

Act 2008-504

INTRODUCTION

General Information

Code of Alabama 1975, Section 40-18-86, provides for income tax withholding at a rate of 3 or 4 percent on sales or transfers of real property and associated tangible personal property by nonresidents of Alabama. This Code Section is applicable to any sale or transfer occurring on or after August 1, 2008. For the purposes of this Code Section, nonresidents include individuals, trusts, partnerships, corporations, limited liability companies, limited liability partnerships, and unincorporated organizations. This law does not apply to residents of Alabama so there is no requirement for any of the forms applicable under Section 40-18-86 to be completed on the sale or transfer of property by a resident.

The rate of withholding is 3 or 4 percent of the purchase 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 NR-AF2 (Affidavit of Seller's Gain) attesting to the amount of the taxable gain. The seller is responsible for the calculation of the gain. The completed Form NR-AF2 must be sent to the Alabama Department of Revenue. A copy of this form along with an explanation of the cost basis and expenses should be kept with the closing file. The buyer may rely on the seller's affidavit with the above mentioned explanation unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit. 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.

Exemptions to the Law

A. Residents of Alabama - The withholding requirements under this law do not apply to residents of Alabama. Alabama residents include both individuals and business entities domiciled in Alabama. Business entities will be considered domiciled in Alabama if they are organized under Alabama law or they have their principal place of business in Alabama.

B. Principal Residence – If the property qualifies as a principal residence within the meaning of Internal Revenue Code Section 121, the sale of a principal residence is exempt from the withholding requirement.

C. Purchase Price Threshold – Beginning August 1, 2008, withholding is not required on transactions prior to January 1, 2009,

where the purchase price is less than \$800,000. For transactions after December 31, 2008, the purchase price threshold drops to \$300,000.

D. 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.

E. Federal and State Agencies - The transaction is not subject to the withholding requirements if the seller or buyer is an agency or authority of the United States or the State of Alabama, or a private mortgage insurance company.

F. Composite Returns - If the seller is an entity which files a composite return with Alabama and remits the tax on the gain on behalf of its members, partners, or shareholders, then the buyer is not required to withhold.

G. 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.

H. Tax Exempt Organization - The seller is a tax exempt organization, and the income from the sale is not subject to Alabama income tax.

I. Insurance Company - The seller is an insurance company which pays tax on its premium income to Alabama.

J. Financial Institution - The seller is a financial institution, as defined under Alabama Code Section 40-16-1, and is subject to Alabama's Financial Institution Excise Tax (FIET).

K. Non-Recognition Transactions - Transfers of real property where gain is realized by the seller, but completely not recognized by the seller for Alabama income tax purposes, such as a like kind exchange, are not subject to the withholding provisions of Alabama Code Section 40-18-86. Transfers of real property where gain is realized by the seller, but partially not recognized by the seller for Alabama income tax purposes, are subject to the withholding provisions of Alabama Code Section 40-18-86 only to the extent of the recognized gain.

L. Transfers of Certain Limited Interests in Real Property - Certain transfers of limited interests in real property, including easements, rights of way, mortgages or other instruments that secure indebtedness, or leases (not including capital leases), are not subject to the withholding provisions of Alabama Code Section 40-18-86.

Confidentiality Issues

For privacy purposes and to maintain the confidentiality of the taxpayers' personal information, the identification numbers (SSN or FEIN) of the seller/transferor and of the buyer/transferee may be omitted or deleted from the copies of all forms exchanged between the parties involved in transactions covered by the provisions of Section 40-18-86. However, any form or document that is required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy sent to the Department.

Definitions

(1) **Residents of Alabama** – Individuals and business entities domiciled in Alabama. Business entities will be considered domiciled in Alabama if the entity is organized under Alabama law or if the entity has its principal place of business in Alabama.

(2) **Deemed resident** – A nonresident of Alabama will be considered as a “deemed resident” of Alabama, and not subject to the withholding provisions of this Section, if all of the following conditions are met:

(a) The seller or transferor has filed Alabama income tax returns or appropriate extensions for the two tax years immediately preceding the sale;

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

(c) The seller or transferor will report the sale on an Alabama income tax return for the current year and file the return by the due date (or extended due date); and

(d) The seller or transferor is registered to do business in Alabama if the seller is a corporation or a limited partnership.

(3) **Nonresidents of Alabama** – The term “Nonresident of Alabama” shall include individuals, trusts, partnerships, corporations, and unincorporated organizations. For purposes of Alabama Code Section 40-18-86 (the “Act”), the following persons are Nonresidents of Alabama and are, therefore, subject to the withholding tax requirements:

(a) **Individual** – Any individual having his or her principal residence outside Alabama at the time of closing, unless he or she otherwise meets the requirements of Section 40-18-86(a)(1) through (4) to be deemed a resident.

(b) **Corporation** – Any corporation whose principal place of business is located outside Alabama, unless it otherwise meets the requirements of Section 40-18-86(a)(1) through (4) to be deemed a resident.

