



Fund Affiliate Assembly

Foreign Seller Ahead!

Proceed with Caution

Top FIRPTA Questions & Answers

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What is FIRPTA?

Laying the foundation



Foreign Investment in Real Property Tax Act

- 26 U.S.C. § 1445 – FIRPTA (2017)
- Passed in 1980 to ensure that foreign investors pay tax on their gains
- Presumes that all sellers are foreign
- FIRPTA is a withholding against potential taxes owed
- Requires Buyer to
 - Withhold funds from transaction, 15% of amount realized
 - Fill in forms 8288 & 8288-A
 - Remit to IRS within 20 days

FIRPTA

- That means that buyer must withhold & remit on every transaction unless there is an exception
- These are the ONLY exceptions, by law
 1. Not a foreign person
 2. Foreign person passes the substantial presence test
 3. Buyer, use & property qualify for \$300k exemption
 4. Seller has treaty benefits
 5. Contract or transfer price is \$0.00
 6. Governmental purchase
 7. Receive a withholding certification from IRS

8288

- Buyer is required to fill in forms
- Real estate transaction ALWAYS use part I
 - Part II is not for real estate transactions
- Buyer is withholding agent
- Buyer signs at bottom
- Settlement agent fills in very bottom if paid to fill out form

Form 8288
(Rev. April 2018)
Department of the Treasury
Internal Revenue Service

U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

OMB No. 1545-0902

Go to www.irs.gov/Form8288 for instructions and the latest information.

If this is an amended return, check here ☐

Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A.
Attach additional sheets if you need more space.

Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)

1 Name of buyer or other transferee responsible for withholding. See instructions. Identifying number

Street address, apt. or suite no., or rural route. Do not use a P.O. box.

City or town, province or state, country, and ZIP or foreign postal code Phone number (optional)

2 Description and location of property acquired

3 Date of transfer 4 Number of Forms 8288-A attached

5 Complete all items that apply. Enter dollar amounts on applicable lines.

a Amount subject to withholding at 15% b Amount subject to withholding at 10% c Withholding is at a reduced rate. See instructions

6 Total amount withheld

Part II To Be Completed by an Entity Subject to the Provisions of Section 1445(e)

1 Name of entity or fiduciary responsible for withholding. See instructions. Identifying number

Street address, apt. or suite no., or rural route. Do not use a P.O. box.

City or town, province or state, country, and ZIP or foreign postal code Phone number (optional)

2 Description of U.S. real property interest

3 Date of transfer 4 Number of Forms 8288-A attached

5 Complete all items that apply. Enter dollar amounts on applicable lines.

a Amount subject to withholding at 15% b Amount subject to withholding at 10% c Amount subject to withholding at 21% d Withholding is at a reduced rate. See instructions e Large trust election to withhold at distribution

6 Total amount withheld

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of withholding agent, partner, fiduciary, or corporate officer Title (if applicable) Date

Print/Type preparer's name Preparer's signature Date Check ☐ if self-employed PTIN

Paid Preparer Use Only

Firm's name Firm's EIN

Firm's address Phone no.

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Form 8288 (Rev. 4-2018)

8288-A

- Buyer is withholding agent
- If seller does not have an identification number (ITIN) leave blank
 - ITIN a number assigned to foreign person by IRS from W-7 application
- Copy A & B to IRS
- Copy C to buyer
- Extra copy of 8288 & 8288-A to seller pursuant to contract

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests OMB No. 1545-0902		
		2 Federal income tax withheld			
Withholding agent's federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	Copy A For Internal Revenue Service Center For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.	
Name of person subject to withholding		5 Description of property transferred			
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is: An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ►			
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)			

Form **8288-A** (Rev. 4-2018) Cat. No. 62261L **Attach Copies A and B to Form 8288** Department of the Treasury - Internal Revenue Service

What does the Fr/Bar contract say?

- No withholding required if
 - Seller provides proof of non-foreign status to buyer by
 - Written certification of non-foreign status
 - By contract, buyer is not required to accept any other exception
 - Other exceptions add risk to buyer

(i) No withholding is required under Section 1445 of the Code if the Seller is not a “foreign person”. Seller can provide proof of non-foreign status to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller’s name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds to the IRS.

Why this burden on buyer?



Why buyer?

- Buyer has the money
- IRS cannot tell you what to do with someone else's money
- Buyer will be liable if withholding is incorrect
 - Penalties & interest
- Think about your paycheck, example:
 - Buyer is like an employer – has money
 - Seller is like an employee – provided services
 - Settlement agent if like ADP – fills in forms, etc.

FIRPTA Tip 1

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1. Settlement agent is NOT withholding agent
 - Buyer is withholding agent
 - Buyer signs forms under penalty of perjury

So, what is my role in FIRPTA withholding?



Who do you represent? – Buyer

- No withholding if
 - Non-foreign seller signs a non-foreign certification, or
 - Foreign seller falls into one of categories where withholding is not required & buyer willing to accept
- Withholding
 - Fill out the forms
 - Have buyer sign forms
 - Withhold proper funds
 - Forms & withheld funds are remitted on time (20 days after closing)

Who do you represent? – Seller

- Provide notice of foreign status pursuant to contract
- Provide non-foreign certification
- May apply for a withholding certification
- Foreign seller
 - Encourage seller to apply for ITIN (Form W-7)
 - About 7 weeks to receive according to the IRS
 - Inform seller of requirement to file a tax return

Who do you represent? – Settlement Agent

- No one
 - Facilitate FIRPTA withholding
 - May fill out forms on behalf of buyer
 - Buyer to sign Form 8288
 - Remit funds a forms to IRS within 20 days of closing
- May charge extra for service, if provided for in non-representation letter
 - Make sure to fill in bottom of 8288, if there was a charge to buyer

FIRPTA Tip 2

2. May charge extra for filling in forms for buyer if, retainer letter or non-representation letter excluded FIRPTA from settlement fee



**Universal goal:
Not to withhold on
this transaction**



**Seller says no FIRPTA is required
because . . .**



Must withhold, by law unless ...

