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# TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION



*Millions of Dollars in Discrepancies in  
Tax Withholding Required by the Foreign  
Investment in Real Property Tax Act Are  
Not Being Identified or Addressed*

**March 9, 2020**

**Reference Number: 2020-40-014**

This report has cleared the Treasury Inspector General for Tax Administration disclosure review process and information determined to be restricted from public release has been redacted from this document.

**Redaction Legend:**

2 = Law Enforcement Techniques/Procedures and Guidelines for Law Enforcement Investigations or Prosecutions

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## HIGHLIGHTS

### **MILLIONS OF DOLLARS IN DISCREPANCIES IN TAX WITHHOLDING REQUIRED BY THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ARE NOT BEING IDENTIFIED OR ADDRESSED**

## Highlights

### **Final Report issued on March 9, 2020**

Highlights of Reference Number: 2020-40-014 to the Commissioner of Internal Revenue.

### **IMPACT ON TAXPAYERS**

The Foreign Investment in Real Property Tax Act (FIRPTA) of 1980 imposes an income tax on foreign persons selling U.S. real property interests. Buyers are required to withhold a percentage of the anticipated taxes due on the amount realized from the sale. The withholding requirement serves as an incentive for foreign sellers to file the appropriate U.S. tax return (*i.e.*, Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, or Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation*) to report income from the sale and claim a credit for the withheld funds. During Processing Year 2017, buyers reported more than \$1.6 billion in FIRPTA withholding.

### **WHY TIGTA DID THE AUDIT**

A foreign seller of U.S. property can claim a credit for the tax withheld by the buyer. If the seller's tax liability is less than the amount of tax withheld, the seller gets a refund of the difference. Sellers filed 17,382 tax returns claiming more than \$598.7 million in FIRPTA withholding credits during Processing Year 2017. The overall objective of this review was to assess IRS efforts to verify the accuracy of withholding credits reported on Forms 1040NR and Forms 1120-F.

### **WHAT TIGTA FOUND**

Reconciliation processes do not effectively identify and address FIRPTA reporting and payment noncompliance. TIGTA identified 2,988 buyers with discrepancies of more than

\$688 million between the withholding reported on Forms 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, filed during Processing Year 2017 and the withholding assessed to the buyer's tax account. Extensive data inaccuracies in the FIRPTA database, incorrect and unclear guidelines, and employee errors contributed to these discrepancies.

In addition, some FIRPTA withholding assessments are incorrect because the IRS does not have sufficient procedures to ensure that Withholding Certificates are properly applied when determining the amount of withholding that should be assessed to buyers' tax accounts. TIGTA identified 3,184 Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, for which the IRS did not assess more than \$264 million in FIRPTA withholding tax.

The IRS also has not established processes to use Form 1099-S, *Proceeds From Real Estate Transactions*, to identify buyers that do not report and pay FIRPTA withholdings. TIGTA's analysis of Forms 1099-S for Tax Year 2017 identified approximately \$22 million in FIRPTA withholding that was not reported and paid to the IRS. Finally, employee errors resulted in 1,835 foreign individuals potentially receiving more than \$60 million in additional FIRPTA withholding credits than they were entitled to receive.

### **WHAT TIGTA RECOMMENDED**

TIGTA made 12 recommendations to the IRS to improve the processing of Forms 8288 and Forms 8288-A and the verification of withholding credits claimed by foreign sellers. In addition, TIGTA recommended that the IRS initiate actions to address the accuracy of information in the FIRPTA database.

IRS management agreed with all of TIGTA's recommendations and plans to take appropriate corrective actions, including implementing a strategy to improve the quality of data entered into the FIRPTA database, providing additional training to tax examiners, and improving internal guidance.



TREASURY INSPECTOR GENERAL  
FOR TAX ADMINISTRATION

DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

March 9, 2020

**MEMORANDUM FOR COMMISSIONER OF INTERNAL REVENUE**

**FROM:** Michael E. McKenney  
Deputy Inspector General for Audit

**SUBJECT:** Final Audit Report – Millions of Dollars in Discrepancies in Tax Withholding Required by the Foreign Investment in Real Property Tax Act Are Not Being Identified or Addressed (Audit # 201840038)

This report presents the results of our review to assess Internal Revenue Service (IRS) efforts to verify the accuracy of withholding credits reported on Forms 1040NR, *U.S. Nonresident Alien Income Tax Return*, and Forms 1120-F, *U.S. Income Tax Return of a Foreign Corporation*. This audit was part of our Fiscal Year 2019 Annual Audit Plan and addresses the major management challenge of Improving Tax Reporting and Payment Compliance.

Although IRS management agreed to all twelve of our recommendations, they did not agree with our outcome measures. IRS management stated that they believe our outcome measures are overstated and cited the reliability of the data in the FIRPTA database we used to calculate these outcomes. Our report fully acknowledges and raises concerns regarding the extensive data inaccuracies in the FIRPTA database. However, the IRS still requires its tax examiners to use this database to verify withholding credit claims. As such, we used the same information that tax examiners are required to use to compute our potential outcome measures.

Management's complete response to the draft report is included as Appendix VII.

Copies of this report are also being sent to the IRS managers affected by the report recommendations. If you have any questions, please contact me or Russell P. Martin, Assistant Inspector General for Audit (Returns Processing and Account Services).



