

**THE CALIFORNIA LAWYERS ASSOCIATION  
TAXATION SECTION  
TAX PROCEDURE AND LITIGATION COMMITTEE**

**PROPOSED REGULATORY AND STATUTORY AMENDMENTS TO THE  
FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT  
WITHHOLDING EXEMPTION PROVISIONS TO ENSURE THAT  
TAXPAYERS' REQUESTS ARE RESOLVED ON A TIMELY BASIS**

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<sup>1</sup> The comments contained in this paper are the individual views of the authors who prepared them, and do not represent the position of the California Lawyers Association.

<sup>2</sup> Although the authors and/or presenters of this paper might have clients affected by the rules applicable to the subject matter of this paper and have advised such clients on applicable law, no such participant has been engaged by a client to participate on this project.

## EXECUTIVE SUMMARY<sup>3</sup>

This paper proposes a statutory and/or regulatory change in connection with the Foreign Investment Real Property Tax Act ("FIRPTA") exemption provisions. FIRPTA requires that tax be withheld when a foreign person disposes of a U.S. real property interest. To ensure tax compliance, FIRPTA generally requires a withholding agent to withhold 15% of the amount realized on the disposition of U.S. real property regardless of the actual tax which would be owed as a result of the transaction. Internal Revenue Code ("IRC") § 1445(a). Section 1445 allows the buyer, seller, or buyer's settlement agent to request a determination of the seller's maximum tax liability and to request a reduction in the withholding amount. IRC § 1445(c). These requests are submitted on a Form 8288-B, *Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests* ("Application for Withholding Certificate"). By law, the Internal Revenue Service ("IRS" or "Service") must respond to an Application for Withholding Certificate within 90 days. IRC § 1445(c)(3)(B).

Because of the volume of applications and the time it takes to review supporting documentation submitted with each application, the Service often does not respond to a taxpayer's request within the statutory 90-day window. This leads to delays which impact: (1) the Service's receipt of withheld funds; (2) the seller's ability to obtain a release of any over-withheld tax amounts; and (3) delays in the filing, and processing, of income tax returns which report the property sale and the associated withholding amounts. Such delays are negatively impacting both the Federal government, and buyers & sellers of real property.

This paper proposes that: (1) IRC § 1445(c)(3)(B) be amended to extend the 90-day determination deadline to 180-days; and (2) IRC § 1445(c)(3)(B) be amended to provide that where the Service fails to meet the 180-day deadline, the submitted Application for Withholding Certificate shall be deemed approved as a matter of law, subject to limited exceptions. This paper also separately proposes that the Treasury Department issue regulations which provide that where the Service fails to respond to an Application for Withholding Certificate within the statutory deadline, the submitted Application for Withholding Certificate shall be deemed approved, subject to limited exceptions.

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## DISCUSSION

### I. INTRODUCTION

FIRPTA imposes a tax on capital gains derived from the disposition of U.S. real property interests by foreign persons. The general withholding rate is 15% of the amount realized on the disposition of the property. IRC § 1445(a). A withholding rate of 10% applies in select situations. IRC § 1445(c)(4). The amount realized includes the sum of cash paid, the fair market value of other property transferred, and the outstanding amount of any liability assumed by the transferee. 26 CFR § 1.1445-1(g)(5).

Because the general withholding rate applies to the entire amount realized, and transferors often owe less than this amount, Congress provided that withholding cannot exceed the transferor's maximum tax liability. IRC § 1445(c)(1). Congress delegated to the Secretary the authority to pass regulations to determine a transferor's maximum tax liability. IRC § 1445(c)(3)(A)(ii). The applicable regulations provide a mechanism to reduce or eliminate the withholding amount through the issuance of a withholding certificate. 26 CFR § 1.1445-3(a). A buyer, seller, or buyer's settlement agent may request a determination of the seller's maximum tax liability by submitting Form 8288-B, *Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests*. In response to the Application for Withholding Certificate the Service may deny the request, or it may issue a withholding certificate stating the amount of tax that is required to be withheld, if any.

A Form 8288-B submission typically includes supporting documentation to justify a request for reduced or exempt FIRPTA withholding. This may include a copy of the signed purchase and sale agreement, evidence of the transferor's adjusted basis in the property (such as settlement statements or acquisition records), estimated selling expenses, and a calculation of the anticipated gain or loss. If the transfer is claimed to be non-taxable (e.g., due to a like-kind exchange or corporate reorganization), relevant legal or transactional documentation must also be provided. All information is provided under penalties of perjury and must be accurate and complete to allow the Service to evaluate the request.

