The buyer is not subject to the withholding requirements if the seller is a mortgagor conveying the mortgaged property to a mortgagee in a foreclosure or in a transfer in lieu of foreclosure with no additional consideration.
- D. Federal and State Agencies – The transaction is not subject to the withholding requirements if the seller or buyer is an agency of the United States or the State of Georgia, or a private mortgage insurance company.
- E. Composite Returns – If the seller is an entity which files a composite return and remits the tax on the gain on behalf of its members, then the buyer is not required to withhold.

F. FNMA, GNMA, or FHLMC – The seller or buyer is the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation.

G. Tax Exempt Organization – The Seller is a tax exempt organization and the income from the sale is not subject to federal or state income tax.

H. Insurance Company – The seller is an insurance company which pays tax on its premium income to Georgia.

I. Like Kind Exchange – The transaction is a like kind exchange and all of the income from the sale is not subject to federal or state income tax.

For forms, general information, and filing procedures, contact the Withholding Processing Unit at 1-877-423-6711.

For answers to questions regarding Georgia law and regulations, call (404) 417-2399.

O.C.G.A. Section 48-7-128

48-7-128. Withholding tax on sale or transfer of real property and associated tangible personal property by nonresidents.

(a) As used in this Code section, the term “nonresident of Georgia” shall include individuals, trusts, partnerships, corporations, and unincorporated organizations. Any seller or transferor who meets all of the following conditions and who provides the buyer or transferee with an affidavit signed under oath swearing or affirming that the following conditions are met will be deemed a resident for purposes of this Code section:

(1) The seller or transferor has filed Georgia income tax returns or appropriate extensions have been received for the two income tax years immediately preceding the year of sale;

(2) The seller or transferor is in business in Georgia and will continue substantially the same business in Georgia after the sale or the seller or transferor has real property remaining in the state at the time of closing of equal or greater value than the withholding tax liability as measured by the 100 percent property tax assessment of such remaining property;

(3) The seller or transferor will report the sale on a Georgia income tax return for the current year and file it by its due date; and

(4) If the seller or transferor is a corporation or limited partnership, it is registered to do business in Georgia.

(b) (1) Except as otherwise provided in this Code section, in the case of any sale or transfer of real property and related tangible personal property located in Georgia by a nonresident of Georgia, the buyer or transferee shall be required to withhold and remit to the commissioner on forms provided by the commissioner a withholding tax equal to 3 percent of the purchase price or consideration paid for the sale or transfer; provided, however, that if the amount required to be withheld pursuant to this subsection exceeds the net proceeds payable to the seller or transferor, the buyer or transferee shall withhold and pay over to the commissioner only the net proceeds otherwise payable to the seller or transferor. Any buyer or transferee who fails to withhold such amount shall be personally liable for the amount of such tax.

(2) The liability imposed by this subsection shall be paid upon notice and demand by the commissioner or the commissioner’s delegate and shall be assessed and collected in the same manner as all other withholding taxes imposed by this article.

(3) The person or entity identified as the seller on the settlement statement shall be considered the seller for all purposes regarding this Code section, including but not limited to, executing and delivering to the buyer or transferee all forms or other documents incident to determining the appropriate amount of tax to be withheld or the appropriate amount exempt from withholding requirements.

(c) If the seller or transferor determines that the amount required to be withheld pursuant to paragraph (1) of subsection (b) of this Code section will result in excess withholding on any gain required to be recognized from the sale, the seller or transferor may provide the buyer or transferee with an affidavit signed under oath swearing or affirming to the amount of the gain required to be recognized from the sale, and the buyer or transferee shall withhold 3 percent of the amount of the gain required to be recognized, if any, stated in the affidavit rather than as provided in paragraph (1) of subsection (b) of this Code section. If, however, the amount required to be withheld pursuant to this subsection exceeds the net proceeds payable to the seller or transferor, the buyer or transferee shall withhold and pay over to the commissioner only the net proceeds otherwise payable to the seller or transferor.

(d) Subsection (b) of this Code section shall not apply where:

(1) The real property being sold or transferred is a principal residence of the seller or transferor within the meaning of Section 1034 of the Internal Revenue Code;

(2) The seller or transferor is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration; or

(3) The transferor or transferee is an agency or authority of the United States of America, an agency or authority of the State of Georgia, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, or a private mortgage insurance company.