(c) **Partnership** – Any partnership whose principal place of business is located outside Alabama, unless it otherwise meets the requirements of Section 40-18-86(a)(1) through (4) 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 Section 40-18-86(a)(1) through (4) to be deemed a resident.

(e) **Limited Liability Company** – Any limited liability company whose principal place of business is located outside Alabama, unless it otherwise meets the requirements of Section 40-18-86(a)(1) through (4) to be deemed a resident.

(f) **Limited Liability Partnership** – Any limited liability partnership whose principal place of business is located outside Alabama, unless it otherwise meets the requirements of Section 40-18-86(a)(1) through (4) to be deemed a resident.

(g) **Estate** – Any estate that is located outside Alabama, unless it otherwise meets the requirements of Section 40-18-86(a)(1) through (4) to be deemed a resident.

(4) **Co-owners** – If two or more persons sell real property which they own as joint tenants, whether with right of survivorship, as tenants in common, or otherwise, 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).

(5) **Sale or transfer date** – The sale or transfer date will be considered the closing or settlement date of the transaction.

(6) **Threshold** – The purchase price amount below which no withholding is required. The Commissioner of the Alabama Department of Revenue is allowed by law to set the threshold amount. For purposes of Section 40-18-86, withholding will not be required on transactions where the purchase price is less than \$800,000.00 for sales or transfers prior to January 1, 2009. For sales or transfers made after December 31, 2008, the threshold is \$300,000.00. If the purchase price exceeds the threshold, the withholding requirements of Section 40-18-86 apply. According to the provisions of the law, there shall be no withholding in excess of the “net proceeds.”

(7) **Net proceeds** – “Net proceeds” as used in the Section 40-18-86 means the amount of money and other consideration received by the seller after deducting mortgage or other secured debt, ad valorem taxes, sales commissions, title premiums, survey expense, costs for environmental and other reports, and all other closing costs and expenses.

(8) **Real property** – As defined in Section 40-1-1, *Code of Alabama 1975*, means land and all things thereunto pertaining, all structures, and all things annexed or attached thereto which would pass to a vendee by the conveyance of the land or property.

(9) **Tangible personal property** – As defined in Section 40-1-1, *Code of Alabama 1975*, “personal property” means all things other than real property. For purposes of this Section, “tangible personal property” associated with the real property means tangible personal property which is conveyed with, and is located on, the real property as a part of the same transaction.

(10) **Due date** – The date set by law for filing the required returns and paying any amount of tax due. For purposes of this Section, returns required and any tax withheld on the sale or transfer of property in Alabama by a nonresident are due to the Alabama Department of Revenue 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 occurred.

(11) **Filing/Payment date** – The filing and payment date will be determined based on provisions of Section 40-1-45, *Code of Alabama 1975*, Timely Mailing Treated as Timely Filing and Paying.

1 HB357
2 96665-2
3 By Representative Lindsey
4 RFD: Education Appropriations
5 First Read: 07-FEB-08



ENROLLED, An Act,

To create a new Section 40-18-86 of the Code of Alabama 1975, relating to withholding tax on the sale or transfer of real property and associated tangible property by nonresidents.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. A new Section 40-18-86 is added to the Code of Alabama 1975, to read as follows:

§40-18-86.

(a) As used in this section, the term nonresident of Alabama 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 all of the following conditions are met will be deemed a resident for purposes of this section:

(1) The seller or transferor has filed Alabama 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 Alabama and will continue substantially the same business in Alabama after the sale or the seller or transferor has real

1 property remaining in the state at the time of closing of
2 equal or greater value than the withholding tax liability as
3 measured by the 100 percent property tax assessment of such
4 remaining property.

5 (3) The seller or transferor will report the sale on
6 an Alabama income tax return for the current year and file it
7 by the due date.

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

11 (b) (1) Except as otherwise provided in this section,
12 in the case of any sale or transfer of real property and
13 related tangible personal property located in Alabama by a
14 nonresident of Alabama, the buyer or transferee shall be
15 required to withhold and remit to the Commissioner of Revenue
16 on forms provided by the commissioner a withholding tax for
17 individual buyers or transferees equal to three percent of the
18 purchase price or consideration paid for the sale or transfer,
19 and for corporate, partnership, or unincorporated association
20 buyers or transferees equal to four percent of the purchase
21 price or consideration paid for the sale or transfer;
22 provided, however, that if the amount required to be withheld
23 pursuant to this subsection exceeds the net proceeds payable
24 to the seller or transferor, the buyer or transferee shall
25 withhold and pay over to the commissioner only the net

1 proceeds otherwise payable to the seller or transferor. Any
2 buyer or transferee who fails to withhold such amount shall be
3 personally liable for the amount of the tax.

