

1, 2001 (see 26 CFR part 1, revised April 1, 1999) and, therefore, to require withholding certificates conforming to the requirements described in this section (new withholding certificates). For purposes of this section, a new withholding certificate is deemed to satisfy the documentation requirement under the regulations in effect prior to January 1, 2001 (see 26 CFR part 1, revised April 1, 1999). Further, a new withholding certificate remains valid for the period specified in § 1.1441-1(e)(4)(ii), regardless of when the certificate is obtained.

[T.D. 8734, 62 FR 53466, Oct. 14, 1997, as amended by T.D. 8804, 63 FR 72186, Dec. 31, 1998; T.D. 8856, 64 FR 73411, Dec. 30, 1999]

§ 1.1445-1 Withholding on dispositions of U.S. real property interests by foreign persons: In general.

(a) *Purpose and scope of regulations.* These regulations set forth rules relating to the withholding requirements of section 1445. In general, section 1445(a) provides that any person who acquires a U.S. real property interest from a foreign person must withhold a tax of 10 percent from the amount realized by the transferor foreign person (or a lesser amount established by agreement with the Internal Revenue Service). Section 1445(e) provides special rules requiring withholding on distributions and certain other transactions by corporations, partnerships, trusts, and estates. This § 1.1445-1 provides general rules concerning the withholding requirement of sections 1445(a), as well as definitions applicable under both section 1445(a) and 1445(e). Section 1.1445-2 provides for various situations in which withholding is not required under section 1445(a). Section 1.1445-3 provides for adjustments to the amount required to be withheld by transferees under section 1445(a). Section 1.1445-4 prescribes the duties of agents in transactions subject to withholding under either section 1445(a) or 1445(e). Section 1.1445-5 provides rules concerning the withholding required under section 1445(e), while § 1.1445-6 provides for adjustments to the amount required to be withheld under section 1445(e). Finally, § 1.1445-7 provides rules concerning the treatment of a foreign corporation that has made an

election under section 897(i) to be treated as a domestic corporation.

(b) *Duty to withhold—(1) In general.* Transferees of U.S. real property interests are required to deduct and withhold a tax equal to 10 percent of the amount realized by the transferor, if the transferor is a foreign person and the disposition takes place on or after January 1, 1985. Neither the transferee's duty to withhold nor the amount required to be withheld is affected by the amount of cash to be paid by the transferee. Amounts withheld must be reported and paid over in accordance with the requirements of paragraph (c) of this section. Failures to withhold and pay over are subject to the liabilities set forth in paragraph (e) of this section. If two or more persons are joint transferees of a U.S. real property interest, each such person is subject to the obligation to withhold. That obligation is fulfilled with respect to each such person if any one of them withholds and pays over the required amount in accordance with the rules of this section. If the amount realized (as defined in paragraph (g)(5) of this section) by the transferor is zero, then no withholding is required. For example, if a real property interest is transferred as a gift (i.e., the recipient does not assume any liabilities or furnish any other consideration to the transferor) then no withholding is required. Withholding is not required with respect to dispositions that takes place before January 1, 1985, even if the first payment of consideration is made after December 31, 1984.

(2) *U.S. real property interest owned jointly by foreign and non-foreign transferors.* The amount subject to withholding under paragraph (b)(1) of this section with respect to the transfer of a U.S. real property interest owned by one or more foreign persons (as defined in § 1.897-1(k)) and one or more non-foreign persons shall be determined by allocating the amount realized from the transfer between (or among) such transferors based upon the capital contribution of each transferor with respect to the property and by aggregating the amounts allocated to any foreign person (or persons). For this purpose, a husband and wife will each

be deemed to have contributed 50 percent of the aggregate capital contributed by such husband and wife. See §1.1445-1(f)(3)(iv) with respect to the crediting of the amount withheld between or among joint foreign transferors.

