

Senate Bill 1101

Sponsored by Senator KRUSE; Senators FERRIOLI, G GEORGE, L GEORGE, NELSON, STARR, WHITSETT, WINTERS (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Limits requirement for withholding funds in real estate transfer involving nonresident transferor to licensed escrow agent.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to withholding of income tax in real estate transfers; creating new provisions; amending
3 ORS 314.258; and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 314.258 is amended to read:

6 314.258. (1) As used in this section:

7 (a) "Authorized agent" means an agent who is responsible for closing and settlement services
8 in a conveyance [*of a real property interest*].

9 (b) "Closing and settlement services" means services that are provided [*for the benefit of a*
10 *transferor or a transferee in connection with a conveyance of a real property interest, and the receipt*
11 *or disbursement of moneys in connection with a sale, lease, encumbrance, mortgage or deed of trust in*
12 *or related to real property*] **by a licensed escrow agent in a real estate closing escrow as pro-**
13 **vided in ORS 696.505 to 696.590.**

14 (c) "**Consideration**" includes the unpaid balance owing on any lien, mortgage, contract,
15 **indebtedness or other encumbrance assumed in a conveyance.**

16 [*(c)*] (d) "Conveyance" means [*a sale, lease, encumbrance, mortgage or creation of a secured in-*
17 *terest in real property.*] **a transfer or a contract to transfer fee title to any real estate located**
18 **in the State of Oregon.**

19 (e) "**Net proceeds**" means the net amount shown, prior to reduction for withholding, on
20 **the transferor's settlement statement for the conveyance transaction.**

21 [*(d)*] (f) "Real property interest" means a United States real property interest, as defined in
22 section 897(c) of the Internal Revenue Code, that is located in the State of Oregon.

23 (g) "**Transferor**" means:

24 (A) **An individual who is not a resident of this state, as defined in ORS 316.027, on the**
25 **closing date of the conveyance and on the date on which proceeds of the conveyance are**
26 **disbursed; or**

27 (B) **A corporation taxed under section 11 and subchapter C, chapter 1 of the Internal**
28 **Revenue Code, that is not domiciled in this state or that is not registered or otherwise**
29 **qualified to do business in this state.**

30 (2) [*(a)*] *If there is a conveyance of a real property interest, the* **An** authorized agent providing

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 closing and settlement services is required to withhold **from consideration payable to a**
 2 **transferor** an amount equal to the least of:

3 [(A)] (a) Four percent of the consideration for the real property interest being conveyed;

4 [(B)] (b) *[Four percent of]* The net proceeds resulting from the conveyance; or

5 [(C)] (c) *[Ten]* **Eight** percent of the gain includable in **the transferor's Oregon** taxable income.

6 **In arriving at this amount, the authorized agent may rely upon the transferor's written af-**
 7 **firmation of the amount of includable gain.**

8 [(b) *For purposes of this subsection, a transferor is:*]

9 [(A) *An individual who is not a resident of this state at the time of both the closing date of the*
 10 *conveyance and the date on which proceeds of the conveyance are disbursed; or]*

11 [(B) *A C corporation that, immediately after the conveyance of the real property interest, is not*
 12 *doing business in this state.*]

13 (3) [(a) *Notwithstanding subsection (2) of this section,*] An authorized agent is not required to
 14 withhold amounts under this section if [*the authorized agent obtains a written affirmation executed*
 15 *by the transferor on a form prescribed by the Department of Revenue certifying under penalty of per-*
 16 *jury that*]:

17 [(A)] (a) The consideration for the conveyance does not exceed \$100,000;

18 [(B)] (b) The transferee is acquiring the real property interest through foreclosure; [*or]*

19 [(C)] (c) [*The transferor:*] **The conveyance is pursuant to a judicial foreclosure proceeding,**
 20 **a writ of execution, a nonjudicial foreclosure of a trust deed or a nonjudicial forfeiture of a**
 21 **land sale contract;**

22 **(d) The conveyance is in lieu of foreclosure of a mortgage, trust deed or other security**
 23 **instrument or a land sale contract with no additional monetary consideration;**

24 **(e) The transferor is a personal representative, executor, conservator, bankruptcy trustee**
 25 **or other person acting under judicial review;**

26 **(f) The transferor delivers to the authorized agent a certification that the Internal Re-**
 27 **venue Service does not require information reporting on the transaction; or**

28 **(g) The authorized agent obtains a written affirmation that the transferor will not owe**
 29 **Oregon income tax as a result of the conveyance.**

