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What Foreign Investors need to know when Buying, Selling or Leasing Real Estate in Florida

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The Law office of Kevin F. Jursinski PA has been successfully closing residential and commercial real estate transactions in Florida for the past 35 years. We have represented both domestic and foreign investors who have purchased and sold real estate in Florida.

This article addresses a number of factors that need to be considered by a foreign investor when buying, selling or leasing real estate in Florida. To be more precise, this article shall refer to a foreign investor as a “Foreign National”. The Internal Revenue Service (IRS) deems a Foreign National as a person who is not a naturalized citizen of the United States of America and is identified as a non-resident alien.

Within this article there are several references to further information that can be found online. At the end of the article, you will find links to all websites mentioned.

1. Use of Various Entities to Acquire Real Estate in Florida

Foreign Nationals have the ability to acquire real estate in the U.S. for personal use either in their own names or in the name of an entity (Corporation, LLC or Florida Land Trust) without any involvement by a U.S. governmental agency. I’ve also written an in-depth article discussing the various types of real estate entities that should be considered for use when acquiring Florida real estate. A link to the article is listed at the end of this article.

2. Requirement by Foreign Nationals to obtains Taxpayer ID Number

A Foreign National does not need a green card, but will need an Individual Taxpayer Identification Number (ITIN) for the person/entity taking title.

An ITIN is a tax-processing number assigned to Foreign Nationals. An ITIN can be issued by the IRS or by a Certified Professional Accountant approved by the IRS. You will have to fill out Form W-7 (in

English) or Form W-7(SP) (in Spanish) to process your application for an ITIN. The W-7 form requires that you identify a valid basis for the application. Depending on your nationality, you may also need a valid foreign passport, visa and two or more current photo identifications, such as a driver's license.

ITIN Guidance for Foreign Buyers/Sellers of U.S. Property is listed on the IRS website. Here is an excerpt of the guideline:

“Foreign sellers of U.S. real property interests need Taxpayer Identification Numbers (TINs) to request reduced tax withholding when disposing of the property interest, and to pay any required withholding. Individuals who do not qualify for Social Security Numbers (SSN) may obtain Individual Taxpayer Identification Numbers (ITINs) to meet the requirement to supply a TIN.

The Internal Revenue Service implemented new procedures, effective December 17, 2003, to strengthen controls on ITINs and ensure the numbers are issued for tax administration purposes only. To help your qualifying clients obtain ITINs without undue burden, see the instructions for Forms W-7 and W-7SP and the information below, which describes how the new process impacts FIRPTA (Foreign Investment in Real Property Tax Act) processing. TINs required for withholding (Forms 8288 and 8288-A)”.

3. Florida specific requirements for registration by Foreign Nationals

For Foreign Nationals, there are certain filing requirements for legal entities that want to purchase real estate in Florida. Any property owned by a foreign business entity or U.S. Corporation/LLC/etc. whose ownership by a Foreign National(s) exceeds 10 percent, must have a Florida registered agent and Florida office on file with the Florida Department of State.

If a Foreign National or its entity collects sales tax on a rental property, a Foreign National must register as a sales tax dealer with the Florida Department of Revenue. Note that Florida requires sales tax on commercial rental properties but not on long-term leases of residential rental properties. However, there may be individual counties that require collection of sales tax on residential properties based upon certain specific local requirements.

As an example: While Florida has no state income tax, there is a “Tourist Tax” in Lee County, Florida. The Tourist Tax is for residential leases under six (6) months in duration and is in addition to the Florida State sales tax of 6 percent on lease payments received. Specifically the Tourist Tax requires that you must charge, report and pay 5 percent Tourist Development Tax, as well as the Florida Sales Tax (6 percent) on short terms rentals. Reports on short term rentals must be made or there can be a penalty and interest assessed by the respective department in charge.

Lee County offers only one exemption for payment of the Tourist Tax and that is only available to:

“...Those who have signed a bona fide written lease in excess of 6 months and one day, or have paid the tax continuously month-to-month for the first 6 months without a lease are exempt. Exempt status with the State of Florida Department of Revenue Sales & Use Tax is also exempt from Lee County Tax.”

