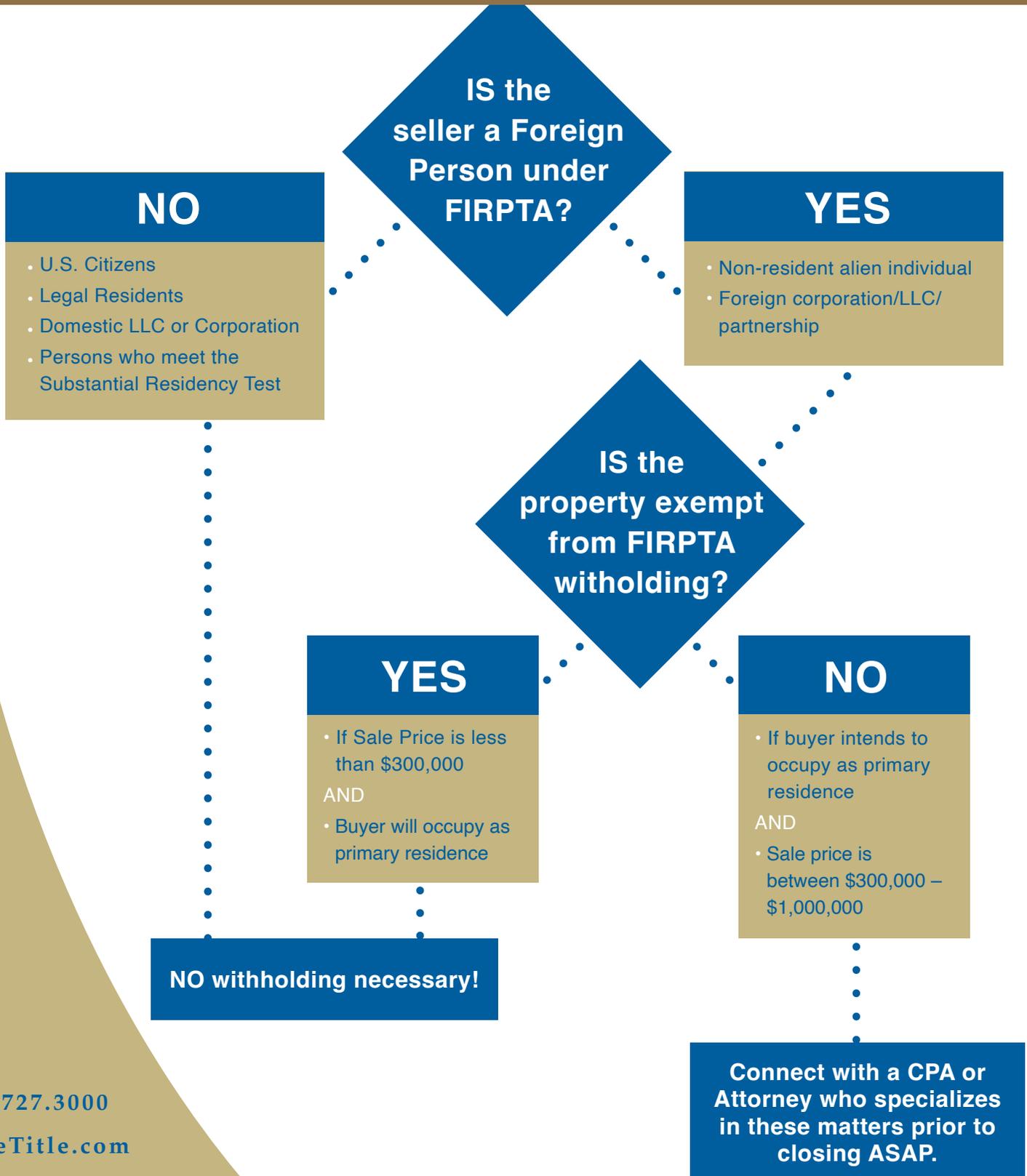


# FIRPTA

The Foreign Investment in Real Property Tax Act taxes foreign persons on the disposition of any of their real property interests held in the United States.



## FIRPTA FAQ

### What is FIRPTA?

The Foreign Investment in Real Property Tax Act (FIRPTA) taxes foreign persons on the disposition of any of their real property interests held in the United States. As foreign persons are generally not subject to United States income taxes on capital gains, FIRPTA was conceived as a mechanism to capture these capital gains taxes when a foreign person sells real property located within the United States. The **buyer** of such real property is required to withhold an amount realized on said sale, usually 15%, and remit this withholding to the United States Internal Revenue Service (“IRS”). This withholding is not a final tax, but a withholding that foreign persons may then credit against their calculated federal tax liability on the real property gains from the disposition of this property.