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1. Seller is not foreign

- US Citizen or
- Foreign seller
 - Lawful permanent resident of US - has a “green card”

2. Passes substantial presence test

3. \$300,000 exemption with buyer, use & property qualify

- Buyer or member of family to use at least 50% of time in use for first two – 12 mo. periods
- Not commercial, vacant, teardown
- Titled in person's name

Must withhold unless ...

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4. Treaty special notice requirements are needed

- Tres. Reg. § 1.1445-2 (d)(2)(iii) (2016)

5. Amount realized is zero (\$0.00)

6. US Governmental bodies acquiring US real property

- Tres. Reg. §1.1445-2 (2016)

7. Withholding certificate received with no withholding required

- Application to IRS for a reduced rate or zero withholding on current transaction

FIRPTA Tip 3

3. When sending out retainer or non-representation letter include a non-foreign certification for each seller

Non-Foreign Certification by Individual Transferor (Seller's FIRPTA Affidavit)



Transferor: _____
Transferee: _____
Property: _____
Closing Date: _____

Before me, the undersigned authority, personally appeared the person(s) named in paragraph 2(b) below who, after being duly sworn, stated as follows:

Non-Foreign Certification by Entity Transferor (Seller's FIRPTA Affidavit)



Transferor: _____
Transferee: _____
Property: _____
Closing Date: _____

Before me, the undersigned authority, personally appeared the person(s) named below who, after being duly sworn, stated as follows:

Transferor is selling that certain real property located in , which is more particularly described as follows:

What does a certification of non-foreign status need to include?



What does a certification of non-foreign status need to include?

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IRS Instructions for Form 8288:

Transferor not a foreign person.

Generally, no withholding is required if you receive a certification of nonforeign status from the transferor, signed under penalties of perjury, stating that the transferor is not a foreign person and containing the transferor's name, address, and identification number (social security number (SSN) or employer identification number (EIN)).

- No specific form
- Statement that transferor is not a foreign person
- Transferor's
 - Name
 - Home address (or office if an entity)
 - US identification number (SSN or EIN)
- Signed under penalty of perjury
 - Tres. Reg. Sec. 1.1445-2 (b)(2) (2016)

Certification of non-foreign status

- Receive a certification of non-foreign status
 - Must retain such certification for 6 years
 - Five tax years after tax year of transfer
 - Tres. Reg. Sec. 1.1445-2 (b)(3) (2016)
- May rely upon certification unless
 - Actual knowledge of falsehood
 - Foreign corporation with election under 26 U.S.C. § 897(1) certification with no acknowledgment attached

Certification of non-foreign status signed by

- Individual
 - By individual or
 - Qualified Substitute – gives a statement under penalties of perjury that certification of non-foreign status is in his/her possession
 - Person responsible for closing transaction
 - Transferee's agent
- Disregarded entity – may NOT sign
 - Owner of disregarded entity signs as self
 - For example single member LLC is Joe Smith – Joe Smith signs non-foreign certification as Joe Smith
- Tres. Reg. 1.1445-2 (b)(2)(C) (2016)

Certification of non-foreign status signed by

- Domestic corporation
 - Responsible officer
- Foreign corporation elected to be treated as domestic under 26 U.S.C. § 897 (i) (2018)
 - Responsible officer
 - Must attach acknowledgment of election received from IRS
 - Acknowledgment must state information required by Tres. Reg. § 1.897-3 has been determined to be complete
 - Certification without said acknowledgment CANNOT be relied upon

Certification of non-foreign status signed by

- Partnership (domestic only)
 - General partner
- Trust (domestic only)
 - Trustee
- Estate (domestic only)
 - Personal representative

FIRPTA Tip 4

4. Have foreign buyer retain non-foreign certification until disposition of real property
 - Will be needed if foreign seller to apply for a withholding certificate

**How far do I have to dig to make
sure the seller is not lying?**



How far do I have to dig to make sure the seller is not lying?

- If non-foreign certification is provided meeting requirements &
 - You have NOT received notice that certification is false or
 - You have NOT received notice not to rely on such a certification
- Then no withholding is required

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IRS Instructions for Form 8288:

If you receive a certification (or statement), the withholding tax cannot be collected from you unless you knew that the certification (or statement) was false or you received a notice from your agent, the transferor's agent, or the qualified substitute that it was false. The certification must be signed by the individual, a responsible officer of a corporation, a general partner of a partnership, or the trustee, executor, or fiduciary of a trust or estate.

How far do I have to dig to make sure the seller is not lying?

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- If other means (such as substantial presence test) were used to determine that transferor was not a foreign person &
 - Later it was determined that transferor was a foreign person, then
 - Withholding tax may be collected from buyer
 - See Instructions for Form 8288, Withholding Not Required, Transferor not a foreign person, pg. 3 (Rev. 5-2018)

You may also use other means to determine that the transferor is not a foreign person. But if you do, and it is later determined that the transferor is a foreign person, the withholding tax may be collected from you.

What is the “Substantial Presence Test?”



