

**New Jersey  
N2K Hour:**

**NEW JERSEY  
TRANSFER  
TAXES**

December 14, 2021

**stewart title<sup>®</sup>**

*Real partners. Real possibilities.™*

## Transactions Subject to RTF

- The Realty Transfer Tax or Realty Transfer Fee (RTF) must be paid in order to record a deed transferring title to real property in the state of NJ.
- It should be noted that if a deed is recorded, and it is determined later that additional RTF fees are due, the deed is still valid and the buyer's status as Bona Fide Purchaser is not affected.
- The statute (N.J.S.A. 4c:15-5 et seq.) imposes the fee on the seller, but the parties can agree otherwise. Regardless of the parties' agreement if, after the fact, it is determined that additional tax is due, the seller will be liable for it.

## **Transactions Subject to RTF - continued**

- The RTF must be paid when the deed conveys a freehold estate or a lease for a term of 99 years or more. In calculating the lease term for purposes of imposition of the tax, contemplated renewal terms count in calculation.
- The tax is also imposed on the recording of proprietary leases and assignments of such leases in connection with co-operative apartment units. These documents are not often recorded.
- Conveyances of leases for less than 99 years, non-freehold estates (including easements, rights of way, deeds of restrictions etc.) are not subject to the RTF.

## Exemptions to the RTF

- The statute delineates full exemptions to the RTF and partial exemptions which allow a reduction in the fee amount that would otherwise apply.
- Some of the full exemptions which will be encountered most frequently are (a) deeds for a consideration of less than \$100, (d) confirming or correcting a previously recorded deed, (j) between husband and wife or parent and child, (o) by an executor or administrator of an estate to an heir to effect distribution, (p) within 90 days following entry of a divorce.
- Please review N.J.S.A. 4C:15-10 for the full list of exemptions. There are some considerations to take into account in determining whether a deed qualifies for one of the full exemptions.

## Exemptions to the RTF - continued

- The exemption fee for a deed for a consideration of less than \$100 is often misunderstood, primarily because of a failure to understand the definition of “consideration”.
- Consideration is defined as anything of value. Accordingly a transfer for a nominal consideration on a property with an existing mortgage encumbrance must pay an RTF on the value of the mortgage.
- Similarly, when you have a deed from one legal entity to another with common ownership, the legal entity cannot avoid the RTF with a nominal consideration deed. The RTF in this case could be calculated on the value of the stock transferred or the assessed value may be utilized divided by the Director’s Ratio of the municipality.

## Exemptions to the RTF - continued

- Deeds between husband and wife and parent and child are exempt, however, one must be careful in the case of step-children.
- A deed into a step-child is not exempt unless the step-child has been adopted. A step-parent step-child relationship satisfies the condition. A deed from a parent to a child and the child's spouse is exempt. However if the person other than the child is not the spouse, the transfer is only exempt as to  $\frac{1}{2}$  of the consideration.
- A transfer by a parent to a grantee in trust, even for the benefit of the parent's children as beneficiaries is not exempt. See N.J.S.A. 18:16-5.11(b).

## Exemptions to the RTF - continued

- Occasionally there is confusion as to the exemption for deeds recorded within 90 days of a final judgment of divorce. Note that the deed must be recorded during that window.
- Another full exemption category is a deed given in specific performance of a final judgment. We sometimes get inquiries as to why this exemption can't be utilized when more than 90 days have passed since a divorce decree was issued.

## Exemptions to the RTF - continued

- The argument arises when a property settlement agreement contemplating a sale of the property by one spouse to the other is incorporated with the divorce judgment. This argument fails, however, because it has been held that the separation agreement is consensual and not part of the order. *Carlson v. Carlson*, 72 N.J. 363 (1977).



## Partial Exemptions to the RTF

- The partial exemptions to the RTF, which require a payment of a smaller amount than the full RTF would be, are for senior citizens, blind persons, disabled persons, and on property which is low and moderate income housing.
- In order to qualify for the senior citizen discount a person must be a NJ resident, must be 62 years old or older and must occupy the property. A vacation home may qualify as occupied if the person lives there for at least 2 or 3 months a year and does not rent out the property.
- In the case of people who are married or in a civil union only one person is required to be 62 or older to qualify for the partial exemption on the full consideration.

