North Carolina Journal of International Law and Commercial Regulation

Volume 11 | Number 1 Article 7

Winter 1986

The FIRPTA Withholding Rules: A Review of Internal Revenue Code Section 1445(a) and the Temporary Regulations

David M. Furr

The FIRPTA Withholding Rules: A Review of Internal Revenue Code Section 1445(a) and the Temporary Regulations

*David M. Furr**

I. Introduction

In recent years, foreign investment in U.S. real estate and business has escalated beyond all expectation and prediction.[1] Until 1980, however, foreign persons who disposed of U.S. real property that was not effectively connected with a U.S. trade or business were not subject to U.S. taxation on gains from the disposition. Because of this perceived inequity, Congress enacted the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA),[2] which generally requires foreign persons to pay a minimum tax of twenty percent on the gain derived from the disposition of a United States Real Property Interest (USRPI).[3] The FIRPTA tax was to be enforced by requiring foreign persons owning the USRPI to withhold taxes and report certain information.[4]

The changes in U.S. federal income tax rules applicable to foreign investors[5] did not discourage foreign investment,[6] though reporting on various facts surrounding the investment, in many cases, directly conflicted with one of the principal desires of the foreign investor: anonymity.[7] The administrative burden of reviewing such

* Associate, Garland & Alala, Gastonia, North Carolina. B.A. 1980, J.D. 1982, Wake Forest University; LL.M. (Taxation) 1983, University of Florida.

[1] Alexander, *U.S. Taxation of Real Estate Owned by Nonresident Aliens and Foreign Corporations*, 21 U. MIAMI L. REV. 650 (1967); Niehuss, *Foreign Investment in the United States: A Review of the Government Policy*, 16 VA. J. INT'L L. 65 (1975); Zagaris, *Investment by Nonresident Aliens in United States Real Estate*, 31 U. MIAMI L. REV. 565 (1977).

[2] I.R.C. § 897 (1982).

[3] *Id.* § 897(a)(2). Foreign corporations must pay a tax of 28% of such gain. *Id.* § 882(a)(1).

[4] *Id.* § 6039C.

[5] Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), I.R.C. § 897 (1982); *id.* § 6039C.

[6] *See, e.g.*, *Foreign Investments in Real Estate: Where the Money's Coming from and How It Is Spent*, W, G & L REAL ESTATE OUTLOOK, Feb. 1980, at 11.

[7] Whatever the impetus for this desire, foreign investors almost universally wish that their identities remain undisclosed. The reasons vary from nefarious motives to simple concern over adverse public reaction in the home country. Congress has yet to enforce the stringent reporting requirements that it has enacted.

informational filings as well as public lobbying against the new rules caused Congress to repeatedly delay implementation of the reporting requirements.[8]

In the Tax Reform Act of 1984,[9] Congress shifted the emphasis of report filing and tax withholding away from the foreign investor to the transferee of the investment.[10] While the reporting requirements have been delayed by Congress, foreign persons are still required to file U.S. tax returns to report dispositions of USRPIs and report taxes due on such dispositions.[11] Section 1445 of the Internal Revenue Code, however, now provides that transferees of U.S. real property interests[12] are required to withhold a tax equal to ten percent of the amount realized[13] by the transferor, if the transferor is a foreign person[14] and the disposition occurs on or after January 1, 1985. Failure to withhold the applicable tax can result in the transferee being liable for the tax, and possibly for interest and penalties. Additionally, this new section provides that the transferor's and/or the transferee's agents can be liable for any underwithheld tax up to the amount of compensation that they may derive from the transaction.[15]

This article examines the new withholding procedures of section 1445 as well as the adverse consequences that may result from failure to comply with such law. In addition, suggestions and procedures for complying with the law as an agent of either party are included.

II. Application of FIRPTA

A basic understanding of the rules and terms found in section 897 is necessary to the proper application of section 1445.

