

IRM PROCEDURAL UPDATE

DATE: 02/16/2016

NUMBER: WI-21-0216-0334

SUBJECT: Change to Percentage of Tax Withheld on Property Dispositions Based on the PATH Act

AFFECTED IRM(s)/SUBSECTION(s): 21.8.5

CHANGE(s):

IRM 21.8.5.3 Revised paragraphs two and eight. Added paragraphs three and four based on section 324 of P.L. 114-113, the PATH Act.

1. The disposition/sale of a U.S. Real Property interest (USRPI) by a foreign person is subject to income tax withholding.
2. Generally, the tax on the total amount realized (the sales price) is required to be withheld and submitted to IRS with:
 - Form 8288, *U.S. Withholding Tax Return for Disposition by Foreign Persons of U.S. Real Property Interests*, and
 - Form 8288-A, *Statement of Withholding by Foreign Persons of U.S. Real Property Interests*.
3. For dispositions prior to February 17, 2016, the withholding tax generally is 10 percent of the amount realized.
4. Effective for dispositions after February 16, 2016, Public Law (PL) 114-113, the Protecting Americans from Tax Hikes (PATH) Act, generally increases the withholding tax to 15 percent of the amount realized.

NOTE: Reduced rate for certain sale of residence: The increased rate of withholding does not apply to the sale of a property for use by the buyer as a residence where the amount realized by the seller is \$1 million or less. The withholding rate for dispositions meeting this condition remains at 10 percent.

5. The amount required to be withheld for any disposition can be adjusted with an approved Withholding Certificate.
6. Form 8288-B, *Application for Withholding Certificate for Disposition by Foreign Persons of U.S. Real Property Interests*, is used to apply to the IRS for the reduction or elimination (by category of exemption or reduction) of withholding on a transfer made by a foreign seller.

NOTE: A formal letter of application may be accepted in lieu of Form 8288-B for all categories of exemption or reduction requests.

7. Form 8288-B, or formal letter, may be submitted by either:
 - The transferor (foreign seller)

- The transferee (buyer) of a USRPI.
 - Agent
8. The Internal Revenue Code treats an option to acquire a USRPI as a USRPI itself. Therefore, if a foreign person disposes of an option to acquire a USRPI, the transferee (buyer) of the option must deduct and withhold the appropriate percentage of the amount realized by the transferor (seller) upon the disposition. See paragraphs three and four above for the appropriate percentages. The transferee (buyer) must remit the withholding tax to the IRS on Form 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interest*, and Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*. Alternatively, the transferee (buyer) or transferor (seller) may request a withholding certificate on Form 8288-B, *Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests*, in instances where reduced withholding is appropriate. See Publication 515, *(Circular E) Employer's Tax Guide* for more details.
 9. Treasury Decision 9082 requires that all foreign transferors (sellers) of USRPI's provide their Taxpayer Identifying Number (TIN) on withholding tax returns, applications for withholding certificates, and other notices or elections under IRC § 897 and IRC § 1445. TINs are required so the IRS can identify foreign taxpayers, and more easily match applications, withholding tax returns, notices, and elections with the foreign transferor's (seller's) income tax returns.
 10. The IRS is also aware of transactions where a foreign corporation arranges a sale of its USRPI to a transferee (buyer) and quitclaims the USRPI to its foreign individual shareholder, so that the individual (instead of the corporation) sells the USRPI to the transferee (buyer) at a reduced capital gain rate (a 20 percent maximum rate). If the foreign corporation had directly sold the USRPI itself, it could be subject to a capital gain rate as high as 35 percent. The foreign corporation (and not the individual) is the taxable party in this transaction and must send Form 8288 and Form 8288-A to the IRS with a withholding tax equal to 35 percent of the gain in the USRPI, unless it qualifies for reduced withholding and submits Form 8288-B to the IRS. See Publication 515. It is important that all U.S. realtors, tax practitioners, attorneys, and real estate and title companies be alerted to this tax avoidance scheme.

CAUTION: Forward all quitclaim 8288-B applications with this tax avoidance scheme criteria to:

Internal Revenue Service
 Attn: Brent Roberson M/S 4160
 1973 Rulon White Boulevard
 Ogden, UT 84404

11. **Purpose of Withholding Certificates:** A withholding certificate, obtained prior to a transfer, notifies the transferee (buyer) and the withholding agent that either no withholding is required, or the tax can be withheld at a reduced rate.

- A withholding certificate that is obtained **after** the transfer of the property may authorize either an early refund, or a normal refund.
 - A withholding certificate authorizing a reduction to or an exemption from withholding, may be issued when the general rate exceeds the transferor's (seller's) maximum tax liability; or withholding of a reduced amount does not jeopardize collection of the tax; or
 - The transferor (seller) is exempt from U.S. tax on all gain realized on the transaction; or
 - **Notice of Non-Recognition** the transferor (seller) notifies the transferee (buyer) in writing that the correct percentage of withholding is not required by the transferee (buyer) on the USRPI because the *transferor (seller) is not recognizing* any gain or loss with respect to the transfer. See paragraphs three and four above for the correct percentage of withholding.
 - An agreement with the IRS that provides security for the payment of the tax liability is executed by either the transferee (buyer) or the transferor (seller).
 - A withholding certificate can be requested for an Installment Sale. See IRM 21.8.5.3.5 (8).
12. Agents (lawyers, real estate agents, etc.) of either the transferor (seller) or transferee (buyer) may sign the application for the exemption certificate under a power of attorney, and must certify under penalty of perjury that all representations are true and correct to the best of that person's knowledge and belief.
13. Agents are not generally liable for the withholding tax.

