

INCOME TAXATION OF REAL ESTATE SALES

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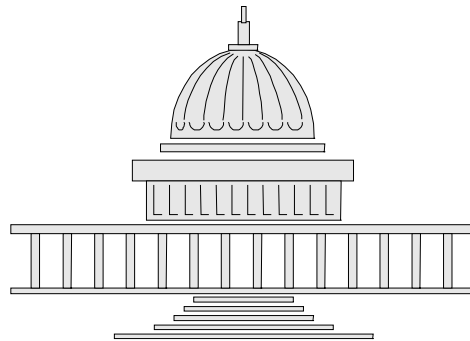
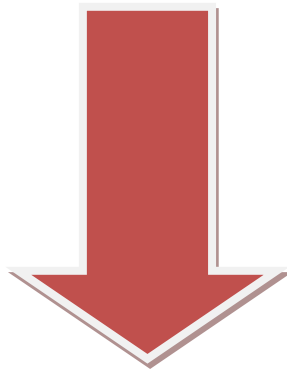


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1 **1 Introduction**

2 Those who engage in buying and selling real property are often asked by real estate agents and escrow companies to fill out
3 tax withholding and reporting paperwork relating to their transactions. Those who are non-taxpayers often have a difficult
4 time deciding how to complete this paperwork in a way that accurately describes and protects their status. This
5 memorandum of law will describe:

- 6 1. The state and federal laws applicable to income tax withholding and reporting of real estate sales.
- 7 2. The forms used for state and federal tax withholding and reporting of real estate sales.
- 8 3. Tactics for filling out real estate withholding and reporting forms useful to those who are “nontaxpayers” not subject to
9 the Internal Revenue Code Subtitle A.
- 10 4. Tools and techniques for educating title companies, escrow companies, and buyers so that they will cooperate with you
11 in lawfully avoiding income tax withholding and reporting of real estate sales.

12 **2 I.R.C. 121 Exclusion of Proceeds from Sale of Principal Residence**

13 I.R.C. 121 allows for an exclusion from gross income of the sale of a principal residence if the taxpayer has used the
14 residence as his principal residence for 2 of the last five years. The amount of gain excluded is up to \$250,000 for a single
15 individual and \$500,000 for a married couple. This exclusion, like every other “benefit” of the I.R.C., only applies to
16 “taxpayers”. Many of the real estate withholding forms you will encounter during the sale of a property will mention this
17 exclusion. The provision of law permitting this is as follows:

18 [TITLE 26 > Subtitle A > CHAPTER 1 > Subchapter B > PART III > § 121](#)
19 [§ 121. Exclusion of gain from sale of principal residence](#)

20 (a) *Exclusion*

21 **Gross income shall not include gain from the sale or exchange of property if, during the 5-year period**
22 **ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the**
23 **taxpayer’s principal residence for periods aggregating 2 years or more.**

24 (b) *Limitations*

25 (1) *In general*

26 *The amount of gain excluded from gross income under subsection (a) with respect to any sale or exchange*
27 **shall not exceed \$250,000.**

28 (2) *Special rules for joint returns*

29 *In the case of a husband and wife who make a joint return for the taxable year of the sale or exchange of*
30 *the property—*

31 (A) **\$500,000 Limitation for certain joint returns**

32 *Paragraph (1) shall be applied by substituting “\$500,000” for “\$250,000” if—*

33 (i) *either spouse meets the ownership requirements of subsection (a) with respect to such property;*

34 (ii) *both spouses meet the use requirements of subsection (a) with respect to such property; and*

35 (iii) *neither spouse is ineligible for the benefits of subsection (a) with respect to such property by*
36 *reason of paragraph (3).*

37 (B) *Other joint returns*

38 *If such spouses do not meet the requirements of subparagraph (A), the limitation under paragraph*
39 *(1) shall be the sum of the limitations under paragraph (1) to which each spouse would be entitled if*

1 such spouses had not been married. For purposes of the preceding sentence, each spouse shall be
2 treated as owning the property during the period that either spouse owned the property.