A. Disposition

The "disposition of a USRPI" triggers the application of the FIRPTA rules.[16] The use of "disposition" apparently means that

---

8 T.D. 8000, 1985-86 I.R.B. 14.

9 Tax Reform Act of 1984, § 129, I.R.C. § 1445 (West Supp. 1985).

10 *Id.*

11 The proper forms would be either the 1040N, 1040R, 1041, or 1120F.

12 "United States Real Property Interest" [hereinafter USRPI] is a technical term defined *infra* notes 19-25 and accompanying text.

13 "Amount realized" is a technical term defined *infra* note 85 and accompanying text.

14 For the purposes of this article, "foreign person" includes any individual who is a nonresident alien for U.S. tax purposes and any foreign corporation, partnership, trust, or estate. Moreover, the scope of this article is limited to direct dispositions of USRPI's by foreign persons. Indirect dispositions governed by § 1445(e) are not discussed.

15 I.R.C. § 1445(d) (West Supp. 1985). This amount may be in addition to the client's damages for the agent's failure to advise of the withholding. *See infra* note 106 and accompanying text.

16 I.R.C. § 897(a) (1982).

transactions broader than mere sales or exchanges of real property will trigger FIRPTA application. Proposed Regulation section 1.897-1(g) states that disposition "means any transfer that would constitute a disposition by the transferor for any purpose of the Internal Revenue Code and regulations thereunder."[17] Therefore, tax-free reorganizations are not necessarily precluded from FIRPTA taxation.[18]

B. *United States Real Property Interest (USRPI)*

The term United States Real Property Interest (USRPI) is one of the pivotal terms found in section 897. Generally, a USRPI is either any interest in real property located in the United States or the Virgin Islands or any interest (other than as a creditor) in a domestic corporation if the domestic corporation is a United States Real Property Holding Corporation (USRPHC).[19] USRPIs include an extremely broad range of assets related to real property, such as tangible personal property related to the use of real property,[20] leasehold interests,[21] and options to buy real property.[22]

A USRPI includes an interest in a USRPHC as noted above. Section 897(c)(2) defines a USRPHC as any domestic corporation if the fair market value of the USRPI equals or exceeds fifty percent of the total fair market value of (i) its USRPI, (ii) its interests in foreign real property, and (iii) its assets used or held for use in a trade or business.[23] Basically, a corporation's real property includes its fee ownership of land plus improvements thereon, as well as leasehold and leasehold improvements.[24] Therefore, the disposition of stock of a USRPHC by a foreign person will trigger the application of the FIRPTA rules.[25]

C. *Exceptions to FIRPTA Application*

Section 897(e) provides that dispositions which result in nonrecognition of tax on the gain or loss in property may be exempt from section 897's application. Nevertheless, the extent of the tax exemp-

---

17 *But see id.* § 897(e)(2)(B)(i). Possible caveats to this exception are discussed *infra* note 26.

18 *Id.*

19 *Id.* § 897(c)(1). A detailed discussion of all interests included within this term may be found in Treas. Reg. § 1.897-1 (1985).

20 I.R.C. § 897(c)(6)(B) (1982).

21 *Id.* § 897(c)(6)(A).

22 *Id.*

23 Treas. Reg. § 1.897-2(b)(2) provides, however, that a corporation may presume that it is not a USRPHC if the book value of its real property is 25% or less of the total value of the corporation's assets as described in the regulation.

24 I.R.C. § 897(c)(6) (1982). Associated tangible personal property is also included within this test. *Id.*

25 *But see id.* § 897(e)(2)(B).

tion is unclear, especially in the case of reorganization.[26] The facts and economic results of every transaction that may have nonrecognition status must be carefully examined to determine whether the FIRPTA exception may apply.

D. Summary

If a foreign person has a USRPI and makes a disposition of the USRPI, then gain must be recognized pursuant to section 897. As part of the Tax Reform Act of 1984, Congress enacted a tax withholding system by which the transferee of the USRPI is responsible for withholding tax on the disposition of the USRPI. The rules and temporary regulations[27] implementing the FIRPTA rules will now be the primary focus of this article.