## **Partial Exemptions to the RTF - continued**

- If the property is owned by 2 or more people 1 or several of which do not qualify, a qualifying senior citizen may still be entitled to the partial exemption for his or her share of the proceeds.
- In order for this to be true however, the property must be owned as tenants in common (except in the case of husband and wife or civil union partner). If the parties own as joint tenants the qualifying senior cannot claim the partial exemption.
- In the event there are qualifying and non-qualifying co-tenants, contact the Realty Transfer Fee Unit of the Division of Taxation. They will provide a letter with a breakdown of fees that must be presented to the County Recording Officer when recording the deed.

## Partial Exemptions to the RTF - continued

- The same joint tenancy restriction is applicable in the case of a blind or disabled co-tenant.
- Disabled person, for the purposes of the partial exemption, is defined as a resident of NJ who is “permanently and totally disabled, unable to engage in gainful employment, and receiving disability benefits or any other compensation under any federal or state law”.
- The definitions of a blind person and low or moderate income housing are somewhat complicated. The full list of definitions can be found on the instructions page of the form.

## The Mansion Tax

- The so called mansion tax is part of the RTF and imposes a 1% fee on the entire amount of consideration for certain types of property when the consideration recited in the deed is in excess of 1 million dollars.
- The fee, as per the statute, is imposed upon the buyer. The parties to a transaction can of course negotiate the responsibility for the payment.
- The types of property subject to the tax, based on property tax classification, are 4A (commercial), 2 (residential), 3A farm property (regular). But it only applies to farm property, if there is a building or structure on the farm property intended for residential use which is also transferred to the same buyer with the farm. Cooperative units are also subject to the tax.

## The Mansion Tax - continued

- The definitions of these types of property classifications can be found in N.J.A.C. 18:12-2.2. Your tax search is going to show the type of property tax classification, so you should be able to determine when the mansion tax applies.
- As stated, there is a distinction between 3B and 3A farm property. Farm property is either qualified and assessed under The Farmland Assessment Act (3B property NOT subject to mansion tax) or not qualified and assessed under the Act (3A property which is subject to the tax).

## The Mansion Tax - continued

- The other classes of property which are not subject to the tax are defined in the administrative code section N.J.A.C. 18:12-2.2. Industrial properties and apartments are examples. Contact your underwriter if there is any question as to applicability.

## The Mansion Tax - continued

- The mansion tax is based on the full and actual consideration being paid for the property. Various techniques have been employed to avoid the tax.
- An example of an idea that doesn't work would be where a husband and wife are going to buy a house for 1.2 million and instead enter into separate contracts for \$600,000 each.
- The intention of the parties here is to purchase the property together and whether they receive separate deeds or not the total consideration is 1.2 million. The separate contract and deed scheme is a fiction and the mansion tax is due.

## The Mansion Tax - continued

- The buyer must attach the Affidavit of Consideration For Use By Buyer (RTF-1EE) when submitting a deed for recording subject to the mansion tax. If the property is Class 2 (residential) or 3A Farm, Paragraph 2(c), the calculation of equalized assessed value, does not have to be filled out.
- However, the equalized value calculation must be filled out for Class 4A (commercial) properties. This is accomplished by dividing the assessed value by the Director's Ratio for the municipality where the property is located.



## The Mansion Tax - continued

- The Director's Ratio for each municipality can be found by utilizing The Table of Equalized Value available on the State of NJ (Treasury) website. The tax is calculated on the deed consideration, not the equalized value calculation.
- In order to obtain information regarding the “**director's ratio**” (equalized assessed valuation) required by the forms, one should visit the site listed below.
- <http://www.state.nj.us/treasury/taxation/lpt/lptvalue.shtml>

## The Mansion Tax - continued

- The Affidavit of Consideration For Use by Seller must be attached to all deeds for the transfer of Class 4 property. This is so for Class 4B and Class 4C when no mansion tax is due, as well as for Class 4A.
- Section 3A of RTF-1 form must be filled out if the property is 4A and therefore subject to the mansion tax. The amount of the tax is calculated on the amount of consideration, not the equalized value.
- As a caveat, the instructions for the Buyer Affidavit of Consideration requires use of the form for 4A property when the equalized value is over a million or the consideration is over a million. So, if the purchase price is \$990,000 but the equalized value is \$1,000,001, the form must be used.

