

LB&I Transaction Unit Knowledge Base – International

Library Level	Number	Title
Shelf		Individual Inbound
Book	15	Withholding (Individual Inbound)
Chapter	15.2	Nonresident Alien FIRPTA Issues
Section		
Subsection		

Unit Name	Overview of Withholding under FIRPTA for Sales by Individuals	
Primary UIL Code	9442.02	Nonresident Alien FIRPTA Income and Withholding

Document Control Number (DCN)	WIT/T/15_02-01
Date of Last Update	09/19/17

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Issue and Transaction Overview

Overview of Withholding under FIRPTA for Sales by Individuals

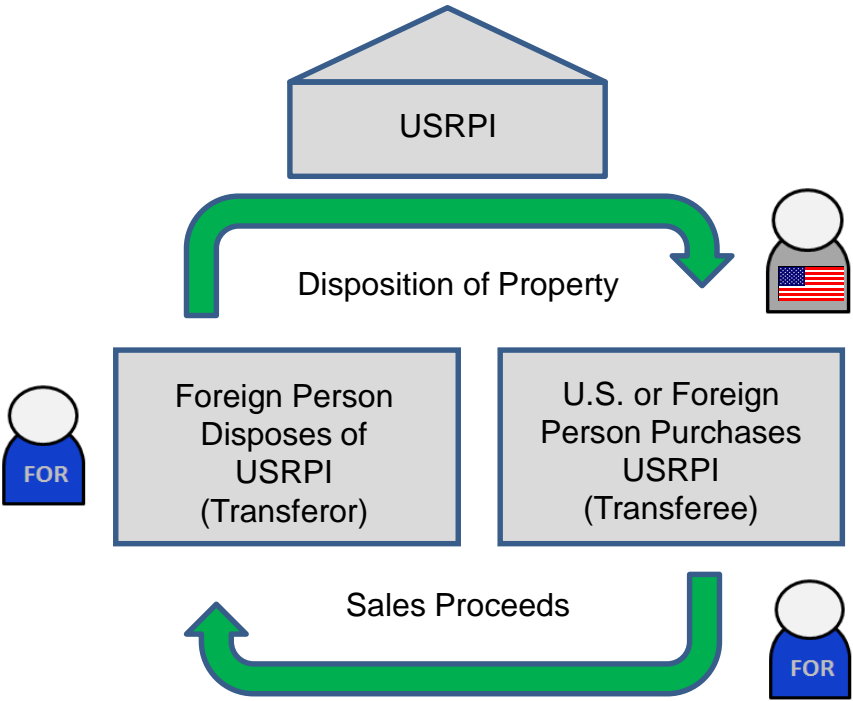
Foreign persons are liable for U.S. income tax on a sale or other taxable disposition of U.S. real property. U.S. income tax treaties generally allow for such U.S. taxation of a foreign person's taxable disposition of U.S. real property (such as the *2006 U.S. Model Income Tax Convention*, Article 6). In order to ensure payment of tax on such real property dispositions by foreign persons, a withholding tax is imposed on specified withholding agents involved in the transaction (for example, the purchaser). The general rules of this withholding mechanism are covered in this Practice Unit.

Under the *Foreign Investment in Real Property Tax Act of 1980* (FIRPTA), a foreign person who disposes of a U.S. real property interest is subject to the income tax withholding on the transaction. FIRPTA gives the United States the authority to tax foreign persons on the disposition of U.S. real property interests. For FIRPTA purposes, a disposition means a "disposition" for any purpose of the Internal Revenue Code (IRC). Therefore, dispositions include but are not limited to sales or exchanges, liquidations, redemptions, gifts, transfers, etc.

Persons, whether U.S. or foreign, purchasing U.S. real property interests from foreign persons, certain purchasers' agents, and settlement officers are generally required to withhold 10 percent of the amount realized on dispositions prior to February 17, 2016, and withhold 15 percent on dispositions after February 16, 2016. The general rate has been increased from 10 percent to 15 percent due to the *Protecting Americans from Tax Hikes Act of 2015* (the PATH Act) which was signed into law on December 18, 2015. In most transactions, the buyer or purchaser is the withholding agent. The buyer is required to determine if the seller is a foreign person or not. If the buyer fails to withhold when the seller is a foreign person, the buyer may be liable for the tax required to be withheld.