III. The Statutory Scheme of Section 1445

A. Standards for Withholding

Generally, Internal Revenue Code section 1445(a) imposes a duty on any person who acquires a USRPI from a foreign person to withhold a ten percent tax from the amount realized on the sale and to remit the tax to the Internal Revenue Service within ten days of the closing. Three standards, however, have been adopted in the statute by which a transferee may safely avoid withholding. Each standard will be discussed separately in the succeeding subsections.

1. Transferor Certification. Section 1445(b) generally states that a transferee has no duty to withhold if he can ascertain that either the transferee is not a foreign person or the property being transferred is not a USRPI. Only if both tests are met may the transferee safely avoid withholding.

The safest means for a transferee to establish that withholding is not required is for the transferee to obtain a withholding certificate from the Internal Revenue Service prior to the transfer.[28] The duty to disclose or determine either foreign person or USRPI status is upon the transferee. The transferee may obtain various types of certifications from the transferor or other relevant parties to establish that withholding is not required. Nonforeign certifications should be included as a routine closing document for every transaction involving the transfer of real or tangible personal property or of the trans-

---

[26] *Id.* § 897(e)(2)(B)(i). Generally, I.R.C. § 368 provides for nonrecognition of gain or loss on transactions covered by that section. One can only hypothesize as to the type of reorganization that would possibly trigger § 897 taxation. Perhaps if a non-USRPHC were formed for tax avoidance purposes, the Internal Revenue Service would collapse the transaction and apply the FIRPTA disposition rules.

[27] 49 Fed. Reg. 50,667 (1984) (to be codified at 26 C.F.R. Parts 1 and 6(a)).

[28] I.R.C. § 1445(b)(4) (West Supp. 1985).

fer of an interest in a domestic corporation. The certification that is obtained does not have to be filed with the Internal Revenue Service, but it must be retained by the transferee until the end of the fifth taxable year after the taxable year in which the transfer occurs.[29]

The transferor may provide several types of withholding certificates upon which the transferee may safely rely and not withhold tax. The simplest, and probably the most commonly used, is the nonforeign certification.[30] The Temporary Regulations provide sample forms, which require the transferor to declare, under penalties of perjury, that the transferor is not a foreign person.[31] Unless the transferee or his agent has actual knowledge that the certification is false, the transferee may rely thereon and will not be liable for any tax even if the transferor subsequently is determined to be a foreign person.

A special form exists for certain types of foreign corporations to provide nonforeign certifications. If a foreign corporation has made a special election under section 897(i) of the Internal Revenue Code,[32] then such a corporation may issue a nonforeign certification. If the transferee is aware that the transferor is a foreign corporation, then the transferee may not rely upon such certification unless it is accompanied by a copy of the Internal Revenue Code acknowledgement of the section 897(i) election.[33] Any attorney who represents a foreign corporation should evaluate the merits of making the section 897(i) election as a means of eliminating the withholding requirement at closing.

Besides the nonforeign certification, the statute also provides for a non-USRPHC certification. If the sale involves the sale of an interest in a domestic corporation, the transferee, in order to avoid the statutory withholding, must obtain a certification of non-USRPHC status unless he can obtain a certification of nonforeign status.[34] This second type of certification declares that the corporation has not been a USRPHC at any time during the previous five years (or the period in which the interest was held by the present holder, if shorter).[35] The transferee may rely upon such certification only if he has no actual knowledge that it is false and only if the certi-

---

[29] Temp. Reg. § 1.1445-2T(b)(3) (1985).

[30] *Id.* § 1.1445-2T(b)(2).

[31] *Id.* § 1.1445-2T(b)(2)(iii). The samples provided by the Regulations do not require notarization of the certificates. Notarization, however, should be adopted as a standard procedure, as well as recording, to establish evidence of compliance with the withholding exceptions.

