

FIRPTA Q&A

Q: What is FIRPTA?

A: United States tax law requires that all persons, whether foreign or domestic, pay income tax on the disposition of U.S. real property interests. Domestic persons or entities typically are subject to this tax as part of their regular income tax; However, it requires that a buyer withhold and remit to the IRS a certain percentage of the sales price in anticipation of the taxes that will be due from the foreign seller on such transaction.

Q: Does FIRPTA apply to a personal residence?

A: FIRPTA applies in nearly all transactions, residential and commercial, in which a foreign owner of a U.S. real property interest sells such interest. The amount withheld is not the tax itself, but is payment on account of the taxes that will ultimately be due from the seller.

Q: What is the definition of a “foreign person” with regards to FIRPTA?

A: *FIRPTA* defines a “Foreign Person” as *any* person other than a “United States Person.”

Q: What is the definition of a “United States Person”?

A: “*United States Person*” is any of the following:

- i. A U.S. Citizen
- ii. A resident alien who has a Green Card;
- iii. A resident alien who meets the Substantial Presence Test;
- iv. A domestic (U.S.) corporation, partnership, or other legal entity (except a “Disregarded Entity” as defined by IRS regulations), trustee or other fiduciary;
- v. A Disregarded Entity, the owner of which qualifies as a “United States Person” under (i),(ii),(iii), or (iv) above; or
- vi. A foreign entity which has elected to be treated as a domestic corporation (as evidenced by acknowledgment copy of election furnished by IRS)

“Disregarded Entity” is any single-owner domestic business entity (such as a single-member limited liability company)

The Substantial Presence Test: Under FIRPTA, a Foreign Person is considered a U.S. Person for the calendar year of sale if they are present in the United States for at least:

- a) All days during year of sale;
- b) 1/3rd of the days during the first preceding year; and
- c) 1/6th of the days during the second preceding year.

When counting days, you may not include the days that a Foreign Person is present in the U.S. as a representative of a foreign government (e.g. foreign diplomat), as a teacher or student under a “J”, “Q”, “F” or “M” Visa, or as a professional athlete in a charitable sports event.

Q: Is there any exception to the 15% withholding requirements under FIRPTA when U.S. real property is sold by a foreign person?

A: Yes, there is no withholding required if sales price is \$300,000.00 dollars or less and the buyer (including family members) intends to use the property for personal purposes as a residence for more than 50% of the time the property is in use for the first two 12-month periods following the transfer. The days the property is vacant are excluded in the 50% calculation. *Vacant Land* is specifically excluded, even if the buyer intends to build a residence on the property. In order for this exemption to apply, the buyer must be an individual, as opposed to a partnership, corporation, estate, or trust.

Q: The property is a personal residence, under \$300,000.00 and the buyer is going to live in it. Doesn't that automatically exempt it from withholding?

A: The buyer must sign an affidavit, under the penalties of perjury, that he meets the requirements for the exemption. Even though the seller may be exempt from the 15% withholding, the seller is still required to file a U.S. income tax return to report the sale and pay any applicable income taxes on the profit of the sale.

Q: What if the house is a personal residence, more than \$300,000.00 and less than \$1,000,000.00, what is the buyer (Transferee) responsible to withhold?

A: 10%, regardless of the intent to occupy.

Q: What if the property is sold for over \$1,000,000.00? What percentage is the buyer (Transferee) responsible for withholding?

A: 15%. Regardless of the intent to occupy.

Q: Is there an exemption from the 15% withholding when a foreign person is the seller in a short sale?

A: There is no exemption from the 15% withholding on account of a short sale. However, in most cases, it would be advisable to apply for a reduction in the withholding from the IRS. A withholding certificate, stating that the withholding had been reduced to zero, must be obtained before closing can take place or the 15% must be held by the closing agent until a withholding certificate can be obtained or remitted to the IRS within 20 days after closing. Even though the IRS is not obligated to expedite the processing of reduced withholding applications in the case of a short sale, it is sometimes possible to obtain expedited processing due to a hardship.

Q: What if the seller is a Domestic LLC?

A: **Single Member LLC:** A single-member LLC, while a recognized legal entity, is considered a "Disregarded Entity" for tax purposes. Accordingly, if the seller is a single-member limited liability company, then you have to look to the identity of the sole member of the LLC. If the sole member is a

“Foreign Person”, then the FIRPTA withholding rules apply in the same manner as if the foreign sole member was the seller.

Multi-Member LLC: A domestic limited liability company with more than one owner is not considered a “Disregarded Entity” and is taxed differently than a single-member LLC. Accordingly, the FIRPTA rules regarding withholding do not apply to multi-member domestic LLC’s. Must report the sale with the LLC’s U.S. EIN number. If the domestic LLC does not have an EIN, one must be applied for prior to the sale.

Q: What if the seller is a foreign corporation?

A: FIRPTA applies if the company did not elect to be taxed as a domestic corporation. If they have elected to be taxed as a domestic corporation, also known as “checked the box”, evidence of this election must be presented on or before closing and documented in the file.

Q: What is a withholding certificate and who may apply for one?