(3) *Options to acquire a U.S. real property interest*—(i) *No withholding on grant of option.* No withholding is required under section 1445 with respect to any amount realized by the grantor on the grant of an option to acquire a U.S. real property interest.

(ii) *No withholding upon lapse of option.* No withholding is required under section 1445 with respect to any amount realized by the grantor upon the lapse of an option to acquire a U.S. real property interest.

(iii) *Withholding required upon the sale or exchange of option.* A transferee of an option to acquire a U.S. real property interest must deduct and withhold a tax equal to 10 percent of the amount realized by the transferor upon the disposition. This §1.1445-1(b)(3)(iii) does not apply to require withholding upon the initial grant of an option.

(iv) *Withholding required on exercise of option.* If the holder exercises an option to purchase a U.S. real property interest, the amount paid for the option shall be considered an amount realized by the grantor/transferor upon the transfer of the property with respect to which the option was granted, and shall thus be subject to withholding on the day that such underlying property is transferred. The preceding sentence applies regardless of whether or not the terms of the option specifically provide that the option price is applied to the purchase price.

(4) *Exceptions and modifications.* The duty to withhold under section 1445(a) is subject to the exceptions and modifications contained in §§1.1445-2 and 1.1445-3. Generally, §1.1445-2 provides rules for determining that withholding is not required because either the transferor is not a foreign person or the interest transferred is not a U.S. real property interest. In addition, §1.1445-2 provides exceptions to the withholding requirement, including a rule that exempts from withholding any person who acquires a U.S. real property interest for use as a residence

for a contract price of \$300,000 or less. If withholding is required under section 1445(a), §1.1445-3 allows the amount withheld to be modified pursuant to a withholding certificate issued by the Internal Revenue Service. If a transferee cannot withhold the full amount required because the first payment of consideration for the transfer does not involve sufficient cash (or other liquid assets convertible into cash, such as foreign currency), then a withholding certificate must be obtained pursuant to §1.1445-3.

(c) *Reporting and paying over of withheld amounts*—(1) *In general.* A transferee must report and pay over any tax withheld by the 20th day after the date of the transfer. Forms 8288 and 8288-A are used for this purpose, and must be filed at the location as provided in the instructions to Forms 8288 and 8288-A. Pursuant to section 7502 and regulations thereunder, the timely mailing of Forms 8288 and 8288-A will be treated as their timely filing. Form 8288-A will be stamped by the IRS to show receipt, and a stamped copy will be mailed by the IRS to the transferor (at the address reported on the form) for the transferor's use. See §§1.1445-1(f) and 1.1445-3(f). Forms 8288 and 8288-A are required to include the identifying numbers of both the transferor and the transferee, as provided in paragraph (d) of this section. If any identifying number as required by such forms is not provided, the transferee must still report and pay over any tax withheld on Form 8288, although the transferor cannot obtain a credit or refund of tax on the basis of a Form 8288-A that does not include the transferor's identifying number (see paragraph (f)(2) of this section).

(2) *Pending application for withholding certificate*—(i) *In general.* (A) *Delayed reporting and payment with respect to application submitted by transferee.* If an application for a withholding certificate with respect to a transfer of a U.S. real property interest is submitted to the Internal Revenue Service by the transferee on the day of or at any time prior to the transfer, the transferee must withhold 10 percent of the amount realized as required by paragraph (b) of this section. However, 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. For this purpose, the Service's final determination occurs on the day when the withholding certificate is mailed to the transferee by the Service or when a notification denying the request for a withholding certificate is mailed to the transferee by the Service. An application is submitted to the Service on the day it is actually received by the Service at the address provided in § 1.1445-1(g)(10) or, under the rules of section 7502, on the day it is mailed to the Service at the address provided in § 1.1445-1(g)(10).

