

FIRPTA (The Foreign Investment in Real Property Tax Act)

Withholding When the Seller is a Foreign Person: Under federal law, a buyer of real estate is obligated to withhold 15% of the purchase price and forward that amount to the Internal Revenue Service **IF** the seller is a foreign person. The law applies to all sales of real property in the United States, residential and commercial, whether maintained for personal use or investment. The withholding amount is reduced to 10% if the buyer will be an owner occupant and the purchase price is \$1 million or less.

Penalties: A buyer who fails to withhold when required, may be liable for the amount of the tax, plus interest and penalties, if the seller is a foreign person and does not pay taxes on the sale.

Exemptions: The buyer *need not* withhold if they obtain any one of the four exemptions applies:

- One – The Buyer’s Affidavit. The buyer may sign an affidavit affirming the buyer’s intent to occupy the property as a residence and that the purchase price does not exceed \$300,000. Use C.A.R. Form AB;
- Two – The Seller’s Affidavit. The seller may provide an affidavit to the buyer asserting the seller is not a foreign person AND the affidavit contains the seller’s social security number or taxpayer ID. C.A.R. Form AS may be used;
- Three – The Qualified Substitute. Instead of providing the buyer with an AS (which contains the seller’s Tax ID), the seller may provide a completed affidavit to a title or escrow company (qualified substitute) who in turn provides the buyer with an affidavit affirming the qualified substitute is in possession of the seller’s completed affidavit asserting that no withholding is required; **OR**
- Four – IRS Withholding Statement: Although rarely done, the seller may provide the buyer with a statement from the IRS showing that no withholding is required.

Qualified Substitute is the Default. C.A.R. Form AS presumes that the seller will use a qualified substitute. In such case, the form will be provided to the buyer with Paragraph 3B left blank. The seller will then manually complete Paragraph 3B and provide the form to the title or escrow company acting as the qualified substitute. The title or escrow company may use C.A.R. Form QS, or its own form, to satisfy its obligation to notify the buyer. If a title or escrow company is not willing to act as a qualified substitute, then the seller will have to complete the AS Form (check the box in 3B and complete the taxpayer information) and provide the fully completed form to the buyer.

What should the buyer do if they can’t qualify for an exemption?

If the buyer does not receive a fully completed Form AS from the seller, or a Form QS, or equivalent, from the title or escrow company, the buyer should instruct escrow to withhold funds to forward to the IRS and talk to an attorney about the implications to the transaction.