

FIRPTA Questions & Answers

(continued)

current ITIN Guidance for Foreign Property Buyers/Sellers publication on the IRS website at IRS.gov.

Question #6

Is the 10% withholding a tax?

The amount withheld is not a tax. The foreign Seller is obligated to file a U.S. Tax Return and pay the additional tax due or obtain a refund of the amount by which the amount withheld exceeds the ultimate tax liability.

Question #7

Who is liable for the failure to withhold?

Buyer has the obligation and liability for withholding. If Buyer fails to remit the required 10% withholding, Buyer is liable for amount together with interest and penalties for failure to withhold the required 10%.

Question #8

Can a Foreign Person sometimes qualify as a U.S. Person to eliminate the need for withholding?

Yes. A Foreign Person will qualify to be treated as a U.S. Person and eliminate FIRPTA withholding if either (i) the Seller possesses a current green card which qualifies the person as resident alien; or (ii) the Seller meets the "Substantial Presence Test" in accordance with IRS Regulations. This exception numbered "(ii)" should be discussed with a tax professional and the Buyer must also seek the advice of a tax professional.

Question #9

Is withholding always required on a foreign corporation or other legal Entity?

No. A foreign legal Entity (e.g. foreign corporation) may elect with the IRS to be taxed as a U.S. corporation which qualifies them as a U.S. person and eliminates FIRPTA withholding; provided, a copy of the acceptance by the IRS of such election is furnished to Buyer.

Question #10

Is withholding required if all the Sellers are not foreign?

Yes. As to multiple owners, withholding is required on a percentage basis only as to those Sellers that are foreign. (Example: If husband is a U.S. Citizen and wife is foreign-withholding of 10% is required only as to the wife's 50% interest).

Question #11

Is it true that if the purchase price of the residence is less than \$300,000, withholding is not required?

No. If the sale price of the residence is less than \$300,000 and Buyer or Buyer's family member intend to occupy the subject property more than 50% of the time the property is occupied (vacant days DO NOT count) by any other parties during each of the two year periods following closing, and Buyer is willing to sign an Affidavit to this effect, Buyer may elect not to withhold the required 10%. To avoid risks to the Buyer, Buyer should consult a tax professional prior to executing the Affidavit.

Question #12

What is Buyer's liability if Buyer waives withholding based on the Personal Residence Exemption but does not occupy the property for the required 2 year period?

If property is not occupied as required, Buyer becomes liable to the IRS for the required 10% withholding together with interest and penalties unless they can satisfy IRS that such failure was not "reasonably foreseeable" at the time of closing.

Question #13

Does Buyer have to waive withholding?

No. As a result of the possible liability indicated above, IRS regulations DO NOT mandate the waiver of withholding based on the Personal Residence Exemption. Therefore, Buyer may elect to remit the required 10% withholding to the IRS even though they intend to occupy the property.

Question #14

What is an "IRS Withholding Certificate"?

If the ultimate tax liability of foreign Seller will be less than the required 10% withholding, Seller can apply for a Withholding Certificate. Application for Withholding Certificate is made in most cases by filing of IRS Form 8288-B. The application must be filed PRIOR to closing otherwise the required 10% withholding must be remitted to the IRS (no exceptions to this requirement).

What happens when an Application for Withholding has been submitted and, for example on a short sale, there is a change in the purchase price from the original contract?

The Application for Withholding will need to be amended accordingly.

Question #15

If IRS Withholding Certificate has been requested but not received by closing, does closing have to be postponed?

No. If Seller furnishes a copy of a properly executed Form 8288-B together with evidence of its filing with the IRS prior to closing, the required 10% withholding may be escrowed with the closing agent or other escrow agent, provided Form 8288-B. The Buyer may, however, elect to have the funds sent to the IRS at closing and may decline the escrow procedure based on certain sale and purchase contracts.

Question #16

How does escrow of 10% get disbursed?

