

## FIRPTA Checklist

FIRPTA tax must be withheld when seller is foreign UNLESS one of the following applies:

- Seller is a domestic corporation, partnership, or trust. The citizenship of the stockholders, partners and beneficiaries is irrelevant. FIRPTA tax may be due, but it is paid by the seller after closing; no duty to withhold at closing.
- The contract sales price is for \$300,000 or less and purchaser has a present intention to use the property as a residence at least 50% of the time it used by anyone for the first two, 12-month periods following the sale.
- Seller has received a qualifying statement from the IRS that no tax is due.
- Seller furnishes a non-foreign affidavit.
  - FIRPTA does not require a seller to prove he is “not a non-resident alien”; the purchaser (and settlement agent) may rely on the affidavit unless they know it to be false.
  - Someone is “not a non-resident alien” if he or she is a resident alien—someone who either has a green card or passes the substantial presence test. Merely having an SSN or visa is not determinative because a non-resident alien can have an SSN or visa.
  - Any domestic LLC and any foreign corporation can elect to be treated as a domestic corporation. Such a seller may sign the non-foreign affidavit; attach acknowledgment from the IRS that it has made this election. Citizenship of the members or stockholders is irrelevant.
  - If seller is a single-member LLC and has not made the election to be treated as a domestic corporation, disregard the entity and look to the citizenship of the single member, which may be an individual or another entity.
  - If seller is a multi-member LLC and has not made the election to be treated as a domestic corporation, it is considered a domestic partnership and may sign the nonforeign affidavit. Citizenship of the partners is irrelevant.

Once affidavit is signed, settlement agent must either: (1) provide affidavit to purchaser (identifying seller’s SSN) or (2) receive seller’s affidavit as the “qualified substitute” and give to the purchaser an affidavit stating that the settlement agent has received the seller’s affidavit.

If FIRPTA tax is due, withhold 15% of the contract sales price. It is irrelevant if seller’s proceeds are zero or less than zero. The tax must be paid. A lesser amount may be withheld if any of the following applies:

- Collect 10% if ALL the following apply:
  - The transferee must use the property as a personal residence;
  - The amount realized does not exceed \$1,000,000; AND,
  - The \$300,000 exception does not apply.

- If there are two (2) or more sellers, only some of whom are foreign, apportion FIRPTA tax based on capital contribution. Husband and wife are considered 50/50 owners. Who gets the proceeds is irrelevant; capital contribution is determinative.

Remember the Special Rules (See Outline for Specifics):

- No withholding required when the purchaser is a governmental body (state or federal)
- Foreclosures are subject to FIRPTA tax based on the citizenship of the debtor. A lesser amount (alternative amount) may be withheld if special rules are followed.
- Deeds in lieu are subject to FIRPTA tax unless some special rules are followed.
- Gift transfers may be subject to FIRPTA tax. Do not allow sellers to avoid FIRPTA by having foreign seller gift property to non-foreign seller prior to closing.
- Short sales are subject to FIRPTA tax. The fact that there may be no seller proceeds is irrelevant. FIRPTA withholding is based on contract sales price.

If in doubt whether FIRPTA tax is due, request a qualifying statement (withholding certificate) from the IRS and let the IRS tell you whether FIRPTA tax is due.

- IRS must process request within 90 days.
- Request must be made either at or before closing by either the seller or the purchaser; but if by the seller, purchaser must be given notice.
- If IRS does not respond before closing, settlement agent may (on behalf of purchaser) hold FIRPTA tax in escrow until a qualifying statement is received.

If FIRPTA tax must be withheld, use forms 8288 and 8288-A, downloadable from: [www.irs.gov](http://www.irs.gov).  
*Read the instructions on the form(s).*

- Purchaser, not settlement agent, should be listed as the withholding agent.
- The instructions tell you what to do if the seller does not have an SSN.
- FIRPTA tax must be remitted to IRS by 20<sup>th</sup> day following the date of transfer (settlement date).



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