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*Abbreviations*

BRTF	Business Return Transaction File
FIRPTA	Foreign Investment in Real Property Tax Act
IRS	Internal Revenue Service
TIGTA	Treasury Inspector General for Tax Administration



## Millions of Dollars in Discrepancies in Tax Withholding Required by the Foreign Investment in Real Property Tax Act Are Not Being Identified or Addressed

### Background

In 1980, Congress passed the Foreign Investment in Real Property Tax Act (FIRPTA),<sup>1</sup> which imposes an income tax on foreign persons selling U.S. real property interests. In 1984, Congress subsequently passed the Deficit Reduction Act of 1984,<sup>2</sup> which added Internal Revenue Code Section (§) 1445, to require a buyer to withhold 10 percent of the amount realized from the sale of U.S. real property by foreign sellers for anticipated taxes. The FIRPTA withholding requirement serves as an incentive for foreign sellers to file the appropriate U.S. tax return, *i.e.*, Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, or Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation*, to report income from the sale and claim a credit for the withheld funds. The Protecting Americans from Tax Hikes Act of 2015,<sup>3</sup> which was enacted on December 18, 2015, changed the withholding rate from 10 percent to 15 percent. However, the percentages vary based on selling price, whether the property is a personal residence, or whether the seller is a corporation. Figure 1 provides the requirements for withholding amounts.

**Figure 1: FIRPTA Withholding Rates**

Individual Foreign Seller		
		Percentage of Withholding
Commercial Property		15 percent
Personal Residence	Real Estate Sales Price	
	\$300,000 or less	No Withholding
	Over \$300,000 to \$1 Million	10 percent
	Over \$1 Million	15 percent
Corporate Foreign Seller		
Sales Before January 1, 2018		35 percent
Sales After December 31, 2017		21 percent

Source: *Instructions for Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests.*

<sup>1</sup> Enacted as Subtitle C of Title XI (the Revenue Adjustments Act of 1980) of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599, 2682 (Dec. 5, 1980).

<sup>2</sup> Tax Reform Act of 1984, Pub. L. No. 98-369 § 129, 98 Stat. 494, 655.

<sup>3</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).





## *Millions of Dollars in Discrepancies in Tax Withholding Required by the Foreign Investment in Real Property Tax Act Are Not Being Identified or Addressed*

### **FIRPTA buyer reporting and payment requirements**

Buyers use two tax forms for reporting and paying the tax related to the disposition of U.S. real property interests by foreigners:

- Form 8288 – *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*. See Appendix V for an example of Form 8288.
- Form 8288-A – *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests* (Copy A for the Internal Revenue Service (IRS), Copy B for use by the person subject to withholding, and Copy C for the withholding agent). See Appendix VI for an example of Form 8288-A.

Form 8288 is the transmittal for Form 8288-A. The buyer of a U.S. real property interest that is required to withhold FIRPTA tax must file both Form 8288 and Form 8288-A with the IRS within 20 days of the transfer of the property to report and remit the amount withheld. A separate Form 8288-A is required for each person subject to FIRPTA withholding and must be attached to Form 8288. For example, if a husband and wife own a property together, a separate Form 8288-A is required for the husband and the wife. The husband and wife are each treated as having contributed 50 percent of the property. For sales involving a partnership, a separate Form 8288-A is required for each partner. The amount each partner realizes from the transfer is based on his or her capital contribution to the property.

If the buyer fails to withhold the tax, then the buyer is liable for the payment of the tax that was required to be withheld as well as any penalties and interest. Figure 2 shows the number of Forms 8288 processed during Processing Years<sup>4</sup> 2017 and 2018.

***Figure 2: Forms 8288 Processed in Processing Years 2017 and 2018***

Processing Year	Total Returns	Total Withholding Reported
2017	19,817	\$1,600,633,467
2018 (through May 17, 2018)	6,546	\$426,774,587

Source: *Business Return Transactions File (BRTF)*.<sup>5</sup>

### **Processing of Forms 8288 and 8288-A**

Buyers are directed to send Forms 8288 and Forms 8288-A to the IRS FIRPTA unit located at the Tax Processing Center in Ogden, Utah. Once received, a tax examiner in the FIRPTA unit enters information from each Form 8288-A into the FIRPTA database. The FIRPTA database was developed to process, store, and retrieve information input from Forms 8288/8288-A to

<sup>4</sup> The calendar year in which the tax return or document is processed by the IRS.

<sup>5</sup> The BRTF contains business tax return data.



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verify withholding credits claimed by the seller. Information entered includes the foreign person's identifying information, the proceeds from the sale, and the amount of tax withheld. If the Form 8288-A is incomplete or not attached to the Form 8288, and the tax examiner is unable to enter the required information into the FIRPTA database, he or she will send Letter 3104C, *FIRPTA and Foreign Partnership Withholding Tax Return Processing*, to request the missing information from the buyer. The IRS will also send Letter 3104C when the sale amount and withholding amounts on Forms 8288-A do not balance with the amounts reported on the Form 8288. If no reply is received in response to the Letter 3104 C, the IRS will enter the Form 8288-A information into the database as it appears on the Form 8288-A.

After the tax examiners enter information into the FIRPTA database, they stamp the Form 8288 with the date they input Copy A of Forms 8288-A into the FIRPTA database. The tax examiners also date stamp each Copy B of the Forms 8288-A and return them back to the sellers. The tax examiners then release the Form 8288 and Copy A of Forms 8288-A to continue the processing of Form 8288. This includes inputting assessments of the withholding taxes reported on the Forms 8288 to the buyers' tax accounts and crediting payments submitted by the buyers.

