



## Taxes And The Foreign Seller

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As foreign markets witness booms to their economies as of late, foreign investment in New York properties has been on the rise. Sellers and purchasers must be made aware of the taxes related to both the transfer of property and the capital gains associated with same.

Unfortunately, the New York State and New York City transfer taxes which range from 1.4% to 3.025% of the purchase price are unavoidable unless the selling entity is tax exempt. These entities are limited to a United States Government Agency, New York State Agency or a foreign government where the property was used exclusively for diplomatic or consular purposes. An exemption also applies in the situation where either party is a non-profit organization formed and operated exclusively for religious, charitable or educational purposes.

When a property is sold, Capital Gains taxes are due to both the Internal Revenue Service and New York State Department of Taxation. If the sale is of residential property that was used as the Seller's principal residence for two of the previous five years, the Seller can exclude \$250,000 (single) or \$500,000 (married filing jointly) from the profit of the sale. This exclusion is available to sellers and is permitted every two (2) years. This means that all sales where the property was used as a primary residence are free from capital gains taxes if the profit was less than \$250,000 for a single person or \$500,000 for a married couple filing jointly.

Capital Gains taxes, both Federal and State, are paid at the time of the Seller's income tax filing. This is usually by the April 15 deadline of the year following the sale of the property.

If the Seller is not a New York Resident, the estimated capital gains tax must be paid at closing. To do so the Seller must complete Form IT-2263 (Condominium) or IT-2664 (Cooperative) and tender a check in an amount equal to 8.82% of the estimated gain (as of the 2014 Tax Year). The Seller is exempt from paying this at closing if the property sold was used as their principal residence any two of the previous five years. This does not exempt them from the tax due, if any, only the time of which the payment is made, at closing versus at the time of the seller's income tax filing.

If the seller is a foreign person, defined as a nonresident alien, individual or foreign corporation, the purchaser is required to act as a withholding agent and obligated to withhold a portion of the purchase price. This is known as the Foreign Investment in Real Property Tax Act (FIRPTA) withholding. If the Seller is unable to provide a FIRPTA Affidavit, at closing, affirming that they are not subject to FIRPTA withholding because they are not considered a foreign person or provide a certificate of withholding from the Internal Revenue Service then a withholding is necessary.

Obtaining a certificate of withholding from the IRS requires an application to be made by the seller prior to closing. The processing of the application and issuance of the certificate can take four to eight weeks or longer so it should be made as early in the sales process as possible. If the certificate is not received at the time of closing, the Purchaser is required to withhold, for non-corporate sellers, an amount equal to 10% of the purchase price. Purchaser's attorney then holds this amount in escrow until the certificate of withholding is issued. The amount of tax due, if any, according to the certificate must then be paid within twenty days of issuance.

It is very common that the seller does not make an application for the certificate of withholding. In this situation the amount equal to 10% of the purchase price is delivered to the IRS immediately. The seller must then apply for a refund of the overpayment of the tax, if any.

The penalties, which are levied against the purchaser, as the required withholding agent, for non-payment or late payment of the FIRPTA withholding is considerable so it is prudent to submit all amounts due in a timely fashion.

The sale of real estate may trigger taxable events with both the IRS and New York State Department of Taxation. It is critical for all sellers to consult a Certified Public Accountant prior to any real estate transaction to discuss their tax liabilities and at timeframe these liabilities would become due. ■

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