Transaction and Fact Pattern

Overview of Withholding under FIRPTA for Sales by Individuals

Diagram of Transaction	Facts
 <p>The diagram illustrates the transaction flow. At the top, a house icon represents the USRPI. A green arrow labeled 'Disposition of Property' points from the USRPI to a person icon with an American flag, representing the transferee. Below this, two boxes represent the parties: 'Foreign Person Disposes of USRPI (Transferor)' and 'U.S. or Foreign Person Purchases USRPI (Transferee)'. A green arrow labeled 'Sales Proceeds' points from the transferee back to the transferor. A person icon with 'FOR' is shown next to the transferor box, and another person icon with 'FOR' is shown next to the transferee box.</p>	<ul style="list-style-type: none"> ▪ A foreign person (transferor) disposes, transfers, sells, etc. a U.S. real property interest (USRPI) to either a U.S. person or a foreign person. ▪ The buyer (transferee) of the USRPI is generally required under FIRPTA to withhold an amount equal to 10 percent of the amount realized by the transferor on dispositions prior to February 17, 2016, and withhold 15 percent on dispositions after February 16, 2016. <p><u>Effect on Tax</u> If there is any gain on the sale of USRPI by a foreign person, the gain is considered effectively connected income. Therefore, the foreign person is required to file a Form 1040NR and report the gain which is taxable by the U.S. If the transferee does not withhold as required, then the U.S. is relying on the foreign person to file the Form 1040NR to report the gain and pay the tax due.</p>

Summary of Potential Issues

Overview of Withholding under FIRPTA for Sales by Individuals

<u>Issue 1</u>	Determine if the transferor is a foreign person.
<u>Issue 2</u>	Determine if the property disposed of is a U.S. real property interest.
<u>Issue 3</u>	Determine if the transferee properly withheld, filed appropriate forms and paid the tax withheld.
<u>Issue 4</u>	Determine if one of the exemptions to FIRPTA withholding applies.

All Issues, Step 1: Initial Factual Development

Overview of Withholding under FIRPTA for Sales by Individuals

In general under FIRPTA, any person, whether a U.S. or foreign person, who acquires a USRPI from the seller who is a foreign person must withhold a tax of 10 percent of the amount realized by the transferor on dispositions prior to February 17, 2016, and withhold 15 percent on dispositions after February 16, 2016.

Fact Element	Resources
<ul style="list-style-type: none"> ▪ Determine if a foreign person (transferor) disposes of an interest either in real property or an entity that owns real property located in the U.S. ▪ Determine whether the real property disposed of by the transferor is a USRPI. ▪ Determine whether the interest in the U.S. entity which owns U.S. real property is a U.S. real property holding corporation. ▪ Determine whether the transferee, who may be a U.S. person or a foreign person, is required to withhold on the amount realized and if so, at which withholding rate. ▪ Determine whether the transferee withheld amounts and submitted the amounts withheld within 20 days of the date of the disposition to the IRS by using Forms 8288 and 8288-A and provided a copy of Form 8288-A to the transferor. 	<ul style="list-style-type: none"> ▪ IRS.gov - <i>FIRPTA Withholding - Withholding of Tax on Dispositions of United States Real Property Interests</i> ▪ IRC 897 ▪ IRC 1445 ▪ Treas. Reg. 1.1445-1 ▪ IRC 897(c) ▪ IRM 4.61.12 - <i>Foreign Investment in Real Property Tax Act</i> ▪ IRM 2.3.59 - <i>Command Codes BMFOL and BMFOR</i> ▪ Form 8288 ▪ Form 8288-A

All Issues, Step 1: Initial Factual Development (cont'd)

Overview of Withholding under FIRPTA for Sales by Individuals

Fact Element	Resources
<ul style="list-style-type: none">▪ Determine status of transferor – foreign or U.S. person.▪ Identify property disposed of including contracts, attachments, exhibits, addendums, etc.▪ Determine steps of the transaction.▪ Identify any exemptions for required withholding.	

Issue 1, Step 2: Review Potential Issues

Overview of Withholding under FIRPTA for Sales by Individuals

Issue 1

Determine if the transferor is a foreign person.