“Substantial Presence Test”

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- Can be used as an exemption to FIRPTA withholding
- Seller will be considered a US resident for tax purposes if seller meets substantial presence test for calendar year
 - Seller must be physically present in US at least:
 1. 31 days during the current year, &
 2. 183 days during 3-year period (current year & 2 years immediately before) counting:
 - All the days present in current year, &
 - 1/3 days present in first year prior, &
 - 1/6 days present in second prior
- Seller to sign a detailed affidavit for buyer's benefit

“Substantial Presence Test”

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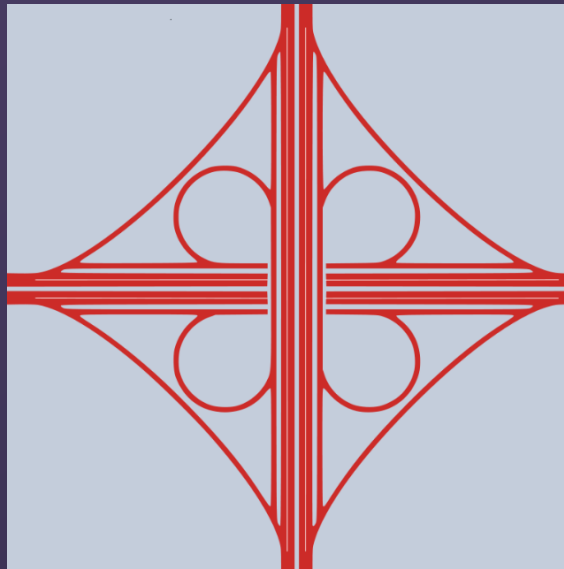
- **Example:**
- Seller was present in US on 120 days in each of 2020, 2019, and 2018
 - 2020 – 120
 - 2019 – 40 (1/3 of 120)
 - 2018 – 20 (1/6 of 120)
- Total 180 days, Seller is NOT considered a resident for 2020
- For additional details see “*IRS Substantial Presence Test*”

FIRPTA Tip 5

5. If foreign seller “lives in the US,” do not close in January as foreign seller will NOT qualify for substantial presence test
- Cannot use substantial presence test in January
 - Requires person to be in US 31 days of current year
 - Buyer not required to accept under Fr/Bar-5 contract



**Sale price is less than \$300,000, so
no withholding, correct?**



\$300,000 exemption qualifications

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- Contract is for \$300,000 or less
- Residence
 - Not commercial property
 - Not vacant land &
 - Not a teardown
- Individual(s) to take title
 - No trust
 - No companies
 - No LLC

\$300,000 exemption qualifications

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- Buyer or family member will reside in property
 - Family member 26 U.S.C. § 267 (c)(4)
 - Brothers, Sisters (half or whole)
 - Spouse
 - Ancestors &
 - Lineal descendants

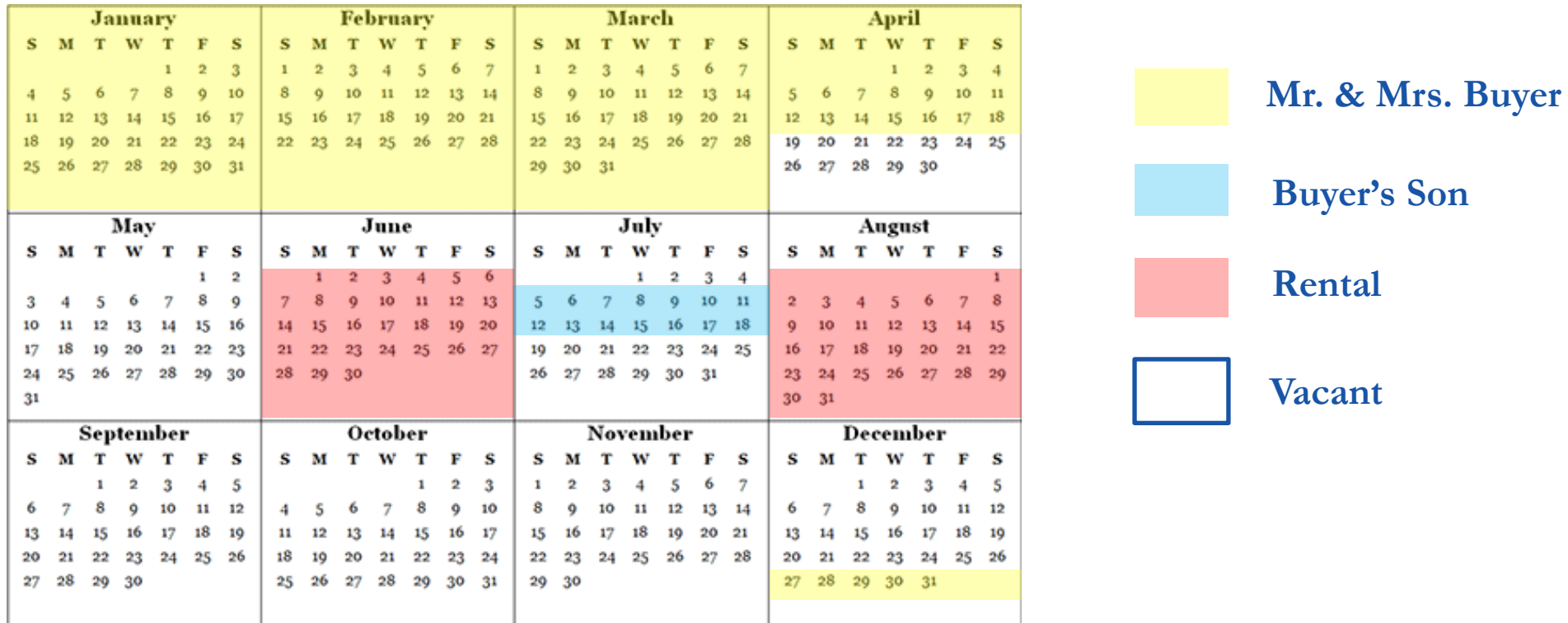
\$300,000 exemption qualifications

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- Buyer or family member will reside in property
 - Minimum 50% of time occupied
 - “The number of days that the property will be vacant is not taken into account in determining the number of days such property is used by any person.” 26 U.S.C. § 1.1445-2 (d) (2016)
- Buyer not required to accept under Fr/Bar-5 contract

\$300,000 exemption qualifications

- Minimum 50% of time occupied



\$300,000 exemption qualifications

- Buyer or family member will reside in property
 - First two 12 month periods post acquisition
 - 50% in first year of ownership
 - 50% in second year of ownership
- Buyer willing to sign affidavit of intent to comply
 - To protect settlement agent
- If buyer does not comply
 - Not foreseeable change in use – no problem
 - Foreseeable change in use – IRS will seek 15% plus penalties & interest

\$1,000,000 reduction in withholding

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- Sale price is over \$300,000 and up to & including \$1,000,000
- Meets all of qualifications of \$300,000 exemption
- May withhold 10%
 - 26 U.S.C. § 1445 (c)(4) (2016)
- Buyer not required to accept under Fr/Bar-5 contract

FIRPTA Tip 6

6. When using \$300,000 exemption (or \$1,000,000 reduced rate) verify that buyer, use & property qualify

How long for IRS to respond to a withholding reduction request?