(B) *Delayed reporting and payment with respect to application submitted by transferor.* If an application for a withholding certificate with respect to a transfer of a U.S. real property interest is submitted to the Internal Revenue Service by the Transferor on the day of or any time prior to the transfer, such transferor must provide notice to the transferee prior to the transfer. No particular form is required but the notice must set forth the name, address, and taxpayer identification number of the transferor, a brief description of the property which is the subject of the application, and the date the application was submitted to the Service. The transferee must withhold 10 percent of the amount realized as required in paragraph (b) of this section but need not report or pay over to the Service such amount (or a lesser amount as determined by the Service) until the 20th day following the Service's final determination with respect to the application. The Service will send a copy of the withholding certificate or copy of the notification denying the request for a withholding certificate to the transferee. For this purpose, the Service's final determination will be deemed to occur on the day when the copy of the withholding certificate or the copy of the notification denying the request for a withholding certificate is mailed by the Service to the transferee (or transferees). An application is submitted to the Service on the day it is actually received by the Service at the address provided in § 1.1445-

1(g)(10) or, under the rules of § 7502, on the day it is mailed to the Service at the address provided in § 1.1445-1(g)(10).

(ii) *Anti-abuse rule—(A) In general.* A transferee that in reliance upon the rules of this paragraph (c)(2) fails to report and pay over amounts withheld by the 20th day following the date of the transfer, shall be subject to the payment of interest and penalties if the relevant application for a withholding certificate (or an amendment to the application for a withholding certificate) was submitted for a principal purpose of delaying the transferee's payment to the IRS of the amount withheld. Interest and penalties shall be assessed on the amount that is ultimately paid over (or collected pursuant to the agreement) with respect to the period between the 20th day after the date of the transfer and the date on which payment is made (or collected).

(B) *Presumption.* A principal purpose of delaying payment of the amount withheld shall be presumed if—

(1) The transferee applies for a withholding certificate pursuant to § 1.1445-3(c) based on a determination of the transferor's maximum tax liability, and

(2) Such liability is ultimately determined to be equal to 90 percent or more of the amount that was otherwise required to be withheld and paid over. However, the presumption created by the previous sentence may be rebutted by evidence establishing that delaying payment of the amount withheld was not a principal purpose of the transaction.

(d) *Contents of Forms 8288 and 8288-A—(1) Transactions subject to section 1445(a).* Any person that is required to file Forms 8288 and 8288-A pursuant to section 1445(a) and the rules of this section must set forth thereon the following information:

(i) The name, identifying number, and home address (in the case of an individual) or office address (in the case of any entity) of the transferee(s) filing the return;

(ii) The name, identifying number, and home address (in the case of an individual) or office address (in the case of any entity) of the transferor(s);

(iii) A brief description of the U.S. real property interest transferred, including its location and the nature of any substantial improvements in the case of real property, and the class or type and amount of interests transferred in the case of interests in a corporation that constitute U.S. real property interests;

(iv) The date of the transfer;

(v) The amount realized by the transferor, as defined in paragraph (g)(5) of this section;

(vi) The amount withheld by the transferee and whether withholding is at the statutory or reduced rate; and

(vii) Such other information as the Commissioner may require.

For purposes of paragraph (d)(1) (i) and (ii), mailing addresses may be provided in addition to, but not in lieu of, home addresses or office addresses.

(2) *Transactions subject to section 1445(e)*. Any person that is required to file Forms 8288 and 8288-A pursuant to the rules of §1.1445-5 must set forth thereon the following information:

(i) The name, identifying number, and office address of the entity or fiduciary filing the return;

(ii) The amount withheld by the entity or fiduciary;

(iii) The date of the transfer;

(iv) In the case of a transaction subject to withholding pursuant to section 1445(e)(1) and §1.1445-5(c):

(A) A brief description of the U.S. real property interest transferred, as described in paragraph (d)(1)(iii) of this section;

(B) The name, identifying number, and home address (in the case of an individual) or office address (in the case of an entity) of each holder of an interest in the entity that is a foreign person; and

(C) Each such interest-holder's pro rata share of the amount withheld;

(v) In the case of a distribution subject to withholding pursuant to section 1445(e)(2) and §1.1445-5(d):

(A) A brief description of the U.S. real property interest transferred, as described in paragraph (d)(1)(iii) of this section; and

(B) The amount of gain recognized upon the distribution by the corporation.