[32] I.R.C. § 897(i) (1982) provides that foreign corporations can elect to be treated as domestic corporations for the purposes of §§ 897 and 6039C provided that the special conditions thereunder are met.

[33] Temp. Reg. § 1.1445-2T(b)(2)(ii) (1985).

[34] *Id.* § 1.1445-2T(c)(3).

[35] *Id.*

fication was obtained within thirty days prior to the date of the transfer.[36]

A non-USRPHC certification does not have to be acquired and withholding is not required if the interest obtained in the domestic corporation is one that is regularly traded on an established securities market.[37] The Temporary Regulations appear to be less stringent than the statute, however, since they will permit no withholding if the corporation has any class of equity interest that is publicly traded.[38] Nevertheless, if the transferee is acquiring an equity interest which is not publicly traded, reason and common sense should dictate that the transferee will request certification or non-USRPHC status or a nonforeign certification in order to justify the forebearance of any withholding.

If at any time after the date of the transfer, the transferee obtains knowledge or notice that the transferor certifications are false, the transferee must then withhold the full ten percent of the tax from any consideration that remains to be paid.[39] In actual practice, this requirement may dictate that as much as one hundred percent of the balance due to the transferor be withheld for remittance to the Internal Revenue Service. Remittance to the Internal Revenue Service must occur by the tenth day following the date on which payment of any remaining consideration is made.[40]

The Temporary Regulations state that the tax must be withheld from any payments made if the above situation occurs.[41] Whether innocent third party creditors can be penalized for underwithholding by the transferee is not evident from the Temporary Regulations. The operation of the statute should not be allowed to permit harm in this scenario.

2. *Statutory Exceptions and Limitations.* A transferee may also avoid withholding if a special statutory exception applies.[42] Several exceptions to withholding are listed in section 1445(b) and the Temporary Regulations, and each will be discussed separately.

a. *Purchase of Residence for $300,000 or Less.* No withholding is required if the property is to be used by the transferee as a residence and the amount to be paid for the property does not exceed $300,000.[43] The Temporary Regulations provide an objective test to determine the status of "residence." To qualify as a residence,

---

36 *Id.*
37 I.R.C. § 1445(b)(6) (West Supp. 1985).
38 Temp. Reg. § 1.1445-2T(c)(2) (1985).
39 *Id.* § 1.1445-2T(b)(4)(iv).
40 *Id.*
41 *Id.*
42 I.R.C. § 1445(b) (West Supp. 1985).
43 *Id.* § 1445(b)(5).

the transferee or members of his family must have definite plans to reside at the property for at least fifty percent of the number of days that the property is in use during each of the first two twelve-month periods following the date of the transfer.[44] The "in-use" language of the regulation apparently is directed to purchases of vacation and resort property, although nothing in the regulation or legislative history expressly states this assertion as a fact.

If the transferee fails to satisfy the residency requirements, then he is liable for failure to withhold the tax.[45] The Temporary Regulations do state, however, that if the transferee can establish that the failure to reside was due to a change in circumstances that could not be reasonably anticipated on the date of the transfer, then the transferee may be excused from withholding.[46] In cases in which the time test may present a foreseeable problem, the use of one of the transfer certification procedures should be used along with this special exemption.

b. Nonrecognition Transactions. Withholding may also be avoided if the transferor certifies that he is not required to recognize any gain or loss on the transfer by reason of a nonrecognition provision of the Internal Revenue Code and the transferee sends a copy of said certification to the Internal Revenue Service within ten days after the transfer.[47] The Temporary Regulations provide in detail the facts and information which must be given to the Internal Revenue Service to support the claim of nonrecognition.[48]

The Temporary Regulations provide, however, that the transferor's statement may not be relied on if either: (i) the transferee and the transferor are related persons; (ii) the transferor recognizes any gain at all from the transaction (boot in a like-kind exchange, for example); or (iii) the transferee knows or has reason to know that the transferor is not entitled to the nonrecognition treatment claimed.[49] If any of the above circumstances exist in a proposed transaction, the parties should request an Internal Revenue Service withholding certificate for the transaction.[50]

Examples of transactions that would qualify for this special exception include section 1031 like-kind exchanges, gift transactions, and tax free reorganizations. In any of these transactions, special care should be taken to determine whether gain recognition due to

---

44 Temp. Reg. § 1.1445-2T(d)(1) (1985).

45 *Id.*

46 *Id.*

47 *Id.* § 1.1445-2T(d)(2).