## Controlling Interest Transfer Tax

- The Controlling Interest Transfer Tax (CITT) applies in situations where there is a transfer in the controlling interest of an entity which owns 4A property with a value of over 1 million dollars.
- If the property is the only asset of the acquired entity, the purchase price is used to determine the tax amount. If the entity owns other assets the equalized assessed value is utilized and a tax is due only if the value exceeds 1 million dollars.
- There is an applicable form called the CITT-1 and the form must be attached to the transferor/seller's NJ business tax return. There are exemptions to the requirement to pay the tax. Please see the CITT-1E Statement of Waiver Form and check with your underwriter.

## Non-resident Income Tax Withholding

- The Non-resident Seller's Tax Declaration (GIT-REP 1) must be submitted with a deed for recording when the seller is a non-resident. In other words a person who lives outside of the State of New Jersey and doesn't qualify for any of the exemptions.
- A non-resident seller is subject to withholding for income tax purposes and the settlement agent must collect the amount received and submit the funds in order for the deed to be recorded.

## Non-resident Income Tax Withholding - continued

- The amount of withholding is determined by multiplying the gain from the sale by the highest Gross Income Tax rate then in effect. This rate is currently 10.75%. This is subject to the proviso that in no event can the amount of withholding be less than 2% of the non-resident seller's share of the consideration.

## **Non-resident Income Tax Withholding - continued**

- As a practical matter the amount collected at closing is virtually always the 2% of total consideration amount.
- The withholding tax may be prepaid prior to the closing. This procedure requires the use of the Non-resident Seller's Tax Prepayment Receipt (GIT-REP 2)
- The form must be submitted, in person, along with payment at an office of the Division of Taxation. The form will be stamped with the Director's Seal, and that stamped form must be submitted with the deed for recording.

## Exemptions to Withholding Requirement

- The most obvious situation where withholding is not required is when the seller is a resident taxpayer of the State of New Jersey pursuant to the NJ Gross Income Tax Act.
- This means essentially that the state is satisfied it's going to get any money due when the taxpayer files the NJ income tax return. This requires the use of the Seller's Residency Certification/Exemption Form (GIT-REP 3).
- The GIT-REP 3 form is utilized for all situations when withholding is not necessary. When the seller is a resident taxpayer the applicable box on the form is number 1.

## Exemptions to Withholding Requirement - continued

- One of the more frequent exemptions utilized is Box 2 on the form which is applicable when the real property being sold is used as the principal marital residence of the sellers.
- Principal residence is defined by reference to 26 U.S. Code Section 121 which requires that the property has been used as the taxpayer's principal residence for periods aggregating at least 2 years of the previous 5 year period ending on the date of the sale.
- This Box 2 is often checked inappropriately when the seller(s) have also checked Box 1 and show their address to still be in NJ. It is unnecessary and redundant to check Box 2 in this situation, and a zealous county clerk employee may reject the deed.



## Exceptions to Withholding Requirement - continued

- The requirement to pay an estimated tax applies only to individuals, estates or trusts. So a business entity such as a corporation, LLC or partnership does not need to pay the withholding tax. This is Box 5 on the GIT-REP 3 form.
- No estimated tax payment is required of an out of state resident if the total consideration is \$1,000 or less. This should not be confused with the exemption from the RTF for deeds with a consideration of less than \$100.
- Property transferred by the executor or administrator of an estate to a devisee or heir which is for the purpose of affecting distribution of the estate consistent with the terms of the will or intestacy laws is not taxable.

## Exceptions to Withholding Requirements - continued

- Property transferred between spouses, or in connection with a divorce decree or property settlement agreement, is exempt.
- Relocation transactions are exempt from the tax. However, the exemption seems to apply only if the deed into the buyers is coming out of a trustee of the relocation company which has taken title, not if the deed comes directly from the individuals.

## Exemptions to Withholding Requirements - continued

- Other exempt transactions are those involving the US or NJ governments or government sponsored entities; involving cemetery plots; 1031 exchanges; short sales and conveyances from a mortgagor to a mortgagee in foreclosure or in lieu of foreclosure with no additional consideration.

