



Will my seller have sales proceeds withheld because she is not a US citizen?

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QUESTION: I have been contacted by a French citizen who is interested in listing a North Carolina property for sale that she recently inherited from an American relative. Under paragraph 8(a) of the Offer to Purchase and Contract (Form 2-T), it states that a seller who does not provide a non-foreign affidavit to the closing attorney may be subject to withholding as provided by the Internal Revenue Code. My question is, if I list and sell the property, will my client have any of the sales proceeds withheld?

ANSWER: Possibly. The law known as the Foreign Investment in Real Property Tax Act of 1980 (“FIRPTA”) requires a settlement agent under certain circumstances to withhold a portion of the sales price from the seller at closing if the seller is not a U.S. citizen or the holder of a green card. There are many possible scenarios and exceptions to the general rule. For example, if the seller is selling to a buyer who intends to occupy the property as their primary residence and the sales price is \$300,000 or less, no withholding is required. Also, if the seller applies for and obtains something called a FIRPTA Withholding Certificate from the IRS prior to closing, no withholding is required. If withholding is required, 10% of the purchase price (or 15% if the purchase price exceeds one million dollars) must be withheld and sent to the IRS. The sellers would be entitled to a refund of any withheld amount that exceeds their actual tax liability.

Under FIRPTA, the *buyer* is responsible for making sure the withholding is done properly. In practice, this duty would fall on the buyer’s closing attorney. That’s why Form 2-T requires a seller to provide an affidavit certifying that the seller is not a foreign person for purposes of U.S. income taxation. If the seller is a foreign person for U.S. income tax purposes and any required withholding is not done properly, the buyer can be penalized and charged late fees by the IRS. Therefore, unless the closing attorney is also a tax expert, the parties should be advised to seek professional tax advice in situations like the one you have asked about.

For more information on this topic, including a list of questions that brokers need to know the answers to, see *What in the World is FIRPTA?* by Charlotte attorney Richard Poe. The article, which appeared in the May 2021 issue of *Insight* magazine, can be accessed [here](#).

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