IRS response time is linked to quality of application

- Seller applies because the tax burden will not be the 15% withholding amount
- Applications are detailed (IRS Form 8288-B)
 - Requires specific information & documentation
 - Similar to a tax return
- May begin gathering information upon listing of property
- May make application once contract is fully executed
- Response from 60 days to 2+ years!
 - Fully complete applications have an average turnaround time of 60 – 90 days regularly

IRS response time is linked to quality of application

- Application must be postmarked by closing date
 - If post marked after closing date
 - Will be denied
 - Withheld funds due 20 days after closing
- Application will place **seller on IRS radar**
- All foreign sellers are required to file a tax return

IRS response time is linked to quality of application

- Supporting documentation most often missed
 - Proof that no FIRPTA withholding was due at purchase
 - Retention of non-foreign certification upon purchase is necessary
- CPA or accountant can provide adjusted basis
 - Will need to submit proof of adjusted basis with application
- Application will take time to complete
 - Several weeks if seller is prepared
 - Longer if seller is unprepared

IRS response time is linked to quality of application

- IRS will send letter stating that withholding is
 - Reduced
 - Not needed
 - Request denied
- Withholding pursuant to letter due 20 days from date of letter
 - Letter are held in basement & batch-mailed
- Letter is sent to person(s) specified in application
 - Paragraph 5 (if 8288-B form used)

IRS response time is linked to quality of application

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- Example
 - Amount realized \$559,500.00
 - 15% = \$83,925.00
 - Amount due per letter
 - \$1,628.00
- Letter are batched-mailed

Internal Revenue Service
P.O. Box 409101
Ogden, UT 84409

Department of the Treasury

Date of the Withholding Certificate: 05/22/2019
Taxpayer Identification Number: [REDACTED]
File Number: [REDACTED]

Contact Person: CUSTOMER SERVICE
Contact Telephone Number: 267-941-1000
(Not a toll-free number)
Contact Hours: 06:00 am - 9:00 pm

Dear [REDACTED]

We received Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests. This Form 8288-B is for the disposition of the U.S. real property interest described as [REDACTED] MIAMI BEACH, FL. The transferor of the described property is [REDACTED] and the transferee is [REDACTED]

This letter is your approved withholding certificate and your legal notification that the required withholding amount for \$599,500.00 tax liability for the disposition of the U.S. real property interest described above would exceed their maximum tax liability. Therefore, we reduced the required withholding to \$1,628.00, which the transferee must remit to the IRS along with Form 8288 and 8288-A by the twentieth (20th) day following the date of this withholding certificate letter. We also determined that substitution of the reduced withholding amount would not jeopardize the collection of the tax imposed on any gain reported from the disposition of the U.S. real property interest.

As a reminder, this withholding certificate doesn't eliminate the requirement to file a U.S. income tax return to report this transaction.

If you have any questions, please call customer service. The telephone number and hours appear above. If the number is outside your local calling area, there will be a long-distance charge to you. Or, you may write to us at the address shown at the top of this letter.

FIRPTA Tip 7, 8 & 9

7. It may not always be a good idea for a seller to apply for a withhold certificate
 - Direct seller to a tax attorney for proper evaluation
8. To verify timely remittance of a withholding certificate request, mail application yourself (may use 8288-B)
9. Fill in your name and firm address in paragraph 5 of application to have the IRS response sent to your office

**Seller wants to avoid FIRPTA
withholding so ...**



Seller avoiding FIRPTA withholding

- Seller proposes to quit claim to a US (fill in the blank) prior to sale
 - Gifts do not have FIRPTA withholding requirements
 - Gifts may be recharacterized as income to recipient
 - Gift givers are subject to gift tax
- Seller is already in a binding contract & any quit claim would violate the contract
- Sounds like a type of tax evasion



What to do when getting push back from seller for FIRPTA?



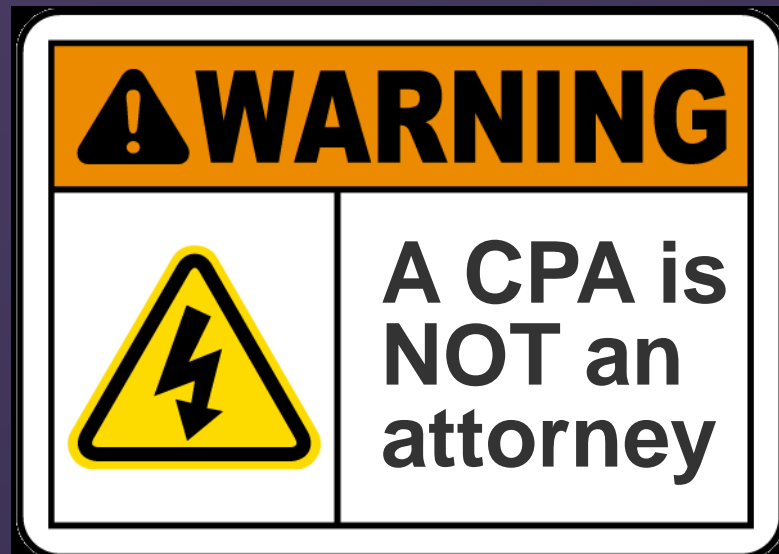
Push back from seller for FIRPTA

- Foreign sellers know about FIRPTA
- Rely on the contract
- FR/Bar requirements
 - Paragraph 10 (i)
 - “Seller shall inform [b]uyer in writing if [s]eller is a ‘foreign person’ as defined by ... (‘FIRPTA’).”
 - “Buyer and [s]eller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.”