In addition to filing Form 8288 and Form 8288-A, the buyer's settlement agent<sup>6</sup> must also file Form 1099-S, *Proceeds From Real Estate Transactions*, with the IRS to report the sale of the property.

**Exemption from withholding or reduced withholding**

The buyer, buyer's settlement agent, or seller can apply for a Withholding Certificate to reduce or eliminate the amount of withholding on the sale of the U.S. real property. To apply, the buyer, buyer's settlement agent, or seller sends a Form 8288-B, *Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests*, to the IRS FIRPTA unit at the Tax Return Processing Center in Ogden, Utah. A seller that applies for a Withholding Certificate must also notify the buyer in writing on the day of or prior to the transfer of the submission of the Form 8288-B.

Once received, a tax examiner processes Form 8288-B and enters the certificate information into the FIRPTA database. If approved, the IRS will issue a Withholding Certificate notifying the buyer and seller that the seller is exempt from U.S. tax or the seller's tax liability is less than the tax that would be required to be withheld. If the Form 8288-B was submitted to the IRS on or before the date of transfer of the property and the IRS determines that the seller is exempt from withholding, the buyer is not required to file Form 8288. However, if the Form 8288-B was submitted after the date of transfer of the property or the seller is eligible for reduced withholding, the buyer must attach a copy of the Withholding Certificate Letter issued by the

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<sup>6</sup> A settlement agent is a person who arranges the transfer of securities or real property in a sale. For real estate transactions, the settlement agent functions chiefly for the buyer.



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IRS to the Form 8288. For Withholding Certificate applications that are not approved, the IRS notifies the buyer and seller.

### **FIRPTA seller filing requirement**

To claim a credit for the tax withheld (referred to as a FIRPTA withholding credit), the foreign seller is required to file a U.S. income tax return to report the sale of their U.S. property along with any tax liability. If the tax liability is less than the amount of tax withheld, the foreign seller gets a refund of the difference. FIRPTA withholding credits are reported on Form 1040NR, line 62c, or Form 1120-F, line 5i. Figure 3 provides a breakdown of the FIRPTA withholding credits claimed on Forms 1040NR and 1120-F in Processing Years 2017 and 2018.

***Figure 3: Tax Returns Filed Claiming the FIRPTA  
Withholding Credit in Processing Years 2017 and 2018***

Form	Processing Year 2017		Processing Year 2018	
	Number of Returns	Credits Claimed	Number of Returns	Credits Claimed
1040NR	17,201	\$538,317,192	22,826	\$571,330,864
1120-F	181	\$60,453,712	308	\$71,370,890

*Source: Treasury Inspector General for Tax Administration (TIGTA) analysis of the Individual Return Transaction File<sup>7</sup> and the BRTF.*

### **Processing of Form 1040NR and Form 1120-F FIRPTA withholding credit claims**

Tax examiners located in the IRS Error Resolution function at the Tax Processing Centers in Austin, Texas, and Ogden, Utah, are required to verify 100 percent of the FIRPTA withholding credits claimed on Forms 1040NR and 1120-F. Tax examiners perform this verification by matching the credit amount reported on the tax return to the coinciding Form 8288-A and Withholding Certificate information input into the FIRPTA database. For those claims for which there is no information in the FIRPTA database, the IRS will allow the withholding credit as long as the foreign seller is able to provide supporting documentation, *e.g.*, a settlement statement.

On June 15, 2010, the IRS issued a Chief Counsel Advisory<sup>8</sup> stating that FIRPTA credits must be allowed to the foreign seller as long as the foreign seller is able to provide supporting documentation, even if the buyer has not filed Form 8288 and Form 8288-A or paid the FIRPTA

<sup>7</sup> The Individual Return Transaction File contains individual tax return data.

<sup>8</sup> Chief Counsel Advisories are informal advice provided to IRS management and executives at their request to assist with the administration of the Internal Revenue Code.



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withholding tax to the IRS. Previously, the IRS would not have allowed the credit if a Form 8288-A was not attached to the return.

**TIGTA previously reported that the IRS could not provide assurance that foreign sellers complied with FIRPTA reporting and payment requirements<sup>9</sup>**

In September 2014, TIGTA reported that the IRS could not provide assurance that foreign sellers subject to the FIRPTA were in compliance because the Form 1099-S did not identify transactions subject to FIRPTA withholding. TIGTA's analysis of Forms 1099-S for Tax Years 2009 through 2011 indicated that there may be significant noncompliance with FIRPTA filing and payment requirements. In response to our recommendations, the IRS revised Form 1099-S for Tax Year 2017 to capture information necessary to identify transactions subject to the FIRPTA that would allow the IRS to enforce compliance. Prior to Tax Year 2017, the Form 1099-S did not contain information needed to identify real estate transactions resulting from the sale of U.S. property by a foreign individual.

This review was performed at the Submission Processing Centers in Austin, Texas, and Ogden, Utah, and with information obtained from the Customer Account Services function of the Wage and Investment Division's Submission Processing organization in Covington, Kentucky, during the period April 2018 through May 2019. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. Detailed information on our audit objective, scope, and methodology is presented in Appendix I. Major contributors to the report are listed in Appendix II.

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<sup>9</sup> TIGTA, Ref. No. 2014-30-051, *Additional Actions Are Needed to Help Ensure Taxpayer Compliance With the Foreign Investment in Real Property Tax Act* (Sept. 2014).