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

9 (c) If the seller or transferor determines that the
10 amount required to be withheld pursuant to subdivision (1) of
11 subsection (b) of this section will result in excess
12 withholding on any gain required to be recognized from the
13 sale, the seller or transferor may provide the buyer or
14 transferee with an affidavit signed under oath swearing or
15 affirming to the amount of the gain required to be recognized
16 from the sale, and any individual buyer or transferee shall
17 withhold three percent of the amount of the gain required to
18 be recognized, if any, and the corporate, partnership, or
19 unincorporated association buyers or transferee shall withhold
20 four percent of the amount of the gain required to be
21 recognized, if any, stated in the affidavit rather than as
22 provided in subdivision (1) of subsection (b) of this section.
23 If, however, the amount required to be withheld pursuant to
24 this subsection exceeds the net proceeds payable to the seller
25 or transferor, the buyer or transferee shall withhold and pay

1 over to the commissioner only the net proceeds otherwise
2 payable to the seller or transferor.

3 (d) Subsection (b) of this section shall not apply
4 where any of the following occur:

5 (1) The real property being sold or transferred is a
6 principal residence of the seller or transferor within the
7 meaning of Section 121 of the Internal Revenue Code.

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

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

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

20 (e) (1) Unless otherwise provided, if the seller or
21 transferor is a partnership or Subchapter "S" corporation or
22 other unincorporated organization which certifies to the buyer
23 or transferee that a composite return is being filed on behalf
24 of the nonresident partners, shareholders, or members and that
25 the partnership, Subchapter "S" corporation, or unincorporated

1 organization remits the tax on the gain on behalf of the
2 nonresident partners, shareholders, or members, the buyer or
3 transferee shall not be required to withhold as provided in
4 this section. Any nonresident partner, shareholder, or member
5 who falsely certifies that a composite return is being filed
6 on behalf of such partner, shareholder, or member shall be
7 liable for a penalty in the amount of five hundred dollars
8 (\$500) or 10 percent of the amount required to be withheld,
9 whichever is greater.

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

15 (f) Every buyer or transferee of real property
16 located in Alabama who is required to deduct and withhold the
17 withholding tax imposed by subsection (b) shall file the
18 required return and remit payment to the Department of Revenue
19 on or before the last day of the calendar month following the
20 calendar month within which the sale or transfer giving rise
21 to the withholding tax occurred.

22 Section 2. This act shall become effective on the
23 first day of the third month following its passage and
24 approval by the Governor, or its otherwise becoming law.

Adm. / Hunt

Speaker of the House of Representatives

Jim Folsom

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 04-MAR-08.

Greg Pappas
Clerk

Senate

19-MAY-08

Passed

APPROVED

TIME

May 29, 2008
4:20 p.m.
Bob Riley
GOVERNOR

Alabama Secretary Of State

Act Num....: 2008-504
Bill Num....: H-357

Recv'd 05/29/08 05:32pm JJB

ANSWERS TO FREQUENTLY ASKED QUESTIONS

Q. What kind of tax is this? Sales tax? Real estate transfer tax?

A. No, this is neither a sales tax nor a real estate transfer tax. It is income tax withholding. The principle is similar to income tax withholding by employers. The buyer withholds Alabama income tax from the payment to the nonresident seller. The buyer is responsible for providing the seller with a copy of Form WNR and Form WNR-V. The seller will attach a copy of Form WNR to the appropriate Alabama income tax return to claim credit for the taxes paid. The taxes withheld and remitted by the buyer to the Alabama Department of Revenue will be considered as an estimated tax payment made on behalf of the seller.

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

A. Yes. In general, income from the sale of Alabama property is required to be reported on an Alabama income tax return. Once the nonresident return is completed and filed by the due date of the return including extensions, 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. *Code of Alabama 1975*, Section 40-18-86, generally requires that 3 or 4 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 Seller's Gain (see Form NR-AF2), then the buyer may withhold 3 or 4 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 payments to the transferor as shown on the closing statement, but "net proceeds" may be calculated as the amount of money and other consideration received by the seller after deducting mortgage or other secured debt, ad valorem taxes, sales commissions, title premiums, survey expense, costs for environmental and other reports, and all other closing costs and expenses.

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

A. Yes. Since *Code of Alabama 1975*, Section 40-18-86, allows 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 NR-AF2.

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. In the case of co-owners who are married, ownership is determined separately if one owner is a nonresident. Separate forms must be completed for each nonresident seller/transferor who will be required to file an Alabama income tax return.

Q. If a buyer reasonably relies on a seller's sworn affidavit of residency, will the buyer 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. The buyer may rely on the seller's affidavit unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit.

Q. If the seller is an Alabama resident, must he provide the buyer with a sworn affidavit Form NR-AF1 (or for deemed residency)?

A. No, an Alabama resident does not need to provide an affidavit since this withholding law does not apply to residents. The affidavit is for **nonresident** sellers who wish to be "deemed" residents for withholding purposes. In a transaction where a nonresident seller is considered a "deemed resident" of Alabama, the buyer should retain a copy of the affidavit, and must submit the original copy to the Alabama Department of Revenue. Even though an affidavit is not required when the seller is an Alabama resident, the affidavit may be used by a resident seller if the buyer wishes to document the seller's representation of Alabama residency. In this situation, the affidavit does not need to be sent to the Alabama Department of Revenue, but the buyer and seller may wish to keep copies for their records.

