FIRPTA

What is it?

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) was enacted to ensure that foreign investors are subject to federal income tax when they dispose of a U.S. Real Property Interest. The statute requires that any buyer who acquires property from a foreign seller must withhold a certain percentage of the "amount realized" and remit it to the Internal Revenue Service (IRS) within 20 days of closing. The amount withheld is considered a credit on the total tax liability that will be determined when the seller later files a tax return.

When does it apply to a transaction?

FIRPTA applies whenever property is purchased from a "foreign person." A "foreign person" would include a non-resident alien, foreign corporation, foreign partnerships and "disregarded entities." A "disregarded entity" is a domestic entity that is owned and operated by one individual. For example, if a Canadian citizen forms a Texas lilmited liability company and wants to sell real property located in Harris County, Texas, FIRPTA would likely apply. The entity is disregarded for tax purpoases and FIRPTA would apply if the sole member of the limited liability company were a "foreign person", as in this example. A resident alien who has a green card is NOT a "foreign person."

What amount is withheld and whose responsibility is it?

If FIRPTA applies to the transaction, 15% of the "amount realized" must be withheld. The "amount realized" is generally the amount paid for the property or sales price. Since the buyer is the statutory withholding agent, it is their responsibility to prepare the forms and remit the withholding amount to the IRS. Any failure to do same could result in liability. Most contracts track the language of the statute, making the purchaser the responsible party regarding any FIRPTA withholding. The funds and IRS forms (8288 and 8288-A) should be remitted to the IRS within 20 days of closing the transaction.

Are there any exceptions to the withholding requirement?

There are a number of exceptions to FIRPTA which may result in a reduced withholding or possibly eliminate the withholding altogether. For instance, if the seller furnishes the buyer with an affidavit that certifies that the seller is not a foreign person, the certification includes the sellers name, U.S. social security number or taxpayer identification number and address, then no withholding would be required.

What should I do if FIRPTA is applicable to my transaction?

Determining if the statute is applicable, the withholding amount and whether an exception applies is not a task the parties should handle on their own. Parties should always seek professional guidance from a tax attorney or CPA, due to the complexity of hte law and IRS regulations, to ensure that their liabilities are satisfied.

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