3 **FIRPTA Requirements**

4 The Federal Investment in Real Property Transfer Act (FIRPTA) is found at 26 U.S.C. §897, which says the following:

5 [TITLE 26](#) > [Subtitle A](#) > [CHAPTER 1](#) > [Subchapter N](#) > [PART II](#) > [Subpart D](#) > § 897
6 [§ 897. Disposition of investment in United States real property](#)

7 (a) *General rule*

8 (1) *Treatment as effectively connected with United States trade or business*

9 For purposes of this title, gain or loss of a **nonresident alien individual or a foreign corporation** from the
10 disposition of a **United States real property interest** shall be taken into account—

11 (A) in the case of a **nonresident alien individual**, under section [871 \(B\)\(1\)](#), or

12 (B) in the case of a foreign corporation, under section [882 \(a\)\(1\)](#), as if the taxpayer were engaged in a
13 trade or business within the United States during the taxable year and as if such gain or loss were
14 effectively connected with such trade or business.

15 (2) *Minimum tax on **nonresident alien individuals***

16 (A) *In general*

17 In the case of any nonresident alien individual, the taxable excess for purposes of section [55 \(b\)\(1\)\(A\)](#)
18 shall not be less than the lesser of—

19 (i) the individual's alternative minimum taxable income (as defined in section [55 \(b\)\(2\)](#)) for the
20 taxable year, or

21 (ii) the individual's net United States real property gain for the taxable year.

22 (B) *Net United States real property gain*

23 For purposes of subparagraph (A), the term "net United States real property gain" means the excess
24 of—

25 (i) the aggregate of the gains for the taxable year from dispositions of United States real property
26 interests, over

27 (ii) the aggregate of the losses for the taxable year from dispositions of such interests.

28 (b) *Limitation on losses of individuals*

29 In the case of an individual, a loss shall be taken into account under subsection (a) only to the extent such
30 loss would be taken into account under section [165 \(c\)](#) (determined without regard to subsection (a) of
31 this section).

32 (c) *United States real property interest*

33 For purposes of this section—

34 (1) *United States real property interest*

35 (A) *In general*

36 Except as provided in subparagraph (B), the term "United States real property interest" means—

37 (i) an interest in real property (including an interest in a mine, well, or other natural deposit)
38 located in the United States or the Virgin Islands, and

(ii) any interest (other than an interest solely as a creditor) in any domestic corporation unless the taxpayer establishes (at such time and in such manner as the Secretary by regulations prescribes) that such corporation was at no time a United States real property holding corporation during the shorter of—

(I) the period after June 18, 1980, during which the taxpayer held such interest, or

(II) the 5-year period ending on the date of the disposition of such interest.

(B) Exclusion for interest in certain corporations

The term “United States real property interest” does not include any interest in a corporation if—

(i) as of the date of the disposition of such interest, such corporation did not hold any United States real property interests, and

(ii) all of the United States real property interests held by such corporation at any time during the shorter of the periods described in subparagraph (A)(ii)—

(I) were disposed of in transactions in which the full amount of the gain (if any) was recognized, or

(II) ceased to be United States real property interests by reason of the application of this subparagraph to 1 or more other corporations.

(2) United States real property holding corporation

The term “United States real property holding corporation” means any corporation if—

(A) the fair market value of its United States real property interests equals or exceeds 50 percent of

(B) the fair market value of—

(i) its United States real property interests,

(ii) its interests in real property located outside the United States, plus

(iii) any other of its assets which are used or held for use in a trade or business.

(3) Exception for stock regularly traded on established securities markets

If any class of stock of a corporation is regularly traded on an established securities market, stock of such class shall be treated as a United States real property interest only in the case of a person who, at some time during the shorter of the periods described in paragraph (1)(A)(ii), held more than 5 percent of such class of stock.

(4) Interests held by foreign corporations and by partnerships, trusts, and estates

For purposes of determining whether any corporation is a United States real property holding corporation—

(A) Foreign corporations

Paragraph (1)(A)(ii) shall be applied by substituting “any corporation (whether foreign or domestic)” for “any domestic corporation”.

(B) Interests held by partnerships, etc.

Under regulations prescribed by the Secretary, assets held by a partnership, trust, or estate shall be treated as held proportionately by its partners or beneficiaries. Any asset treated as held by a partner or beneficiary by reason of this subparagraph which is used or held for use by the partnership, trust, or estate in a trade or business shall be treated as so used or held by the partner or beneficiary. Any asset treated as held by a partner or beneficiary by reason of this subparagraph shall be so treated for purposes of applying this subparagraph successively to partnerships, trusts, or estates which are above the first partnership, trust, or estate in a chain thereof.