(vi) In the case of a distribution subject to withholding pursuant to section 1445(e)(3) and §1.1445-5(e):

(A) A brief description of the property distributed by the corporation;

(B) The name, identifying number, and home address (in case of an individual) or office address (in the case of an entity) of each holder of an interest in the entity that is a foreign person;

(C) The amount realized upon the distribution by each such foreign interest holder; and

(D) Each foreign interest-holder's pro rata share of the amount withheld; and

(vii) Such other information as the Commissioner may require.

(e) *Liability of transferee upon failure to withhold*—(1) *In general*. Every person required to deduct and withhold tax under section 1445 is made liable for that tax by section 1461. Therefore, a person that is required to deduct and withhold tax but fails to do so may be held liable for the payment of the tax and any applicable penalties and interest.

(2) *Transferor's liability not otherwise satisfied*—(i) *Tax and penalties*. Except as provided in paragraph (e)(3) of this section, if a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then the tax shall be assessed against and collected from that transferee. Such person may also be subject to any of the civil and criminal penalties that apply. Corporate officers or other responsible persons may be subject to a civil penalty under section 6672 equal to the amount that should have been withheld and paid over.

(ii) *Interest*. If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then such transferee shall be liable for the payment of interest pursuant to section 6601 and the regulations thereunder. Interest shall be payable with respect to the period between—

(A) The last date on which the tax imposed under section 1445 was required to be paid over by the transferee, and

(B) The date on which such tax is actually paid. Interest shall be payable with respect to the entire amount that is required to be deducted and withheld. However, if the Service issues a

withholding certificate providing for withholding of a reduced amount, then, for the period after the issuance of the certificate, interest shall be payable with respect to that reduced amount.

(3) *Transferor's liability otherwise satisfied*—(i) *Tax and penalties.* If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, and the transferor's tax liability with respect to the transfer was satisfied (or was established to be zero) by—

(A) The transferor's filing of an income tax return (and payment of any tax due) with respect to the transfer, or

(B) The issuance of a withholding certificate by the Internal Revenue Service establishing that the transferor's maximum tax liability is zero,

then the tax required to be withheld under section 1445 shall not be collected from the transferee. Such transferee's liability for tax, and the requirement that such person file Forms 8288 and 8288-A, shall be deemed to have been satisfied as of the date on which the transferor's income tax return was filed or the withholding certificate was issued. No penalty shall be imposed on or collected from such person for failure to return or pay the tax, unless such failure was fraudulent and for the purpose of evading payment. A transferee that seeks to avoid liability for tax and penalties pursuant to the rule of paragraph (e)(3)(i) must provide sufficient information for the Service to determine whether the transferor's tax liability was satisfied (or was established to be zero).

(ii) *Interest.* If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then such person shall be liable for the payment of interest under section 6601 and regulations thereunder. Such transferee's liability for the payment of interest shall not be excused by reason of the deemed satisfaction, pursuant to subdivision (i) of this paragraph (e)(3), of the transferee's liability under section 1445, because the deemed satisfaction of that liability is the equivalent of the late payment of a liability, on which interest must be paid. Interest shall be payable with respect to the period between—

(A) The last date on which the tax imposed under section 1445 was required to be paid over, and

(B) The date (established from information supplied to the Service by the transferee) on which any tax due is paid with respect to the transferor's relevant income tax return, or the date the withholding certificate is issued establishing that the transferor's maximum tax liability is zero.

Interest shall be payable with respect to the entire amount that is required to be deducted and withheld. However, if the Service issues a withholding certificate providing for withholding of a reduced amount, then for the period after the issuance of the certificate interest shall be payable with respect to that reduced amount.