Explanation of Issue	Resources
<p>The FIRPTA rules generally require a transferee to withhold on the amount realized when a transferor who is a nonresident alien or a foreign corporation (foreign person) disposes a U.S. real property interest unless there is an exemption. The first determination to be made is whether the transferor is a foreign person.</p>	<ul style="list-style-type: none"> ▪ IRC 897(a) ▪ IRC 1445(a)
<p>A foreign person is defined for FIRPTA purposes to mean any person other than a United States person. Additionally, a foreign person includes a foreign government.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.897-9T(c) ▪ IRC 1445(f)(3) ▪ Treas. Reg. 1.897-9T(e)
<p>A foreign person includes a nonresident alien which is defined as neither a U.S. citizen nor a resident of the U.S.</p>	<ul style="list-style-type: none"> ▪ IRC 7701(b)(1)(B)
<p>A United States person is defined in the IRC to be U.S. citizens, resident aliens, U.S. corporations, U.S. partnerships, U.S. estates and trusts. A resident alien is defined as 1) one who has lawful permanent resident status (green card holder), 2) meets the substantial presence test (183 day test), or 3) made a first year election to be taxed as U.S. resident. See IRC 7701(b)(4).</p>	<ul style="list-style-type: none"> ▪ IRC 7701(a)(30) ▪ IRC 7701(b)(1)(A) ▪ IRC 7701(b)(4)
<p>A United States person also includes a nonresident alien who makes an election to be treated as a resident of the United States under IRC 6013(g) or (h).</p>	<ul style="list-style-type: none"> ▪ IRC 6013

Issue 1, Step 3: Additional Factual Development

Overview of Withholding under FIRPTA for Sales by Individuals


Issue 1

Fact Element	Resources
<p>Transferor is a foreign person, or not a:</p> <ul style="list-style-type: none"> ▪ U.S. citizen ▪ Resident alien by meeting one of the following: <ul style="list-style-type: none"> - Lawful permanent resident (green card holder) - Substantial presence test - First year election - Election under IRC 6013(g) or (h) 	<ul style="list-style-type: none"> ▪ IRC 7701(b)(1)(A) ▪ IRC 7701(b)(1)(A)(i) ▪ Treas. Reg. 301.7701(b)-1(b) ▪ IRM 2.3.32 - <i>Command Code MFTRA</i> ▪ IRM 5.1.18.13 - <i>United States Passport Office</i> ▪ IRM 2.3.80 – <i>Command Code DDBKD</i> ▪ IRC 7701(b)(1)(A)(ii) ▪ IRC 7701(b)(3) ▪ Treas. Reg. 301.7701(b)-1(c) ▪ IRM 2.3.51 - <i>Command Code IMFOL</i> ▪ IRM 2.3.35 - <i>Command Code IRPTR</i>
<ul style="list-style-type: none"> ▪ Not a U.S. entity 	<ul style="list-style-type: none"> ▪ IRC 7701(b)(1)(A)(III) ▪ IRC 7701(b)(4) ▪ IRC 6013 ▪ IRC 7701(a)(30)(A)

Issue 1, Step 4: Develop Arguments

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 1](#)

Explanation of Adjustment	Resources
<p>The first fact to determine in the issue of whether FIRPTA withholding under IRC 1445 is required is to verify that the transferor is a foreign person. This is done by confirming the transferor, who is not a U.S. citizen, is also not a U.S. person. In most cases, this means the foreign citizen is not a resident alien.</p> <p>Therefore, the three tests should be applied to the facts of the transferor to confirm he/she is not a resident alien. These tests are:</p> <ol style="list-style-type: none">1) Lawful permanent resident (green card) test,2) Substantial presence (183 day) test, and3) The first year election test	<ul style="list-style-type: none">▪ IRC 7701(b)(1)(A)▪ IRC 7701(b)(3)▪ IRC 7701(b)(4)
 DECISION POINT: If the transferor is not a foreign person, FIRPTA does not apply and withholding under IRC 1445 is not required.	

Issue 2, Step 2: Review Potential Issues

Overview of Withholding under FIRPTA for Sales by Individuals

Issue 2

Determine if the property disposed of is a U.S. real property interest.

Explanation of Issue	Resources
<p>IRC 897(c) defines a U.S. real property interest as any interest in:</p> <ol style="list-style-type: none"> 1) Real property located in the United States or the U.S. Virgin Islands including: <ul style="list-style-type: none"> - Land and unsevered natural products of the land (crops, timber, mines, wells, etc.) - Improvements (buildings or other permanent structures or components of either) - Personal property (movable walls, furnishings, etc.) associated with use of the real property 2) A domestic corporation that is a U.S. real property holding corporation (USRPHC) is a U.S. corporation in which the fair market value of its USRPI equals or exceeds 50 percent of the fair market value of the USRPI plus interests in real property outside the U.S. plus any other assets used or held for use in the trade or business adjusting for all exceptions. 	<ul style="list-style-type: none"> ▪ IRC 897(c) ▪ Treas. Reg. 1.897-1 ▪ Treas. Reg. 1.897-1(b) ▪ Treas. Reg. 1.897-2(b) ▪ Treas. Reg. 1.897-2(d)
<p>Dispositions include but are not limited to:</p> <ul style="list-style-type: none"> ▪ Sales or exchanges ▪ Liquidation or redemption ▪ Like kind exchanges under IRC 1031 ▪ Involuntary conversions ▪ Gifts 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.897-1(g)

