

## **SOUTH CAROLINA WITHHOLDING TAX FOR NONRESIDENT SELLERS OF REAL PROPERTY**

### **7% of Gain Withholding**

South Carolina Code Section 12-8-580 mandates that anyone purchasing real property in South Carolina from a nonresident Seller must withhold seven percent (7%) of the gain recognized on the sale by the nonresident Seller. If the nonresident Seller is a partnership, trust, or estate, the purchaser is also obligated to withhold seven percent (7%) of the recognized gain. If the nonresident Seller is a corporation, the purchaser must withhold five percent (5%) of the nonresident corporation's recognized gain.

### **Seller's Affidavit**

The purchaser may rely on an affidavit stating the amount of the gain signed by the Seller to satisfy the South Carolina Withholding requirements. The affidavit must be signed, witnessed, and notarized under penalty of perjury stating: the Seller's name, address and social security number, the date of the sale, a brief description of the property, and the amount of the nonresident Seller's gain on the property. If the Seller does not provide the purchaser with such an affidavit, the entire net sale proceeds payable to the nonresident Seller must be withheld and submitted to the South Carolina Department of Revenue.

### **Nonresident Definition**

For the purposes of this South Carolina law, a nonresident is defined as any individual whose permanent home is outside of South Carolina. Additionally, corporations incorporated outside of South Carolina and partnerships whose principal place of business is located outside of South Carolina are defined as nonresidents for withholding purposes. There are some exceptions. If the nonresident Seller is a corporation incorporated outside of South Carolina, has its principal place of business in South Carolina, and does no business in its state of incorporation, then the Seller is a "deemed" resident and may be exempt from the withholding requirements. If the nonresident Seller has been in business in South Carolina during the last two taxable years, including the year of sale, will continue substantially the same business in South Carolina after the sale, has filed at least one South Carolina income tax return, is not delinquent in filing South Carolina income tax returns, and has a certificate of authority to do business in South Carolina or is registered to do business in South Carolina, then the Seller is a "deemed" resident and may be exempt from the withholding requirements. Both of the above exceptions further require the Seller to agree to report the sale on a timely filed South Carolina income tax return and certify its "deemed resident" status on the Nonresident Seller Withholding Affidavit.

### **Deferred Gains**

Gains on certain transactions, called like-kind exchanges, are given tax-deferred treatment under Internal Revenue Code §1031. A like-kind exchange occurs when the Seller sells one property and subsequently purchases a property deemed similar under IRC §1031 within a given period of time. In a simultaneous exchange, a portion of the gain may be recognized, or the gain may be completely deferred, in which case no withholding is due. If a portion of the gain is recognized, withholding is due on that amount. If the exchange is not simultaneous, there is a chance that the exchange will not take place, and the Seller would then owe withholding. The Seller has two options in this situation. The Seller can pay the withholding with personal funds and then request a refund after the exchange is complete. Alternatively, the Buyer and Seller can agree to use a Qualified Intermediary. The Qualified Intermediary receives the withholding and agrees to pay it to the South Carolina Department of Revenue if the exchange does not take place. When the exchange is completed, the Qualified Intermediary transfers the withholding amount back to the Seller.

### **Gains in General**

For specific information in calculating the amount of gain, if any, to be recognized on the sale of real property, consult IRS Publication 551 Basis of Assets. Generally, the Seller of real property may increase the cost basis of that property by including the cost of any improvements having a useful life of more than one year. Also some of the settlement charges incurred in purchasing the property may be added to the property cost basis. Those settlement charges include legal fees, recording fees, survey costs, transfer taxes, and owner's title insurance. On the other hand, depreciation decreases a Seller's adjusted basis in real property. Before completing the Nonresident Seller Withholding Affidavit, a Seller should carefully calculate the property's gain.