FIRPTA

PROVIDENCE TITLE

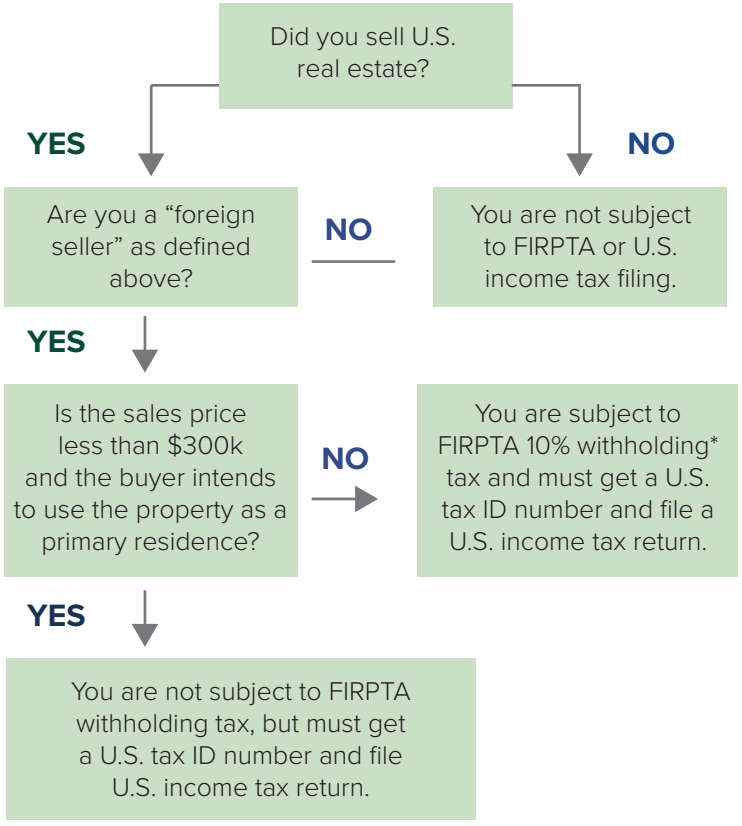
The foreign Investment in Real Property Tax Act of 1980, better known as FIRPTA, outlines Internal Revenue Service tax withholding and reporting obligations on the transferee (buyer) of a U.S. real property interest when the transferor (seller) is a "foreign person". Under FIRPTA, foreign sellers are taxed similarly to U.S. real estate owners when selling their properties by placing the tax-remittance burden on the buyer.

FOREIGN PERSON UNDER FIRPTA

A "foreign person" under FIRPTA is defined as (1) an individual that is not a U.S. citizen or a resident alien, (2) a foreign corporation that has not elected to be treated as a domestic corporation, or (3) a foreign partnership, trust or estate.

BUYER'S OBLIGATIONS UNDER FIRPTA

In transactions with foreign persons, the buyer must withhold a certain percent of the amount realized from the transfer (the sale) of the property. The buyer must report and pay over to the IRS any tax withheld within 20 days of closing. Generally speaking, the amount realized is the sales or purchase price of the real property.



*The withholding rate is 10% for properties sold for less than $1 million and that the buyer intends to occupy as a residence. The withholding rate is 15% for a property the buyer does not intend to use as a residence. Any sales price in excess of $1M requires a 15% withholding regardless of buyer's intended use.

SELLER EXEMPTIONS UNDER FIRPTA

If a foreign person is selling a U.S. real property interest, the appropriate tax must be withheld, unless there is an exception from withholding. The most common exceptions are:

- Sales price is $300,000 or less, and the buyer acquires the property for use as his or her residence.
- The seller provides an Affidavit of Non-Foreign Status.
- The seller provides a FIRPTA Withholding Certificate from the IRS.
- The seller is participating in a simultaneous 1031 exchange and the seller gives the buyer written notice that no recognition of any gain or loss on the sale is required.

SELLER'S AFFIDAVIT OF NON-FOREIGN STATUS

The Seller's Affidavit of Non-Foreign Status (Seller's Affidavit) is a sworn statement completed and signed by the seller. It includes the seller's tax identification number (most often a social security number), and a statement by the seller, under penalty of perjury, that he or she is not a foreign person as defined under FIRPTA, and thus, is not subject to tax withholding under FIRPTA. The seller must provide a completed and signed Seller's Affidavit directly to the buyer.

BUYER'S LIABILITY UPON FAILURE TO WITHHOLD TAX

A person that is required to deduct and withhold tax but fails to do so may be held liable for the payment of the tax and any applicable penalties and interest.

FEDERAL TAX REQUIREMENTS UNDER THE TEXAS REAL ESTATE COMMISSION'S (TREC) CONTRACT

According to paragraph 20 of the standard TREC contract, if a seller is a "foreign person", or if seller fails to deliver the Seller's Affidavit, then the buyer must withhold from the sales proceeds an amount sufficient to comply with applicable tax law and to timely deliver the appropriate amount to the IRS with the appropriate tax forms.

SUBSTANTIAL PRESENCE TEST

You will be considered a United States resident for tax purposes if you meet the substantial presence test for the calendar year. To meet this test, you must be physically present in the United States (U.S.) on at least: (1) 31 days during the current year, and (2) 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting: (a) All the days you were present in the current year, and (b) 1/3 of the days you were present in the first year before the current year, and (c) 1/6 of the days you were present in the second year before the current year.