Issue 2, Step 3: Additional Factual Development

Overview of Withholding under FIRPTA for Sales by Individuals


[Issue 2](#)

Fact Element	Resources
<p>Verification of real property disposed of through internal and external databases including Accurant:</p> <ul style="list-style-type: none"> ▪ Review any Form 1099-S issued for the disposition by the transferor (Doc. Code 75) ▪ Review of Form 8288-A ▪ Review of Integrated Data Retrieval System (IDRS) command code Information Returns Processing Transcript Request – Payee Online (IRPTRO) (Doc. Code 41) ▪ Review of sales contract and attachments and HUD statement ▪ Review of title documents ▪ Review of court documents (deeds) ▪ Review internet public records 	<ul style="list-style-type: none"> ▪ IRM 2.3.35 - <i>Command Code IRPTR</i>
<p>Verification that interest in a domestic corporation is a USRPHC:</p> <ul style="list-style-type: none"> ▪ Review of internal information for domestic corporation (books, records, tax returns) ▪ Review of other public information (internet) ▪ Third party contact with domestic corporation 	<ul style="list-style-type: none"> ▪ IRM 2.3 - <i>IDRS Terminal Responses</i> ▪ IRM 4.11.57 - <i>Examining Officers Guide (EOG), Third Party Contacts</i>

Issue 2, Step 4: Develop Arguments

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 2](#)

Explanation of Adjustment	Resources
<p>Determining whether a nonresident alien disposes of a USRPI is a fact-intensive issue.</p> <p>First, there must be a disposition of property. Typically, taxpayers will identify sales of their property as dispositions on their tax returns but might not identify gifts, liquidations, redemptions and foreclosures as dispositions.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.897-1(g)
 DECISION POINT: If there was a disposition, FIRPTA related withholding under IRC 1445 may be required. If not, FIRPTA related withholding does not apply.	

Issue 3, Step 2: Review Potential Issues

Overview of Withholding under FIRPTA for Sales by Individuals

Issue 3

Determine if the transferee properly withheld, filed appropriate forms and paid the tax withheld.

Explanation of Issue	Resources
<p>IRC 1445 requires a transferee to withhold on the amount realized when a transferor who is a foreign person disposes, transfers, sells, etc. a USRPI unless there is an exemption.</p> <p>For dispositions of USRPI prior to February 17, 2016, a transferee is generally required to withhold 10 percent of the amount realized.</p> <p>For dispositions of a USRPI after February 16, 2016, a transferee is generally required to withhold 15 percent of the amount realized, per the PATH Act change.</p> <p>An exception to the 15 percent withholding rate for dispositions of USRPI after February 16, 2016, is when the amount realized is in excess of \$300,000 but does not exceed \$1,000,000 and the transferee is going to use the USRPI as a personal residence. Then the rate is 10 percent.</p>	<ul style="list-style-type: none">▪ IRC 1445▪ Treas. Reg. 1.1445-1 ▪ Treas. Reg. 1.1445-1(h) ▪ IRC 1445(c)(4)▪ IRC 1445(b)(5)

Issue 3, Step 2: Review Potential Issues (cont'd)

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 3](#)

Explanation of Issue	Resources
<p>A transferee is required to report and pay the amount withheld within 20 days of the date of the disposition by completing and filing a Form 8288 with the IRS. Attached to the Form 8288 is the Form 8288-A.</p> <p>A transferee sends copies A and B of the Form 8288-A to the IRS with Form 8288 and keeps copy C. The IRS stamps copy B of the Form 8288-A, if it is complete, and sends it to transferor.</p>	<ul style="list-style-type: none">▪ IRC 1445▪ Treas. Reg. 1.1445-1 ▪ Treas. Reg. 1.1445-1(d)(1)

Issue 3, Step 3: Additional Factual Development

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 3](#)