30 [(i) *If an individual, is a resident of this state;*]

31 [(ii) *If a corporation, has a permanent place of business in this state; or]*

32 [(iii) *Has professionally competent knowledge or advice that the transferor will not owe tax under*
 33 *ORS chapter 316, 317 or 318 for the tax year because the conveyance is an exchange that qualifies for*
 34 *deferral under section 1031 or 1033 of the Internal Revenue Code or is a nontaxable transaction under*
 35 *Oregon tax law.*]

36 [(b) *If withholding is not retained and remitted to the department pursuant to this section, the au-*
 37 *thorized agent shall retain the written affirmation described in this subsection for six years from the*
 38 *date of the closing of the conveyance transaction and shall present the written affirmation to the de-*
 39 *partment immediately upon request in writing from the department.*]

40 [(4) *For purposes of this section, a corporation is not doing business in this state if:*]

41 [(a) *The corporation has not been issued a certificate of existence or a certificate of authorization*
 42 *by the Secretary of State as described in ORS 60.027; and]*

43 [(b) *The corporation does not maintain a permanent office with a staff of at least one employee in*
 44 *this state or does not own or lease property in this state other than the property that is the subject of*
 45 *the conveyance.*]

1 ~~[(5)(a)]~~ **(4)(a)** Amounts withheld pursuant to this section are held in trust for the State of Oregon
 2 and shall be paid to the Department of Revenue in the time and manner prescribed by the depart-
 3 ment by rule.

4 (b) If an authorized agent fails to remit an amount withheld or required to be withheld by the
 5 agent under this section by the time remittance is required, the department may *[enforce collection*
 6 *in the same manner as the department enforces the collection of amounts withheld by employers under*
 7 *ORS 316.162 to 316.221]* **recover from the authorized agent the amount required to be withheld**
 8 **with interest at the rate established under ORS 305.220.**

9 (c) **If an authorized agent fails to withhold when withholding is required under this sec-**
 10 **tion, the department may recover a penalty not to exceed the greater of:**

11 (A) **\$500; or**

12 (B) **10 percent of the amount required to be withheld under this section, but not more**
 13 **than \$2,500.**

14 *[(c) Notwithstanding paragraph (b) of this subsection,]*

15 (d) The department may not proceed with collection actions against the authorized agent if the
 16 authorized agent:

17 (A) *[Presents the department with the written affirmation described in subsection (3) of this section;*
 18 *and]* **Withholds the required amount in connection with a conveyance and timely remits the**
 19 **funds to the department;**

20 (B) **Is not required to withhold an amount under this section; or**

21 *[(B)]* (C) **Demonstrates to the department that the authorized agent obtained *[the]* a certif-**
 22 **ication or written affirmation as described in subsection (3) of this section** prior to disbursement of
 23 funds due the transferor resulting from the conveyance.

24 (e) **A transferor may claim the amount withheld by an authorized agent as a credit on**
 25 **the transferor's personal income tax return or corporate income tax return or excise tax**
 26 **return.**

27 (f) **Notwithstanding ORS 696.581 (2), an authorized agent may withhold funds under this**
 28 **section without written instructions to withhold from the transferor.**

29 (g) **A written affirmation, as provided under this section, shall be executed by the**
 30 **transferor or the transferor's tax advisor under penalty of perjury and shall contain the**
 31 **transferor's taxpayer identification number. The agent shall retain for six years from the**
 32 **date of the closing of the conveyance transaction any written affirmation obtained by the**
 33 **authorized agent in connection with the conveyance and shall present the affirmation to the**
 34 **department promptly upon written request from the department.**

35 (h) **It shall be a defense to any claim by the department or by a transferor against the**
 36 **agent that the agent has acted in reasonable reliance upon representations made by the**
 37 **transferor or the transferor's tax advisor.**

38 **SECTION 2.** The Department of Revenue shall establish by rule procedures and criteria
 39 **under which an authorized agent may receive a waiver of the provisions of ORS 314.258 as**
 40 **the provisions applied before the effective date of this 2008 Act, if the agent would be in**
 41 **compliance with the provisions of ORS 314.258, had the conveyance occurred after the effec-**
 42 **tive date of this 2008 Act.**

43 **SECTION 3.** This 2008 Act takes effect on the 91st day after the date on which the special
 44 **session of the Seventy-fourth Legislative Assembly adjourns sine die.**