Upon escrow agent's receipt of Withholding Certificate from the IRS, any funds to be remitted to the IRS required by the Withholding Certificate (Certificate may partially reduce or eliminate withholding totally) must be sent to the IRS within 20 days of the issuance of the Withholding Certificate and the remaining funds are disbursed to Seller. If the application for Withholding Certificate (Form 8288-B) is rejected by the IRS, the entire 10% Withholding amount must be remitted to the IRS within 20 days of the issuance of the rejection or as otherwise directed by the IRS. A Tax Professional will also prepare Form 8288, 8288-A upon remitting funds.

Question #17

If the Buyer is a Foreign Person, will FIRPTA apply to him/her?

When the Buyer subsequently re-sells the property, the Buyer will be subject to the withholding requirements unless an exception applies. If, however, the Buyer is a Foreign Person and is also purchasing the property from a Foreign Person, the Buyer must provide or obtain a U.S. Tax ID Number.

The Foreign Investment in Real Property Tax Act

(FIRPTA)

*General Information
And
How it May Apply to Real Estate Transactions*

FLORIDA | TITLE & GUARANTEE AGENCY™

www.FloridaTitleandGuaranteeAgency.com

General Rule: Section 1445 of the Internal Revenue Code

When a foreign Owner (Transferor) of real property sells, they are subject to the Foreign Investment in Real Property Tax Act (FIRPTA). This Act requires the Buyer (Transferee) to withhold 10% of the purchase price from the Seller and remit same to the IRS within 20 days after closing, unless the Owner (Transferor) qualifies as a U.S. Person or domestic non-disregarded Entity as set forth below. The Buyer is referred to as “the withholding agent” for purposes of the documents remitted to the IRS that accompany the 10% withholding amount.

Individuals

If the Owner (Transferor) is a person, Buyer (Transferee) must obtain and retain in their files a Certification under penalties of perjury in accordance with IRS Regulations certifying that the person is a U.S. Citizen, Resident Alien with a current Resident Alien Card or otherwise qualifies as a U.S. Person under the IRS Regulations.

If Owner (Transferor) does not qualify as a U.S. Person, FIRPTA Withholding by Buyer (Transferee) is required.

Corporations, Limited Liability Companies, and Other Legal Entities

If the Owner (Transferor) is a corporation, limited liability company, or other legal Entity, Buyer (Transferee) must obtain and retain in their files a certification under penalties of perjury in accordance with IRS regulations certifying that the Entity qualifies as a Domestic, Non-Disregarded, Entity. If Owner (Transferor) does not qualify as a domestic, non-disregarded, Entity, FIRPTA Withholding is required.

Note: A domestic single member LLC (limited liability company) is a disregarded Entity and FIRPTA Withholding is required, if the member is a Foreign Person.

Note: If the Seller is a Foreign Person or Entity, and the Buyer fails to withhold, the Buyer may be held liable for the 10% withholding amount plus penalties and interest.

The Real Estate Contract for Sale and Purchase

Most contracts for the sale and purchase of real estate address the requirements under this Section of the IRS Code, as well as set forth the obligations of the parties. We refer you to the provisions of the sales contract customary in your area.

If Seller is a Foreign Person or Entity, both Seller and Buyer should consult a tax professional such as a Florida Certified Public Accountant or Attorney with experience in FIRPTA matters. Each party will have responsibilities to carry out concerning documentation to be completed and filed.

After consulting with a tax professional, Buyer may request the title insurance and settlement agent, in writing, to collect the 10% on his or her behalf. Buyer should also verify that the appropriate remittance forms have been prepared.

The amount withheld must be sent to the IRS by the 20th day of the date of the transfer on Form 8288, referred to as “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”, must also be attached to the remittance for each person for whom tax has been withheld.

Form 8288, Copy C is retained by withholding agent.

Reduced Withholding and Request to Hold Funds in Escrow in Lieu of Remitting

The Foreign Person disposing of a U.S. real property interest may have the 10% withholding amount reduced, if certain conditions are met and Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests, is timely filed prior to closing on the sale, and accepted by the IRS. This means that the Seller is requesting the IRS to make its determination in advance as to how much will be owed. Most of the time, however, the IRS determination of a reduced amount is not issued in time for the closing.

