

## **150-314.258**

### **Withholding on Real Property Interest Conveyances**

(1) Definitions. For purposes of ORS 314.258 and this rule:

(a) “Authorized agent” does not include an employee of a transferee who merely makes payments to a transferor in connection with a conveyance nor an authorized agent who merely performs services such as inspections, appraisals, drafting services, and recording services performed for the benefit of a transferor or transferee in a conveyance.

(b) “Consideration” includes any encumbrance that the transferee agrees to pay or assume as well as the fair market value of any property conveyed or transferred to a transferor, or the fair market value of any service provided to a transferor.

(2) Withholding requirements. Except as provided in subsection (2)(a) of this rule, an authorized agent must withhold tax for the year in which income is recognized for Oregon tax purposes and remit the tax withheld to the department.

(a) An authorized agent is not required to withhold if:

(A) The withholding amount calculated is less than \$100 per transferor;

(B) The total consideration for the property is less than or equal to \$100,000;

(C) The person making a conveyance is a resident of Oregon as defined in ORS 316.027 on the closing date of the conveyance;

(D) The person making a conveyance is a C-Corporation that is qualified to do business in Oregon on the closing date of the conveyance;

(E) The transferor delivers to the authorized agent a written assurance as required in IRC section 6045(e) that the entire gain qualifies for exclusion under IRC section 121;

(F) The transferor is an estate, certain trusts, S corporation, general partnership, or limited partnership, or a limited liability company that for purposes of Treasury Regulation section 301.7701-3 has not elected to be classified as an association taxable as a corporation and is not a disregarded entity the sole member of which is a transferor within the meaning of ORS 314.258(1)(f);

(G) The transferor is an agency or instrumentality of the United States or the State of Oregon or is a city, county, or other municipal or public corporation;

(H) The authorized agent is an attorney involved in a transaction where a licensed escrow agent is providing services for the conveyance; or

(I) The transferor or the transferor’s tax advisor executes a written affirmation under penalty of perjury that the conveyance is not likely to be taxable to the transferor under Oregon law during the tax year of the transferor in which the conveyance occurs.

Examples of such transactions include but are not limited to a conveyance that constitutes or is accomplished as part of:

(i) A transfer that is the sale of a principal residence and the gain qualifies for exclusion under IRC section 121;

(ii) A transfer to a corporation controlled by the transferor for purposes of IRC section 351;

(iii) A transfer pursuant to a tax-free reorganization under IRC section 361;

(iv) A transfer by a tax-exempt entity that does not give rise to unrelated business taxable income to the transferor under IRC section 512;

(v) A transfer to a partnership in exchange for an interest in the partnership such that no gain or loss is recognized under IRC section 721;

- (vi) A transfer that qualifies for nonrecognition under IRC section 1031 or 1033 and the transferor enters into such a transaction;
  - (vii) A transfer between spouses or incident to divorce for purposes of IRC section 1041; or
  - (viii) Any other transaction in which gain is not recognized for purposes of ORS chapters 316, 317, and 318, as explained to the department in writing at the time the transaction is completed.
- (b) The authorized agent must send the tax withheld to the department within 20 days of the date the proceeds from the conveyance are disbursed to the transferor.
  - (c) If there is more than one transferor for one parcel, the authorized agent must withhold tax on each non-exempt transferor as if all transferors had equal ownership in the real property interest unless the transferor establishes to the authorized agent the actual ownership percentage in the real property, such as through recorded documents, tenancy-in-common agreements, or other documents. If the transferor establishes other than equal ownership, the authorized agent must withhold in proportion to each non-exempt transferor's actual ownership percentage in the real property.
  - (d) A transferor may claim the amount withheld by an authorized agent as a credit on the transferor's corresponding personal income tax return or corporate income or excise tax return.
  - (e) If the transferor is a limited liability company the sole member of which is a transferor within the meaning of ORS 314.258(1)(f) (2008) and the limited liability company is a disregarded entity for federal income tax purposes, the transferor is the single member for purposes of this rule.

(3) Calculation of amount to be withheld.