Q. Must a certificate of exemption (Form NR-AF3) 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 NR-AF3 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 that the income from the sale is not subject to Alabama income tax. Transfers of real property where gain is realized by the seller, but completely not recognized by the seller for Alabama income tax purposes, such as a like kind exchange, are not subject to the withholding provisions of Alabama Code Section 40-18-86. Transfers of real property where gain is realized by the seller, but partially not recognized by the seller for Alabama income tax purposes, are subject to the withholding provisions of Alabama Code Section 40-18-86 only to the extent of the recognized gain.

Q. Is withholding required on a transaction that qualifies as a Section 1031 exchange under the Internal Revenue Code? What if the transaction is a "deferred" Section 1031 exchange?

A. As in an exchange of property such as a like-kind exchange, withholding is not required on a Section 1031 exchange to the extent that the income from the sale is not subject to Alabama income tax. Transfers of real property under a Section 1031 exchange where gain may be realized by the seller, but completely not recognized by the seller for Alabama income tax purposes are not subject to the withholding provisions of Alabama Code Section 40-18-86. Transfers of real property where gain is realized by the seller, but partially not recognized by the seller for Alabama income tax purposes, are subject to the withholding provisions of Alabama Code Section 40-18-86 only to the extent of the recognized gain, such as a Section 1031 exchange where monies received by the seller exceed the exchange transaction. If the transaction is a "deferred" Section 1031 exchange, the transaction will qualify for the exemption to the withholding requirement **only** if the seller agrees to have the qualified intermediary file the required payment voucher and remit any withholding due to the Alabama Department of Revenue in the event that monies remain after the 180-day, deferral period.

Q. If an Alabama resident relocates to another state and buys another residence, does his Alabama residence cease to be his principal residence for purposes of Alabama law?

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 and Alabama 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 Internal Revenue Code 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 Alabama on its premium income, it is not subject to Alabama income tax, and withholding on the sale is not required.

Q. If the seller is a financial institution, is the sale subject to withholding?

A. A financial institution, as defined in Section 40-16-1, generally is not subject to Alabama income tax so the withholding under Section 40-18-86 on the sale is not required if the seller is a financial institution subject to Alabama's Financial Institution Excise Tax (FIET).

Q. Does the withholding required under *Code of Alabama 1975*, Section 40-18-86, apply to the sale or transfer of timber located in Alabama by a nonresident of Alabama?

A. Under Alabama 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 *Code of Alabama 1975*, Section 40-18-86 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, 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 statements issued to the seller by the purchaser (Form WNR and Form WNR-V). The partner, shareholder, or member should claim credit for his or her share of the withholding on the Alabama 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 calculation form issued to the seller by the purchaser (Form WNR). If the pass-through entity files a composite return, it may claim credit on the return, and attach the Form WNR. 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. If the seller is a corporation, how does it claim the withholding credit since the corporation income tax return does not have a line for tax withheld?

A. The payment of the amount withheld by the buyer is considered as an estimate paid on behalf of the nonresident seller. If the seller is a corporation, the amount paid by the buyer for the seller will be claimed on the seller's Form 20C as an estimate payment.

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 *Code of Alabama 1975, Section 40-18-86*, is that the seller has filed Alabama income tax returns, or appropriate extensions, for the two income tax years immediately preceding the year of the 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 Alabama returns or appropriate extensions for the most recent two tax years whose original due dates have passed, that condition will be considered satisfied.

Q. Is a single-member limited liability company (SMLLC), whose status is disregarded for federal income tax purposes, considered to be the seller for purposes of *Code of Alabama 1975, Section 40-18-86*?

A. The federal classification for income tax purposes applies for Alabama income tax purposes. Since Section 40-18-86 is the withholding of income tax, the federal classification also applies for income tax withholding purposes. Accordingly, a SMLLC whose status is disregarded for federal income tax purposes is not considered the seller for purposes of Section 40-18-86. Instead the owner of the SMLLC is considered the seller for purposes of the Alabama law.

Q. Is a buyer required to inquire as to whether a LLC-seller is a "disregarded" entity?

A. Alabama law requires the buyer to withhold tax on the sale or transfer of Alabama real estate by a nonresident. In order to withhold, the buyer must determine if the "seller" is a nonresident. Inherent in this provision is the need to properly determine the "seller" of the property. As such, the buyer must inquire as to whether the LLC-seller is a disregarded entity in order to properly determine the seller.

Q. If property is transferred to a relocation company, is the relocation company subject to the withholding requirements of *Code of Alabama 1975, Section 40-18-86*?

A. If the relocation company is a nonresident entity and is listed on the closing statement as the seller, then the relocation company is subject to the requirements of Section 40-18-86.

Q. Is property that is sold or transferred by a nonresident as part of an installment transaction subject to the withholding requirements of *Code of Alabama 1975, Section 40-18-86*, and if so, how is withholding on the installment sale handled?