The State of Florida Department of Revenue can provide more information on any Florida sales tax questions regarding property rentals. A link is posted at the end of this article.

4. Requirement to file Federal Tax return by Foreign Nationals

The Internal Revenue Service requires and enforces the requirement that Foreign Nationals pay U.S. income taxes (state and federal). As indicated above, Florida does not have a state income tax but it does have a state sales tax on certain rentals. In certain instances, a county tax is also imposed on rentals.

If federal tax returns are not filed in a timely fashion, a tax of 30 percent of the gross rental income may be assessed. Should a Foreign National incur operating losses during the initial years of the investment, there is still, nonetheless, a requirement to file your federal income tax returns in a timely manner. Failure to do so can result in a penalty and interest for non-compliance.

5. Reporting of cash transactions in excess of \$10,000

U.S. law requires that all cash transactions over \$10,000 be reported to the federal government. This obligation applies to all parties connected with the real estate transaction (Buyer, Seller, Real Estate Agents, Attorneys and Title Companies). As such, a Foreign National cannot circumvent reporting a real estate transaction simply by utilizing cash as a means of payment.

6. Foreign National's tax liability in his/her home country

A foreign property owner's tax liability in his/her home country will vary depending upon where the purchaser is from and whether that country has a tax treaty with the United States. Consult a tax attorney familiar with your home country's treaty with the U.S. to get answers to tax-related questions.

7. FIRPTA Requirements and Withholding

This is a Florida law that governs the ownership of real estate in the United States for Foreign Nationals. Specifically, the definition of an interest in real property in the United States is:

“A U.S. real property interest is an interest, other than as a creditor, in real property (including an interest in a mine, well or other natural deposit) located in the United States or the U.S. Virgin Islands, as well as certain personal property that is associated with the use of real property (such as farming machinery). It also means any interest, other than as a creditor, in any domestic

corporation unless it is established that the corporation was at no time a U.S. real property holding corporation during the shorter of the period during which the interest was held, or the 5-year period ending on the date of disposition (applicable periods).”

The IRS further summarizes the issue as follows:

“The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests.

A disposition means “disposition” for any purpose of the Internal Revenue Code. This includes but is not limited to a sale or exchange, liquidation, redemption, gift, transfers, etc. Persons purchasing U.S. real property interests (transferees) from foreign persons, certain purchasers' agents, and settlement officers are required to withhold 15% (10% for dispositions before February 17, 2016) of the amount realized on the disposition (special rules for foreign corporations).

In most cases, the transferee/buyer is the withholding agent. If you are the transferee/buyer you must find out if the transferor is a foreign person. If the transferor is a foreign person and you fail to withhold, you may be held liable for the tax. For cases in which a U.S. business entity such as a corporation or partnership disposes of a U.S. real property interest, the business entity itself is the withholding agent.”

8. FIRPTA Rate Increases:

The federal tax withholding rate that went into effect February, 2016 now designates a 10 percent rate for FIRPTA for amounts up to \$1,000,000 and a 15 percent rate applies for amounts exceeding \$1,000,000.

The 10 percent rate will still apply for those transactions in which the property is to be used by the Transferee as a residence, provided the amount realized (generally the sales price) does not exceed \$1,000,000, and the existing \$300,000 “exemption” remains unaffected. Here are the guidelines:

- If the amount realized (generally the sales price) is \$300,000 or less and the property is used by the Transferee as a residence (as provided for in the current regulations), no sums need be withheld or remitted.
- If the amount realized exceeds \$300,000 but does not exceed \$1,000,000 and the property is used by the Transferee as a residence (there are no regulations that specifically address these changes but many are assuming you can follow the current regulations for the \$300,000 exemption), then the withholding rate is 10 percent on the full amount realized.
- If the amount realized exceeds \$1,000,000, then the withholding rate is 15 percent on the entire amount, regardless of use by the Transferee.

