


"FIRPTA" – DO I OR DON'T I WITHHOLD?



Department of the Treasury
Internal Revenue Service

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FIRPTA HISTORY



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HISTORY OF FIRPTA

History	-1980: FIRPTA - 26 U.S.C. § 897 Governed by the IRS: 26 U.S.C. § 1445 & accompanying regulations 26 C.F.R. § 1.1445-1 et seq.) -1984 Amended -2008 Amended
Today	-2016: PATH Act -Increased withholding for certain transactions

FIRPTA HISTORY: PATH ACT

- Effective Feb. 16, 2016
- Increased withholding from 10% - 15% for most transactions
 1. Personal Residence Exemption - \$300,000 or less
AND . .
 2. Reduced Rate of Withholding - More than \$300,000, up to and including \$1,000,000 =10%
 3. Over \$1,000,000 = 15%



FIRPTA FACTS:

- NOT a Tax
- Seller must still file U.S. tax return
- Seller may be entitled to refund for any excess withheld
- Use Form 8288



PAYMENT TO THE IRS:

- **Due Date:** Buyer **must**, in most cases, remit FIRPTA withholding to IRS by the 20th day after the Date of the Transfer.
Date of the Transfer = the date the buyer first paid consideration (not including the initial deposit) or assumed liability for the transaction.
- **IRS Forms MUST** be submitted with the amount withheld:
 - **Form 8288** -U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests)
 - **Form 8288-A** -Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests)



FIRPTA DEFINITIONS:



FIRPTA DEFINITIONS:

- **Amount Realized** – by the transferor is the sum of:
 - 1) The cash paid, or to be paid (principal only),
 - 2) The fair market value of other property transferred, or to be transferred, and
 - 3) The amount of any liability assumed by the transferee or to which the property is subject immediately before and after the transfer.
- **ITIN** – Individual Tax Identification Number is an IRS tax processing number given to those not eligible for a Social Security Number. Must be renewed every five (5) years
- **Non-Resident Alien** – a foreign person without a Resident Alien Card (Green Card) nor meets the criteria for the Substantial Presence Test.



FIRPTA DEFINITIONS CONT.:

- **Substantial Presence Test** – a foreign person who meets certain criteria set by IRS Code. The client must seek advice from a tax professional and bring any supporting documents to you. Keep the documents in your file
- **Resident Alien** – has a Resident Alien Card (Green Card) or meets the Substantial Presence Test.
- **Transferor** – any foreign person that disposes of a U.S. real property interest by sale, exchange, gift, or any other transfer. A transfer includes distributions to shareholders of a corporation, partners of a partnership, and beneficiaries of a trust or estate. The owner of a disregarded entity is treated as the transferor of the property, not the entity.
- **Transferee** – any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.



FIRPTA DEFINITIONS CONT.

• **Foreign Person:**

• A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the Internal Revenue Code to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual.



FIRPTA DEFINITIONS CONT.

• **United States Person:**

1. U.S. Citizen
2. Resident Alien with a Green Card
3. Foreign Person who meets the Substantial Presence Test
4. Domestic corporation, partnership or other legal entity unless entity is a Disregarded Entity
5. Fiduciary
6. Disregarded Entity the owner of which qualifies as a "U.S. Person"
7. Foreign entity which has elected to be treated as a domestic entity



FIRPTA DEFINITIONS CONT.

• **U.S. Real Property Interest:**

An interest, other than as a creditor, in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the U.S. Virgin Islands, as well as certain personal property that is associated with the use of real property (such as farming machinery). It also means any interest, other than as a creditor, in any domestic corporation unless it is established that the corporation was at no time a U.S. real property holding corporation during the shorter of the period during which the interest was held, or the 5-year period ending on the date of disposition. If on the date of disposition, the corporation did not hold any U.S. real property interests, and all the interests held at any time during the shorter of the applicable periods were disposed of in transactions in which the full amount of any gain was recognized, then an interest in the corporation is not a U.S. real property interest. . . .



FIRPTA DEFINITIONS CONT.