The commissioner may by regulation set a purchase price amount below which no withholding is required.

(e) (1) Unless otherwise provided, if the seller or transferor is a partnership or Subchapter "S" corporation or other unincorporated organization which certifies to the buyer or transferee that a composite return is being filed on behalf of the nonresident partners, shareholders, or members and that the partnership, Subchapter "S" corporation, or unincorporated organization remits the tax on the gain on behalf of the nonresident partners, shareholders, or members, the buyer or transferee shall not be required to withhold as provided in this Code section. Any nonresident partner, shareholder, or member who falsely certifies that a composite return is being filed on behalf of such partner, shareholder, or member shall be liable for a penalty in the amount of \$500.00 or 10 percent of the amount required to be withheld, whichever is greater.

(2) The penalty imposed by this subsection shall be paid upon notice and demand by the commissioner or the commissioner's delegate and shall be assessed and collected in the same manner as the withholding tax imposed by this article.

(f) Every buyer or transferee of real property located in Georgia who is required to deduct and withhold the withholding tax imposed by subsection (b) of this Code section shall file the required return and remit payment to the department on or before the last day of the calendar month following the calendar month within which the sale or transfer giving rise to the withholding tax occurred.

**RULES
OF
DEPARTMENT OF REVENUE
TAXPAYER SERVICES DIVISION**

**CHAPTER 560-7-8
RETURNS AND COLLECTIONS**

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**560-7-8-.35 Withholding on Sales or Transfers of Real Property and Associated Tangible
Property by Nonresidents of Georgia.**

(1) **Nonresidents of Georgia.** The term “Nonresident of Georgia” shall include individuals, trusts, partnerships, corporations, and unincorporated organizations. For purposes of O.C.G.A. Section 48-7-128, the following persons are Nonresidents of Georgia and are therefore subject to the withholding tax requirements:

(a) **Individual** – Any individual having his or her principal residence outside Georgia at the time of closing, unless he or she otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(b) **Corporation** – Any corporation whose principal place of business is located outside Georgia, unless it otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(c) **Partnership** – Any partnership whose principal place of business is located outside Georgia, unless it otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(d) **Trust** – Any trust that is being administered by a nonresident fiduciary if the gain from the sale will be taxed to the trust or that has nonresident beneficiaries if the gain from the sale will be taxed to the beneficiaries, unless it otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(e) **Limited Liability Company** – Any limited liability company whose principal place of business is located outside Georgia, unless it otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(f) **Limited Liability Partnership** – Any limited liability partnership whose principal place of business is located outside Georgia, unless it otherwise meets the requirements of O.C.G.A. Section 48-7-128(a) and subparagraph (4)(d) of this Revenue Rule to be deemed a resident.

(2) **Co-owners.** If two or more persons sell real property which they own as joint tenants with right of survivorship or as tenants in common, their respective status as to residence will be determined separately. Withholding is required only on the amount realized or gain recognized by the nonresident co-owner(s).

(3) Calculation of Tax.

(a) **Withholding Requirement and Tax Rate.** Nonresidents who sell or transfer Georgia real property are subject to a 3% withholding tax. The withholding tax is to be computed by applying the 3% rate to the purchase price. As an alternative, if the seller provides the buyer with a completed affidavit of gain (Form IT-AFF2 or equivalent) swearing to the amount of the gain, the withholding may be computed by applying the 3% rate to the amount of recognized gain.

(b) **Threshold.** Withholding will not be required on transactions where the purchase price is less than \$20,000. If the purchase price exceeds \$20,000 and the tax liability is less than \$600, the seller may provide the buyer with a completed affidavit of gain (Form IT-AFF2 or equivalent), swearing to the amount of the gain, and the buyer will not be required to withhold.

(c) **Installment Transactions.** Every buyer or transferee of real property which is sold on the installment basis and who is required to deduct and withhold the withholding tax imposed by subsection (b) of O.C.G.A. Section 48-7-128 shall file the required return and remit payment for the tax to the Department in the following manner.

