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# The Quill – Jan. 2021



## THE QUILL ARTICLE: BETTER CALL SAL

Better Call Sal is a series we like to share from time to time in the newsletter. We use hypothetical but real-life questions that Sal answers in detail. We also love to answer YOUR questions so if you have a real estate title question that you would like Sal to address in our next Better Call Sal article click [HERE](#) to email us. We hope you enjoy!

Question: Hey BCS. . . My Seller is a Foreign Person. What Do I do? ~Amanda in Apex

Answer: Dear Amanda, I get this question on occasion. Below I have copied a Bulletin issued by our friends at North American Title. This is great guidance for anyone dealing with a seller who is a Foreign Person. [Note: The Bulletin provides a review and a reminder to our customers of the basic requirements for complying with the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). Please note that FIRPTA

is outside the scope of title insurance policy coverage and not an issue on which underwriting counsel can provide advice. Consulting a legal or tax professional with specific FIRPTA questions is always a good idea.]

## 1. The Purpose of FIRPTA

FIRPTA enables the Internal Revenue Service (IRS) to collect income tax incurred due to a real property sale by a foreign person. When a foreign person (individual or entity) sells real property located in the United States, FIRPTA requires the buyer to withhold and submit to the IRS up to 15% of the seller's gross proceeds (typically the sales price). These funds are a pre-payment on the tax liability owed by the foreign seller. ***A buyer who does not remit the tax withholding to the IRS may be liable for the tax plus any penalties.***

There are two main questions that determine whether FIRPTA withholding is required:

- (i) Is the seller a "U.S. person?" and
- (ii) Does an exemption to FIRPTA withholding apply?

Withholding is not required where the seller is a U.S. person or the transaction is otherwise exempt from FIRPTA requirements.

## 2. Is the Seller a U.S. Person?

Whether a seller is a U.S. person depends upon the type of entity or individual the seller is, as detailed below. If the seller is deemed to be a U.S. person, the seller must execute a Non-Foreign Status Affidavit or Certificate at closing.

### a. Individuals

An individual is a U.S. person under FIRPTA if he or she is a citizen or legal resident of the United States. Citizens are those individuals born in the United States. Legal residents are those who:

- (i) are legally admitted for permanent residency as demonstrated by a "green card;" or
- (ii) meet the "substantial presence test" as detailed in **IRS Publication 519**, beginning on page 4.

### b. Corporations

A corporation is deemed a U.S. person if it is a domestic corporation, meaning a corporation that is created or organized in the United States. However, if a foreign corporation has previously elected to be treated as a domestic corporation for tax

purposes, the foreign corporation may provide prior to closing an Exemption of Withholding Certificate or Letter from the IRS confirming that election.

#### c. Partnerships

FIRPTA uses a broad definition of “partnership” that includes joint ventures, limited partnerships and syndicates, among others. At a minimum, a partnership must have at least two members and not be classified as a corporation. A partnership is considered a U.S. person if it is created or organized in the United States.

#### d. Limited Liability Companies

An LLC has three options for how it is classified under FIRPTA:

- (i) a corporation;
- (ii) a partnership; or
- (iii) a disregarded entity.

An LLC must make a specific election to the IRS to be classified as a corporation. If it has not made such an election, a multiple-member LLC will be treated as a partnership. A single-member LLC will be treated as a disregarded entity and its status will depend on whether its single member is deemed a U.S. person. If the single member is another single-member LLC, the analysis must be repeated until a decision can be made.

#### e. Trusts

There is a two-part test to determine whether a trust is a U.S. person:

- (i) Can a United States court exercise primary supervision over administration of the trust (the “Court Test”); and
- (ii) Do one or more U.S. persons have authority to control all substantial decisions of the trust (the “Control Test”)?

If the answer to both questions is “yes”, then the trust is a U.S. person under FIRPTA. The Code of Federal Regulations provides several **examples** to assist with this complicated analysis.

#### f. Multiple Sellers

In the case of more than one seller, the analyses listed above must be performed for each seller. If at least one seller is a foreign person, FIRPTA withholding is required for the portion of the sales price attributable to that person. For a foreign married

couple, 50% of the sales price should be attributed to each spouse unless the spouses have otherwise designated a different split.

