

# Preface to the *FIRPTA Withholding Guidebook*

My goal in writing this *FIRPTA Withholding Guidebook* is to provide a practical guidebook for professionals who are not tax specialists in “The Foreign Investment in Real Property Tax Act of 1980” (FIRPTA) or its enforcement mechanism. FIRPTA is a complex set of intricate rules and definitions designed to impose a tax on foreign investors on the disposition of any interest in (i) U.S. real property and (ii) certain U.S. corporations that hold a substantial amount of U.S. real property, directly or indirectly (such interest now referred to as U.S. Real Property Interests or USRPI). FIRPTA was codified in Section 897 of the Internal Revenue Code of 1986, as amended (the Code).

Since 1984, FIRPTA was made enforceable under Code Section 1445 (“FIRPTA Withholding”) through a withholding mechanism designed to effectively deputize someone involved in the disposition of USRPI as a withholding agent who would be held responsible for withholding a portion of the value of the USRPI and sending this amount to the Internal Revenue Service (IRS).

As a lawyer practicing in the area of tax for more than 30 years, I have found that a surprisingly large number of professionals handling real estate–related transactions are not familiar with the requirements of FIRPTA and FIRPTA Withholding. This guidebook is designed for lawyers, accountants, real estate brokers, bankers, and even tax lawyers who do not work with the international tax sections of the Code, to provide them with a workable understanding of the requirements and practical application of the FIRPTA Withholding rules.

I envision this book as a guided tour through the detailed FIRPTA Withholding rules from the perspective of the buyer (the person deputized without pay to collect the FIRPTA tax for the IRS). In order to maintain the reader’s interest in this guided tour, I did three things. First, I prepared the guidebook in the form of a short and concise outline, and I focused most of the materials into a discussion involving a buyer’s FIRPTA Withholding obligation in real property purchases. I separated out those aspects of FIRPTA Withholding that went beyond a buyer’s withholding obligation in real property purchases (i.e., USRPIs extending beyond real property and withholding obligations extending beyond those imposed on buyers) and briefly identified the relevant rules at the end of the guidebook in Part 5.

Because the bulk of FIRPTA Withholding involve sale transactions of real property, I thought it would help maintain the reader’s interest by separating out the discussion of the FIRPTA Withholding obligations in this manner. For example, real estate lawyers and brokers deal mostly, if not exclusively, with real estate sales, so there is no need for these professionals to concern themselves with more complex concepts and rules that affect stock in U.S. corporations or distributions to foreigners by partnerships, corporations, trusts, and estates.

Second, I identified the documents that would be needed to implement most of the requirements of the FIRPTA Withholding rules. As the reader goes through the outline and learns about various documents, I included a copy of such document as an Exhibit. A list of these Exhibit documents is printed on page 27 and marked by a tab to make it easier for the reader to browse through the Exhibit documents. I have included not only the readily available IRS forms, but I have also drafted sample documents to eliminate or reduce the need for the reader to draft his own useable document.

Finally, I included in the Appendix the five relevant tax code provisions, the complete Treasury regulations on FIRPTA Withholding, and the relevant definitional portions of the FIRPTA regulations. This Appendix allows lawyers and other interested professionals to quickly turn to the original source materials on the FIRPTA Withholding rules to get the relevant details to more fully understand the concise outline item descriptions. To further encourage the reader to turn to the Appendix material, I have also provided the authoritative cite for each rule and sub-rule concisely described in the outline.

It should be noted that the inclusion in the Appendix of the complete text of Code Section 1445 and the Treasury Regulations is particularly important because they constitute substantially all of the relevant authority on the subject (including all of the many relevant details). To date, there are only a handful of cases dealing with Code Section 1445, and these cases are not very helpful in clarifying Code Section 1445 because the actual issues decided involved other matters unrelated to Code Section 1445.<sup>1</sup> Furthermore, Code Section 1445 has been amended nine times by Congress over the last 25 years, and I have included the history of these amendments in Appendix 4B. Therefore, I am hopeful that the Appendix to this *FIRPTA Withholding Guidebook*, as of its publication date, will contain substantially all of the primary source materials (other than IRS rulings, publications, and other materials) needed by a professional to advise a buyer of U.S. real property (although a professional *must* go beyond this guidebook to deal with the Code Section 1445(e) provisions—on the special rules concerning distributions and other transactions by corporations, partnerships, trusts, and estates—because of their interrelationship with other complex Code provisions).

In closing, I would like to summarize the benefits that I hope are realized by the format of this guidebook. This guidebook is presented in outline form to allow the reader to quickly read through each of the five parts of the book to get a good understanding of the general scheme of the FIRPTA Withholding rules. The guidebook contains FIRPTA-related forms and documents as Exhibit documents to allow the reader to quickly gain confidence in his ability to implement and deal with the various requirements of FIRPTA Withholding. Finally, this guidebook provides the cite to each of the many rules identified in the outline and provides the actual statute and detailed regulations in the Appendix to allow the reader to get familiar with the details of any given FIRPTA Withholding rule at his own comfortable pace without losing sight of the big picture or his ability to competently implement the rules. To use the “forest and trees” metaphor, the format of this guidebook is specifically designed to allow the reader to toggle between the brief outline, the Appendix materials, and the Exhibit documents so that the reader is free to examine the details of each “tree” without losing interest in the guided tour of the FIRPTA Withholding “forest.”

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<sup>1</sup> NOTE: See Appendix 8 for a list and summary of all the cases to date involving Code § 1445.