Withholding Agent:

- The IRS considers the transferee the Withholding Agent responsible for collecting and sending money to the IRS.
- Buyer must have a SSN or an ITIN (eff. Nov. 4, 2003)

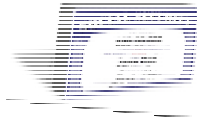


ITIN REQUIREMENT

• All FIRPTA documents **MUST** contain either a SSN or an ITIN for **BOTH** the Buyer and Seller (eff. Nov. 4, 2003)

Scenarios:

- Seller fails to provide ITIN
- Seller has applied for ITIN
- Seller has NOT applied for ITIN
- Buyer has applied for ITIN
- Buyer has NOT applied for ITIN
- ITINs for business entities may be ordered online:
http://sal.www4.irs.gov/sa_vign/newFormSS4.do



WHAT DOES FIRPTA COVER?

FIRPTA INCLUDES:



ALL Sales, including installment sales, Exchanges, Foreclosures, Deeds in Lieu of Foreclosure, Short Sales, and Other Dispositions of a U.S. real property interest by a foreign person,

UNLESS an exemption applies.



**FIRPTA CONSIDERATIONS:
26 U.S.C. §1445**

- Is the Grantor a U.S. Citizen or Foreign Person?
- Is the Grantor a Disregarded Entity?
- Consider FIRPTA RE: DILs.



**¶120 TREC CONTRACT:
FEDERAL TAX REQUIREMENTS**

- If Seller is a "foreign person," as defined by applicable law, or if Seller fails to deliver an affidavit to Buyer that Seller is not a "foreign person," then
- Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service
- together with appropriate tax forms.
- Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction



WITHHOLDING REQUIREMENT:

- Generally, FIRPTA requires that if a foreign person disposes of a United States real property interest, then the person acquiring such interest must deduct and withhold a tax based on the total *amount realized* by the foreign person on the disposition of the purchase price but may also include:
 - The cash paid, or to be paid (principal only);
 - The FMV of other property transferred, or to be transferred; and
 - The amount of any liability assumed by the transferee or to which the property is subject immediately before and after the transfer.



**WITHHOLDING RATES UNDER FIRPTA
FOLLOWING THE PATH ACT:**

Buyer Intends to Use Property as Residence?	YES	NO
> \$300,000	\$0	15%
< \$300,000 - \$1,000,000	10%	15%
Over \$1,000,000	15%	15%



JOINT TITLE HOLDERS:



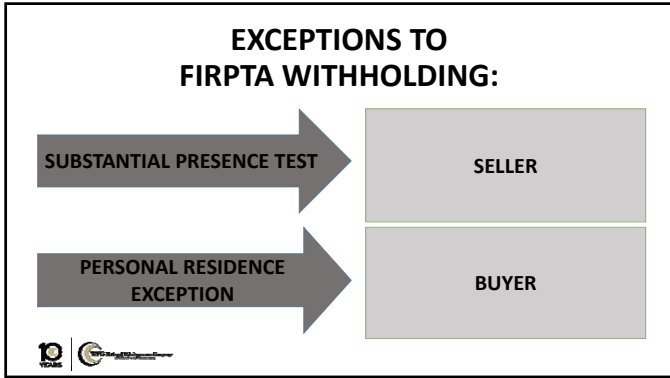
- If either spouse is a foreign person, withholding as to that foreign spouse's interest is required.
 - Treated as though each own 50% interest in the property being sold and conveyed.
- If title is held jointly with at least one owner being a foreign person, withholding as to that foreign person is required.
 - Based upon the % interest of the foreign person



**EXCEPTIONS TO
FIRPTA WITHHOLDING:**

1. Non-Foreign Certification/Affidavit
2. "Withholding Certificate"
3. Notice of Non-recognition Treatment (i.e. 1031 Exchange)
4. Personal Residence Exception





SUBSTANTIAL PRESENCE TEST:

- Foreign Person considered U.S. Person for the calendar year if they are present in the U.S. for at least:
 - 1) 31 days during year of sale