A. An installment sale made by a nonresident is subject to the requirements of Section 40-18-86. The initial payment of the withholding is calculated based on the purchase price less the installment note. If the seller wishes to base the withholding on the gain, the withholding is calculated on the gain that would be recognized as a result of the proceeds received at the time of the closing. The provisions of the law regarding the percentage to be withheld and the due date to file the payment voucher and make the withholding payment to the Alabama Department of Revenue apply to installment sales in the same manner as applicable to any other sale subject to withholding under Section 40-18-86. For subsequent payments, the withholding is calculated by applying 3 or 4 percent of the principal amount included in each payment, or if the gain is used to calculate withholding, by applying 3 or 4 percent of the amount of each principal payment which represents gain. The payment voucher must be filed and the payment remitted 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 for the year, exceeds \$100. If the cumulative amount withheld for the year, less any payments already made, does not exceed \$100 for the calendar year, the buyer will file the payment voucher 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.

Q. *Code of Alabama 1975, Section 40-18-2, imposes a tax on every nonresident individual receiving income from property owned or business transacted in Alabama. Also, Section 40-18-14, states that the taxable income of a nonresident individual includes only income from property owned or business transacted in Alabama. 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. "Business income" is defined in Code of Alabama 1975, Section 40-27-1, as income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade of business operations. Accordingly, interest that is attributable to the installment note in this situation is taxable for Alabama purposes. Is the interest from the installment note subject to the withholding requirements of Code of Alabama 1975, Section 40-18-86?*

A. No. It is not subject to the withholding requirements of Section 40-18-86. However, if the buyer and seller agree, the buyer may withhold on the interest.

FORMS

Form NR-AF1 is the seller's attestation of residency or request to be considered a "deemed resident" of Alabama for purposes of this Code Section. Since the provisions of Section 40-18-86 do not apply to a resident of Alabama, this form does not need to be completed by a resident; however, the buyer may wish to have a resident seller complete the form as proof of residency. In this case, the form should not be sent to the Alabama Department of Revenue, but should be retained with the buyer's records of the transaction. If the seller is a nonresident claiming to be a "deemed resident" of Alabama for purposes of this Code Section, this form must be filed with the Alabama Department of Revenue.

Form NR-AF2 is the seller's attestation of the gain if the seller wishes to use the gain to compute the withholding instead of the purchase price. If Form NR-AF2 is used, the buyer must submit this form along with Form WNR (tax calculation form), Form WNR-V (the payment voucher), and along with payment of any withholding due to the Alabama Department of Revenue.

Form NR-AF3 is the seller's attestation of exemption from the withholding requirement for any of the reasons shown on the form. This form does not have to be completed, but if Form NR-AF3 or a similar document is executed, the form should not be submitted to the Alabama Department of Revenue. The buyer should retain the form with the records of the transaction.

Form WNR is used by the buyer to calculate the withholding tax due to the Alabama Department of Revenue. A copy should be retained by the buyer as a record of the transaction, and the original copy of Form WNR must be filed with the Alabama Department of Revenue. The buyer should give two copies of Form WNR to the seller as proof of taxes withheld. The seller must attach a copy of Form WNR to the seller's Alabama income tax return to claim credit for the payment of the tax, and should retain a copy of the form as a record of the transaction.

Form WNR-V is used by the buyer to remit the withholding tax. The original copy of this form and the payment of the tax due must be mailed to the Alabama Department of Revenue. The buyer should retain a copy of the form as a record of the payment, and give a copy to the seller to be retained with the seller's records.

For privacy purposes and to maintain the confidentiality of the taxpayers' personal information, the identification numbers (SSN or FEIN) of the seller/transferor and of the buyer/transferee may be omitted or deleted from the copies of all forms exchanged between the parties involved in transactions covered by the provisions of Section 40-18-86. However, any form or document that is required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy sent to the Department.

Separate forms must be completed for each seller/transferor who will be required to file an Alabama income tax return. Substitute forms may be used only upon approval by the Alabama Department of Revenue. The due date for all forms required under Section 40-18-86, is the last day of the month following the month in which the sale or other transfer took place. The address to mail Form WNR, Form WNR-V, and any other required affidavits and payments is:

Alabama Department of Revenue
Individual and Corporate Tax Division
Post Office Box 327950
Montgomery, Alabama 36132-7950



50 North Ripley Street
Montgomery, Alabama 36132
For Information Call 334-242-1170

AFFIDAVIT OF SELLER'S RESIDENCE

Seller's Name (and Spouse's Name, if jointly owned)

Seller's Identification Number (SSN or FEIN) *

Spouse's Identification Number (if jointly owned) *

Street Address

City

State

Zip

INSTRUCTIONS

This form is to be executed by the seller and furnished to the buyer to establish Alabama residency so that the proceeds of the sale of property are not subject to the withholding laws of this state (see Section 40-18-86, *Code of Alabama 1975*). Alabama residents include both individuals and business entities domiciled in Alabama. Business entities will be considered domiciled in Alabama if they are organized under Alabama law or they have their principal place of business in Alabama. Alabama residents are not subject to the withholding provisions of Alabama Code Section 40-18-86, and are not required to complete this form; however, a buyer may wish to have an Alabama resident complete this form as proof of residency for the buyer's records. In this case, the form should not be sent to the Alabama Department of Revenue, but should be retained by the buyer.