1 (5) *Treatment of controlling interests*

2 (A) *In general*

3 *Under regulations, for purposes of determining whether any corporation is a United States real*
4 *property holding corporation, if any corporation (hereinafter in this paragraph referred to as the*
5 *“first corporation”) holds a controlling interest in a second corporation—*

6 (i) *the stock which the first corporation holds in the second corporation shall not be taken into*
7 *account,*

8 (ii) *the first corporation shall be treated as holding a portion of each asset of the second*
9 *corporation equal to the percentage of the fair market value of the stock of the second*
10 *corporation represented by the stock held by the first corporation, and*

11 (iii) *any asset treated as held by the first corporation by reason of clause (ii) which is used or*
12 *held for use by the second corporation in a trade or business shall be treated as so used or held*
13 *by the first corporation.*

14 *Any asset treated as held by the first corporation by reason of the preceding sentence shall be so*
15 *treated for purposes of applying the preceding sentence successively to corporations which are*
16 *above the first corporation in a chain of corporations.*

17 (B) *Controlling interest*

18 *For purposes of subparagraph (A), the term “controlling interest” means 50 percent or more of the*
19 *fair market value of all classes of stock of a corporation.*

20 (6) *Other special rules*

21 (A) *Interest in real property*

22 *The term “interest in real property” includes fee ownership and co-ownership of land or*
23 *improvements thereon, leaseholds of land or improvements thereon, options to acquire land or*
24 *improvements thereon, and options to acquire leaseholds of land or improvements thereon.*

25 (B) *Real property includes associated personal property*

26 *The term “real property” includes movable walls, furnishings, and other personal property associated*
27 *with the use of the real property.*

28 (C) *Constructive ownership rules*

29 *For purposes of determining under paragraph (3) whether any person holds more than 5 percent of*
30 *any class of stock and of determining under paragraph (5) whether a person holds a controlling*
31 *interest in any corporation, section 318 (a) shall apply (except that paragraphs (2)(C) and (3)(C) of*
32 *section 318 (a) shall be applied by substituting “5 percent” for “50 percent”).*

33 (d) *Treatment of distributions by foreign corporations*

34 (1) *In general*

35 *Except to the extent otherwise provided in regulations, notwithstanding any other provision of this*
36 *chapter, gain shall be recognized by a foreign corporation on the distribution (including a distribution in*
37 *liquidation or redemption) of a United States real property interest in an amount equal to the excess of the*
38 *fair market value of such interest (as of the time of the distribution) over its adjusted basis.*

39 (2) *Exceptions*

40 *Gain shall not be recognized under paragraph (1)—*

41 (A) *if—*

42 (i) *at the time of the receipt of the distributed property, the distributee would be subject to taxation*
43 *under this chapter on a subsequent disposition of the distributed property, and*

1 (ii) the basis of the distributed property in the hands of the distributee is no greater than the adjusted
2 basis of such property before the distribution, increased by the amount of gain (if any) recognized by
3 the distributing corporation, or

4 (B) if such nonrecognition is provided in regulations prescribed by the Secretary under subsection (e)(2).

5 (e) Coordination with nonrecognition provisions

6 (1) In general

7 Except to the extent otherwise provided in subsection (d) and paragraph (2) of this subsection, any
8 nonrecognition provision shall apply for purposes of this section to a transaction only in the case of an
9 exchange of a United States real property interest for an interest the sale of which would be subject to
10 taxation under this chapter.

11 (2) Regulations

12 The Secretary shall prescribe regulations (which are necessary or appropriate to prevent the avoidance of
13 Federal income taxes) providing—

14 (A) the extent to which nonrecognition provisions shall, and shall not, apply for purposes of this
15 section, and

16 (B) the extent to which—

17 (i) transfers of property in reorganization, and

18 (ii) changes in interests in, or distributions from, a partnership, trust, or estate, shall be treated as
19 sales of property at fair market value.

20 (3) Nonrecognition provision defined

21 For purposes of this subsection, the term “nonrecognition provision” means any provision of this title for
22 not recognizing gain or loss.

