

FIRPTA WITHHOLDINGS

The Non-US Taxpayers transferee must deduct and withhold a tax on the total amount realized, meaning the sales price. The rate of withholding generally is 15% of the amount realized.

A foreign corporation that distributes a U.S. real property interest must withhold a tax equal to 21% of the gain it recognizes on the distribution to its shareholders who are all foreign persons.

Current guidelines establish different withholding rates subject to the sales price and the buyer's use of the subject property.

If the amount realized is below \$300,000, FIRPTA may be waived if certain conditions are met. Such as, buyer certifying that they intend to use the subject property as their residence for more than 50% of the days the property is used by any person during the first 24 months after the sale.

FIRPTA substantial presence test allows for the withhold to be waived. If the seller is physically present in the United States for at least 183 days in the previous calendar year, they qualify as a resident alien and are exempt. The seller will be required to provide a CPA letter affirming the substantial presence test along with the last three years tax returns cover letters. The buyer must also sign an indemnification acknowledging and accepting the process.

The only other way to avoid FIRPTA is via a withholding certificate. Allowing the seller to appeal to the IRS for a lower withhold amount. It may be waived completely only if FIRPTA withholding exceeds the maximum tax liability realized on the sale of the real property, such as if the sale of the property resulted in a loss to the non-resident individual.

The application for withholding certificate is done using the IRS Forms 8288 (Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests).

Several attachments and certifications need to be included with the form 8288, and the certificate must be filed before or on the date of the closing, so it's imperative to start preparing the required information way ahead of the planned date to close the deal. The IRS has 120 days to authorize a lower withholding. FIRPTA withholding will be held in Escrow if the transaction closes while awaiting the IRS decision.