

# **WEST VIRGINIA LEGISLATURE**

**2022 REGULAR SESSION**

**Introduced**

## **Senate Bill 28**

BY SENATORS TRUMP, ROBERTS, AND MARONEY

[Introduced January 12, 2022; referred  
to the Committee on Finance]

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

40 or

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

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

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

46 (i) A transfer by the trustees, successor trustees, substituted trustees under the deed of

47 trust, or trustees conducting a foreclosure sale pursuant to the deed of trust to:

48 (I) The holder of the debt or other obligation secured by the deed of trust;

49 (II) Any designee, nominee, or assignee of the holder of the debt secured by the deed of  
50 trust; or

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

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

55 (C) With respect to the foreclosure of any other lien instrument:

56 (i) A transfer by the party authorized to make the sale to:

57 (I) The holder of the debt or other obligation secured by the lien instrument;

58 (II) Any designee, nominee, or assignee of the holder of the debt secured by the lien  
59 instrument; or

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

62 (ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a  
63 subsequent purchaser for value.

64 (b) (1) For every deed or other instrument of writing that effects a change of ownership on  
65 the land books of a county assessor and for which an amount is required to be withheld under  
66 subsection (c) of this section, the total payment shall be described on the form prescribed by the  
67 Tax Commissioner.

68 (2) The form required under subdivision (1) of this subsection shall be signed under oath  
69 by:

70 (i) The transferor of the property;

71 (ii) An agent of the transferor; or

72 (iii) The real estate reporting person, as defined under Section 6045 of the Internal

73 Revenue Code.

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

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

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

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

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

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

95 (2) The transferor presents to the real estate reporting person, as defined under Section  
96 6045 of the Internal Revenue Code, a certificate issued by the Tax Commissioner stating that:

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

98 (B) A reduced amount of tax is due from that transferor in connection with that sale or

99 exchange of property and stating the reduced amount that should be collected by the real estate  
100 reporting person, as defined under Section 6045 of the Internal Revenue Code, before recordation  
101 or filing; or

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

104 (3) The property transfer is:

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

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

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

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

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

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

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

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

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

125           (2) The transferor shall be credited with having paid the amounts for the taxable year in  
126 which the transaction that is the subject of the tax occurred against any tax owed by the transferor  
127 to the State of West Virginia on gains resulting from the transaction and is entitled to a refund  
128 from the Tax Commissioner of any amount in excess of the amount owed, except as provided in  
129 subsection "i) of this section.

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

133           (h) This section does not:

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

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

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

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

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

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

158 (i) The amendments made to this section made during the regular session of the  
159 Legislature in the year 2022 shall apply retrospectively, but only to transfers of real estate  
160 occurring on or after January 1, 2021.

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.