The obligation to remit the withheld tax and file Form 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, rests with the transferee or another designated withholding agent pursuant to IRC § 1445(a) & 26 CFR § 1.1445-1(c). Form 8288 is used to report the remitted withholding tax to the Service. Along with Form 8288, the transferee or withholding agent must file Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, for each foreign seller involved in the transaction. 26 CFR § 1.1445-1(e)(2). Form 8288-A provides detailed information about the transferor, the amount withheld, and the real property disposed of. The Service processes Form 8288-A by matching it with the withheld tax payment and then detaches and stamps a copy to serve as official proof of the amount withheld. The Service mails this stamped copy back to the

transferor who uses the Form to claim a credit for the withheld tax on their U.S. income tax return, typically Form 1040-NR or Form 1120-F. 26 CFR § 1.1445-1(f)(2). This procedure ensures that the foreign seller can receive credit for the tax withheld at the time of sale and helps the Service track compliance with FIRPTA reporting and payment requirements.

In general, a transferee must report and pay over the withheld tax by the 20th day after the date of the transfer. 26 CFR § 1.1445-1(c). If an Application for Withholding Certificate is submitted to the Service on or before the date of the property transfer, the transferee is still required to withhold the applicable FIRPTA tax. However, the obligation to remit the withheld amount to the Service is deferred. Specifically, the transferee is not required to report and pay the withheld tax until the 20th day following the Service's final determination on the application. 26 CFR § 1.1445-1(c)(2)(i). This determination is deemed to have occurred when the Service issues and mails either the withholding certificate or a formal notice of denial to the transferee.

By law, the Service must respond to an Application for Withholding Certificate within 90 days. IRC § 1445(c)(3)(B).<sup>4</sup> While the law requires the Service to act within 90 days, the law is silent as to what occurs if the Service does not act. A deadline without a consequence is meaningless. As such, consequences should be added to the statute or be provided through regulation. Specifically, an Application for Withholding Certificate should be deemed accepted by the Service if the Service fails to timely respond. To balance such consequences, the 90-day response deadline should be extended to 180 days to allow the Service more time to review and consider each application.

## **II. THE LAW CURRENTLY REQUIRES THE SERVICE TO HANDLE ALL APPLICATIONS FOR WITHHOLDING CERTIFICATES WITHIN 90 DAYS**

### **A. Current Law & Regulations**

Internal Revenue Code § 1445(c)(3)(B) provides that in response to the submission of a Form 8288-B:

(B) Requests to be handled within 90 days

The Secretary shall take action with respect to any request [relating to a determination of the transferor's maximum tax liability]...within 90 days after the Secretary receives the request.

Treasury Regulation § 1.1445-3(a) provides in part:

**(a) In general.** Withholding under section 1445(a) may be reduced or eliminated pursuant to a withholding certificate issued by the Internal Revenue Service in accordance with

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<sup>4</sup> In limited situations additional time is allowed because of amendments to the withholding certificate application. 26 CFR § 1.1445-3(f)(2)(iii).

the rules of this section....The Internal Revenue Service will act upon an application for a withholding certificate not later than the 90th day after it is received. Solely for this purpose (i.e., determining the day upon which the 90-day period commences), an application is received by the Service on the date that all information necessary for the Service to make a determination is provided by the applicant....

The law and regulations, in no uncertain terms, instruct the Service to act upon an Application for Withholding Certificate not later than 90 days after receipt. The statute and regulations do not state that the Service *may* or *should* act, but rather the statute provides that the Service *shall* act, demonstrating Congress' intent to impose a hard deadline which the Service must abide. However, neither the statute nor the regulations provide for a consequence if the Service fails to act, making the 90-day deadline essentially meaningless.

## **B. STATISTICS**

According to the Service, more than 50,000 Forms 8288-A, *Statement of Withholding on Certain Dispositions by Foreign Persons*, were filed in 2021, and over \$3 billion dollars of tax was withheld.<sup>5</sup> Although there are no direct statistics on how many Applications for Withholding Certificate are submitted each year, the authors believe that a large portion of the 50,000 foreign persons who filed Forms 8288-A filed an Application for Withholding Certificate seeking a reduced withholding amount.

According to the National Association of Realtors, more than 50,000 U.S. homes, totaling more than \$42 billion in value, are purchased by foreign investors on a yearly basis.<sup>6</sup> It is estimated that foreign investment in U.S. real property since 2009 has surpassed \$1.2 trillion dollars.<sup>7</sup>

## **III. PROBLEMS ADDRESSED: INEQUITIES OF NOT TIMELY RESPONDING TO AN APPLICATION FOR WITHHOLDING CERTIFICATE**

### **A. Those Affected by the Current Law**

With hundreds of thousands to millions of foreign investments representing billions of dollars in U.S. real property, delays in the issuance of withholding certificates present a significant challenge. For foreign investors who sell U.S. real estate, there is no specific statutory relief available if a withholding certificate is not issued within the required 90-day period. These delays are negatively impacting both the flow of foreign investment into the United States and investors'

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<sup>5</sup> IRS individual tax statistics, available at <https://www.irs.gov/statistics/soi-tax-stats-withholding-tax-on-dispositions-of-us-real-property-interests-by-foreign-persons-statistics>.