48 *Id.* Both a summary of the facts and law supporting the transaction must be present. *Id.* § 1.1445-2T(d)(2)(iii)(E).

49 Temp. Reg. § 1.1445-2T(d)(2)(ii) (1985).

50 These certificates are discussed *infra* notes 60-83 and accompanying text.

boot or liability assumption is a possibility. Similarly, a careful review of the nonrecognition allowances under section 897 and developing law thereunder should be considered.[51]

c. Foreclosures. Banks and other mortgage lenders generally are not required to withhold in a foreclosure action.[52] Nevertheless, the Temporary Regulations require the foreclosing transferee to provide notice of repossession or foreclosure to the Internal Revenue Service by the tenth day after the acquisition of the property.[53] Specific information to be included within the notice can be found within the Temporary Regulations.[54] The transferee in foreclosure would also have the option of acquiring a transferor certification as a means of avoiding withholding responsibilities.[55]

Finally, the Temporary Regulations contain a special anti-abuse provision which disallows this special exemption from withholding if a USRPI is transferred in repossession or foreclosure for a principal purpose of avoiding the withholding requirements.[56] The Regulations presume a "principal purpose" if (i) the creditor's security interest in the property does not arise in connection with the acquisition, improvement, or maintenance of the property; and (ii) the total amount of all debts secured by the property exceeds ninety percent of the fair market value of the property.[57] The practical application of this rule is doubtful because few lenders loan money in excess of ninety percent of the fair market value of the property.

d. Other Special Exceptions. Several exceptions exist for acquisitions by U.S. governmental bodies[58] and for dispositions by foreign governments.[59] The statute and Temporary Regulations sufficiently explain the facts and circumstances which must be present to obtain these withholding exceptions.

3. Internal Revenue Service Withholding Certification. A third means has been provided by the statute to reduce or eliminate the transferee's obligation to withhold or to authorize a refund for the overwithheld tax.

---

[51] *See supra* note 26.

[52] The only exception would be the case in which the debtor/transferor realizes an amount in excess of the secured debt.

[53] Temp. Reg. § 1.1445-2T(d)(3)(ii) (1985). A very important exclusion from this special exception is a deed in lieu of foreclosure. *Id.* § 1.1445-2T(d)(3)(i)(B).

[54] *Id.* § 1.1445-2T(d)(3)(ii).

[55] *Id.* § 1.1445-2T(d)(3)(iii).

[56] *Id.* § 1.1445-2T(d)(3)(iv).

[57] *Id.*

[58] *Id.* § 1.1445-2T(d)(5).

[59] *Id.* § 1.1445-2T(d)(6).

a. *General.* The Temporary Regulations employ the vehicle of a withholding certificate which can be obtained from the Internal Revenue Service by either the transferor or the transferee to achieve the above goals.[60] Four reasons exist for obtaining a withholding certificate from the Internal Revenue Service prior to the date of the transfer.