Fact Element	Resources
<p>Verification of amount realized on sale:</p> <ul style="list-style-type: none"> ▪ Review Form 1099-S ▪ Review IDRS command code IRPTRO – Doc. Code 75 ▪ Review public records ▪ Review sales contract to ensure all assets noted ▪ Verify any additions to basis of the property disposed of 	<ul style="list-style-type: none"> ▪ IRM 2.3.35 - <i>Command Code IRPTR</i> ▪ Accurint
<p>Verification of withholding:</p> <ul style="list-style-type: none"> ▪ Review IDRS command code Information Returns Processing Transcript Request – Selected Documents Payer Summary (IRPTRI) of transferee for Form 8288 (MFT 17) ▪ Review Form 8288 and Form 8288-A filed by transferee 	<ul style="list-style-type: none"> ▪ IRM 2.3.35 - <i>Command Code IRPTR</i> ▪ IRM 21.8.2.11 - <i>Form 8288 and Form 8288-A</i> ▪ CCA 201028040 - IRC 1445
<p>Verification of filing by transferee:</p> <ul style="list-style-type: none"> ▪ Review IDRS command code BMFOL “T” and “R” for Form 8288 (MFT 17) filed by transferee ▪ Review IDRS command code IRPTRO of transferor for Form 8288-A (Doc. Code 41) 	<ul style="list-style-type: none"> ▪ IRM 2.3.59 – <i>Command Code BMFOL and BMFOR</i> ▪ IRM 2.3.35 - <i>Command Code IRPTR</i>

Issue 3, Step 4: Develop Arguments

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 3](#)

Explanation of Adjustment	Resources
<p>If it is determined that the transferee did withhold under IRC 1445, it is imperative that the amount realized on the sale of the USRPI is verified. This is to ensure that the correct amount was withheld by the transferee. Review Forms 8288 and 8288-A to ensure correctness, timeliness and completeness and determine the amount withheld was paid by the transferee within 20 days of the date of the transaction.</p> <p>If the transferee did not withhold, file Forms 8288 and 8288-A and pay the required tax to the IRS, the transferee should be pursued for the appropriate amount which should have been withheld. Transferee may request relief from penalties.</p>	<ul style="list-style-type: none">▪ IRS.gov - <i>Reporting and Paying Tax on U.S. Real Property Interests</i>▪ IRS.gov – <i>FIRPTA Withholding - Withholding of Tax on Dispositions of United States Real Property Interests</i>▪ IRS.gov - <i>ITIN Guidance for Foreign Property Buyers/Sellers</i>▪ Rev. Proc. 2008-27 – Penalty Relief

Issue 4, Step 2: Review Potential Issues

Overview of Withholding under FIRPTA for Sales by Individuals

Issue 4

Determine if one of the exemptions to FIRPTA withholding applies.

Explanation of Issue	Resources
<p>IRC 1445 provides that a transferee is not required to withhold under IRC 1445(a) if the transaction meets one of the following exemptions:</p> <ul style="list-style-type: none">▪ Transferor furnishes nonforeign affidavit▪ Non-publicly traded domestic corporation furnishes affidavit▪ Transferee receives qualifying statement from IRS▪ Amount realized does not exceed \$300,000 on new residence of transferee▪ USRPHC Stock sold is regularly traded on established markets▪ Applicable wash sales transactions▪ Transferor furnishes nonforeign affidavit to qualified substitute who furnishes it to transferee▪ Exceptions for when affidavits are furnished	<ul style="list-style-type: none">▪ IRC 1445(b) ▪ Treas. Reg. 1.1445-2▪ Treas. Reg. 1.1445-3▪ IRC 1445(b)(5)

Issue 4, Step 3: Additional Factual Development

Overview of Withholding under FIRPTA for Sales by Individuals


Issue 4

Fact Element	Resources
<ul style="list-style-type: none"> ▪ Transferor furnishes nonforeign affidavit <ul style="list-style-type: none"> – Exception – transferee knows it to be false ▪ Nonpublicly traded U.S. corporation furnishes affidavit <ul style="list-style-type: none"> – Exception – transferee knows it to be false ▪ Transferor furnishes nonforeign affidavit to qualified substitute who furnishes it to transferee <ul style="list-style-type: none"> – Exception – transferee knows it to be false 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1445-2(b)(2) ▪ Treas. Reg. 1.1445-2(b)(4)(iii) ▪ Treas. Reg. 1.1445-2(c)(3) ▪ Treas. Reg. 1.1445-2(c)(3)(ii) ▪ Treas. Reg. 1.1445-2(c)(3) ▪ Treas. Reg. 1-1445-2(b)(4)(iii)
<ul style="list-style-type: none"> ▪ Transferee receives qualifying statement from IRS ▪ Amount realized from disposition does not exceed \$300,000 on new residence of transferee ▪ Stock sold is regularly traded on established markets ▪ Applicable wash sales transactions 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.1445-3(a) ▪ Treas. Reg. 1.1445-2(d) ▪ IRC 1445(b)(5) ▪ Treas. Reg. 1.1445-2(c)(2) ▪ IRC 1445(b)(8) ▪ IRC 897(h)(5)