(1) **Initial Return and Initial Payment.** The initial required return and the initial tax payment shall be remitted on or before the last day of the calendar month following the calendar month within which the sale or transfer giving rise to the withholding tax occurred. The initial payment is calculated by taking 3 percent of the purchase price less the installment note. Or if the seller elects to base the withholding on the gain, 3 percent of the gain that would be recognized as a result of the proceeds received at the time of the closing.

(2) **Subsequent Return and Subsequent Payments.** For each subsequent return and subsequent payment, the amount of withholding is calculated by taking 3 percent of the principal amount included in each payment, or if the seller elects to base the withholding on the gain, 3 percent of the amount of each principal payment which represents gain. The buyer shall file the required return and remit the payment to the Department on or before the last day of the calendar month following the calendar month within which the cumulative amount withheld for the year, less any payments already made to the Department for the year, exceeds \$300. If the cumulative amount withheld for the year, less any payments already made to the Department for the year, does not exceed \$300 for the calendar year, the buyer shall file the required return and remit the payment to the Department on or before the last day of the month following the end of the calendar year within which the tax was withheld.

(3) **Threshold.** The threshold as described in subparagraph (3)(b) is computed based on the total purchase price or total gain as if the property were not sold on the installment basis, not on each separate principal payment or the amount of the principal payment which represents gain.

(4) Forms.

(a) **Return.** Unless otherwise exempted, every buyer or transferee of real property and associated tangible property from a nonresident seller or transferor must file a return and remit payment to the Department. Form G-2RP may be used as a return and remittance form; however, if the buyer has or creates a form that provides the sales date, buyer's and seller's names, addresses, identification numbers, total amount of the sales price or the gain recognized and the amount of withholding to be remitted, such form may be used instead. The buyer or transferee is required to provide the seller with a copy of the G-2RP or other form for the seller to file with the seller's income tax return.

(b) **Other Document as Substitute for Return.** The buyer, in substitution for the G-2RP, may use the closing statement, transfer tax statement or any other document showing all the information in (4)(a) above. The information should be contained in one page, and that page should be clearly designated at the top "Georgia Withholding Tax Return for Real Estate Transfer". The designation may be handwritten or typed, so long as it is clear and legible.

(c) **Statement of Withholding.** If the transaction is subject to withholding, the buyer shall provide to the seller a copy of the Form G-2RP (or the document used in lieu of that form) as a statement of tax withheld. A copy of the statement shall be filed with the seller's Georgia Income Tax Return in order that the seller may receive credit for the tax withheld on the transaction.

(d) **Affidavit of Seller's Residence.** O.C.G.A. Section 48-7-128(a) provides conditions under which a seller may be deemed a resident of Georgia for purposes of the withholding requirements. In order to be deemed a resident, the seller must provide the buyer with an affidavit swearing that the conditions in the statute and this rule are met. Form IT-AFF1 has been prepared by the Commissioner as an example of the information which must be provided in the seller's affidavit in order to document that the seller is a resident or a deemed resident and that, therefore, the buyer is not required to withhold. Please note that IT-AFF1 is only required by law where a seller is a nonresident but meets the conditions under which the seller may be deemed a resident; however, it may also be used by the buyer to document the seller's representation of Georgia residence if the parties so desire. Copies of Form IT-AFF1 may be obtained from any Department of Revenue office.

(e) **Affidavit of Seller's Gain.** O.C.G.A. Section 48-7-128(c) allows a seller to provide a buyer with an affidavit swearing to the gain required to be recognized on a transaction so that withholding may be based on the gain rather than the purchase price. Form IT-AFF2 has been prepared by the Commissioner as an example of an affidavit swearing to the gain on a transaction. The seller may use this affidavit or may execute an alternate affidavit that contains substantially the same information. This affidavit should be sent to the Department of Revenue at the same time as the Form G-2RP if a balance is due. Documentation of the cost basis, depreciation, and selling expenses should be retained by the seller and only be provided to the Department when requested. Copies of Form IT-AFF2 may be obtained at any Department of Revenue office.