First, the Internal Revenue Service may issue a certificate exercising or allowing adjusted withholding that reflects its determination of the transferor's maximum tax liability.[61] A transferor's maximum tax liability consists of the highest possible tax on the disposition, taking into account all relevant factors that would affect the calculation of tax on the return,[62] and the amount of the transferor's unsatisfied withholding liability, if any.[63] The Temporary Regulations further state that the Internal Revenue Service may, in its discretion, issue a certificate permitting a withholding of a reduced amount based on a determination that a reduced withholding will not jeopardize collection.[64] A detailed statement of the law and facts must support this certificate request.[65]

Second, the Internal Revenue Service may issue a certificate that excuses all withholding if the transferor's gain from the transfer will be exempt and the transferor has no unsubstantiated withholding liability.[66] For purposes of the issuance of this certificate, the gain must be exempt because either (i) the transferor is an integral part or a controlled entity of a foreign government and the disposition of the property is not a commercial activity under section 892, or (ii) the transferor is entitled to the benefits of an income tax treaty providing for such an exemption from FIRPTA recognition.[67] Currently, only the United States-Canadian Income Tax Treaty[68] qualifies under the second test.

Third, the Internal Revenue Service will issue a certificate excusing or reducing withholding if the transferee or transferor enters an agreement with the Internal Revenue Service to pay the tax.[69] The agreement must secure payment of the amount otherwise required to be withheld or the maximum tax liability.[70] This agreement is a contract between the Internal Revenue Service and any other per-

60 *Id.* § 1.1445-3T(a).

61 *Id.* § 1.1445-3T(c).

62 Relevant factors include reduced treaty rates, losses on other dispositions of USRPI, and depreciation recapture required to be treated as ordinary income.

63 Temp. Reg. § 1.1445-3T(c)(3) (1985).

64 *Id.* § 1.1445-3T(c)(4).

65 *Id.*

66 *Id.* § 1.1445-3T(d).

67 *Id.*

68 Sept. 17, 1973, 28 U.S.T. 1134, T.I.A.S. No. 8499.

69 Temp. Reg. § 1.1445-3T(e) (1985).

70 *Id.* § 1.1445-3T(e)(1).

son. The agreement has two necessary elements: (i) a contract between the parties detailing the rights and obligations of each party, and (ii) a security agreement acceptable to appropriate Internal Revenue Service officials.[71] Forms of security acceptable to the Internal Revenue Service include a bond with a surety or a guarantor, a bond with collateral, a letter of credit, and a guaranty by a publicly-traded corporation.[72]

Finally, a withholding certificate may be issued by the Internal Revenue Service to authorize the transferee to utilize special escrow procedures contemplated in the Temporary Regulations.[73] A special escrow procedure for taxes withheld may be used if an application has been made to the Internal Revenue Service for a withholding certificate at least thirty days prior to the date of the transfer.[74] Under this procedure, the transferor may obtain an early refund of any overwithheld tax.[75] If this special escrow procedure is used, any excess tax can be refunded to the transferor as soon as the withholding certificate is received from the Internal Revenue Service. Nevertheless, the Temporary Regulations emphasize that even if the special escrow procedure is used, the transferee must still withhold the full ten percent tax at the closing even though the tax need not be remitted until ten days after the withholding certificate is received.[76] In any event, application should be made for a withholding certificate at least thirty days prior to every closing in order to take advantage of these special escrow procedures, which may enable the transferor to obtain an early refund for overwithheld tax.

The mere application for any of the four types of Internal Revenue Service withholding certificates does not protect the transferee if he fails to withhold.[77] The withholding certificate must actually be received by the date of the transfer and the transferee must then withhold strictly in accordance with the certificate's provisions.[78] After the date of the transfer, the transferee or transferor may apply for a withholding certificate to authorize the early refund of any excess tax that has been withheld.

The Internal Revenue Service must act upon the application for a withholding certificate not later than the ninetieth day after it is received, except in "unusually complicated cases."[79] In an unusually complicated case, the Internal Revenue Service may notify the applicant by the forty-fifth day after the receipt of the application that

[71] *Id.* § 1.1445-3T(e)(2).
[72] *Id.* § 1.1445-3T(e)(3).
[73] *Id.* § 1.1445-3T(f).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* § 1.1445-1T(c)(2)(i).
[78] *Id.*
[79] *Id.* § 1.1445-3T(a).

additional time will be required.[80] In any event, the parties can never be assured of a response prior to the ninetieth day. Therefore, transferors who are subject to the FIRPTA tax and the withholding requirements should plan sufficiently in advance of the closing to apply for a withholding certificate from the Internal Revenue Service if obtaining such a certificate would be beneficial.