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*Results of Review*

**Reconciliation Processes Do Not Effectively Identify and Address  
Noncompliance With Foreign Investment in Real Property Tax Act  
Withholding Reporting and Payment Requirements**

Our analysis of the FIRPTA database identified 2,988 buyers for which the withholding reported on Forms 8288-A filed during Processing Year 2017 did not match the withholding assessed to the buyer's tax account. The discrepancies we identified totaled more than \$688 million. Specifically, for the 2,988 buyers, we identified:

- 1,785 buyers for which the withholding reported on the Form 8288 did not match the withholding reported on the associated Form 8288-A. This includes 1,030 buyers that reported \$513 million less in withholding on Forms 8288 than was reported on Forms 8288-A and 755 buyers that reported \$49 million more in withholding on Forms 8288 than was reported on Forms 8288-A.
- 1,203 buyers that did not file either a Form 8288 or a Form 8288-A as required. This includes 350 buyers that filed Forms 8288-A reporting withholding totaling more than \$12 million but with no Form 8288 filed and 853 buyers with withholding totaling more than \$114 million reported on Forms 8288 but with no Forms 8288-A in the FIRPTA database.

We found that although the IRS has implemented processes to identify and address discrepancies between the withholding reported on Forms 8288 and Forms 8288-A, inconsistencies in internal guidance and extensive inaccuracies in the FIRPTA database limit the effectiveness of these processes. As such, the IRS cannot accurately identify and address the \$688 million in discrepancies in reported and assessed withholding that we identified.

**Extensive data inaccuracies in the FIRPTA database diminish its usefulness in  
accurately verifying withholding credit claims**

Our review of statistically valid samples of 254 of the 2,988 buyers we identified with a reporting discrepancy determined that a large portion of the discrepancies result from tax examiners not accurately entering data into the FIRPTA database.<sup>10</sup> For example, we identified that the data in the FIRPTA database was inaccurate for 129 (51 percent) of the 254 buyers. Inaccuracies include duplicate Forms 8288-A entered into the FIRPTA database and errors in

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<sup>10</sup> We reviewed two statistically valid samples of 127 each of buyers that appeared to have reporting and payment discrepancies. See Appendix I for the details of the statistically valid samples reviewed.



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separating a Form 8288-A among the owners for jointly held property. We confirmed that the information was inaccurate by manually comparing information from the Forms 8288 and Forms 8288-A filed by buyers to the FIRPTA database.

The extent of the inaccuracies we identified can cause the IRS to erroneously issue withholding credits or deny credits to which taxpayers are entitled. Based on the results of our review, we estimate that the FIRPTA database contains potentially inaccurate information for as many as 1,499 buyers.<sup>11</sup> However, our analysis does not reflect the full extent to which the database is inaccurate. We validated the accuracy of only the information associated with the reporting and payment discrepancies we identified through our data analysis because such discrepancies can result in the IRS issuing sellers a credit for taxes that the buyer did not pay to the IRS. We did not validate the accuracy of the information for every purchase of real property contained in the database. Finally, throughout the report, we make recommendations to address deficiencies in the processes to ensure the accuracy of FIRPTA reporting and payment compliance. However, the effectiveness of any actions the IRS may take in response to our recommendations will have limited benefit until the IRS improves the accuracy of the information recorded in the FIRPTA database.

When we notified IRS management of our concerns, they agreed that there were discrepancies between what was reported on Forms 8288 and Forms 8288-A. They also agreed that either some Forms 8288-A were not entered into the FIRPTA database or the tax examiner made transcription errors when entering the information into the FIRPTA database.

**Incorrect and unclear IRS guidelines and tax examiner errors contributed to discrepancies we identified**

IRS guidelines instruct FIRPTA unit tax examiners to verify that the withholding reported on the Form 8288 matches the total withholding reported on the associated Forms 8288-A before entering information into the FIRPTA database. If the amounts do not match, the tax examiner is to correspond with the buyer to determine the correct withholding amount. If the buyer responds, the tax examiner is to correct the withholding amount on the Form 8288 or attached Forms 8288-A. If the buyer does not respond, the tax examiner is instructed to enter the Forms 8288-A into the FIRPTA database as filed by the buyer. The tax examiner does not correct the Form 8288 withholding. Instead, the Form 8288 is sent for processing with the originally reported withholding amount. As a result, the amount of withholding recorded in the FIRPTA database will not match the withholding assessed to the buyer's tax account.

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<sup>11</sup> The point estimate projection of 792 Forms 8288 for one sample of 127 is based on a two-sided 95 percent confidence interval. We are 95 percent confident that the point estimate is between 691 and 893. The point estimate projection of 707 Forms 8288 for sample two is based on a two-sided 95 percent confidence interval. We are 95 percent confident that the point estimate is between 588 and 826.





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In addition, some of the errors we identified resulted from tax examiners not following established procedures when processing Forms 8288 and 8288-A. For example:

- Tax examiners are not ensuring that duplicate Forms 8288-A are not entered into the FIRPTA database. When the Form 8288 is a photocopy, IRS guidelines instruct tax examiners to search the database to determine if the Form 8288-A has been input previously. If they find the Form 8288-A is already in the database, they are to associate the duplicate Form 8288-A with the originally filed form.
- Tax examiners are not correctly processing Forms 8288-A for jointly owned property. A buyer is required to file a separate Form 8288-A for each owner of the purchased property. The buyer is to allocate the total withheld tax on the sale among the joint owners' Form 8288-A based on their percentage of ownership. When a buyer incorrectly submits only one Form 8288-A for property that had more than one owner, guidelines require the tax examiner to create the additional Forms 8288-A using the information on the Form 8288 and allocate the withholding evenly among the sellers. We found that tax examiners were incorrectly duplicating the total withholding on each Form 8288-A, resulting in sellers receiving more withholding credits than they were entitled to receive.
- Tax examiners are not assessing the proper amount of withholding to a buyer's tax account when the buyer did not submit the full amount with the Form 8288. The buyer of foreign-owned property is responsible for withholding tax on the sale and remitting the tax to the IRS. When a buyer does not pay the total withholding with the Form 8288, guidelines require the tax examiner to code the Form 8288, *i.e.*, add an edit mark, to show that the tax was not paid in full. IRS data transcribers use the codes on the Form 8288 to determine how to enter the form into the buyer's tax account. However, we found that some data transcribers were transcribing the amount of withholding that was paid by the buyer rather than the total amount of withholding that was required. As a result, some buyers are not being assessed for the total withholding that they are required to pay.

IRS management stated that they provided feedback to IRS Code and Edit and Transcription functions. In addition, management stated that their review identified areas in which internal guidance needs clarification, and they are conducting additional reviews of related guidance to ensure consistency. IRS management stated updated guidance was issued in early January 2019.

## ***Recommendations***

The Commissioner, Wage and Investment Division, should:

**Recommendation 1:** Initiate actions to address the accuracy of existing data in the FIRPTA database. Subsequent to an initial clean-up, implement processes and procedures to ensure accuracy of the information input into the FIRPTA database.



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**Management's Response:** The IRS agreed with this recommendation and plans to develop and implement a strategy to improve the quality of data entered into the FIRPTA database. The strategy will include training, work-in-process reviews, and improved procedures.

**Recommendation 2:** Conduct additional training to ensure that tax examiners understand established procedures for processing Forms 8288 and Forms 8288-A.

**Management's Response:** The IRS agreed with this recommendation and plans to ensure that tax examiners responsible for processing Form 8288 and Form 8288-A complete the appropriate training course.

**Recommendation 3:** Ensure that tax examiners are aware of the procedures to properly allocate FIRPTA withholding among multiple sellers when the buyer does not correctly submit a Form 8288-A for each seller.

**Management's Response:** The IRS agreed with this recommendation and plans to conduct regular work-in-process reviews to ensure that tax examiners understand the internal guidelines. IRS management will use the review results to identify areas in the guidelines that need strengthening.

**Recommendation 4:** Review the 2,988 buyers we identified with a discrepancy between the withholding reported on Form 8288 and the withholding reported on the associated Form 8288-A and correct the withholding recorded in the FIRPTA database or the buyer's tax account as appropriate.

**Management's Response:** The IRS agreed with this recommendation and plans to review the documents associated with the identified buyers and update the FIRPTA database as needed. When it is determined that an incorrect assessment was made, IRS management will correct the buyer's account or refer the buyer's account for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.

**Some Foreign Investment in Real Property Tax Act Withholding  
Assessments Are Incorrect**

Our review of 26,363 Forms 8288 processed during Processing Years 2017 and 2018<sup>12</sup> identified 3,184 Forms 8288 for which the IRS did not assess more than \$264 million in FIRPTA withholding tax. These include 2,268 Forms 8288 for which the buyers had an approved Withholding Certificate but the application for the Withholding Certificate was not filed timely

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<sup>12</sup> As of May 18, 2018.





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and 916 for which incomplete processes and procedures and tax examiner errors resulted in FIRPTA withholding tax not being accurately assessed.

A buyer must withhold and remit the full amount of tax due on the sale of U.S. property by a foreign person unless an application for a Withholding Certificate is filed ***on or before the date of transfer of the property***.<sup>13</sup> However, we found that the IRS \*\*\*\*\*2\*\*\*\*\* before assessing reduced \*\*\*\*\*2\*\*\*\*. For the 2,268 Forms 8288, the Withholding Certificate was submitted after the date shown on the Form 8288 for the transfer of the property. As such, the IRS incorrectly assessed \$178.8 million less in tax than the buyer was required to withhold. We provided IRS management with our results on May 15, 2019, and they agreed that the buyers we identified were not assessed the proper amount of tax.

For the remaining 916 Forms 8288, incomplete processes and procedures and tax examiner errors resulted in \$85.2 million in FIRPTA withholding tax that was not assessed. These include:

- 899 Forms 8288 for which the buyer did not have an approved Withholding Certificate. When the IRS approves an exemption from withholding or reduced withholding, it issues the buyer a Withholding Certificate. The buyer is required to attach the Withholding Certificate to the Form 8288. IRS internal guidelines state that if a buyer files a Form 8288 with less withholding tax than is required and a Withholding Certificate is not attached to the Form 8288, the tax examiner is to correspond with the taxpayer to obtain support for the reduced withholding. If the buyer does not respond, the employee is to assess the full amount of withholding tax. For each of these Forms 8288, the tax examiner assessed the reduced tax reported by the buyer rather than the full amount of tax as required. As a result, the IRS incorrectly assessed \$84.7 million less in tax than the buyer was required to withhold.
- 17 Forms 8288 for which the reduced tax amount assessed was not supported by the amount shown on the buyers' approved Withholding Certificates. When a Withholding Certificate is attached to the Form 8288, IRS procedures instruct employees to accept the reduced withholding reported by the buyer. However, the IRS \*\*\*\*\*2\*\*\*\*\* \*\*\*\*\*2\*\*\*\*\* \*\*\*\*\*2\*\*\*\*\* As a result, the IRS incorrectly assessed \$531,846 less in tax than was approved by the Withholding Certificate.