(5) **Exemptions.** Although there are no filing requirements under law in exempt transactions, the Commissioner has prepared a Certificate of Exemption (Form IT-AFF3) as an example of a form which may be executed and provided to the parties for record keeping purposes. This form, or a similar document executed by the seller and provided to the buyer, may be used to document the buyer's reliance on the seller's representation that the sale transaction is exempt. Copies of the Certificate of Exemption form may be obtained from any Department of Revenue office.

Authority O.C.G.A. §§ 48-2-12 and 48-7-128.

ANSWERS TO FREQUENTLY ASKED QUESTIONS

Q. What kind of tax is this? Sales Tax? Real Estate Transfer Tax?

A. No. It is income tax withholding. The principle is similar to income tax withholding by employers. The buyer withholds Georgia income tax from the payment to the seller. The buyer is responsible for providing the seller with a withholding tax statement, which the seller attaches to his Georgia income tax return, claiming credit for the withholding on the appropriate line of the tax return.

Q. So the nonresident seller is still required to file a Georgia income tax return, even with the withholding?

A. Yes. In general, income from the sale of Georgia property is required to be reported on a Georgia income tax return. Once the return is completed, the actual tax liability will be determined, and the taxpayer either claims a refund for any overpayment, or pays the amount of any underpayment, the same as with any other income tax return.

Q. How is the amount to be withheld determined?

A. O.C.G.A. Section 48-7-128 generally requires that 3 percent of the purchase price be withheld. However, if the gain recognized on the sale is less than the purchase price, and the seller provides the buyer with an affidavit of gain (see form IT-AFF2), then the buyer may withhold 3 percent of the amount of the gain. If the amount to be withheld, as based on the purchase price or the gain, is greater than the net proceeds of the transfer, then only the net proceeds need be withheld and remitted by the purchaser. Generally, the net proceeds of the sale are the net payment to the transferor as shown on the closing statement.

Q. Are only transactions which result in taxable income to the seller subject to withholding?

A. Yes. Since O.C.G.A. Section 48-7-128 and Regulation 560-7-8-.35 allow a seller to base withholding on the recognizable gain from a transaction, transactions which result in no taxable income do not require withholding. Please see form IT-AFF2.

Q. Is withholding required when there are several 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 only on the purchase price or gain recognized by the nonresident sellers. If the withholding liability for a particular co-owner is established to be less than \$600.00, withholding for that co-owner is not required. In the case of co-owners who are married, ownership is determined separately. If the withholding liability for a particular married co-owner is established to be less than \$600.00, withholding for that married co-owner is not required.

Q. If a buyer reasonably relies on a seller's sworn affidavit of residency, will he be liable if it later turns out that the seller does not meet the conditions of deemed residency?

A. A buyer's reasonable reliance on a seller's affidavit should be sufficient. The standard is a "good faith" reliance standard. A buyer will be held liable if he had actual or constructive knowledge that the seller's affidavit was false or contained erroneous information.

Q. If the seller is a Georgia resident, must he provide the buyer with a sworn affidavit Form IT-AFF1 (for deemed residency)?

A. No. The affidavit is for **nonresident** sellers who wish to be "deemed" residents for withholding purposes. An affidavit is not required when the seller is a Georgia resident. The affidavit may be used by a resident seller; however, if the buyer wishes to document the seller's representation of Georgia residency.

Q. Must a certificate of exemption (Form IT-AFF3) be filed when the seller is exempt by law from the withholding requirement?

A. No. The filing of an affidavit establishing an exemption is not required. However, the buyer may wish to have the seller execute form IT-AFF3 or a similar affidavit, in order to document the buyer's reliance on the seller's representation of exemption.

Q. Is withholding required on a like-kind exchange of property?

A. Withholding is not required to the extent the income from the sale is not subject to Georgia income tax.

Q. If a Georgia resident relocates to another state and buys another residence, does his Georgia residence cease to be his principal residence for purposes of O.C.G.A. Section 48-7-128?

A. In order to be exempt from withholding, the property must be the principal residence of the seller or transferor for purposes of the income exclusion under the Internal Revenue Code. This rule applies no matter how much time elapses after the seller relocates to another state. As long as the property qualifies as a principal residence under the Internal Revenue Code, the exemption from withholding applies for the gain that is excluded from Federal AGI under the Internal Revenue Code.