As indicated above, for sales in excess of one million dollars (\$1,000,000) the withholding amount is effective as set as of February of 2016. If you were involved in a transaction in which you feel that the amount of FIRPTA withholding was not properly handled, you should immediately seek the advice of competent counsel or a tax advisor.

9. FIRPTA: Federal Income Reporting Tax Act and its effects on Foreign Nationals who lease Real Estate in Florida:

Foreign Nationals purchasing Florida real estate, either for personal use or for leasing purposes, subject themselves or their real estate ownership entity to taxation on rental income and ultimately to the income tax on the sale of the real property. Foreign landlords have a choice on how to be taxed as to rental income:

- a. Pay 30 percent of gross rental receipts; or
- b. Pay regular U.S. income tax rates on net income from the property by filing a Form 4224 with the IRS.

As indicated above under FIRPTA, profits made from the sale of U.S. property by a Foreign National are subject to taxation and must be reported as part of the real estate transaction. Here is an excerpt from the IRS website:

“Use Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests to apply for a withholding certificate.”

10. Exceptions to FIRPTA

There are three (3) exceptions identified in FIRPTA which can be used by a Foreign National to avoid payment of Federal Income Taxes and exempt the sale from FIRPTA and the withholding of closing proceeds as a requirement by the closing agent or Buyer:

1. The Seller is a resident alien and has a tax identification number;
2. The sale price is less than \$300,000 and the buyer will use the property as a personal residence at least 50 percent of the time for the next two years after closing; **or**
3. The seller has obtained a withholding certificate from the IRS

Unless one of the above-listed exemptions apply, the Buyer (or Buyer’s closing agent) must withhold 10 percent of the sale price to pay to the IRS. The Buyer must be diligent in regard to real estate transactions with Foreign Nationals since liability for non-payment can be placed upon the Buyer by the IRS.

In February 2016, there was a change to the amount of the federal tax withholding rate. The government increased FIRPTA general withholding rate from 10 percent to 15 percent (see full discussion in Section

8). Sellers and Buyers, as well as Real Estate Attorneys and Title Companies handling real estate closings involving foreign purchasers, must be cautious and adjust their procedures and forms to reflect this change. The specific identification of the FIRPTA requirements are listed on the IRS website.

11. 1031 Exchange treatment potentially available for Foreign Nationals

Foreign investors may be entitled to defer capital gains taxes in the U.S. by purchasing another investment property under Section 1031 of the IRS Code. This is considered a “1031 Exchange”

Before any 1031 Exchange format is considered, the foreign investor should fully research any existing tax treaties between the U.S. and the investor’s home country. Advice from a professional tax advisor and 1031 Exchanger is strongly recommended if a Foreign National is considering a 1031 Exchange.

SUMMARY:

If you are considering a transaction involving a Foreign National or you are a Foreign National interested in buying or selling Florida real estate and would like to discuss your needs, please contact our office at (239) 337-1147, visit our website at www.KFJLaw.com or email your questions to Kevin@KFJLaw.com or Jamie@KFJLaw.com and we will attempt to respond to your inquiry.

Links to Articles:

Entities in which to purchase and hold real estate:

<http://www.kfjlaw.com/files/2012/05/Use-of-Business-Entities-and-Acquisition-of-Real-Estate-Investments-10.14.15.pdf>

ITIN Guidance for Foreign Buyers/Sellers of U.S. Property:

<https://www.irs.gov/individuals/itin-guidance-for-foreign-property-buyers-sellers>

Lee County Clerk of Court’s questions and answers on Lee County’s Tourist Tax:

http://www.leeclerk.org/index.asp?Type=B_LIST&SEC=%7B669B7CA6-1497-49E5-B171-10D96E27EB94%7D

The State of Florida Department of Revenue:

<http://dor.myflorida.com>

IRS FIRPTA Withholding:

<https://www.irs.gov/individuals/international-taxpayers/firpta-withholding>

IRS FIRPTA forms to utilize:

www.irs.gov/individuals/international-taxpayers/format-for-applications