We notified IRS management of our concerns in November 2018. IRS management responded that the incorrect tax assessments were the result of employee errors. IRS management stated that they alerted the IRS Code and Edit function to the errors and indicated that they identified areas in which the guidance for editing the Form 8288 and transcribing the form are inconsistent.

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<sup>13</sup> Code of Federal Regulations Section 1.1445-3(a) and 1.1445-3(g).



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IRS management indicated that they are reviewing the related guidance, and necessary revisions will be made to ensure consistency and clarity.

## ***Recommendations***

The Commissioner, Wage and Investment Division, should:

**Recommendation 5:** Implement processes and procedures to ensure that tax examiners accurately determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay when the application for the Withholding Certificate attached to the Form 8288 was not filed on or before the date of transfer of the property.

**Management's Response:** The IRS agreed with this recommendation and plans to implement training that will address the correct processing of Form 8288 and any accompanying Withholding Certificate. In addition, IRS management will request a programming change for the FIRPTA database that will print the application date on the Withholding Certificate when it is issued. IRS management anticipates the requested programming will be implemented by mid-year Calendar Year 2021 subject to available funding and resources and competing priorities.

**Recommendation 6:** Ensure that tax examiners are aware of the processes and procedures to determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay when the buyer reports reduced withholding and no Withholding Certificate is attached to the Form 8288.

**Management's Response:** The IRS agreed with this recommendation and plans to conduct regular work-in-process reviews to ensure that tax examiners understand the internal guidelines. IRS management will use the review results to identify areas in the guidelines that need improvement.

**Recommendation 7:** Implement processes and procedures to ensure that tax examiners accurately determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay when an approved Withholding Certificate is attached to the Form 8288.

**Management's Response:** The IRS agreed with this recommendation and plans to perform work-in process reviews on a regular basis to ensure that tax examiners understand the internal guidelines. IRS management will use the review results to identify areas in the guidelines that need improvement.

**Recommendation 8:** Ensure that the correct amount of FIRPTA withholding tax is assessed for the buyers that filed the 2,268 Forms 8288 we identified for which the Withholding Certificate was not submitted timely and the 916 Forms 8288 we identified for which the assessed withholding is not supported by an approved Withholding Certificate.



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**Management's Response:** The IRS agreed with this recommendation and plans to review the documents and records associated with the identified buyers. When it is determined that an erroneous withholding credit was allowed, IRS management will correct the buyer's account or refer the buyer's account for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.

**Millions of Dollars in Withholding Credits Were Potentially Paid in Error, and Tax Examiners Did Not Always Document Steps Taken to Verify Claims As Required**

Our analysis of 17,382 Forms 1040NR and Forms 1120-F<sup>14</sup> processed in Processing Year 2017 that claimed a credit for FIRPTA withholding identified 1,835 returns for which, due to IRS employee error, the taxpayer potentially received more than \$60 million in additional FIRPTA withholding credits than they were entitled to receive.

IRS guidelines require IRS employees to verify 100 percent of FIRPTA withholding credits claimed on Forms 1040NR and Forms 1120-F by researching the FIRPTA database. For those claims for which there is no information in the FIRPTA database, the IRS will allow the withholding credit as long as the foreign seller is able to provide supporting documentation, *e.g.*, a settlement statement. When the tax examiner is unable to verify the withholding credit, the tax examiner is to disallow the credit.

**Tax examiners did not always update the FIRPTA database with required information as to the steps taken to verify claims**

IRS internal guidelines require tax examiners to document the tax period for the withholding credit, the amount of credit verified, and the tax form on which the credit was claimed in the Credit Verification section of the FIRPTA database. Our analysis of the 17,382 Forms 1040NR and Forms 1120-F processed in Processing Year 2017 identified 1,145 claims for which the filers received more than \$37 million in withholding credits with no evidence input into the FIRPTA database that tax examiners verified the claim to ensure accuracy. For each of these claims, information from filed Forms 8288-A was input into the FIRPTA database that would support the FIRPTA withholding credit claimed. However, there was no indication in the Credit Verification section of the database of the required documentation of the steps taken by the tax examiner to verify the credit.

IRS management reviewed a sample of 50 of the cases we identified and stated that they found information in the "remarks" section rather than the Credit Verification section of the FIRPTA database supporting the steps taken to verify 21 of the 50 returns. We agree the "remarks" section includes information showing that the credit was verified for 20 of the cases the IRS

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<sup>14</sup> We reviewed 17,201 Forms 1040NR and 181 Forms 1120-F.



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reviewed. However, for the remaining 30 cases, there was no information supporting the verification of the withholding credit.

## ***Recommendations***

The Commissioner, Wage and Investment Division, should

**Recommendation 9:** Review the 1,835 taxpayers we identified that potentially received erroneous FIRPTA withholding credits and take the appropriate steps to recover credits paid in error.

**Management's Response:** The IRS agreed with this recommendation and plans to review the documents and records associated with the identified taxpayers. When it is determined that an erroneous withholding credit was allowed, IRS management will correct the buyer's account or refer the buyer's account for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.

**Recommendation 10:** Ensure that tax examiners document the steps taken to verify the claim in the Credit Verification section of the FIRPTA database as required.

**Management's Response:** The IRS agreed with this recommendation and plans to conduct regular reviews to ensure that employees responsible for verifying credits in the FIRPTA database are following required procedures.