* For privacy and confidentiality purposes, the SSN or FEIN of the seller and of the buyer may be omitted or deleted from copies of all documents exchanged between the parties involved. However, all documents required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy mailed to the Department.

Sellers are not subject to withholding from the proceeds of a sale if either they are a resident of Alabama or they are deemed to be a resident of Alabama by virtue of the fact that they have filed Alabama tax returns in the preceding two years, do business or own property in Alabama, intend to file an Alabama tax return for the current year, and if they are a corporation or limited partnership registered to do business in Alabama.

The seller is to execute this affidavit by placing an initial in the blank preceding the statements which apply. The buyer may rely on the seller's affidavit unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit. For a transaction where a nonresident seller is a "deemed resident," the buyer should retain a copy of the affidavit and submit the original copy to the Alabama Department of Revenue, Individual and Corporate Tax Division, P O Box 327950, Montgomery, AL 36132-7950.

Seller is exempt from withholding on the sale of property because:

____ Seller is a resident of Alabama. (If this statement applies, do not submit a copy of this form to the Alabama Department of Revenue. The buyer should retain a copy of the affidavit as a record of the transaction.)

Seller is not a resident of Alabama, but is a "deemed resident" for purposes of withholding because all of the following apply:

____ Seller is a nonresident who has filed Alabama tax returns or appropriate extensions have been received by the Department for the preceding two years; AND

____ Seller is an established business in Alabama and will continue substantially the same business in Alabama after the sale OR the seller has real property in Alabama at the time of closing of equal or greater value than the withholding tax liability as measured by the 100% property tax assessment of such remaining property; AND

____ Seller will report the sale on an Alabama income tax return for the current year and file by its due date with extensions; AND

____ If seller is a corporation or limited partnership, seller is registered to do business in Alabama.

Under penalties of perjury, I swear that the above information is to the best of my knowledge and belief, true, correct, and complete.

Seller's Signature (and Title, if applicable)

Date

Spouse's Signature (and Title, if applicable)

Date

Sworn to and subscribed before me this

____ day of _____, _____

Notary public

My commission expires _____



50 North Ripley Street
Montgomery, Alabama 36132
For Information Call 334-242-1170

AFFIDAVIT OF SELLER'S GAIN

Seller's Name (and Spouse's Name, if jointly owned)

Seller's Identification Number (SSN or FEIN) *

Spouse's Identification Number (if jointly owned) *

Street Address

City

State

Zip

INSTRUCTIONS

A nonresident seller is required to execute this form or a similar document and present it to the buyer when the seller wishes to establish the gain to be recognized from a sale of real property, against which gain the withholding imposed by the Alabama Department of Revenue under Section 40-18-86, *Code of Alabama 1975*, is to be applied. In order to be subject to withholding only upon the gain recognized, the seller must submit this affidavit to the buyer. The buyer may rely on the seller's affidavit unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit.

"Net proceeds" means the amount of money and other consideration received by the seller after deducting mortgage or other secured debt, ad valorem taxes, sales commissions, title premiums, survey expense, costs for environmental and other reports, and all other closing costs and expenses.

The seller is to complete this document by calculating the gain in the below schedule. The seller should retain a copy of the documentation of the cost basis, depreciation, and selling expenses claimed. That documentation should only be provided to the Department when requested. However, this form, Form NR-AF2, along with Form WNR, Form WNR-V, and any remittance must be mailed to the Alabama Department of Revenue, Individual and Corporate Tax Division, P O Box 327950, Montgomery, AL 36132-7950. The buyer should retain a copy of these documents.

* For privacy and confidentiality purposes, the SSN or FEIN of the seller and of the buyer may be omitted or deleted from copies of all documents exchanged between the parties involved. However, all documents required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy mailed to the Department.

1. SALES PRICE \$ _____
2. COST BASIS INCLUDING IMPROVEMENTS \$ _____
3. DEPRECIATION \$ _____
4. ADJUSTED COST BASIS (line 2 minus line 3) \$ _____
5. SELLING EXPENSES \$ _____
6. NET TAXABLE GAIN (LOSS) (line 1 minus lines 4 and 5) \$ _____
7. AMOUNT OF NET PROCEEDS RECEIVED BY SELLER FROM THE TRANSACTION \$ _____

Under penalties of perjury, I swear that the above information is, to the best of my knowledge and belief, true, correct, and complete.

Seller's Signature (and Title, if applicable)

Date

Spouse's Signature (and Title, if applicable)

Date

Sworn to and subscribed before me this

_____ day of _____, _____

Notary public

My commission expires _____



50 North Ripley Street
Montgomery, Alabama 36132
For Information Call 334-242-1170

SELLER'S CERTIFICATE OF EXEMPTION

Seller's Name _____

Seller's Identification Number (SSN or FEIN) _____

Spouse's Identification Number (if jointly owned) _____

Street Address _____

City _____

State _____

Zip _____

INSTRUCTIONS

This form is provided for the convenience of the seller and the protection of the buyer, to be executed in sales or transfers of real property by nonresidents when the seller is exempt from the withholding requirements imposed by the Alabama Department of Revenue pursuant to Section 40-18-86, *Code of Alabama 1975*. This form is not required to be used or submitted to the Department, but the seller may wish to execute this form or a similar document to protect all parties to the transaction. The buyer may rely on the seller's affidavit unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit. To execute this form, the seller is to initial any statement which applies. If any one of the statements below applies to the seller, the transaction is exempt.