Push back from seller for FIRPTA

- FR/Bar requirements
 - Paragraph 18 V
 - “FIRPTA . . . Requires the buyer of the real property to withhold up to 15% of the amount realized by the seller”
 - No withholding if seller provides non-foreign certification
 - Seller applies for a withholding certificate prior to closing and no withholding certificate received by closing, buyer’s option to:
 - (iii) (a) timely remit or
 - (iii) (b) place funds in escrow at seller’s expense & buyer choosing escrow agent to wait
 - (iv) Net proceeds insufficient to meet withholding requirements, seller to deliver additional collected funds

CPA says FIRPTA does not apply in this transaction. Can I rely on that?



CPA says FIRPTA does not apply

- Maybe
- Many CPAs are knowledgeable about FIRPTA & many are not
- CPAs are not attorneys & not allowed to read & interpret law including FIRPTA – UPL
- Result:
 - Have seller provide a non-foreign certification or
 - Withhold pursuant to FIRPTA

FIRPTA Tip 10

- Regardless of what **anyone says**, withhold for FIRPTA unless you have one or these seven items:
 1. Not a foreign person
 2. Foreign person passes the substantial presence test
 3. Buyer, use & property qualify for the \$300k exemption
 4. Seller has treaty benefits
 5. Contract or transfer price is \$0.00
 6. Governmental purchase
 7. Receive a withholding certification from IRS
- Fr/Bar contract requires buyer to only accept non-foreign certification & withholding certification

Do I need to Withhold Against a Florida LLC if it has an EIN?



Do I need to withhold against a FL LLC if it has an EIN?

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- Maybe – most difficult evaluation
 - Can this LLC give a non-foreign certification
- FIRPTA does not directly address LLCs



Definitions of Terms and Procedures Unique to FIRPTA

The following terms have special meanings with respect to U.S. Real Property Interest - FIRPTA.

- Dispositions
- Corporations
- Partnerships
- Trust and Estates
- U.S. Real Property Interest
- Foreign Person
- Transferor
- Transferee
- Amount Realized
- U.S. Real Property Holding Corporation (USRPHC)

Florida LLC

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Limited Liability Company (LLC)

A Limited Liability Company (LLC) is a business structure allowed by state statute. Each state may use different regulations, you should check with your state if you are interested in starting a Limited Liability Company.

Florida LLC

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Classifications

Depending on elections made by the LLC and the number of members, the IRS will treat an LLC as either a corporation, partnership, or as part of the LLC's owner's tax return (a "disregarded entity"). Specifically, a domestic LLC with at least two members is classified as a partnership for federal income tax purposes unless it files Form 8832 and affirmatively elects to be treated as a corporation. For income tax purposes, an LLC with only one member is treated as an entity disregarded as separate from its owner, unless it files Form 8832 and elects to be treated as a corporation. However, for purposes of employment tax and certain excise taxes, an LLC with only one member is still considered a separate entity.

Single Member LLC

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From Instructions for Form 8288:

- Generally Single Member LLC are disregarded entities
 - Thus disregarded
 - Single member may give a non-foreign certification or
 - Withhold
- If single member LLC has elected to be treated as a corporation buyer may need to retain a tax attorney

Transferor. For purposes of this withholding, this means any foreign person that disposes of a U.S. real property interest by sale, exchange, gift, or any other disposition. A disregarded entity cannot be the transferor for purposes of section 1445. Instead, the person considered as owning the assets of the disregarded entity for federal tax purposes is regarded as the transferor. A

disregarded entity for these purposes means an entity that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, a qualified real estate investment trust subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B).

Multiple Member LLC 2+



- Default to partnership (must be domestic)
- Obtain a non-foreign certification

If you receive a certification (or statement), the withholding tax cannot be collected from you unless you knew that the certification (or statement) was false or you received a notice from your agent, the transferor's agent, or the qualified substitute that it was false. The certification must be signed by the individual, a responsible officer of a corporation, a general partner of a partnership, or the trustee, executor, or fiduciary of a trust or estate.

From Instructions for Form 8288:

Section 1445(e)(1) Transactions

Partnerships. A domestic partnership that is not publicly traded must withhold tax under section 1446 on effectively connected income allocated to its foreign partners and must file Form 8804, and Form 8805. A publicly traded partnership or nominee generally must withhold tax under section 1446 on distributions to its foreign partners and must file Forms 1042 and 1042-S. Because a domestic partnership that disposes of a U.S. real property interest is required to withhold under section 1446, it is not required to withhold under section 1445(e)(1).

Joint Ownership of LLC by Spouses

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- Buyer may need assistance of tax attorney
- Is spouses' residence in a community property state?
 - May be a disregarded or
 - May be a partnership
 - Must be a domestic partnership

Joint Ownership of LLC by Spouse in Community Property States

Rev. Proc. 2002-69 addressed the issue of classification for an entity that is solely owned by husband and wife as community property under laws of a state, a foreign country or possession of the United States.

If there is a qualified entity owned by a husband and wife as community property owners, and they treat the entity as a:

- Disregarded entity for federal tax purposes, the Internal Revenue Service will accept the position that the entity is disregarded for federal tax purposes.
- Partnership for federal tax purposes, the Internal Revenue Service will accept the position that the entity is partnership for federal tax purposes.

A change in the reporting position will be treated for federal tax purposes as a conversion of the entity.