## **Processes Have Not Been Established to Use Third-Party Sale of Real Estate Property Forms to Identify Buyers That Do Not Report and Pay Withholdings**

Our match of 723 Tax Year 2017 Forms 1099-S received by the IRS as of July 26, 2018, that reported the sale of U.S. property over \$300,000 by a foreign individual<sup>15</sup> to Forms 8288 identified 278 Forms 1099-S for which the buyer of U.S. property from a foreign individual did not file a required Form 8288. These 278 Forms 1099-S reported real estate sales of U.S. property by a foreign individual that totaled approximately \$188.4 million. These buyers would be required to pay approximately \$22 million in FIRPTA withholding. However, the IRS has not established processes and procedures to use these forms to identify buyers that are required to file Form 8288 but fail to report and pay the required FIRPTA withholding. When we discussed our analysis with IRS management, they agreed with our assessment and stated that they plan to evaluate the use of the Form 1099-S data as a potential workload selection filter.

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<sup>15</sup> Form 8288 is not required for sales of \$300,000 and below.



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## ***Recommendations***

The Commissioner, Large Business and International Division, should:

**Recommendation 11:** Develop a process to identify Forms 1099-S for which the buyer of U.S. property from a foreign individual did not file Form 8288 to report and pay FIRPTA withholding from the sale of the property.

**Management's Response:** The IRS agreed with this recommendation. As part of a proposed treatment stream for a FIRPTA campaign under development, the campaign team developed a process to use Forms 1099-S to identify withholding agents that have not filed Forms 8288 or 8288-A. The campaign team's method is similar to the TIGTA's method except that the team added two additional steps: (1) determine whether the sellers filed U.S. income tax returns and reported the dispositions and (2) confirm that the sellers are not U.S. persons. Of the 278 Forms 1099-S referenced in Recommendation 12 below, the campaign identified 38 buyers thus far that appear to have not filed Forms 8288 or 8288-A for dispositions during Tax Year 2017.

**Recommendation 12:** Take actions to address the reporting and payment noncompliance of the buyers we identified that did not file Form 8288 or remit withholding reported on the 278 Forms 1099-S.

**Management's Response:** The IRS agreed with this recommendation. For a sample of the 278 Forms 1099-S, IRS management contacted the settlement agents and determined that a majority of the forms were not related to foreign sellers. As such, the buyers were not liable for FIRPTA withholding tax and did not have a Form 8288 or 8288-A filing obligation. The reasons that Form 1099-S, Line 5, was incorrectly checked include: (1) the seller had a foreign address but was actually a U.S. citizen working overseas and (2) an error made by settlement agent personnel. Of the 278 Forms 1099-S, the campaign has identified 38 buyers that appear to have not filed Forms 8288 or 8288-A for dispositions during Tax Year 2017.



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## **Appendix I**

### *Detailed Objective, Scope, and Methodology*

Our overall objective was to assess IRS efforts to verify the accuracy of withholding credits reported on Forms 1040NR, *U.S. Nonresident Alien Income Tax Return*, and Forms 1120-F, *U.S. Income Tax Return of a Foreign Corporation*. To accomplish our objective, we:

- I. Determined whether the IRS has an effective process to ensure that the proper amount of FIRPTA withholding is reported and paid.
  - A. Identified Forms 8288-A processed in Processing Year 2017 and compared the amount of FIRPTA withholding reported to the amount of FIRPTA withholding assessed to the buyers.
  - B. Reviewed a statistically valid sample of 127 Forms 8288 for which it appeared the buyer was not assessed or paid the incorrect amount of FIRPTA withholding based on what was reported on Forms 8288-A. Our sample was selected using a 95 percent confidence level,  $\pm 5$  percent precision, and 10 percent estimated error rate.
- II. Determined whether the IRS has an effective process to ensure that Forms 8288-A are correctly entered into the FIRPTA database.
  - A. Identified Forms 8288 processed in Processing Year 2017 for which there were no Forms 8288-A in the FIRPTA database or there was a discrepancy between the withholding reported on Forms 8288-A and Forms 8288.
  - B. Selected a statistically valid sample of 127 Forms 8288 to determine whether the associated Forms 8288-A were entered into the FIRPTA database or whether there was a discrepancy between the withholding reported on Forms 8288-A and 8288. Our sample was selected using a 95 percent confidence level,  $\pm 5$  percent precision, and 10 percent estimated error rate.
- III. Determined whether the IRS has effective processes to verify if taxpayers that indicate they are exempt from withholding FIRPTA tax or are eligible for reduced withholding have received a Withholding Certificate from the IRS. For those in which the tax assessed was less than the computed withholding amount, we determined if the seller was approved by the IRS as exempt or eligible for reduced withholding.
- IV. Determined whether the IRS has an effective process to ensure the proper amount of FIRPTA withholding credit was claimed by the seller.
  - A. Determined whether the withholding claimed on Forms 1040NR and 1120-F matched the Form 8288-A withholding in the FIRPTA database or the withholding reported on





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the settlement statement and whether it was incorrectly marked as verified in the FIRPTA database.

- B. Determined whether the IRS took actions to assess the buyer the amount of withholding tax per settlement statements.
- C. Quantified the number of foreign seller Forms 1099-S for which no Form 8288-A or Form 8288 was in the FIRPTA database.