23 [(f) Repealed. Pub. L. 104–188, title I, § 1702(g)(2), Aug. 20, 1996, 110 Stat. 1873]

24 (g) Special rule for sales of interest in partnerships, trusts, and estates

25 Under regulations prescribed by the Secretary, the amount of any money, and the fair market value of any
26 property, received by a nonresident alien individual or foreign corporation in exchange for all or part of its
27 interest in a partnership, trust, or estate shall, to the extent attributable to United States real property
28 interests, be considered as an amount received from the sale or exchange in the United States of such
29 property.

30 (h) Special rules for certain investment entities

31 For purposes of this section—

32 (1) Look-through of distributions

33 Any distribution by a qualified investment entity to a nonresident alien individual or a foreign corporation
34 shall, to the extent attributable to gain from sales or exchanges by the qualified investment entity of United
35 States real property interests, be treated as gain recognized by such nonresident alien individual or foreign
36 corporation from the sale or exchange of a United States real property interest. Notwithstanding the
37 preceding sentence, any distribution by a real estate investment trust with respect to any class of stock
38 which is regularly traded on an established securities market located in the United States shall not be
39 treated as gain recognized from the sale or exchange of a United States real property interest if the
40 shareholder did not own more than 5 percent of such class of stock at any time during the 1-year period
41 ending on the date of the distribution.

42 (2) Sale of stock in domestically controlled entity not taxed

43 The term “United States real property interest” does not include any interest in a domestically controlled
44 qualified investment entity.

1 (3) Distributions by domestically controlled qualified investment entities

2 In the case of a domestically controlled qualified investment entity, rules similar to the rules of subsection
3 (d) shall apply to the foreign ownership percentage of any gain.

4 (4) Definitions

5 (A) Qualified investment entity

6 (i) In general The term “qualified investment entity” means—

7 (I) any real estate investment trust, and

8 (II) any regulated investment company.

9 (ii) Termination Clause (i)(II) shall not apply after December 31, 2007.

10 (B) Domestically controlled

11 The term “domestically controlled qualified investment entity” means any qualified investment entity
12 in which at all times during the testing period less than 50 percent in value of the stock was held
13 directly or indirectly by foreign persons.

14 (C) Foreign ownership percentage

15 The term “foreign ownership percentage” means that percentage of the stock of the qualified
16 investment entity which was held (directly or indirectly) by foreign persons at the time during the
17 testing period during which the direct and indirect ownership of stock by foreign persons was greatest.

18 (D) Testing period

19 The term “testing period” means whichever of the following periods is the shortest:

20 (i) the period beginning on June 19, 1980, and ending on the date of the disposition or of the
21 distribution, as the case may be,

22 (ii) the 5-year period ending on the date of the disposition or of the distribution, as the case may
23 be, or

24 (iii) the period during which the qualified investment entity was in existence.

25 (i) Election by foreign corporation to be treated as domestic corporation

26 (1) In general

27 If—

28 (A) a foreign corporation holds a United States real property interest, and

29 (B) under any treaty obligation of the United States the foreign corporation is entitled to
30 nondiscriminatory treatment with respect to that interest, then such foreign corporation may make an
31 election to be treated as a domestic corporation for purposes of this section, section [1445](#), and section
32 [6039C](#).

33 (2) Revocation only with consent

34 Any election under paragraph (1), once made, may be revoked only with the consent of the Secretary.

35 (3) Making of election

36 An election under paragraph (1) may be made only—

37 (A) if all of the owners of all classes of interests (other than interests solely as a creditor) in the
38 foreign corporation at the time of the election consent to the making of the election and agree that

1 gain, if any, from the disposition of such interest after June 18, 1980, which would be taken into
2 account under subsection (a) shall be taxable notwithstanding any provision to the contrary in a treaty
3 to which the United States is a party, and

4 (B) subject to such other conditions as the Secretary may prescribe by regulations with respect to the
5 corporation or its shareholders.

6 In the case of a class of interest (other than an interest solely as a creditor) which is regularly traded
7 on an established securities market, the consent described in subparagraph (A) need only be made by
8 any person if such person held more than 5 percent of such class of interest at some time during the
9 shorter of the periods described in subsection (c)(1)(A)(ii). The constructive ownership rules of
10 subsection (c)(6)(C) shall apply in determining whether a person held more than 5 percent of a class
11 of interest.

12 (4) Exclusive method of claiming nondiscrimination

13 The election provided by paragraph (1) shall be the exclusive remedy for any person claiming
14 discriminatory treatment with respect to this section, section 1145, and section 6039C.