Issue 4, Step 4: Develop Arguments

Overview of Withholding under FIRPTA for Sales by Individuals

[Issue 4](#)

Explanation of Adjustment	Resources
<p>Although a transferor, who appears to be a foreign person, disposes of a USRPI, there are situations where the transferee is exempted from the required withholding under IRC 1445.</p>	<ul style="list-style-type: none">▪ IRS.gov - Exceptions from FIRPTA Withholding▪ Treas. Reg. 1.1445-2(b) thru (d)▪ Treas. Reg. 1.1445-3(a)
<p> DECISION POINT: In these situations, when either claimed by the transferee or initiated by the IRS, verification and confirmation is required to ensure either the transferee was correct in applying one of the exemptions or the IRS was correct in determining one of the exemptions was allowable.</p>	

Index of Referenced Resources

Overview of Withholding under FIRPTA for Sales by Individuals

IRC 897

IRC 1031

IRC 1445

IRC 6013

IRC 7701

Treas. Reg. 1.897-1

Treas. Reg. 1.897-2

Treas. Reg. 1.897-9T(c)

Treas. Reg. 1.1445-1

Treas. Reg. 1.1445-2

Treas. Reg. 1.1445-3

Treas. Reg. 301.7701(b)-1

Rev. Proc. 2008-27 - Penalty Relief

CCA 201028040 – IRC 1445

Index of Referenced Resources (cont'd)

Overview of Withholding under FIRPTA for Sales by Individuals

IRM 2.3 - IDRS Terminal Responses

IRM 4.11.57 - Examining Officers Guide (EOG), Third Party Contacts

IRM 4.61.12 - Foreign Investment in Real Property Tax Act

IRM 5.1.18.13 - United States Passport Office

IRM 21.8.2.11 - Form 8288 and Form 8288-A

IRS.gov - Exceptions from FIRPTA Withholding

IRS.gov - FIRPTA Withholding - Withholding of Tax on Dispositions of United States Real Property Interests

IRS.gov - ITIN Guidance for Foreign Property Buyers/Sellers

IRS.gov - Reporting and Paying Tax on U.S. Real Property Interests

Foreign Investment in Real Property Tax Act (FIRPTA) of 1980

Form 8288

Form 8288-A

Protecting Americans from Tax Hikes Act of 2015

Training and Additional Resources

Overview of Withholding under FIRPTA for Sales by Individuals

Type of Resource	Descriptions
Saba Meeting Sessions	<ul style="list-style-type: none">▪ IIC Withholding – 2012 Centra▪ IIC Treaties and Jurisdiction to Tax – 2012 Centra
Reference Materials – Treaties	<ul style="list-style-type: none">▪ IRS.gov – International Tax Topics (FIRPTA)

Glossary of Terms and Acronyms

Term/Acronym	Definition
FIRPTA	Foreign Investment in Real Property Tax Act of 1980
Foreign Person	Any person other than a United States person
IDRS	Integrated Data Retrieval System
IRPTRI	Information Returns Processing Transcript Request – Selected Documents Payer Summary
IRPTRO	Information Returns Processing Transcript Request – Payee Online Transcript
ITIN	Individual Taxpayer Identification Number
Nonresident Alien	Neither a U.S. citizen nor a resident of the U.S.
PATH Act	Protecting Americans from Tax Hikes Act of 2015
Transferee	Purchaser or buyer of USRPI
Transferor	Seller of USRPI
United States Person	U.S. citizens, resident aliens, U.S. corporations, U.S. partnerships, U.S. estates and trusts; includes a foreign person who makes an election to be treated as a resident of the U.S. under IRC 6013(g) or (h)
USRPI	U.S. real property interest
USRPHC	U.S. real property holding corporation

Index of Related Practice Units

Associated UILs	Related Practice Unit	DCN
9424.04	Taxation on the Disposition of USRPI by Foreign Persons	RPW/C/08_04-01 (formerly RPW/CU/P_08.4_05(2016))
9442.02	Verifying Refund Request of IRC 1445 Withholding on Dispositions of U.S. Real Property Interests	WIT/P/15_02-02 (formerly WIT/9442.02_02(2016))