This is to certify that the seller of this property is not a resident of Alabama, but is exempt from the withholding provisions of the Alabama Department of Revenue Section 40-18-86 by virtue of the following:

_____ The property being sold is the seller's principal residence and none of the gain is required to be included in federal adjusted gross income.

_____ The seller is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration.

_____ The seller or buyer is a subdivision, agency or authority of the United States of America or the State of Alabama.

_____ The seller or buyer is the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation.

_____ The seller or buyer is a private mortgage insurance company.

_____ The purchase price of the property is less than \$300,000.00.

_____ The seller is an S corporation or a partnership subject to withholding under Section 40-18-86, and an Alabama composite return will be filed on behalf of the nonresident shareholders, members, or partners.

_____ The seller is a tax exempt organization, and the income from this sale is not subject to Alabama income tax.

_____ The seller is an insurance company which pays to Alabama a tax on its premium income.

_____ The seller is a financial institution, as defined under Section 40-16-1, subject to Alabama's Financial Institution Excise Tax.

_____ The transaction is a non-recognition transaction such as a like kind exchange where gain is realized by the seller but completely not recognized for Alabama income tax purposes.

_____ The transaction is a transfer of a limited interest in real property, including easements, rights of way, mortgages or other instruments that secure indebtedness, or leases (not including capital leases).

Under penalties of perjury, I swear that the above information is, to the best of my knowledge and belief, true, correct, and complete.

Seller's Signature (and Title, if applicable) _____

Date _____

Sworn to and subscribed before me this _____

day of _____, _____

Notary public

My commission expires _____

Withholding on Sales or Transfers of Real Property and Associated Tangible Personal Property by Nonresidents

1. Seller's / Transferor's Name	2. Seller's / Transferor's SSN or FEIN *	14. Seller / Transferor is: <input type="checkbox"/> a. Individual <input type="checkbox"/> b. Corporation <input type="checkbox"/> c. Trust or Estate <input type="checkbox"/> d. Business Trust <input type="checkbox"/> e. Partnership <input type="checkbox"/> f. S Corporation <input type="checkbox"/> g. Limited Liability Company <input type="checkbox"/> h. Limited Liability Partnership
3. Seller's / Transferor's Mailing Address		
4. City	State Zip	
5. Buyer's / Transferee's Name	6. Buyer's / Transferee's SSN or FEIN *	
7. Buyer's / Transferee's Mailing Address		
8. City	State Zip	
9. Date of Sale		
10. Address of Property Sold		
11. Total Sales Price		11
12. Taxable Amount or Gain (if gain is used, attach Form NR-AF2)		12
13. Amount Withheld or Remitted to State (<i>not to exceed net proceeds</i>) – enter amount here and on Form WNR-V as "Amount Paid"		13

The buyer/transferee should retain a copy of this form as a record of the transaction, and give two copies to the seller/transferor. The seller/transferor must attach one copy of Form WNR to the seller/transferor's Alabama income tax return to claim credit for the payment, and should retain one copy as a record of the transaction. The buyer/transferee must mail the original copy of this form to the Alabama Department of Revenue, Individual and Corporate Tax Division, P.O. Box 327950, Montgomery, AL 36132-7950.

Instructions for Preparing Form WNR

Line 1. If more than one seller/transferor, complete a separate form for each.

Line 2. Social security number if an individual; FEIN if a corporation or other organization with an FEIN. *

Lines 3 and 4. If mailing address is a Post Office Box, also list street address.

Line 5. If more than one buyer/transferee, complete a separate form for each.

Line 6. Social security number if an individual; FEIN if a corporation or other organization with an FEIN. *

Lines 7 and 8. If mailing address is a Post Office Box, also list street address.

Line 9. Date the sale or transfer of real property and associated tangible personal property took place.

Line 10. Physical address of the real property and associated tangible personal property being sold.

Line 11. Total amount paid for the real property and associated tangible personal property, including the value of any real, personal, tangible or intangible property given in consideration of the sale or transfer.

Line 12. If the taxable gain from the sale or transfer is known, and the taxable amount or gain is less than the sales price, seller/transferor may execute an Affidavit of Seller's Gain (Form NR-AF2) to the buyer, swearing to the taxable amount or gain, and the amount to be withheld (Line 13) may be computed using the taxable amount or gain; otherwise, the amount to be withheld and remitted (Line 13) is to be calculated based on the total sales price (Line 11). If the gain is used to calculate the withholding, Form NR-AF2 must be attached.