(4) *Coordination with entity with holding rules.* For purposes of section 1445(e) and §§1.1445-5, 1.1445-6, 1.1445-7, and 1.1445-8T, the rules of this paragraph (e) shall be applied by—

(i) Substituting the words "person required to withhold" for the word "transferee" each place it appears in this paragraph (e), and

(ii) Substituting the words "person subject to withholding" for the word "transferor" each place it appears in this paragraph (e).

(f) *Effect of withholding on transferor*—(1) *In general.* The withholding of tax under section 1445(a) does not excuse a foreign person that disposes of a U.S. real property interest from filing a U.S. tax return with respect to the income arising from the disposition. Form 1040NR, 1041, or 1120F, as appropriate, must be filed, and any tax due must be paid, by the filing deadline generally applicable to such person. (The return may be filed by such later date as is provided in an extension granted by the Internal Revenue Service.) Any tax withheld under section 1445(a) shall be credited against the amount of income tax as computed in such return.

(2) *Manner of obtaining credit or refund.* A stamped copy of Form 8288-A will be provided to the transferor by the Service (under paragraph (c) of this section) if the Form 8288-A is complete, including the transferor's identifying number. Except as provided in paragraph (f)(3) of this section, a stamped

copy of Form 8288-A must be attached to the transferor's return to establish the amount withheld that is available as a credit. If the amount withheld under section 1445(a) constitutes less than the full amount of the transferor's U.S. tax liability for that taxable year, then a payment of estimated tax may be required to be made pursuant to section 6154 or 6654 prior to the filing of the income tax return for that year. Alternatively, if the amount withheld under section 1445(a) exceeds the transferor's maximum tax liability with respect to the disposition (as determined by the IRS), then the transferor may seek an early refund of the excess pursuant to §1.1445-3(g), or a normal refund upon the filing of a tax return.

(3) *Special rules*—(i) *Failure to receive Form 8288-A*. If a stamped copy of Form 8288-A has not been provided to the transferor by the Service, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence (e.g., closing documents) of such amount. Such a transferor must attach to its return a statement which supplies all of the information required by §1.1445-1(d), including the transferor's identifying number.

(ii) *U.S. persons subjected to withholding*. If a transferee withholds tax under section 1445(a) with respect to a person who is not a foreign person, such person may credit the amount of any tax withheld against his income tax liability in accordance with the provisions of this §1.1445-1(f) or apply for an early refund under §1.1445-3(g).

(iii) *Refund in case of installment sale*. A transferor that takes gain into account in accordance with the provisions of section 453 shall not be entitled to a refund of the amount withheld, unless a withholding certificate providing for such a refund is obtained from the Internal Revenue Service pursuant to the provisions of §1.1445-3.

(iv) *Joint foreign transferors*. If two or more foreign persons jointly transfer a U.S. real property interest, each transferor shall be credited with such portion of the amount withheld as such transferors mutually agree. Such transferors must request that the transferee reflect the agreed-upon cred-

iting of the amount withheld on the Forms 8288-A filed by the transferee. If the foreign transferors fail to request that the transferee reflect the agreed-upon crediting of the amount withheld by the 10th day after the date of transfer, the transferee must credit the amount withheld equally between (or among) the foreign transferors. In such case, the transferee is indemnified pursuant to section 1461 against any claim by a transferor objecting to the resulting division of credits. For rules regarding the amount realized allocated to joint foreign and non-foreign transferors, see §1.1445-1(b)(2).

(g) *Definitions*—(1) *In general*. Unless otherwise specified, the definitions of terms provided in §1.897-1 shall apply for purposes of this section and §§1.1445-2 through 1.1445-7. For purposes of section 1445 and the regulations thereunder, definitions of other relevant terms are provided in this paragraph (g). In addition, the term "residence" is defined in 1.1445-2(d)(1), the terms "transferor's agent" and "transferee's agent" are defined in 1.1445-4(f), and the term "relevant taxpayer" is defined in 1.1445-6(a)(2).