15 (j) Certain contributions to capital

16 Except to the extent otherwise provided in regulations, gain shall be recognized by a nonresident alien
17 individual or foreign corporation on the transfer of a United States real property interest to a foreign
18 corporation if the transfer is made as paid in surplus or as a contribution to capital, in the amount of the
19 excess of—

20 (1) the fair market value of such property transferred, over

21 (2) the sum of—

22 (A) the adjusted basis of such property in the hands of the transferor, plus

23 (B) the amount of gain, if any, recognized to the transferor under any other provision at the time of the
24 transfer.

25 Note the following about the above FIRPTA act:

- 26 1. The act refers only to real property located in the “United States”, which is defined in 26 U.S.C. §7701(a)(9) and
27 (a)(10) and includes no part of any state of the Union.

28 [TITLE 26 > Subtitle F > CHAPTER 79 > Sec. 7701.](#) [Internal Revenue Code]
29 [Sec. 7701. - Definitions](#)

30 (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent
31 thereof—

32 (9) United States

33 The term "United States" when used in a geographical sense includes only the [States](#) and the District of
34 Columbia.

35 (10) State

36 The term "State" shall be construed to include the District of Columbia, where such construction is necessary to
37 carry out provisions of this title.

- 38 2. The rules of statutory construction forbid adding anything to the definition of “United States” above, or assuming
39 anything not expressly spelled out:

40 **“Expressio unius est exclusio alterius.** A maxim of statutory interpretation meaning that **the expression of one**
41 **thing is the exclusion of another.** *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325; *Newblock v. Bowles*,
42 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. **When certain persons**
43 **or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be**

1 inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects
2 of a certain provision, other exceptions or effects are excluded."
3 [Black's Law Dictionary, Sixth Edition, p. 581]

4 "When a statute includes an explicit definition, we must follow that definition, even if it varies from that
5 term's ordinary meaning. Meese v. Keene, 481 U.S. 465, 484-485 (1987) ("It is axiomatic that the statutory
6 definition of the term excludes unstated meanings of that term"); Colautti v. Franklin, 439 U.S. at 392-393, n.
7 10 ("As a rule, a definition which declares what a term "means" . . . excludes any meaning that is not stated");
8 Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 502 (1945); Fox v. Standard Oil Co. of N.J., 294 U.S.
9 87, 95-96 (1935) (Cardozo, J.); see also 2A N. Singer, Sutherland on Statutes and Statutory Construction §
10 47.07, p. 152, and n. 10 (5th ed. 1992) (collecting cases). That is to say, the statute, read "as a whole," post at
11 998 [530 U.S. 943] (THOMAS, J., dissenting), leads the reader to a definition. That definition does not include
12 the Attorney General's restriction -- "the child up to the head." Its words, "substantial portion," indicate the
13 contrary."
14 [[Stenberg v. Carhart, 530 U.S. 914 \(2000\)](#)]

- 15 3. The term "domestic" is in reference to the term "United States", which in turn implies the District of Columbia or the
16 Virgin Islands.

17 [TITLE 26 > Subtitle A > CHAPTER 1 > Subchapter N > PART II > Subpart D > § 897](#)
18 [§ 897. Disposition of investment in United States real property](#)

19 (c) United States real property interest

20 For purposes of this section—

21 (1) United States real property interest

22 (A) In general

23 Except as provided in subparagraph (B), the term "United States real property interest" means—

24 (i) an interest in real property (including an interest in a mine, well, or other natural deposit)
25 located in the United States or the Virgin Islands, and

26 (ii) any interest (other than an interest solely as a creditor) in any domestic corporation unless the
27 taxpayer establishes (at such time and in such manner as the Secretary by regulations prescribes)
28 that such corporation was at no time a United States real property holding corporation during the
29 shorter of—

- 30 4. Federal law may not be enforced within a state of the Union:

31 "It is no longer open to question that the general government, unlike the states, [Hammer v. Dagenhart, 247](#)
32 [U.S. 251, 275](#), 38 S.Ct. 529, 3 A.L.R. 649, Ann.Cas.1918E 724, possesses no inherent power in respect of the
33 internal affairs of the states; and emphatically not with regard to legislation."
34 [[Carter v. Carter Coal Co., 298 U.S. 238](#), 56 S.Ct. 855 (1936)]