Line 13. For individual buyers or transferees, the amount withheld and remitted (not to exceed net proceeds) to the State is 3% of the total sales price (Line 11). For corporate, partnership, unincorporated association, or other entity buyers or transferees, the amount withheld and remitted (not to exceed net proceeds) to the State is 4% of the total sales price (Line 11). In the case of a sale or transfer where the seller/transferor has supplied an affidavit (Form NR-AF2) to the buyer/transferee, swearing to the taxable amount or gain, the amount to be withheld and remitted to the State shall be computed as 3% or 4% (depending on the tax type of the buyer) of the taxable amount or gain (Line 12). Enter the dollar amount withheld to be remitted to the State on Line 13 of this form and on Form WNR-V as "Amount Paid."

Line 14. Check the appropriate box for the seller/transferor.

* For privacy and confidentiality purposes, the SSN or FEIN of the seller and of the buyer may be omitted or deleted from copies of documents exchanged between the parties involved. However, all documents required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy mailed to the Department.

Instructions for Preparing and Filing Form WNR-V

Use Form WNR-V to remit Alabama tax withheld on sales or transfers of real property and associated tangible personal property by nonresidents. A separate form must be completed for each seller/transferor who will be required to file an Alabama income tax return. The amount of withholding tax remitted will be credited to the Alabama income tax account of the seller/transferor as an estimated tax payment.

The determination of the amount to be withheld (if any), not to exceed net proceeds, will be made on Form WNR, Withholding on Sales or Transfers of Real Property and Associated Tangible Personal Property by Nonresidents. If the amount of taxable gain is used to calculate the withholding, Form NR-AF2, Affidavit of Seller's Gain, must be attached to Form WNR. The buyer may rely on the seller's affidavit unless the buyer knows or should know, based on the buyer's knowledge at the time of closing, that statements made on the affidavit are false. The buyer has no duty to investigate the statements made on a seller's affidavit.

All information requested on Form WNR-V pertains to the seller/transferor (SSN or FEIN, tax period, type of taxpayer/entity, name, and address of the seller/transferor). For the "Tax Period of Seller," enter the last day of the current year (year of the sale of the property). For example, on a sale of property occurring in 2008, a taxpayer who files an income tax return on a calendar year basis would enter, "12/31/2008." A taxpayer who files an income tax return on a fiscal year basis would enter the last day of the taxpayer's fiscal year. For the "Name of Seller/Transferor," enter the last name first for a seller who is an individual.

For privacy and confidentiality purposes, the SSN or FEIN of the seller and of the buyer may be omitted or deleted from copies of documents exchanged between the parties involved. However, all documents required to be submitted to the Alabama Department of Revenue must contain the complete SSN or FEIN information on the original copy mailed to the Department.



The buyer/transferee must remit the tax due by mailing this form with a payment for the amount shown on Line 13 of Form WNR on or before the last day of the month following the month of the closing. The buyer/transferee should retain a copy of Form WNR-V as a record of the payment, and give a copy to the seller/transferor to be retained with the seller/transferor's records. For additional information or assistance, contact the Individual and Corporate Tax Division at 334-242-1300.

Form WNR-V and remittance should be mailed to the

Alabama Department of Revenue
Individual and Corporate Tax Division
PO Box 327950
Montgomery, AL 36132-7950.

Payment is due on or before the last day of the calendar month following the calendar month within which the sale or transfer of property occurred. The voucher below and payment should be mailed to the **Alabama Department of Revenue, Individual and Corporate Tax Division, PO Box 327950, Montgomery, AL 36132-7950.**

DETACH ALONG THIS LINE AND MAIL VOUCHER WITH YOUR FULL PAYMENT

DO NOT STAPLE OR ATTACH THIS VOUCHER TO YOUR PAYMENT		<p>FORM WNR-V</p> <p>ALABAMA DEPARTMENT OF REVENUE</p> <p>Withholding on Sales or Transfers of Real Property and Associated Tangible Personal Property by Nonresidents Payment Voucher</p>	<p>STATE COPY</p> 
<p>Tax Period of Seller: ● _____ / _____ / _____ <small>MONTH DAY YEAR</small></p>			
<p>SSN: ● _____</p>			
<p>FEIN: ● _____</p>			
<p>Amount Paid: \$ ● _____</p>			
<p>Seller/Transferor is: <input type="checkbox"/> a. Individual <input type="checkbox"/> b. Corporation <input type="checkbox"/> c. Trust or Estate <input type="checkbox"/> d. Business Trust</p> <p><small>CHECK ONLY ONE BOX</small></p> <p><input type="checkbox"/> e. Partnership <input type="checkbox"/> f. S Corporation <input type="checkbox"/> g. Limited Liability Company <input type="checkbox"/> h. Limited Liability Partnership</p>			
<p>NAME OF SELLER / TRANSFEROR (FOR AN INDIVIDUAL, ENTER LAST NAME FIRST)</p> <p>● _____</p>			
<p>SELLER'S / TRANSFEROR'S MAILING ADDRESS</p>			
<p>CITY _____</p>		<p>STATE _____</p>	<p>ZIP CODE _____</p>