<sup>6</sup> See National Association of Realtors, Annual Foreign Investment in U.S. Existing Homes Sales Decreased 21.2% to \$42 Billion, available at <https://www.nar.realtor/newsroom/annual-foreign-investment-in-u-s-existing-homes-sales-decreased-21-2-to-42-billion>.

<sup>7</sup> See Nonresident Investor, available at <https://nonresidentinvestor.com/foreign-investment-in-us-real-estate/>.

ability to efficiently reinvest their sales proceeds into new U.S. properties.

In situations where the Service fails to respond to an Application for Withholding Certificate within 90-days, the taxpayer must decide whether to instruct the transferee/withholding agent to remit the fully withheld tax, or whether to wait for a reply from the Service. If the taxpayer waits, a situation can arise where the taxpayer's return becomes due before the Form 8288 is filed. In such a situation the taxpayer must file a return either reporting withholding that has not yet been paid to the Service or reporting no withholding and later amending the return to correct the withholding amount once the Service acts upon the Application for Withholding Certificate. In either situation government resources are ultimately wasted processing and matching the withheld tax amounts.

While the statistics on the exact number of taxpayers potentially impacted by the current delays in issuing a withholding certificate are not readily available, the potential impact covers tens of thousands of foreign investors and potentially billions of dollars in investment and tax revenue each tax year. For these reasons, the law and regulations should be changed to ensure that these foreign taxpayers are not negatively impacted.

#### **B. The Service is Losing Out on the Time Value of Money and Resources**

In general, a transferee must report and pay over the withheld tax by the 20th day after the date the real property is transferred. *See* 26 CFR § 1.1445-1(c)(1). This deadline, however, is delayed in situations where an Application for Withholding Certificate is submitted on the day of or at any time prior to the transfer of the real property. When an Application for Withholding Certificate has been submitted, "the amount withheld, or a lesser amount as determined by the Service, need not be reported and paid over to the Service until the 20th day following the Service's final determination with respect to the application for a withholding certificate." 26 CFR § 1.1445-1(c)(2).

The Service's delay in responding to an Application for Withholding Certificate delays the remittance of the withheld funds to the Treasury. By not timely responding to an Application for Withholding Certificate, the Service is depriving itself of the time value of money of these withheld funds. If the Service were to timely act on these withholding certificate requests, then funds could be transferred to the Service for its use as opposed to sitting in the account of the withholding agent.

Therefore, fixing the current delay provides a benefit to not only taxpayers but also the U.S. itself.

**IV. PROPOSED REMEDY – ADD AN ADDITIONAL 90 DAYS TO RESPOND TO AN APPLICATION FOR WITHHOLDING CERTIFICATE AND INSTITUTE AUTOMATIC APPROVAL OF AN APPLICATION FOR WITHHOLDING CERTIFICATE IF TIMELY RESPONSE IS NOT MADE**

**A. Proposed Statutory Change**

Two changes should be made to IRC § 1445 to rectify the issues discussed above. First, IRC § 1445(c)(3)(B) should be amended to extend the 90-day determination deadline to 180-days. Second, IRC § 1445(c)(3)(B) should be amended to provide that where the Service fails to meet the 180-day deadline, the submitted Application for Withholding Certificate shall be deemed approved as a matter of law, subject to limited exceptions.

The current statute, IRC § 1445(c)(3)(B) provides:

The Secretary shall take action with respect to any request described in subparagraph (A) within 90 days after the Secretary receives the request.

The statute should be amended to read as follows:

**(B) Time for Acting on Request; Deemed Approval**

**(i) Requests to be handled within 180 days**

The Secretary shall take action, and notify the applicant of such action, with respect to any request described in subparagraph (A) within 180 days after the Secretary receives the request.

**(ii) Deemed Approval**

If the Secretary fails to notify the applicant of such determination within the applicable period, the application shall be deemed approved, and the amount of withholding shall be reduced in accordance with the amount proposed in the application. The applicant and the withholding agent may rely on such deemed approval as though an actual certificate had been issued. The Secretary may retroactively revoke deemed approval only in cases involving material misstatements, fraud, or bad faith.

Amending the statute in the manner described above will provide the Service with additional time to review and respond to an Application for Withholding Certificate, while providing for a deemed approval timeline if the Service fails to act within 180-days.

