

FIRPTA and Other Issues Related to Foreign Sellers

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What is FIRPTA?

- FIRPTA is the acronym for the Foreign Investment in Real Property Tax Act of 1980, a federal law.
- The disposition (including sale) of a real property interest located in the United States (or the US Virgin Islands) by a “foreign person” is subject to FIRPTA income tax withholding.
- FIRPTA authorizes the United States to tax foreign persons on the sale of US real property interests.
- Buyers must deduct, withhold, and submit to the Internal Revenue Service a tax equal to 15 percent of the amount realized on the sale (unless the transaction is exempt).



Why does this matter to me?



- Foreign purchasers of property in the United States have escalated dramatically over the past few years.
- Many sellers and buyers do not have a clue about this tax law.
- Real estate agents are expected to be the experts when it comes to real property transactions.
- There are provisions in the standard real estate purchase contract (“REPC”) and the standard Seller’s Property Condition Disclosure form that address FIRPTA and require corresponding disclosure.

FIRPTA Terminology

- “FIRPTA” – Foreign Investment in Real Property Tax Act of 1980
- “Foreign Person” – Generally, a nonresident alien individual (does not include a resident alien individual holding a valid green card), foreign corporation that has not elected to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate
- “Transferor” – Seller of the property
- “Transferee” – Buyer of the property and also the “withholding agent”
- “Amount” – Sum of (1) cash paid or to be paid; (2) the fair market value of other property transferred; and (3) the amount of any liability assumed by the buyer (loan assumption) to which the property is subject

FIRPTA – The General Rules

- In the case of any disposition of a United States real property interest by a foreign person, the transferee shall be required to deduct and withhold a tax equal to 15 percent of the amount realized on the disposition.
- This tax is typically withheld from the seller's proceeds at the time of the closing.
- Form 8288 (Withholding Tax Form) is completed by the buyer.
- Form 8288-A (Statement of Withholding) is completed by each seller based on the percentage of ownership interest.
- If the property was transferred jointly by U.S. citizens or residents and foreign persons, the amount realized is allocated between the sellers based on the ownership interest of each.
- Form 8288 and Form 8288-A are submitted with the withheld funds to the IRS within 20 days of closing.



FIRPTA – The General Rules

- If the buyer fails to withhold the tax as required, the buyer may be liable for the tax owed by the seller, plus interest, and a penalty up to \$10,000.
- If authorized by the IRS pending the determination of the applicable tax, the withheld tax may be retained beyond the 20-day period until required to be paid.



FIRPTA – Exemptions

The buyer is exempt from withholding the tax if:

- The seller provides an affidavit of non-foreign status (usually prepared by the title company closing the transaction), assuming the buyer does not know or have notice that the affidavit is false.
- The seller receives a withholding certificate from the IRS specifying either an amount agreed upon or that the seller is exempt from any tax.
- The property will be used by the buyer as the buyer's residence, and the amount realized from the sale does not exceed \$300,000.



REPC Section 7(k) - FIRPTA and Seller's Property Condition Disclosure

- Under these provisions, the seller discloses, warrants, and represents to the buyer whether the seller is a foreign person (check “is” or “is not” box on the Seller's Property Condition Disclosure).
- If the seller is a foreign person, the buyer is required to withhold the FIRPTA tax at the closing and remit the tax to the IRS (subject to exemptions).
- This is very significant and not fully understood by most buyers.



FIRPTA – The Role of the Title Company

- At the closing, the seller should provide an affidavit of non-foreign status.
- The affidavit is usually prepared by the title company closing the transaction.
- If the seller is a foreign person, the 15 percent tax is withheld from the seller's proceeds at the time of the closing.
- Form 8288 (Withholding Tax Form) is completed by the buyer.
- Form 8288-A (Statement of Withholding) is completed by each seller.
- Form 8288 and Form 8288-A are submitted with the withheld funds to the IRS within 20 days of closing.



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The Sad But True FIRPTA Withholding Story

- Split closing situation
- Seller was a foreign seller and disclosed that to the buyers
- Buyers had no clue about FIRPTA
- No exemption applied
- Title company closing buyers had no intention whatsoever of assisting with FIRPTA requirements
- Escrow officer's approach: "It's a stupid law to require this of a buyer. We are just going to have the seller and buyer sign our form to avoid any possible liability."



WAIVER OF SETTLEMENT AGENT RESPONSIBILITY

Date: [REDACTED]
File No: [REDACTED]
Settlement Agent: [REDACTED]
Seller: [REDACTED]
Purchaser: [REDACTED]
Property: [REDACTED]

To: Escrow Holder

Escrow Holder is released from and shall have no liability, obligation or responsibility with respect to, (a) withholding of funds pursuant to Section 1445 of the Internal Revenue Code 1986 as amended, (b) advising the parties as to the requirements of such Section or (c) determining whether the transferor is a foreign person under such Section, acting as the Qualified Substitute or otherwise making any inquiry concerning compliance with such Section for any party to the transaction.