A business entity is a qualified entity if;

1. The business entity is wholly owned by a husband and wife as community property under the laws of a state, a foreign country, or possession of the United States;
2. No person other than one or both spouses would be considered an owner for federal tax purposes; and
3. The business entity is not treated as a corporation under IRC §310.7701-2.

Note: If an LLC is owned by husband and wife in a non-community property state, the LLC should file as a partnership. LLCs owned by a husband and wife are not eligible to be "qualified joint ventures" (which can elect not be treated as partnerships) because they are state law entities. For more information see [Election for Husband and Wife Unincorporated Businesses](#).

Reminders

- Whom do you represent?
- Buyer is withholding agent & responsible for withholding
- Settlement agent is a facilitator (think ADP & payroll)
- FR/Bar contract provisions:
 - Paragraph 10 (i) – “Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.”

FIRPTA Tip 10 & 11

10. You are not a tax attorney

11. It is buyer's responsibility to determine if FIRPTA withholding is required

- Direct buyer to a tax attorney if necessary

Only one of two sellers is foreign.

How is FIRPTA calculated?



Withholding for only one of two sellers

- Is the foreign person a resident alien (has a green card)?
 - If so, may give a non-foreign certification
- Does the foreign person “live” in the US?
 - If so, see if they qualify for the substantial presence test
 - Buyer not required to accept under Fr/Bar-5 contract

Withholding for only one of two sellers

- Divide amount realized by the transferor's capital contribution
 - Deed should have this information
 - Husband & wife are 50/50
 - In doubt – divide evenly

- From Instructions for the 8288



Joint transferors. If one or more foreign persons and one or more U.S. persons jointly transfer a U.S. real property interest, you must determine the amount subject to withholding in the following manner.

1. Allocate the amount realized from the transfer among the transferors based on their capital contribution to the property. For this purpose, a husband and wife are treated as having contributed 50% each.
2. Withhold on the total amount allocated to foreign transferors.
3. Credit the amount withheld among the foreign transferors as they mutually agree. The transferors must request that the withholding be credited as agreed upon by the 10th day after the date of transfer. If no agreement is reached, credit the withholding by evenly dividing it among the foreign transferors.

Withholding for only one of two sellers

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- Form 8288 amount realized will be amount associated with foreign persons

Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)	
1 Name of buyer or other transferee responsible for withholding. See instructions.	Identifying number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.	
City or town, province or state, country, and ZIP or foreign postal code	Phone number (optional)
2 Description and location of property acquired	
3 Date of transfer	
4 Number of Forms 8288-A attached	
5 Complete all items that apply. Enter dollar amounts on applicable lines.	6 Total amount withheld
a Amount subject to withholding at 15%	
b Amount subject to withholding at 10%	
c Withholding is at a reduced rate. See instructions	

**Seller will not make a profit, does
FIRPTA still apply?**



Seller has no profit or it is a short sale

- Yes
- FIRPTA is not a tax
- FIRPTA is withholding against potential tax owed
 - Like federal income tax withheld from a paycheck
- Seller to provide collected funds if proceeds do not cover FIRPTA withholding, pursuant to contract
- May apply for a withholding certificate
 - In a short sale should have IRS result prior to closing, because it takes a long time to process a short sale
- Seller will need to file a tax return

**Seller has a tax ID, is withholding
required?**



Seller has a tax ID, is withholding required?

65

- Yes, unless
 1. Seller to provide a non-foreign certification, Tres. Reg. § 1.1445-2(b)
 2. Seller meets the substantial presence test, IRS Substantial Presence Test
 3. Buyer, use & property qualify for \$300,000 exemption, Tres. Reg. § 1.1445-2 (d)
 4. Seller has treaty benefits, Tres. Reg. § 1.1445-2 (d)(2)
 5. Amount realized is \$0.00, Tres. Reg. § 1.1445-2 (d)(8) or
 6. Governmental purchase, Tres. Reg. § 1.1445-2 (d)(5)
 7. Seller has a withholding certificate letter from IRS, Tres. Reg. § 1.1445-2 (d)(7)

– OTHERWISE Withhold
- Fr/Bar contract requires buyer to only accept non-foreign certification & withholding certification

Seller has a tax ID, is withholding required?

- Seller says he/she has a (fill in the blank) visa
- Having a visa is not in itself an exception to FIRPTA
 - However if seller is “living” in US may qualify for substantial presence test
- Always
 - Obtain a non-foreign certification
 - Affidavit with specifics of meeting substantial presence test or
 - Withhold
- Fr/Bar contract requires buyer to only accept non-foreign certification & withholding certification

When is withholding due IRS?



When is withholding due to IRS?

- Must be postmarked no later than **20 days after closing**
- Include
 - Withheld funds
 - 8288 – signed by buyer
 - 8288-A
 - Copies A & B
 - One for each foreign seller

Send to:

Internal Revenue Service
Ogdon Service Center
PO Box 409101
Ogden, UT 84409

When is withholding due to IRS?

- On each item in package include:
 - Buyer name & SSN
 - Seller name & ITIN
 - Street address

Fund Loyal Law Firm
123 Main Street
Great City, FL

1025

DATE May 15, 2020

PAY TO THE ORDER OF United States Treasury \$75,000.00

Seventy-Five Thousand and ----- 00/100 DOLLARS

Betty Buyer – 000-00-0000
Sam Seller –
1445 Oak Road, Great City, FL

MEMO

1025

When is withholding due to IRS?