When this Application (8288-B) is completed by a tax professional prior to closing and sent in no later than closing, and the IRS determination letter has not been received by the date of closing, Sellers often ask the Buyer to hold the 10% collected in escrow instead of sending it in to the IRS at closing.

We will refer the parties to the sales contract for options. Generally, however, the Buyer has the option to either agree to the escrow procedure, at the Seller’s expense, or direct that the funds be remitted to the IRS at closing, notwithstanding the Application for Withholding.

In all cases, the parties should be advised by their tax professional.

Exemptions

There are some exemptions from this withholding. However, there are very specific criteria and those should be discussed with a tax professional. One in particular causes much confusion. If the purchase price of the real estate is under \$300,000, and the Buyer qualifies under a specified intent to occupy formula, and the Buyer is prepared to attest in writing to same, the 10% will not be required to be collected at closing. The execution of such a document should be discussed with the Buyer’s tax professional.

Taxpayer Identification Numbers

All remittance documents, namely the 8288, 8288-A, must include the Seller and Buyer’s U.S. federal taxpayer identification number (TIN). If one has not been issued to Seller or Buyer, a W-7 form must also be prepared and submitted.

Notice to Seek Advice. This information is intended to summarize some of the general requirements of FIRPTA. It is not intended to give tax or legal advice and may not be relevant to your unique situation. It is suggested that you seek the advice of your tax advisor as to how FIRPTA may apply in your unique, personal circumstances and this information may not be relied upon for any particular transaction.

FIRPTA Questions & Answers

The following Questions and Answers are designed to assist the Buyer and Seller with a general understanding of the nature of FIRPTA Withholding and the responsibilities connected with it.

It is imperative that each party, whether Seller or Buyer, consult its own tax professional concerning these responsibilities.

Question #1

When does FIRPTA require withholding and what amount?

Unless the Seller qualifies as a U.S. person, (or resident alien with a green card), in all cases in which the Seller is either a Foreign Person or foreign legal Entity (e.g. foreign corporation), FIRPTA generally requires withholding of an amount equal to 10% of the Sales Price and not the net proceeds of the sale.

Question #2

If foreign Seller has a Tax ID Number, does this eliminate withholding?

No. FIRPTA requires every Buyer and Seller to have a Tax ID Number including foreign Buyers and Sellers; therefore, the fact that the foreign Seller has its Tax ID number does not eliminate withholding.

Question #3

How does a Foreign Person obtain a Tax ID Number required by FIRPTA?

A foreign individual must apply to the IRS using Form W-7 to obtain their Tax ID Number. It is recommended that the application be made through a tax professional.

Question #4

How does a foreign business Entity such as a Corporation or Limited Liability company obtain a Tax ID Number required by FIRPTA?

Foreign business entities may be able to obtain their required U.S Tax ID Number either on line or by phone. The procedures to be followed can be found by searching “How to apply for an EIN” on the IRS website at IRS.gov.

Question #5

If Buyer or Seller does not have a Tax ID Number is it necessary to postpone the closing?

No. If the foreign Buyer has not applied for or received their U.S. Tax ID Number by the time of closing, the 10% Withholding Amount must be remitted within 20 days from the date of closing to the IRS, Ogden Submission Processing Campus, in Ogden Utah. In a separate package, a completed IRS Form W-7 together with passport or birth certificate or other supporting documentation acceptable to IRS (must be original or copy certified by its issuing agency-notarized copies no longer accepted) together with a photo copy of the 8288 and 8288-A must simultaneously be submitted to the IRS, Austin Submission Processing Campus, in Austin Texas. If the foreign Seller has not applied for or received their U.S. Tax ID Number by the time of closing, the 10% Withholding Amount must be remitted by Buyer to the IRS at the Ogden Submission Processing Campus as otherwise required within 20 days from the date of closing except that the U.S. Tax ID Number of the Seller is left blank. In either case, the IRS withholds the processing of the 8288 and 8288-A until the required U.S. Tax ID Number of the foreign Buyer and or Seller has been issued. These procedures are subject to change and should be updated as necessary. The most current procedure and changes can be obtained by reviewing the most