PURCHASER(S):

SELLER (s)

[REDACTED]

[REDACTED]

X _____
[REDACTED]

REPC Section 8 - Buyer Due Diligence

- The buyer has the right to review and approve of ***the contents of the Seller Disclosures***, and any other tests, evaluations and verifications of the property desired by the buyer, such as: “the physical condition of the property; the existence of any hazardous substances, environmental issues or geologic conditions; the square footage or acreage of the land and/or improvements; the condition of the roof, walls, and foundation; the condition of the plumbing, electrical, mechanical, heating and air conditioning systems and fixtures; the condition of all appliances; the costs and availability of homeowners’ insurance and flood insurance, if applicable; water source, availability and quality; the location of property lines; regulatory use restrictions or violations; fees for services such as HOA dues, municipal services, and utility costs; convicted sex offenders residing in proximity to the property, ***and any other matters deemed material to buyer in making a decision to purchase the property.***”



REPC Section 8 - Buyer Due Diligence

- Under Section 8.1(b) the buyer has the right to cancel or resolve with the seller the buyer's objections to the due diligence items.
- The buyer must be careful to conduct the due diligence review and make a determination as to the acceptability of the due diligence items prior to the "Due Diligence Deadline" referenced in Section 24(b) of the REPC.
- Failure to do so may result in the loss of the buyer's earnest money deposit.



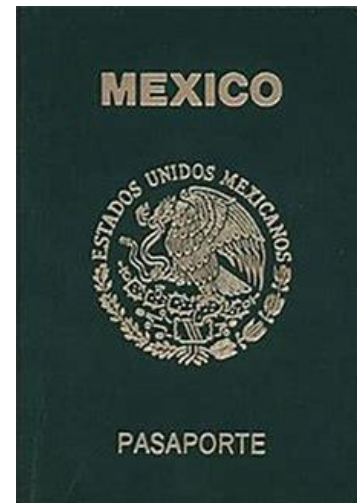
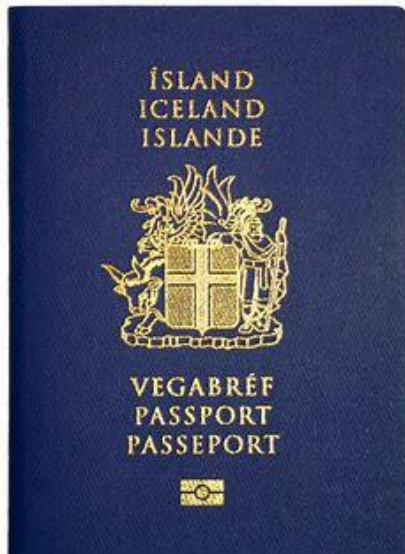
“Foreign Sellers” Signing Transaction Documents

- Under Utah law, a recorded document, such as a deed transferring real property, must have a valid notary acknowledgment attached to the signature.
- This requirement presents potential problem with “foreign” sellers.



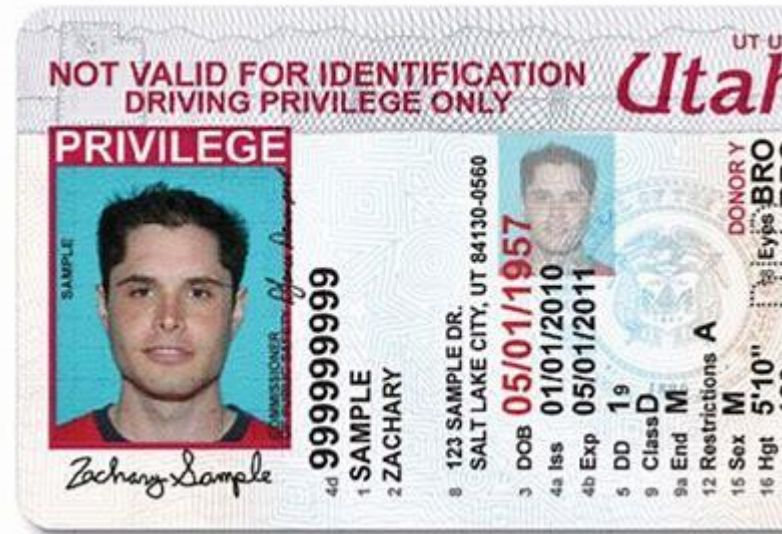
“Foreign Sellers” Signing Transaction Documents in Utah

- To establish “satisfactory evidence of identity,” a Utah notary acknowledging a document *inside* Utah must have:
 - Valid personal identification with the individual’s photograph, signature, and physical description that the U.S. government, any state within the U.S., or *a foreign government* issues; or
 - A valid passport that *any nation* issues



“Foreign Sellers” Signing Transaction Documents in Utah

- “Satisfactory evidence of identity” does not include a driving privilege card issued under Utah law.



“Foreign Sellers” Signing Transaction Documents Outside Utah

- Under Utah law, the following persons ***authorized under the laws and regulations of other governments*** may perform notarial acts ***outside Utah for use in Utah***:
 - A notary public authorized to perform notarial acts ***in the place where the act is performed***;
or
 - A judge, clerk, or deputy clerk of any court of record ***in the place there the notarial act is performed***; or
 - An officer of the foreign service of the U.S., a consular agent, or any other person authorized by regulation of the U.S. Department of State to perform notarial acts in the place where the act is performed; or
 - A commissioned officer in active service with, or any person authorized by regulation of, the U.S. Armed Forces to perform notarial acts if the notarial act is performed for any of his/her dependents, a U.S. merchant seaman, a member of the U.S. Armed Forces, or any person serving with or accompanying the U.S. Armed Forces; or
 - Any person authorized to perform notarial acts ***in the place where the act is performed***



Questions?

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Thanks!

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