***Fund Loyal Law Firm
123 Main Street
Great City, FL***

May 15, 2020

Internal Revenue Service
Ogdon Service Center
PO Box 409101
Ogden, UT 84409

RE: FIRPTA withholding
Buyer: Betty Buyer – 000-00-0000
Seller: Sam Seller – No ITIN
Address: 1445 Oak Road, Great City, FL

Sir/Madam:

- Include
 - Cover letter stating
 - Inventory of contents
 - Request to
 - Stamp “received” enclosed copy of letter &
 - Return it in enclosed SASE
 - Copy of cover letter
 - SASE

FIRPTA Tip 12



12. When mailing FIRPTA withholding to IRS include a cover letter & make sure each document has

- Buyer's name and identification number
- Seller's name and identification number
- Street address of the transferred property
 - Including the check

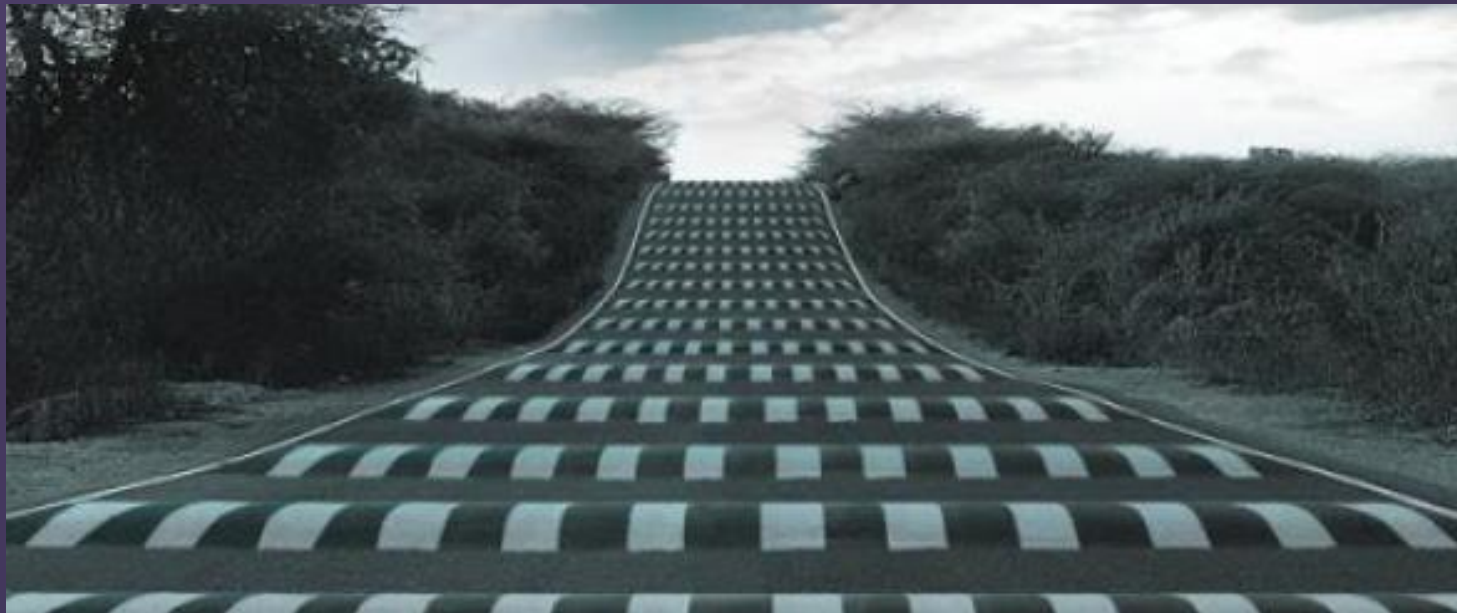
**Do I have to file a 1099-S if I send
in FIRPTA withholding?**



1099-S & FIRPTA withholding

- YES
- FIRPTA is a withholding against potential tax owed, just like withholding in a paycheck
- 1099-S is a reporting to IRS of a real estate transaction 
- There are specific steps to take at or before the transaction
- File with IRS 1099-S & leave seller ITIN blank
- If IRS attempts to fine you for an incomplete 1099-S, send an affidavit
- For details see “The Catch-22 of Foreign Sellers and the Form 1099-S” 49 *Fund Concept* 105 (Sep. 2017) 

Rapid Fire Q & A



Rapid Fire Q & A

- Who is responsible for FIRPTA withholding
 - Withholding agent – THE BUYER
- Who signs the bottom of the 8288
 - Withholding agent – THE BUYER
- Who is required to fill in the 8288 & 8288-A
 - Withholding agent – THE BUYER
- Both seller & buyer are foreign does withholding apply?
 - Yes

Rapid Fire Q & A

- Seller is not making a profit at all, does FIRPTA still apply?
 - Yes
- Property is being sold as a short sale does FIRPTA still apply?
 - Yes
- Seller says he/she has a SSN, is withholding required?
 - Yes, unless seller provides a non-foreign certification
- Seller has a visa is withholding required?
 - Yes, unless seller can meet the substantial presence test