NOTE: Under Treasury Regulation 1.1445–4(e), an agent who fails to notify a transferee (buyer) of a false certification or statement received from the transferor (seller) shall be held liable for the tax that the recipient of the notice would have been required to withhold. However, the agent's liability is limited to the amount of compensation the agent receives from the transaction.

IRM 21.8.5.3.3 Added the Note and revisions to paragraph 1C based on section 324 of P.L. 114-113, the PATH Act.

1. Applicants for withholding certificates must include the category or the reason the request is being submitted.
 - a. **Category 1:** Applications for withholding certificates based on a claim that the transferor (seller) is entitled to nonrecognition treatment or is exempt from tax. The following are the additional requirements included in this category:
 - a brief description of the transfer,
 - a brief summary of the law and facts supporting the claim of nonrecognition or exemption,
 - evidence that the transferor (seller) has no unsatisfied withholding liability,

the Fair Market Value (FMV) or other "good faith" estimate of the property. No supporting evidence concerning the value of the property is required in the application.

- b. **Category 2:** Applications for withholding certificates based solely on a calculation of the transferor's (seller's) maximum tax liability. The following additional requirements must be included. The applicant must include a calculation of the maximum tax (MTAX) that may be imposed on the disposition, including the following information.

Additional Requirements for MTAX Calculation
1. The amount realized by the transferor (seller) with evidence confirming this amount (such as a copy of the signed contract).
2. The adjusted basis of the property with evidence confirming the basis claimed. EXAMPLE: Schedules of depreciation allowed for tax purposes during the period the property was held and/or settlement sheet when purchased.
3. Amounts to be recaptured with respect to accelerated depreciation, investment tax credit, or other items subject to recapture.
4. The maximum long term capital gain tax rate for individuals is 15 percent if the gain realized was on or after May 6, 2003 and before January 1, 2013. The maximum long term capital gain tax rate for individuals for gains realized on or after January 1, 2013 is 20 percent. The corporate maximum capital gain tax rate is 35 percent. However, the transferor (seller) may also submit a draft copy (DO NOT PROCESS the DRAFT COPY) of their income tax return showing the ESTIMATED MAXIMUM TAX LIABILITY (EMTAXL). The estimated taxes may differ from the 15, 20, or 35 percent calculation. If so, allow the taxpayer's Maximum Tax Liability (MTAXL). See Treasury Regulation 1.1445-6(c).
5. Tentative tax owed.
6. Amount of any increase or decrease of tax to which the transferor (seller) is subject, including any reduction to which the transferor (seller) is entitled, under a provision of a U.S. income tax treaty, as well as evidence supporting the adjustment claimed.

- c. **Category 3:** Applications for withholding certificates under the special installment sales rules. Generally, the transferee (buyer) is required to fully satisfy the withholding obligations based on the amount realized. However, when the applicant supplies the computation, as described under Category 2, the gain under the installment method can result in reduced withholding. The following are the additional requirements to include in this category:

Additional Requirements for Installment Sales
1. An agreement, signed by the Transferee (Buyer) "under penalties of perjury" to withhold and pay the required tax.

2. Withhold and pay the appropriate percent of tax or such lesser amount, as determined by IRS, of any down payment, including any liabilities of the transferor (seller) assumed by the transferee (buyer).
3. Withhold the appropriate percent or such lesser amount of each subsequent payment.
4. Notify IRS prior to the disposition or encumbrance of the subject property and pay over, using Form 8288 and Form 8288-A, to the Service the amount remaining to be withheld.

NOTE: See IRM 21.8.5.3 for the appropriate percent of tax.

- d. **CATEGORIES 4, 5 OR 6** are not identified on Form 8288-B. Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*, instructs the taxpayer to include a statement containing the information pertinent to the specific category for which they qualify.
- e. **Category 4:** Application for withholding based on an agreement for the payment of tax. Include the following information to establish the transferor's (seller's) maximum tax liability, or the amount otherwise required to be withheld, a signed copy of the agreement proposed by the applicant, and a copy of the security instrument proposed by the applicant.
- f. **Category 5:** Applications for blanket withholding certificates. A statement to the effect that a blanket withholding certificate is in affect which excuses withholding with respect to multiple disposition of property interest by the transferor (seller) during a period of no more than 12 months.
- g. **Category 6:** Applications for withholding certificates based on any other basis. Information stated above for Category 4 must be included, along with a description of the nonconforming security, and a memorandum of law and facts establishing that the proposed security is valid and enforceable and adequately protects the government's interest.

NOTE: If the criteria for Category 4, 5 or 6 are identified, forward the document to the Ogden Campus, using Form 3210, to:

Internal Revenue Service
 Attn: Brent Roberson M/S 4160
 1973 N. Rulon White Boulevard
 Ogden, UT 84404