- (a) An authorized agent is required to withhold and remit to the department the least of:
  - (A) Four percent of the consideration for the real property payable to the transferor;
  - (B) Eight percent of the amount of gain from the conveyance that is includable in the transferor's Oregon taxable income; or
  - (C) The net proceeds from the conveyance payable to the transferor.

(c) A transferor subject to withholding must deliver to an authorized agent at or before conveyance of the real property a written affirmation, signed under penalty of perjury, identifying the amount of withholding required by subsection (a) of this section. If the transferor fails to timely deliver the form, the authorized agent must withhold four percent of the amount of consideration, or if less, all the net proceeds.

Example 1: Anne sold her rental property for \$300,000. Her federal and Oregon adjusted basis in the property is \$250,000. She has an outstanding mortgage against the property of \$157,000 and closing costs are \$3,350. At closing, she determines she is not exempt from withholding so her escrow officer must withhold tax based on the least of four percent of the consideration, eight percent of the gain includable in Oregon taxable income, or all of the net proceeds.

Step 1) Determine four percent of the consideration. In this case, it is \$12,000 ( $\$300,000 \times 0.04 = \$12,000$ ).

Step 2) Determine eight percent of the gain includable in Oregon taxable income as follows:

\$300,000 Consideration less

\$250,000 Federal and Oregon adjusted basis equals

### \$50,000 Gain

\$4,000 ( $\$50,000 \times 0.08 = \$4,000$ ) is eight percent of the gain.

Step 3) Determine the “net proceeds” as follows:

\$139,650 Net amount disbursed to seller ( $\$300,000$  consideration -  $\$157,000$  mortgage –  $\$3,350$  closing costs =  $\$139,650$ )

\$139,650 is the “net proceeds” from this conveyance.

Step 4) Because eight percent of the gain (\$4,000) is the lowest of the amounts calculated in steps one, two, or three, Anne’s escrow officer would withhold and remit \$4,000.

(d) Installment sales. If a transferor elects to recognize income from the conveyance using the installment method under IRC section 453, the transferor may reduce the gain by the amount of the installment that will be recognized in future years. The withholding calculation is based on the entire consideration and net proceeds, or the modified gain to determine the lowest of the three methods provided in subsection (a) of this section.

Example 2: Assume the same facts as Example 1 except that Anne is selling the property on an installment basis and recognizing the income from the sale using the installment method under IRC section 453 over five years in equal installments. Because Anne is selling the property over time, the amount of gain includable in Oregon taxable income is \$10,000 for the year of the conveyance ( $\$50,000 \div 5$  years =  $\$10,000$ ) and \$10,000 in each year thereafter. Eight percent of the amount included in Oregon taxable income is \$800. Anne’s escrow officer would withhold and remit \$800 for the year of the conveyance because it is the least amount using the three methods provided in subsection (a) of this section.

(e) Deferred exchanges. If a transferor enters into a like-kind exchange under IRC section 1031, withholding is not necessary at the time the transferor relinquishes the property to a Qualified Intermediary (QI) unless part of the proceeds from the sale are disbursed to the transferor.

Example 3: Robert entered into an exchange under IRC section 1031 to defer tax on the gain from the sale of his rental property. The consideration for the property was \$500,000. Robert’s federal and Oregon adjusted basis in the property is \$150,000. He holds a first mortgage of \$190,000 and he incurred \$10,000 in costs related to the conveyance. Robert requested \$50,000 of the consideration to be paid to him directly. Robert’s escrow officer transferred title of the property and \$250,000 of the consideration to a QI and the escrow officer disbursed \$50,000 directly to Robert as requested. The escrow officer is required to withhold on the amount disbursed to Robert as follows:

Step 1) Determine four percent of the consideration. In this case, it is \$20,000 ( $\$500,000 \times 0.04 = \$20,000$ ).

Step 2) Determine eight percent of the gain includable in Oregon taxable income as follows:

\$500,000 Consideration

\$150,000 Federal and Oregon adjusted basis

\$350,000 Gain

\$300,000 Gain eligible for deferral under IRC section 1031

\$50,000 gain includable in Oregon taxable income.