## Foreign Investment in Real Property Tax Act (FIRPTA)

- The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding.
- A foreign person is defined as a non-resident alien individual, foreign corporation that has not made an election to be treated as a domestic corporation under IRS Code Section 897(i), foreign partnership, foreign trust or foreign estate.
- Not included in the above definition is a resident alien individual. In other words, an individual with a green card is not subject to tax withholding under FIRPTA. Note that the definitional language is the same as the language required on the 1099.

## FIRPTA - continued

- The burden of withholding falls on the buyer as the buyer will be responsible to pay the tax if its not paid. This means that practically speaking you as a settlement agent are responsible. It is not a lien on title.
- The tax to be withheld pursuant to the statute is 15% of the “amount realized”. The amount realized will typically be the purchase price but will also include, if applicable, the fair market value of other property transferred or to be transferred, and any liability assumed.
- If the property is jointly owned by foreign persons and non-foreign persons, the amount realized is to be allocated between the transferors, based on their capital contributions. In most cases this is going to correspond to percentage of ownership.

## FIRPTA - continued

- There is no requirement to withhold if purchase price is \$300,000 or less AND the buyer is an individual and either the buyer or a family member has definite plans to reside in the property for at least 50% of the first 2 twelve month periods after transfer.
- If the purchase price is 1 million dollars or less and the same conditions as described in the previous paragraph are met, the applicable withholding amount is reduced to 10%.
- There are a number of exemptions to the withholding requirement. A detailed discussion of same is beyond the scope of this course. The assumption must be that withholding is required. Contact your underwriter if a party is claiming an exemption.

## FIRPTA - continued

- The two forms utilized to report and pay the withholding tax are Form 8288 which is the U.S. Withholding Tax Return and Form 8288-A which is the Statement of Withholding.
- These forms can be found on the IRS website and transferees (buyers) must use these forms to report and pay the withholding tax. Form 8288-A must be filled out for each person from whom tax has been withheld.
- These forms come with directions and must be filled out precisely. If you have ANY questions regarding same, contact your underwriter. Mistakes can be costly.

## Summary

- We have reviewed several situations where settlement agents are, in effect, charged with the duties of tax collectors. Unfortunately the failure to discharge these duties appropriately can cost money and cause other problems.
- The RTF must be collected and paid to get your deed recorded. If relying on a full or partial exemption, make sure its applicable or you might wind up having to pay the tax.
- We have discussed the mansion tax and its applicability to residential, 4A commercial and 3A farm property. Be skeptical of obvious attempts to improperly avoid the payment of the tax.



## Summary - continued

- One must be very careful when dealing with a transaction to which FIRPTA is applicable. Also be careful to make sure that its not applicable by getting a FIRPTA affidavit and making sure the 1099 includes the appropriate language.

stewart title

Real partners. Real possibilities.™

www.VUwriter.com

stewart title

Real partners. Real possibilities.™

www.VUwriter.com

The screenshot shows the Stewart Title Virtual Underwriter website. At the top left is the Stewart Title logo with the tagline "Real partners. Real possibilities.™". To the right of the logo are navigation links: "Select Location", "Recently Viewed", "Terms of Use", and "State Laws and Customs Toolkit". Below the logo is a search bar with the text "Virtual Underwriter" and a magnifying glass icon. A dark red navigation bar contains several menu items: "Forms", "Bulletins", "Real Estate Practices" (which is circled in blue), "Standard Exceptions", "Underwriting Manual", and "Special Alerts". Below the navigation bar is a section titled "Everything you need." with the text: "With VU, you have access to information needed to underwrite a real estate transaction, 24 hours a day, seven days a week. [Click here](#) for a tutorial." To the right of this text is an image of several books stacked together. Below the text and image is a "Keyword Search" section with a text input field containing "Example : Absentee", a "Find It" button, and radio button options for "All of these words", "This exact phrase", and "Any of these words". To the right of the search section is a "Select a Location" section with a dropdown menu labeled "Select a state".

Virtual Underwriter

stewart title

*Real partners. Real possibilities.™*

[NJUWing@Stewart.com](mailto:NJUWing@Stewart.com)