A: Technically, the amount of tax required to be withheld under the provisions of FIRPTA cannot exceed the maximum tax liability of the transfer. Many times, the maximum tax liability is significantly less than the 15% required withholding. Under these circumstances, the regulations provide a procedure by which the IRS can agree to an amount which is less than the required 15% withholding. The agreement of a reduced amount can be obtained by applying for a withholding certificate. This procedure is generally done by submitting a properly completed IRS Form 8288-B on or before the closing date. Either the transferor (seller) or transferee (buyer) may apply for the withholding certificate.

Q: If a non-resident sells U.S. real estate at a loss and receives a zero withholding certificate, must they still file a U.S. income tax return to report the sale?

A: Yes, without exception. The granting of a withholding certificate does not eliminate any requirements to file a U.S. tax return to report the transaction.

Q: Can the buyer assign the responsibility for withholding to the settlement or escrow agent?

A: There are no provisions in the IRS rules for the buyer to assign their responsibility to anyone else, including the escrow or real estate agents. The escrow agent cannot provide legal or tax advice.

Q: Under FIRPTA, a foreign person disposing of a U.S. real property interest must have 15% of the amount realized withheld. What constitutes “amount realized?”

A: Generally, the amount realized, for purposes of FIRPTA withholding, is the sales or contract price.

Q: The seller is foreign, but looks to have a social security number, is this possible?

A: If the seller is foreign, it is likely they do not have a social security number. Foreign citizens doing business and earning income in the United States are required to have taxpayer identification numbers (TINS). These look similar to social security numbers. The test of whether FIRPTA withholding is required or not, is a statement made by the seller under penalty of perjury that they are not a non-resident alien for purposes of U.S. income taxation.

Q: What if the seller is taking a loss on their home?

A: Under FIRPTA there is no automatic exemption from withholding if the seller is taking a loss or no gain. If a foreign seller feels they are exempt from FIRPTA withholding because there is no gain on the sale, they need to consult with a tax expert and may find they need to apply for a withholding certificate from the IRS that will grant them the exemption on the transaction using IRS form 8288-B. If this is the case, this should occur early on in the transaction.

Q: A foreign seller doesn't have a TIN and is willing to pay the IRS. Can the money just be sent to the IRS without a TIN?

A: Yes. While the IRS requires sellers to have a TIN the money can be held and sent during the seller's application process which should take place on or before the date of closing.

Q: How does a foreign person apply for a TIN?

A: The TIN is applied for by completing a form W-7 and remitting the form, along with proper documentation, to the IRS. In order to apply for a TIN, the foreign person must show that they have a valid reason for requesting the number. The sale of U.S. real estate constitutes a valid reason for obtaining the TIN.

For more information on how to obtain a TIN:

[ITIN Guidance for Foreign Property Buyers Sellers | Internal Revenue Service \(irs.gov\)](#)

[Instructions for Form W-7 \(11/2023\) | Internal Revenue Service \(irs.gov\)](#)

[Form W-7 \(Rev. August 2019\) \(irs.gov\)](#)

Q: A foreign seller only owns a portion of the property. How much money does the foreign seller owe?

A: The foreign seller will owe withholding on their percentage of ownership of the property.

Q: Isn't a transaction from a foreign seller to a foreign buyer exempt from withholding?

A: No. The same rules apply, and both parties are required to have TINs.

Q: A nonresident has a contract to sell U.S. real estate for \$500,000.00, with a closing date of March 1st. There will be a loss on the transaction. What is the latest date an application for reduced withholding can be submitted?

A: The application for a reduction in the 15% withholding must be submitted to the IRS no later than March 1st, the date of closing. If the application is not submitted by the date of closing, the full 15% withholding must be remitted to the IRS.

Q: How long does it take the IRS to process an application for withholding?

A: Although there is no set time period, most applications for a reduced withholding are processed within 90-120 days after submission.

Q: How long is the withholding submitted and reported?

A: At closing, the 15% withholding is deducted from the proceeds due to the seller. If no reduction is applied for, the 15% withholding must be remitted to the IRS within 20 days after closing. If an application has been filed to reduce the withholding, the 15% is withheld, but the funds are held in escrow, awaiting receipt of the withholding certificate from the IRS. The reduced withholding must be remitted to the IRS within 20 days after the date of the withholding certificate. The withholding amount is remitted to the IRS using [Form 8288](#) and [Form 8288-A](#).

Q: The FIRPTA withholding was paid at close of escrow, but not that much money was due from the IRS. How does the seller get their money back?

A: The seller can either (in advance of closing) file an [Form 8288-B Application](#) for Withholding Certificate to request a reduced amount or no withholding. The seller can also file a tax return the following year to obtain any refund due. A CPA or other tax expert should be consulted for guidance.

Q: The sellers and buyer don't want to pay a CPA to answer their questions. Can't the real estate person or escrow person help with FIRPTA questions?

A: Escrow personnel and real estate agents may have experience with FIRPTA but are not qualified to provide advice on individual taxpayer's situations.

Q: The seller lives in another country, but says they are a U.S. citizen. Isn't withholding required?

A: U.S. citizens may be living in other countries. Current residency is not a good indication of FIRPTA status.