Eight percent of the gain is \$4,000.

Step 3) Determine the “net proceeds” as follows:

\$50,000 Net amount disbursed to seller shown on the settlement statement before reducing for withholding.

Step 4) The lowest of the amounts calculated in steps one, two, or three is \$4,000 (8 percent of the gain). Robert's escrow officer would withhold and remit \$4,000.

(4) Written affirmation.

(a) (A) To claim exemption under subparagraph (2)(a)(I) of this rule, the transferor or the transferor's tax advisor must complete and sign a written affirmation under penalty of perjury, that the transferor is exempt from withholding because the transferor is unlikely to owe Oregon tax as a result of the conveyance, before the funds related to the transaction are disbursed.

(B) To determine whether the transferor is unlikely to owe Oregon income tax as a result of the conveyance, the gain may not be offset against any other items of gain, loss, deduction, or credit the transferor expects to claim on the related tax return unless the item is directly related to the conveyance. For example, when a California resident must pay tax to both Oregon and California on the gain from the sale of the Oregon property, the California resident will claim the credit for taxes paid to another state on the Oregon nonresident return so the transferor has established that he or she is unlikely to owe Oregon tax as a result of the conveyance.

(C) The transferor must provide the completed written affirmation to the authorized agent providing closing and settlement services.

(b) Basing withholding on the amount of includible gain. If the transferor is subject to withholding, the transferor may calculate tax based on the amount of gain includible in Oregon taxable income. The transferor must complete and sign the written affirmation under penalty of perjury that the calculation is true and accurate to the best of the transferor's knowledge.

(c) Sale of a principal residence. The gain from the sale of a principal residence may qualify for exemption from withholding under either ORS 314.258(3)(e) or ORS 314.258(3)(f). If the transferor is eligible to exclude the entire gain under IRC section 121, they must complete a written assurance similar to that found in IRC section 6045(e) pursuant to ORS 314.258(3)(e) and this rule. If the transferor completes the written assurance, it is in lieu of the written affirmation required under ORS 314.258(3)(f) and subsection (4)(a) of this rule and the transferor need not complete the written affirmation. However, the authorized agent must provide the information contained in the written assurance in the same manner as information contained in the written affirmation. If the gain is not fully excludible under IRC section 121, the transferor must complete the written affirmation calculating the gain under penalty of perjury.

(d) In addition to retaining the completed written affirmation or assurance in the authorized agent's records, the authorized agent must send a copy of the affirmation or assurance to the department within 30 days of the date of the conveyance.

(5) Failure to withhold.

(a) An authorized agent who relies on the written representation made by the transferor that the transferor is either exempt from or not subject to withholding, is not liable for amounts required to be withheld under ORS 314.258. An authorized agent who relies on the calculation shown on the written affirmation provided by the transferor is not liable for the amount that was required to be withheld in excess of that shown on the written

affirmation. The transferor is liable for the tax and may be subject to interest charged on the underpayment of estimated tax.

(b) Penalty assessment. The department may assess a failure-to-withhold penalty if an authorized agent fails to demonstrate to the department's satisfaction that the authorized agent met the requirements of ORS 314.258.

(A) For conveyances that occurred before May 23, 2008, the department will not assess the failure-to-withhold penalty if an authorized agent met the requirements of either ORS 314.258 (2007) or ORS 314.258 (2008).

(B) For conveyances that occurred on or after May 23, 2008, the department will not assess the failure-to-withhold penalty if an authorized agent met the requirements of ORS 314.258 (2008) and related rules.

(6) Failure to remit. If an authorized agent withholds tax from the transferor's disbursal and fails to remit the same amount to the department timely, the authorized agent is liable to the State of Oregon for those amounts. The department may collect such amounts from the authorized agent together with interest under ORS 305.220.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the Department of Revenue pursuant to ORS 183.360(2) and ORS 183.355(6).]

Stat. Auth.: ORS 305.100, 314.258

Stats. Implemented: ORS 314.258