Q. If the seller of the property is an exempt organization, is the sale subject to withholding?

A. Not unless the transaction results in unrelated business taxable income under Internal Revenue Code Section 512. In general, any transaction which results in unrelated business income as defined in IRC Section 512 is subject to withholding. Transactions which do not result in unrelated income are not subject to withholding.

Q. If the seller is an insurance company, is the sale subject to withholding?

A. If the insurance company pays a tax to Georgia on its premium income, it is not subject to Georgia income tax and withholding on the sale is not required.

Q. Does the withholding required under O.C.G.A. Section 48-7-128 apply to the sale or transfer of timber located in Georgia by a nonresident of Georgia?

A. Under Georgia law, standing timber is real property. Once timber is severed from the stump, it becomes personal property. If title to the timber passes before it is severed from the stump, withholding under O.C.G.A. Section 48-7-128 is required. If title to the timber does not pass until after it is severed from the stump, withholding is required only if the underlying land is sold with the timber.

Q. If tax is withheld from a nonresident seller who is a partnership, S corporation, or limited liability company treated as a partnership, how does the seller claim credit for 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. It should be passed through each tier in multitiered situations until it is claimed. Each partner's, shareholder's, or member's share of the withholding should be listed on the K-1 Form with a schedule showing how it was passed through and each partner, shareholder, and member should be provided a copy of the original withholding statement issued to the seller by the purchaser (Form G-2RP). The partner, shareholder, or member should claim credit for their share of the withholding on their Georgia income tax return, and attach a copy of the K-1 Form, the schedule showing how it was passed through, and a copy of the withholding statement issued to the seller by the purchaser (Form G-2RP). If the pass-through entity files a composite return, it may claim credit on the return, and attach the withholding statement. If some of the nonresident partners, shareholders, or members are not

included on the composite return, credit may only be claimed for the portion of the withholding that is attributable to the partners, shareholders, or members who are included on the composite return.

Q. Can a nonresident seller qualify as a deemed resident in order to be exempt from withholding, if he satisfies some, but not all of the listed conditions?

A. No. In order to qualify as a deemed resident, all of the qualifying conditions must be satisfied.

Q. One of the conditions for a nonresident seller to be considered a deemed resident under O.C.G.A. Section 48-7-128, is that he has filed Georgia income tax returns, or appropriate extensions, for the two income tax years immediately preceding the year of sale. What if the sale occurs before the due date for the previous year's income tax return?

A. If the seller or transferor has filed Georgia returns or appropriate extensions for the most recent two tax years whose original due dates have passed, that condition will be considered satisfied.

Q. If property is transferred to a relocation company, is the relocation company subject to the withholding requirements of O.C.G.A. Section 48-7-128?

A. If the relocation company is listed on the settlement statement as the seller, then they are subject to the requirements of O.C.G.A. Section 48-7-128.

Q. O.C.G.A. Section 48-7-30 indicates that a taxable nonresident individual shall determine the amount of taxable income in the manner prescribed for the allocation and apportionment of income of corporations. The allocation and apportionment of corporations is described in O.C.G.A. Section 48-7-31. Paragraph 1 of subsection (c) of this code section reads as follows:

Interest received on bonds held for investment and income received from other intangible property held for investment are not subject to apportionment. All expenses connected with such investment income shall be applied against the investment income. The net investment income from intangible property shall be allocated to this state if the situs of the corporation is in this state or if the intangible property was acquired as income from property held in this state or as a result of business done in this state.

An installment note, held by someone who is not in the business of holding installment notes, derived from the sale of investment real property or rental real property by a nonresident individual, would be intangible property that was acquired as income from property held in this state or as a result of business done in this state. Doing business in Georgia is defined in subsection (a) of O.C.G.A. Section 48-7-31 as any activities or transactions for the purposes of financial profit or gain. Accordingly, interest that is attributable to the installment note in this situation is taxable for Georgia purposes. Is the interest from the installment note subject to the withholding requirements of O.C.G.A. Section 48-7-128?

A. No, it is not subject to the withholding requirements of O.C.G.A. Section 48-7-128. However, if the buyer and seller agree, the buyer can withhold on the interest.