### 3. Does an Exemption to Withholding Apply

Even if the seller is a foreign person, withholding may not be required if an exemption applies. The primary exemption is for individual buyers who will use the property as their residence. This exemption applies where:

- (i) the sales price is \$300,000 or less; and
- (ii) the buyer has definite plans to reside at the property for at least 50% of the number of days that the property is used by any person during each of the next two 12-month periods after the sale.

This exemption is not available to entity buyers, rental property or commercial investments. The buyer should execute an affidavit confirming that he or she will meet this residency requirement.

### 4. The Amount of Withholding Required

The percentage of the sales price that the buyer is required to withhold varies depending on the amount of the sales price and the applicability of the buyer residence exemption. The following chart lists the different withholding percentage requirements:

#### Sale Price

\$0 – \$300,000

\$300,001 – \$1,000,000

\$0 – \$1,000,000

\$1,000,001+

#### Use of Property

Buyer's Residence Exemption

Buyer's Residence Exemption

Not the Buyer's Residence

Any Use

#### Withholding Amount

0%

10%

15%

15%

### 5. Responsibility for FIRTPA Compliance

Buyers have the ultimate responsibility for complying with FIRPTA, including withholding and remittance to the IRS. However, many customers will look to you as the settlement agent for FIRPTA assistance. You are not required to provide this assistance. However, if you do so, consider using a notice signed by the buyer that waives any settlement agent responsibility for FIRPTA withholding and remittance.

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## THE QUILL TIP:

### APPROVAL FOR TRANSACTIONS INVOLVING NEW CONSTRUCTION

For any properties that involve new construction where the purchase price or loan amount is greater than \$2.0M, we have to obtain Approval from Underwriting Counsel for one of our Carriers. Typically, these are commercial transactions, but not always. When you submit your title opinion, it helps us get a quick approval if you also supply the following information:

1. The physical address of the property.
2. Whether or not a Mechanics' Lien Agent (MLA) has been appointed, and if so, the date.
3. The **LiensNC.com** file number.
4. Whether or not construction has begun.
5. Whether the owner is acting as its own builder and; if not, who the general contractor will be.
6. The intended use of the property (shopping mall, apartment or office building).

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## LET'S RING IN 2021:

### BARRISTERS NEW YEAR RESOLUTIONS

No one is happier to see 2020 go than us and we are ready for a fresh start! Here are a few New Year's resolutions from our team. Some traditional and some not so traditional! ?

"My Resolution is to watch more European (fútbol) soccer!" ~Sal Balsamo

"I plan to finish renovating the basement in my new house!" ~Lee Houghton

"This is the year I'm going to finally learn how to play the guitar."

~Summer Hogan

"I am resolving to NOT resolve!"

~Christine Bruns

"My resolution is to teach my daughter NOT to pull every shirt out of her drawer when I ask her to pick out ONE shirt. And when she does pull them all out, teach her how to put them back. Right now when I ask her to put things back she just tells me "no thank you". The positive side is she says it nicely." ~Jennifer Conrad



"Make time to meditate on a regular basis" ~Landis Sinnett

"My resolution is to try to see the glass half full instead of half empty." ~Maria Houghton

## 2021 SUPER BOWL PARTY RECIPE:

### CANDICE'S TEX-MEX MEATBALLS

Your 2021 Super Bowl party plans may look different this year but we still want to make sure you have some good family recipe ideas. Give this easy Tex-Mex Meatball appetizer a try from our very own Candice Mott. We do not think you will be disappointed. Happy Super Bowl planning!

#### Ingredients:

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- 1 1/2 lb ground beef
- 1 medium onion, finely chopped
- 1/2 cup dry bread crumbs
- 1/4 cup milk
- 1/4 cup chopped fresh parsley
- 1 tsp salt
- 1/4 tsp ground black pepper

#### Tex-Mex Seasoning:

- 1/3 cup chopped fresh cilantro
- 1 1/2 tsp chili powder
- 1 tsp ground cumin

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Directions:

Preheat oven to 400 degrees and line a 9×13 baking sheet with parchment paper or coat with non-stick spray or olive oil. In a mixing bowl, combine ground beef, onion, bread crumbs, milk, parsley, salt and pepper. Add the seasoning to the bowl. Form 48 meatballs from the mixture and place on prepared baking sheet. Bake 15 minutes or until meatballs reach 160 degrees. Serve with salsa for dipping.



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