Finally, the Temporary Regulations contain a special anti-abuse rule which provides for interest and penalties if the application for a withholding certificate was submitted principally to delay the payment of tax to the Internal Revenue Service.[81] Such an improper purpose is presumed if the maximum tax liability ultimately determined to be due is equal to ninety percent or more of the amount that otherwise would be withheld.[82] Nevertheless, the parties may offer evidence that the certificate was not used to delay payment as a means of rebutting the above presumption.[83]

b. Amount of Tax Withheld. Section 1445(a) generally requires that ten percent of the amount realized by the transferor must be withheld and remitted to the Internal Revenue Service.[84] The "amount realized" is the sum of (i) the cash paid or to be paid, (ii) the fair market value of other property transferred or to be transferred, and (iii) the outstanding amount of any liability assumed by the transferee or to which the USRPI is subject immediately before and after the transfer.[85] Most importantly, the statute requires that the ten percent of the amount realized must be withheld at the closing regardless of the size of the cash downpayment. If the contract required only a five percent cash downpayment at closing or if only liabilities were assumed at closing, the transferee nonetheless has a duty to withhold ten percent of the contract price at closing.

If the appropriate amount is not withheld by the transferee, presumably the transferee must supply the correct amount from his own funds, unless he has obtained a prior written authorization from the Internal Revenue Service to withhold a lesser amount.[86] Therefore, the cash downpayment in any contract should be sufficient to cover the transferee's withholding obligation, or more, if the transferor expects to receive cash at closing.

c. Remittance of the Tax. A transferee who withholds tax

---

80 *Id.*

81 *Id.* § 1.1445-1T(c)(2)(iii).

82 *Id.*

83 *Id.*

84 I.R.C. § 1445(a) (West Supp. 1985). The amount may be less pursuant to the provisions of § 1445(c).

85 Temp. Reg. § 1.1445-1T(g)(5) (1985).

86 *See supra* text accompanying notes 60-83 for a discussion of Internal Revenue Service withholding certification procedures.

pursuant to section 1445(a) must remit the tax to the Internal Revenue Service by the tenth day after the date of the transfer.[87] The date of the transfer is the first date on which consideration is paid or liabilities are assumed by the transferee.[88] Payment prior to the passage of title of a good faith deposit will not constitute a triggering event, even if such payment is eventually applied to the purchase price.[89]

The withholding of tax under section 1445(a) does not excuse a foreign person who disposes of a USRPI from filing a U.S. tax return with respect to the income arising from the disposition.[90] Forms 1040NR, 1041, or 1120F, as appropriate, must be filed and any tax due must be paid by the filing deadline generally applicable to such persons. Any tax withheld pursuant to section 1445(a) will be credited against the amount of income tax as computed in such return. If the tax withheld is more than that actually owed, the transferor can obtain a normal refund by filing a U.S. tax return or by applying for an early refund as discussed earlier.[91]

B. Failure To Withhold or Remit

1. Transferee and Transferor. As previously discussed, the transferee who fails to withhold section 1445(a) tax when he has a duty to do so will be liable for the tax that should have been withheld.[92] The tax may be assessed and collected from the transferee under standard Internal Revenue Service procedures. Such transferee may also be subject to criminal penalties under Internal Revenue Code section 7202.[93] Corporate officers or other responsible persons may be subject to a civil penalty under Internal Revenue Code section 6672 that will be equal to the amount that should have been withheld and paid over.[94]

Similarly, if the transferee fails to remit any tax withheld, the Internal Revenue Service may sue the transferee to collect the tax. Nevertheless, the transferor also remains liable for any tax actually due on the transaction under Internal Revenue Code section 897.[95] Therefore, transferors who are subject to FIRPTA withholding should insist that they receive a copy of completed remittance forms and should also require that any taxes withheld be disbursed to the

---

87 Temp. Reg. § 1.1445-1T(c) (1985). Forms 8288 and 8288A are used for this purpose. *Id.* The contents of these forms can be found in Treas. Reg. § 1.1445-1T(d).