(2) *Transfer*. The term "transfer" means any transaction that would constitute a disposition for any purpose, of the Internal Revenue Code and regulations thereunder. For purposes of §§1.1445-5 and 1.1445-6, the term includes distribution to shareholders of a corporation, partners of a partnership and beneficiaries of a trust or estate.

(3) *Transferor*. The term "transferor" means any person, foreign or domestic, that disposes of a U.S. real property interest by sale, exchange, gift, or any other transfer. The term "U.S. real property interest" is defined in §1.897-1(c).

(4) *Transferee*. The term "transferee" means any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.

(5) *Amount realized*. The amount realized by the transferor for the transfer of a U.S. real property interest 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 U.S. real property interest is subject immediately before and after the transfer.

The term “cash paid or to be paid” does not include stated or unstated interest or original issue discount (as determined under the rules of sections 1271 through 1275).

(6) *Contract price.* The contract price of a U.S. real property interest is the sum that is agreed to by the transferee and transferor as the total amount of consideration to be paid for the property. That amount will generally be equal to the amount realized by the transferor, as defined in paragraph (b)(5) of this section.

(7) *Fair market value.* The fair market value of property means the price at which the property would change hands between an unrelated willing buyer and willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all relevant facts.

(8) *Date of transfer.* The date of transfer of a U.S. real property interest is the first date on which consideration is paid (or a liability assumed) by the transferee. However, for purposes of section 1445(e) (2), (3), and (4) and §§ 1.1445-5(c)(1)(iii) and 1.1445-5(c)(3) only, the date of transfer is the date of the distribution that gives rise to the obligation to withhold. For purposes of this paragraph (g)(8), the payment of consideration does not include the payment, prior to the passage of legal or equitable title (other than pursuant to an initial contract for purchase), of earnest money, a good-faith deposit, or any similar sum that is primarily intended to bind the transferee or transferor to the entering or performance of a contract. Such a payment will not constitute a payment of consideration solely because it may ultimately be applied against the amount owed to the transferor by the transferee. Such a payment is presumed to be earnest money, a good faith deposit, or a similar sum if it is subject to forfeiture in the event of a failure to enter into a contract or a breach of contract. However, a payment that is not forfeitable may nevertheless be found to con-

stitute earnest money, a good faith deposit, or a similar sum.

(9) *Identifying number.* Pursuant to § 1.897-1(p), an individual’s identifying number is the social security number or the identification number assigned by the Internal Revenue Service (see § 301.6109-1 of this chapter). The identifying number of any other person is its United States employer identification number.

(10) *Address of the Director, Philadelphia Service Center.* Any written communication directed to the Director, Philadelphia Service Center is to be addressed as follows: P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586.

(h) *Effective date for taxpayer identification numbers.* The requirement in paragraphs (c)(2)(i)(B), (d)(1)(i) and (ii), (d)(2)(i), (d)(2)(iv)(B), and (d)(2)(vi)(B) of this section that taxpayer identification numbers be provided (in all cases) is applicable for dispositions of U.S. real property interests occurring after November 3, 2003.

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§ 1.1445-2 Situations in which withholding is not required under section 1445(a).

(a) *Purpose and scope of section.* This section provides rules concerning various situations in which withhold is not required under section 1445(a). In general, a transferee has a duty to withhold under section 1445(a) only if both of the following are true:

- (1) The transferor is a foreign person; and
- (2) The transferee is acquiring a U.S. real property interest.

Thus, paragraphs (b) and (c) of this section provide rules under which a transferee of property can ascertain that he has no duty to withhold because one or the other of the two key elements is missing. Under paragraph (b), a transferee may determine that no withholding is required because the transferor is not a foreign person. Under paragraph (c), a transferee may determine that no withholding is required because the property acquired is not a U.S. real property interest. Finally,