

Alexandria
Old Town
703-739-0100

Arlington
703-237-1100

Burke
703-913-8080

Fair Oaks
703-279-1500

Fredericksburg
540-373-1300

Front Royal
540-878-4210

Gainesville
703-468-2020

Kingstowne
703-417-5000

Lake Ridge
703-492-7900

Leesburg
703-840-2000

Manassas
703-393-0333

McLean
703-734-8900

Reston
703-318-9333

Stafford
540-658-0992

Vienna
703-242-2860

Warrenton
540-349-7990



Understanding FIRPTA – Foreign Investment in Real Property Tax Act

**The material provided in this article is for informational purposes only and is not intended to take the place of legal or financial advice. MBH Settlement Group, LC, strongly encourages you to contact an attorney or a certified public accountant that specializes in FIRPTA for your particular matter.*

About FIRPTA

The Foreign Investment in Real Property Tax Act (FIRPTA) of 1980, was enacted into law to encourage tax compliance. FIRPTA is designed to ensure foreign sellers pay income tax on the gains of a real estate sale. The law is structured so that the burden of collecting and paying the taxes on the sale lies with the buyer. The buyer must withhold the tax amount from the money given to the seller.

For the purposes of this law, a foreign person includes but is not limited to non-resident aliens; foreign corporations; foreign partnerships; foreign trusts; or foreign estates. A United States citizen, someone who can pass a complicated substantial presence test proving they are physically present in the U.S. 183 days of the year, or a Lawful Permanent Resident (someone who has a Green Card) selling a property are not subject to FIRPTA regulations.

Responsibilities of a Real Estate Professional in regards to FIRPTA

A real estate transaction requiring FIRPTA is complex and should be handled very carefully. There are different responsibilities for the seller's agent as opposed to the buyer's agent in these transactions.

As the seller's agent you should make reasonable inquires of the seller to determine if they are classified as foreign. The status of the seller needs to be documented in paragraph 24 of the Exclusive Agency Listing Agreement. Found on page nine, the question asks, "Seller is a U.S. citizen or a Lawful Permanent Resident as defined by the Immigration and Nationality Act (Green Card holder). Yes or No."

As the seller's agent you should advise your client to inquire with a tax professional if they should apply to the IRS for a withholding certificate. Common reasons for a seller to apply for a withholding certificate include being able to prove the tax liability is less than the 10% or 15% of the purchase price, or if he is selling the property at a loss and will not owe income taxes.

A withholding certificate, if granted, can reduce the amount of withholding required at settlement from the seller. The required documentation can be robust so it is advisable to start this process as soon as possible. Further, once a withholding certificate is applied for it can take up to 90 days for the IRS to grant the certificate.

ONCE A WITHHOLDING CERTIFICATE IS APPLIED FOR IT CAN TAKE UP TO 90 DAYS FOR THE IRS TO GRANT THE CERTIFICATE

As the buyer's agent, it is of utmost importance to assist your buyer in determining if the seller is foreign. The complexity and risk to the buyer inherent in a FIRPTA transaction, needs to be adequately explained to the buyers prior to ratification of a contract. The same question found in the Exclusive Agency Listing Agreement regarding FIRPTA is also found on page 8 in paragraph 14 of the Residential Sales Contract (Virginia).

Typically, the settlement agent is the party who remits the payment to the IRS but it is the buyer who assumes the legal responsibility. Until the tax is paid, the government has a security interest in the property.

Any agent involved in a transaction with knowledge that the seller falsely presented their foreign status can be held liable for the amount of the withholding and the penalties and fees incurred.

Withholding Exceptions

A buyer will typically qualify for an exception from FIRPTA withholding if the sales price of the property is less than \$300K AND he intends to use the property as his primary residence for at least 24 months. This means he must reside in the home 50% of each of the next two years.

Withholding Amounts

The rate used to determine the withholding amount that needs to be remitted varies depending on several factors:

- 0% (no withholding) – property price is less than \$300K AND the buyer will use it as a primary residence for 50% of each of the first two years of ownership
- 10% of the sales price- property price is more than \$300K but less than \$1Million AND the buyer will use it as a primary residence for 50% of each of the first two years of ownership
- 15% of the sales price- property price is more than \$1Million or any sales price where the buyer is not acquiring the property as a primary residence

It is highly recommended that you have the input of an accountant who specializes in FIRPTA transactions before the sale takes place. The law is complex and there is substantial room for error. A mistake in a FIRPTA sale can be costly to the buyer and will potentially involve legal action for the agents involved.

See you at the settlement table!