88 Temp. Reg. § 1.1445-1T(g)(8) (1985).

89 *Id.* The Regulations view primarily whether the payment's purpose is to bind the parties to enter into or perform according to the contract. *Id.*

90 Temp. Reg. § 1.1445-1T(f) (1985).

91 *See supra* notes 73-76 and accompanying text.

92 Temp. Reg. § 1.1445-1T(e) (1985).

93 *Id.*

94 *Id.*

95 *Id.* § 1.1445-1T(f).

Internal Revenue Service at closing.[96]

2. *Transferor and Transferee's Agents.* A transferor's or transferee's agent[97] who knows that a nonforeign certification or a non-USRPHC certification is false has a duty to notify and provide written notice to the transferee of such knowledge.[98] Moreover, an agent representing a foreign corporation transferor is deemed to know that his client is a foreign corporation. The notice must be given as soon as possible after obtaining such knowledge, but not later than the transfer and prior to the payment of the consideration.[99] If the agent first learns of the false certification after the transfer, then notice must be given by the third day following discovery.[100]

The notice must state that the certificate or statement is false and explain the possible consequences of failure to withhold.[101] The agent also has the duty to furnish the Internal Revenue Service with a copy of this notice.[102]

Obvious problems exist with the liability scheme presented by the statute and the Temporary Regulations. The duty to disclose can present a problem for any agent who is unaware that his client is providing a nonforeign certification. No exemption from liability presently exists for lack of knowledge. Furthermore, violations of ethical duties may appear if the burden is placed on transferor's agent to disclose to the transferee any specific knowledge he may have.[103]

Failure to provide notice makes the agent liable for the tax the recipient would have had to withhold if notice had been given.[104] Liability of the agent is limited, however, to his compensation for the transaction.[105] Agents who assist in preparing or fail to provide knowledge of false certificates or statements may be liable for civil and criminal penalties as well.[106] In addition, the agent will probably be sued in a malpractice action by his client for failure to notify.

---

96 *See supra* note 87 and accompanying text.

97 An agent includes an attorney or any other person who represents the transferor or transferee in any negotiation related to the transaction or in settling the transaction, but excludes "settlement officers" and "clerical personnel." Temp. Reg. § 1.1445-4T(f) (1985). Presumably, this definition could also include real estate brokers, financial planners, and possibly accountants.

98 I.R.C. § 1445(d) (West Supp. 1985).

99 Temp. Reg. § 1.1445-4T(c)(1) (1985).

100 *Id.*

101 *Id.* An example of acceptable notice is provided in the regulation. *Id.*

102 *Id.* § 1.1445-4T(c)(2).

103 A related issue is whether transferor's agent will be liable to transferee to disclose pursuant to his statutory obligation.

104 I.R.C. § 1445(d)(2)(A) (West Supp. 1985).

105 *Id.* § 1445(d)(2)(B).

106 Temp. Reg. § 1.1445-4T(e) (1985).

IV. Conclusion

The new FIRPTA withholding statute and its Temporary Regulations dramatically shift the emphasis of report filing and tax withholding away from the foreign person/investor to the transferee of the investment. Significantly, this burden is shared by the transferee's attorneys and possibly other advisers. All attorneys involved in real estate transactions would be well advised to carefully review closing procedures according to the obligations these new provisions impose, as they may find themselves personally liable for a portion of the withholding tax. Whether this new law is fair to the transferee and his agents is beyond the scope of this article, but the several ambiguities in the Temporary Regulations warrant immediate additional thought and revision before the drafting of the final regulations.