AND

 - 2) 183 days during the 3 year period that includes the year of sale plus the preceding 2 years of sale, counting:
 - a) All days during year of sale
 - b. 1/3rd days during 1st year prior to sale
 - c. 1/6th days during 2nd year prior to sale

PERSONAL RESIDENCE EXCEPTION:

- Sale price =
 - \$300,000 or less **AND** Buyer agrees in writing (Ø)
 - < \$300,000 to \$1 million **AND** Buyer agrees in writing (10%)
- Residential transactions only.
- Residency requirement cannot be satisfied if buyer is not an individual.
- Satisfaction of the residency period does not include time the property is vacant.
- Unimproved land is specifically excluded, even if the buyer intends to build a residence on the property.

PERSONAL RESIDENCE EXCEPTION:

- Primary residence **NOT** required
- Buyer's option
- Occupation requirements:
 - Buyer **or** member of buyer's family
 - 50% of occupied days for each of two 12 months following closing
 - Occupied by anyone



SETTLEMENT AGENT'S ROLE vs. AGENT:

- A person is not treated as an agent if the person only performs one or more of the following acts related to the transaction:
 - Receipt and disbursement of any part of the consideration;
 - Recording of any document;
 - Typing, copying, and other clerical tasks;
 - Obtaining title insurance reports and reports concerning the condition of the property; or
 - Transmitting documents between the parties.



BEST PRACTICE TIPS TO AVOID LIABILITY:

- Don't exceed the boundaries of responsibilities in transaction.
- Never provide legal or tax advice to the parties.
- Encourage parties to seek professional legal and tax advice.



HANDLING FIRPTA:

1. Seller Certification.
2. Qualified Substitute.
Note that this practice carries additional liability for the escrow agent.
3. Waiver of Responsibility.
4. Withhold and Pay Tax.
5. Withholding Certificate.



APPLICATION FOR WITHHOLDING CERTIFICATE

- Seller may apply to either reduce or eliminate withholding
- Application **MUST** be filed prior to closing



FORM 8288-B

Form 8288-B Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests
(Rev. November 2008)
 Department of the Treasury Internal Revenue Service
 OMB No. 1545-1060
 ▶ Please type or print.

- May be used by Seller to request "Withholding Certificate" to eliminate or reduce withholding:
 - Based on calculation of Seller's maximum tax liability (tax liability will be less than 15% of sale price)
 - Seller entitled to Non-Recognition treatment as part of 1031 Exchange



LIABILITY FOR FAILURE TO WITHHOLD:

Buyer's Liability

-Amount of tax to be withheld,
-Interest, and
-Penalties

**Willful Failure to Withhold
or Remit**

-\$10,000 fine
-Imprisonment up to 5 years



LIABILITY FOR FAILURE TO WITHHOLD:

**Real Estate Agent's
Liability**

-Compensation from the transaction

Willful Failure to Notify

-Unpaid withholding up to amount of
commission



LIABILITY FOR FAILURE TO WITHHOLD:

**Settlement Agent's
Liability**

-Not liable to IRS UNLESS
- Qualified Substitute
- May have liability to buyer

Willful Failure to Notify

-Unpaid withholding up to amount of
commission



CONCLUSION:



- FIRPTA is a complicated federal law with legal and tax implications that require a great deal of care. Remember these points:
 - The law is imposed on the **buyer**, who is the transferee and the withholding agent.
 - The settlement agent is **not** an agent for purposes of FIRPTA.
 - Do **not** exceed the boundaries of your obligations and responsibilities in connection with the transaction.
 - Do **not** prepare FIRPTA tax forms.
 - Do **not** offer advice concerning the legal and tax ramifications of the transaction.
 - Refer the principals to their attorney, tax professional, and to the IRS website at www.irs.gov for tax forms and Publication 515 for assistance.
 - How you handle FIRPTA must be included in the written instructions of the principals to the transaction.
 - Contact your local management, legal department, or underwriter for guidance and/or approval of special circumstances.



THANK YOU!

Questions?

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