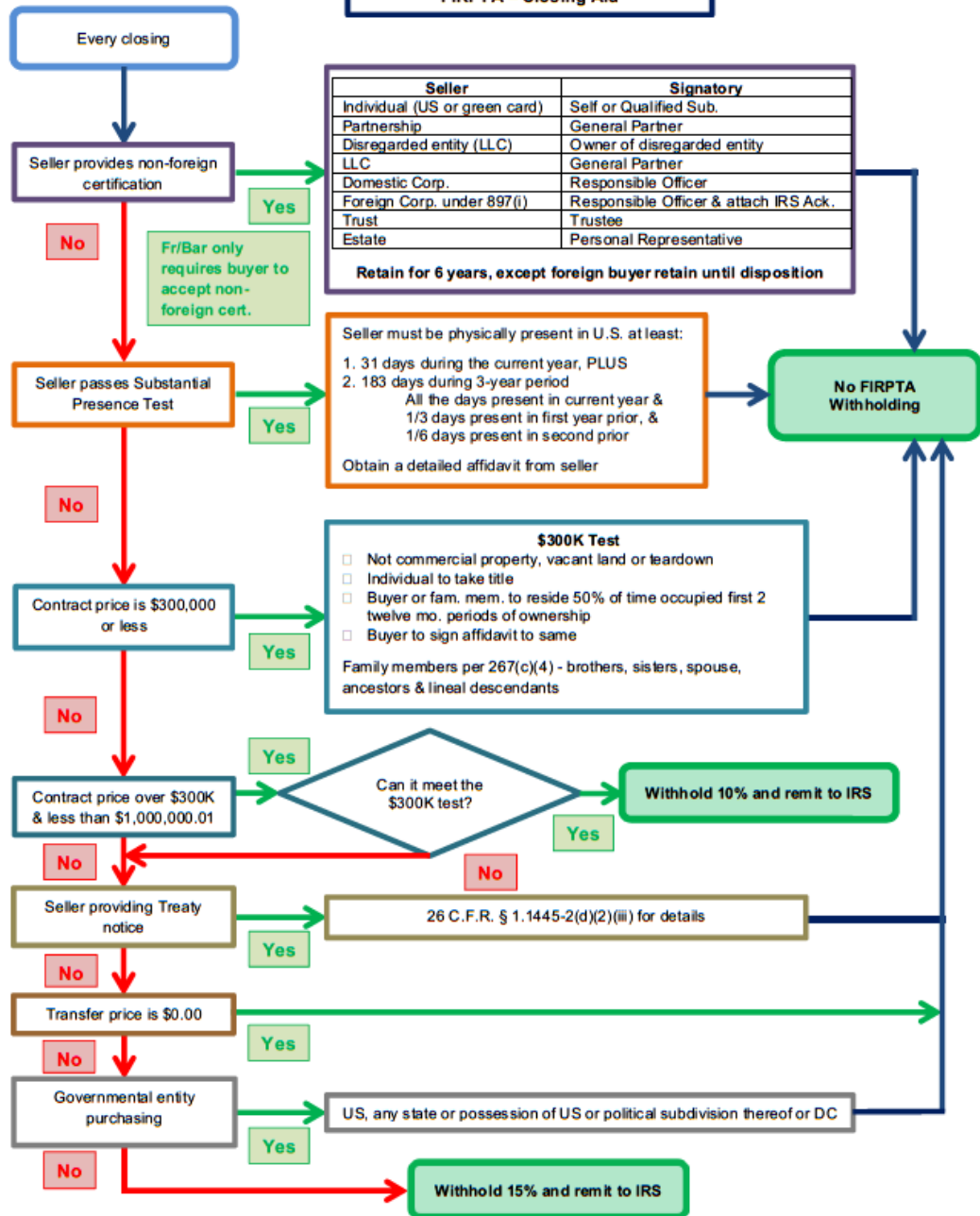
Rapid Fire Q & A

- Seller says they are US citizens but do not live in the US is withholding required?
 - No, if seller provides a non-foreign certification
- Seller's accountant is preparing the 8288 & 8288-A, is that OK?
 - It is buyer's responsibility & buyer has liability
- An estate for a foreigner is selling the property does FIRPTA apply?
 - PR will be selling & may give the non-foreign certification
 - PR will withhold before distribution to foreign beneficiaries

Rapid Fire Q & A

- Is it always a good idea for the seller to apply for a withholding certificate?
 - Not necessarily – seek legal advice from a tax attorney
- What forms does the buyer have to fill out?
 - 8288 &
 - 8288-A (one for each foreign seller)
- What is Linda's Extension?
 - X 6253

FIRPTA – Closing Aid



106

Non-Foreign Certification

- Seller's name, home (or office address if entity), US identification number (SSN or EIN)
 - Signed under penalty of perjury
 - Keep for 6 years (five tax years after tax year of acquisition; foreign buyer to keep until disposition of property)
 - May rely upon this certification unless you receive written notice from others or have direct information to the contrary – no need to verify
- Tres. Reg. Sec. 1.1445-2**

Substantial Presence Test - Days of Presence in the United States

You are treated as present in the U.S. on any day you are physically present in the country, at any time during the day.

Do not count the following as days of presence in the U.S. for the substantial presence test.

- Days you commute to work in the U.S. from a residence in Canada or Mexico, if you regularly commute from Canada or Mexico.
- Days you are in the U.S. for less than 24 hours, when you are in transit between two places outside the United States.
- Days you are in the U.S. as a crew member of a foreign vessel.
- Days you are unable to leave the U.S. because of a medical condition that develops while you are in the United States.
- Days you are an exempt individual (see below).

For details on days excluded from the substantial presence test for other than exempt individuals, refer to [Publication 519, U.S. Tax Guide for Aliens](#).

The term United States (U.S.) includes the following areas.

- All 50 states and the District of Columbia.
- The territorial waters of the United States.
- The seabed and subsoil of those submarine areas that are adjacent to U.S. territorial waters and over which the United States has exclusive rights under international law to explore and exploit natural resources.

The term does not include U.S. possessions and territories or U.S. airspace.

\$300K Test

- Must take title in persons name
- May not take in the name of a trustee, company, LLC or other
- No commercial property
- No vacant land
- No property to be torn down
- Buyer or member of his/her family to reside at least 50% of time it is actually occupied – do not count vacant days. Renter or others may occupy but MUST be less days than owner's including family occupancy days – for the first two 12-month periods. Failure to comply may result in IRS collecting 15% plus penalties and interest from Buyer/Owner
- Buyer/owner to sign affidavit to same
- Family member = bothers & sisters half included; spouse, ancestors & lineal descendants

Note: chart is intended as a work aid & basic guidance for basic real estate transaction & not a substitute for legal analysis of a specific transaction

Things to Remember



Thing to remember

- Buyer is responsible for FIRPTA withholding
- Liability is with buyer
- Buyer signs forms
- May rely upon non-foreign certification
- Use Tax Attorneys when needed
 - CPAs & accountants are not attorneys
- If in doubt, withhold & remit



Thank You!
for attending