### Who is NOT a Foreign Person under FIRPTA?

- U.S. Citizens
- Legal Residents (i.e., “green card” holders)
- Domestic LLC or Corporation
- Persons who meet the Substantial Residency Test

### Who is a Foreign Person under FIRPTA?

- Non-resident alien individual (who do not meet the Substantial Residency Test)
- Foreign corporation/LLC/partnership

### What properties are exempt from the FIRPTA withholding?

- If Sale Price is less than \$300,000;  
AND
- Buyer will occupy as primary residence,

**No withholding necessary!**

### The seller is a Foreign Person under FIRPTA.

#### What is the withholding requirement?

- If buyer intends to occupy as primary residence and the sale price is between \$300,000 - \$1,000,000, the withholding rate is 10% of the total sale price.
- For all other properties, the withholding rate is 15% of the total sale price.

#### Who is required to make the withholding and report to the IRS?

- The buyer is responsible. Title companies, realtors, mortgage companies, etc. have no obligation under the Internal Revenue code; **failure of the buyer to make this withholding could result in tax liability on the buyer!**

### The Seller is a Foreign Person under FIRPTA.

#### How should my buyer proceed?

- The buyer will need to ensure the proper amount is withheld at closing and will need to file Forms 8288 and 8288-A with the IRS.
- **We recommend that the buyer work with their tax advisor or attorney to handle the process properly.**
- If the Seller did not disclose in the contract that he/she/they are a Foreign Person, you may wish to request funds from the Seller to account for the Buyer’s expenses in this area.

- Work with the Seller and their representation to establish the amount to be withheld at closing, and the funds will be held in escrow with the title company, or if a check will be cut (payable to the United States Treasury) to be submitted at closing with the IRS filings.
- Substantial Residency Test

### I represent the Seller, who is a Foreign Person under FIRPTA. What should we do?

- Most standard sales contracts contain an affirmative statement that the Seller is not a foreign person under FIRPTA. You should disclose this in your Listing and ensure that any contract contain the adjustment in the Special Agreements, or otherwise amend the contract with the correct statement.
- Often, the withholding amount is far greater than what the capital gain tax due will be, and though a refund will ultimately be issued, it is best to file an application with the IRS to reduce or eliminate the withholding. Sellers can file Form 8288-B with the IRS prior to closing (but after contract written) to reduce the withholding. We recommend that Foreign Sellers retain a CPA immediately to file this form and provide to the buyer.

### Do you recommend any Certified Public Accountants or Attorneys to assist? Yes!

Bradley A. Crecelius  
Schowalter & Jabouri, P.C.  
12250 Weber Hill Rd., Suite 315  
St. Louis, MO 63127  
314.849.4999  
<http://sjcpa.com>

### What information do we need to give to the title company to prepare for closing?

- As soon as it becomes known, let the title company know the seller is a foreign person under FIRPTA.
- Provide the amount that will be withheld from seller’s proceeds (as calculated and agreed upon between buyer and seller), and any other adjustments that must be made on the closing statement.
- Let the title company know if funds will be held in escrow (pursuant to an agreement) or if the check will be cut to the United States Treasury at closing (and given to buyer to submit to the IRS).



## Substantial Residency Test for Foreign Persons

The **Substantial Residency Test** is a test created by the IRS used to determine whether a foreign person is considered a United States resident for tax purposes. To meet this test, the foreign person must be physically present in the United States for at least 31 days in the year for which the tax return is being filed; AND 183 (adjusted) days during the 3-year period that includes the current year and the 2 years immediately before. It is calculated by adding the full number of days the person was physically present in the U.S. during the current tax year; plus 1/3 of the days the person was physical present in the U.S. in the first year before the current tax year; plus 1/6 of the days the person was physically present in the U.S. in the second year before the current tax year.

The following test applies only to individuals who are non-resident alien individuals.

1. Enter the total number of days you were physically present in the United States this (calendar) year: \_\_\_\_\_ (Answer One)

If the answer to this question is less than 31 days, stop. FIRPTA applies.

If the answer to this question is greater than 31 days, proceed to the next two questions.

2. Enter the total number of days you were physically present in the United States in the previous calendar year \_\_\_\_\_ and multiply by 1/3: \_\_\_\_\_. (Answer Two)
3. Enter the total number of days you were physically present in the United States two years ago \_\_\_\_\_ and multiple by 1/6: \_\_\_\_\_. (Answer Three)

Multiply the above number by 1/6 and enter here: \_\_\_\_\_

4. Add the three answers:

Answer 1: \_\_\_\_\_

Answer 2: \_\_\_\_\_

Answer 3: \_\_\_\_\_

**Total =** \_\_\_\_\_

If the above total = 183 days, you meet the Substantial Residency Test and no withholding is required.