35
36 "The difficulties arising out of our dual form of government and the opportunities for differing opinions
37 concerning the relative rights of state and national governments are many; but for a very long time this court
38 has steadfastly adhered to the doctrine that the taxing power of Congress does not extend to the states or
39 their political subdivisions. The same basic reasoning which leads to that conclusion, we think, requires like
40 limitation upon the power which springs from the bankruptcy clause. *United States v. Butler, supra.*"
41 [[Ashton v. Cameron County Water Improvement District No. 1, 298 U.S. 513](#), 56 S.Ct. 892 (1936)]

- 42 5. FIRPTA limits itself to only "nonresident alien individuals". No one else is covered by the act.
43 6. One can be a "nonresident alien" without also being a "nonresident alien individual".
44 7. The terms "individual" and "nonresident alien individual" are defined as follows:

45 [26 CFR 1.1441-1 Requirement for the deduction and withholding of tax on payments to foreign persons.](#)

46 (c) Definitions

47 (3) Individual.

1 (i) Alien individual.

2 The term alien individual means an individual who is not a citizen or a national of the United States. See Sec.
3 1.1-1(c).

4 (ii) Nonresident alien individual.

5 The term nonresident alien individual means a person described in section 7701(b)(1)(B), an alien individual
6 who is a resident of a foreign country under the residence article of an income tax treaty and Sec.
7 301.7701(b)-7(a)(1) of this chapter, or an alien individual who is a resident of Puerto Rico, Guam, the
8 Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa as determined
9 under Sec. 301.7701(b)-1(d) of this chapter. An alien individual who has made an election under section
10 6013 (g) or (h) to be treated as a resident of the United States is nevertheless treated as a nonresident alien
11 individual for purposes of withholding under chapter 3 of the Code and the regulations thereunder.

- 12 8. The definition of “nonresident alien individual” above does not include a person born within or domiciled within a
13 state of the Union mentioned in the Constitution. Instead, it only includes people born within or domiciled within
14 federal territories and possessions referred to in the Buck Act as follows:

15 [TITLE 4 > CHAPTER 4 > § 110](#)
16 [§ 110. Same; definitions](#)

17 As used in sections 105–109 of this title—

18 (d) The term “State” includes any Territory or possession of the United States.

19 **4 State versions of FIRPTA**

20 States have laws similar to the federal FIRPTA. For instance, the California Revenue and Taxation Code, Section 18662
21 imposes FIRPTA the same as federal. Below is a copy of that code section:

22 *California Revenue and Taxation Code*

23 18662. (a) The Franchise Tax Board may, by regulation, require any person, in whatever capacity acting,
24 including lessees or mortgagors of real or personal property, fiduciaries, employers, and any officer or
25 department of the state or any political subdivision or agency of the state, or any city organized under a
26 freeholder's charter, or any political body not a subdivision or agency of the state, having the control, receipt,
27 custody, disposal, or payment of **items of income** specified in subdivision (b), to withhold an amount,
28 determined by the Franchise Tax Board to reasonably represent the amount of tax due when the items of
29 income are included with other income of the taxpayer, and to transmit the amount withheld to the Franchise
30 Tax Board at the time as it may designate.

31 (b) The items of income referred to in subdivision (a) are interest, dividends, rents, prizes and winnings,
32 premiums, annuities, emoluments, compensation for services, including bonuses, partnership income or gains,
33 and other fixed or determinable annual or periodical gains, profits, and income.

34 (c) The Franchise Tax Board may authorize the tax under subdivision (a) to be deducted and withheld from
35 the interest upon any securities the owners of which are not known to the withholding agent.

36 (d) Any person failing to withhold from any payments any amounts required by subdivision (a) to be withheld
37 is liable for the amount withheld or the amount of taxes due from the person to whom the payments are made to
38 an extent not in excess of the amounts required to be withheld, whichever is greater, unless it is shown that the
39 failure to withhold is due to reasonable cause.

40 (e) (1) This subdivision applies to any disposition of a California real property interest by:

41 (A) Any person, other than either of the following:

42 (i) A corporation, including an entity classified for tax purposes as a corporation under Part 11 (commencing
43 with Section 23001).

44 (ii) A partnership, as determined in accordance with Subchapter K of Chapter 1 of Subtitle A of the Internal
45 Revenue Code, including an entity classified as a partnership for tax purposes under Part 10 (commencing with
46 Section 17001).