Congress has previously adopted deemed approval mechanisms within the Internal Revenue Code. For example, IRC § 7122(f) provides that an Offer in Compromise is deemed accepted if the Secretary fails to formally reject the offer within 24 months of its submission. Likewise, Congress has enacted various provisions limiting the period of time that the Service has to act. Several statutes, including those governing assessment and refund limitations, impose strict

time requirements on the Service, with the failure to adhere to such deadlines leading to the loss of assessment or collection rights.

Assuming a statutory adjustment similar to the one described above is adopted, corresponding amendments to the applicable regulations would also be necessary. These amendments should include a provision specifying that, in cases where an Application for Withholding Certificate is deemed approved, the withholding agent must file Form 8288 within 30 days of the deemed approval date. In addition, Treasury should implement a rule providing that any excess funds withheld from the sale proceeds and remaining in the withholding agent's possession must be released to the transferor no earlier than 20 days after the deemed approval date. Extending the deadline for filing Form 8288 to 30 days, coupled with a 20-day additional holdback period before disbursing excess funds in cases of deemed approval, would address potential issues relating to mailing delays.

## **B. Proposed Additions to 26 CFR § 1.1445-3**

The authors propose that regardless of if Congress acts, the Treasury Department should adopt a regulation which provides that if the Application for Withholding Certificate is not acted upon within 180-days, the application is deemed accepted.

The Treasury Department has the authority to adopt such a regulation. The statutory language of IRC § 1445(c)(3)(A) provides:

(3) Procedural rules

(A) Regulations

Requests for—

- (i) qualifying statements under subsection (b)(4),
- (ii) determinations of transferor's maximum tax liability under paragraph (1), and
- (iii) reductions under paragraph (2) in the amount required to be withheld,

shall be made at the time and manner, and shall include such information, as the Secretary shall prescribe by regulations.

In passing this code section, Congress clearly delegated to the Secretary the right to prescribe regulations relating to determining a transferor's maximum tax liability, which is done through the filing of an Application of Withholding Certificate. Additionally, the Secretary has authority given that he "shall" take action. As such, the Secretary has the authority to issue regulations prescribing a deemed acceptance because: (1) he is authorized to issue regulations; and (2) he "shall" take action.

Further, IRC § 1445(c)(1)(A) provides that the amount withheld "shall not exceed" the tax



owed on the sale of the property. The authority to determine the transferor's maximum tax liability is delegated to the Secretary under IRC § 1445(c)(1)(B). The use of the phrase "shall not exceed" indicates that Congress did not intend to require that the amount withheld always match the final tax liability with exact precision. Rather, because the determination of the transferor's maximum tax liability rests with the Secretary, the Treasury Department may promulgate regulations providing that, if an Application for Withholding Certificate is not acted upon within 180 days, the application is deemed accepted.

The authors propose that the following regulation be promulgated:

Proposed Treasury Regulation § 1.1445-3(i): Automatic Approval for Withholding Certificates Not Acted Upon Within Statutory Period

(i) Automatic Approval of Withholding Certificate Applications.

(1) Automatic Deemed Approval.

If the Secretary fails to issue a written determination approving or denying the application for a withholding certificate within 180 days (or as extended pursuant to § 1.1445-3(f)(2)) of receipt as described in § 1.1445-3(a), the application shall be deemed approved as of the 181st day after receipt of the complete application.

(2) Effect of Deemed Approval.

Upon deemed approval under paragraph (i)(1), the applicant and the withholding agent may rely on the proposed reduced or exempt withholding amount specified in the application. The applicant and the withholding agent shall retain a copy of the complete application and evidence of when the application was initially submitted as proof of deemed approval.

The withholding agent must report and remit any tax by the 30<sup>th</sup> day after the date of deemed approval. If no tax is required to be remitted as a result of the deemed approval, the withholding agent is still required to file a Form 8288.

The withholding agent may not release any excess withheld proceeds to the transferor until 20 days after the date of deemed approval.

(3) Recordkeeping and Notification.

The Form 8288 filed by the withholding agent shall include a copy of the withholding certificate application and supporting documentation, along with a statement notifying the IRS that the remitted amount (if any) is based on the deemed approval provisions found in this section.

(4) Exceptions.

The provisions of this paragraph shall not apply in cases where the application is found to be materially incomplete, fraudulent, or submitted in bad faith. The Secretary retains the authority to retroactively revoke deemed approval if it is determined that the application contained material misstatements or omissions.

The proposed regulation described above would assign meaningful consequences to a statute that otherwise lacks any enforcement mechanism. The proposed regulation will also result in more effective and efficient tax administration which benefits both the taxpayer and the government.

## **V. CONCLUSION**

The failure to timely respond to an Application for Withholding Certificate has caused uncertainty and unnecessary delays for foreign persons investing in United States real property. These delays deprive the United States and foreign persons of funds which they are entitled. For these reasons, the above statutory and regulatory revisions should be adopted.