**Data validation methodology**

During this review, we relied on data extracts obtained from the IRS's Individual Master File, Business Master File, Individual Returns Transaction File, and BRTF databases that were available on TIGTA's Data Center Warehouse.<sup>1</sup> We also used data from the IRS's FIRPTA Form 8288-A database obtained as of March 29, 2018, and Form 8288-B database obtained as of August 10, 2018, provided by the IRS's Information Technology organization. We also relied on Form 1099-S data extracts from the IRS's Information Returns Master File as of July 26, 2018, that was provided by TIGTA Office of Investigations' Strategic Data Services. Before relying on the data, we ensured that each file contained the specific data elements we requested. In addition, we selected random samples of each extract and verified that the data in the extracts were the same as the data captured in the IRS's Integrated Data Retrieval System<sup>2</sup> and FIRPTA database. Based on the results of our testing, we believe that the data used in our review were sufficiently reliable to perform our audit analyses.

**Internal controls methodology**

Internal controls relate to management's plans, methods, and procedures used to meet their mission, goals, and objectives. Internal controls include the processes and procedures for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance. We determined that the following internal controls were relevant to our audit objective: controls over the processing of Forms 8288, 8288-A, and 8288-B and the processing of FIRPTA credits claimed on the income tax returns of foreign sellers. We evaluated these controls by interviewing key personnel, analyzing data from the FIRPTA database, and performing analysis of Form 1099-S data and tax return data from the Individual Return Transaction File and the BRTF located on the TIGTA Data Center Warehouse.

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<sup>1</sup> A TIGTA repository of IRS data.

<sup>2</sup> IRS computer system capable of retrieving or updating stored information. It works in conjunction with a taxpayer's account records.



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## **Appendix II**

### *Major Contributors to This Report*

Russell P. Martin, Assistant Inspector General for Audit (Returns Processing and Account Services)

Deann L. Baiza, Director

Sharla J. Robinson, Acting Director

Kathleen A. Hughes, Audit Manager

Ngan B. Tang, Audit Manager

Linda M. Valentine, Lead Auditor

Joyce Liao-Bruggisser, Auditor





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**Appendix III**

*Report Distribution List*

Commissioner, Large Business and International Division  
Commissioner, Wage and Investment Division  
Deputy Commissioner, Large Business and International Division  
Deputy Commissioner, Wage and Investment Division  
Director, Submission Processing, Wage and Investment Division  
Director, Withholding and International Individual Compliance Practice Area, Large Business  
and International Division  
Director, Enterprise Audit Management



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## **Appendix IV**

### *Outcome Measures*

This appendix presents detailed information on the measurable impact that our recommended corrective actions will have on tax administration. These benefits will be incorporated into our Semiannual Report to Congress.

#### **Type and Value of Outcome Measure:**

- Revenue Protection – Potential; \$525,430,765 in withholding tax reported on Forms 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, during Processing Year 2017 by 1,380 taxpayers, *i.e.*, buyers, that were not assessed to the buyers' tax account (see page 6).

#### **Methodology Used to Measure the Reported Benefit:**

We matched 18,764 buyers Processing Year 2017 Forms 8288-A in the FIRPTA database to the Form 8288 that posted to the buyer's account. We compared the amount of withholding reported on the Form 8288-A to the information in the buyer's tax account to determine whether the proper amount of tax was assessed and whether the buyer paid the assessment. We also identified Forms 8288-A in the FIRPTA database with no corresponding Form 8288 posted to the buyer's tax account. In addition, we reviewed 19,817 Forms 8288 in the BRTF and matched them to the Forms 8288-A in the FIRPTA database. We quantified those that had no Forms 8288-A in the FIRPTA database or the Forms 8288-A reported less taxes withheld than was shown on the Form 8288. We identified:

- 1,030 buyers submitted Forms 8288-A but reported less taxes withheld on Form 8288 than reported on Forms 8288-A totaling \$513,255,241.
- 350 buyers submitted Forms 8288-A and had information from the Form 8288 in the FIRPTA database; however, a Form 8288 never posted to the tax account. The tax withheld per the Form 8288 in the FIRPTA database was \$12,175,524.

#### **Type and Value of Outcome Measure:**

- Taxpayer Rights and Entitlements – Potential; 1,608 taxpayers, *i.e.*, buyers, that reported \$163,101,850 more withholding on Forms 8288, *U.S. Withholding Tax Return for Disposition by Foreign Persons of U.S. Real Property Interests*, than was reported on Form 8288-A (see page 6).



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**Methodology Used to Measure the Reported Benefit:**

We matched 18,764 buyers Processing Year 2017 Forms 8288-A in the FIRPTA database to the Form 8288 that posted to the buyer's account. We compared the amount of withholding reported on the Form 8288-A to the information in the buyer's tax account to determine whether the proper amount of tax was assessed and whether the buyer paid the assessment. We also identified Forms 8288-A in the FIRPTA database with no corresponding Form 8288 posted to the buyer's tax account. In addition, we reviewed 19,817 Forms 8288 in the BRTF and matched them to the Forms 8288-A in the FIRPTA database. We quantified those that had no Forms 8288-A in the FIRPTA database or the Forms 8288-A reported less taxes withheld than was shown on the Form 8288. We identified:

- 755 buyers reported more taxes on Form 8288 than reported on Forms 8288-A totaling \$49,007,279.
- 853 buyers reported \$114,094,571 in FIRPTA tax on Forms 8288 but there were no Forms 8288-A in the FIRPTA database.

**Type and Value of Outcome Measure:**

- Reliability of Information – Potential; 1,499 taxpayers, *i.e.*, buyers, that had a potential discrepancy between the withholding reported on their Forms 8288 and what was reported on their related Forms 8288-A *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests* (see page 6).

**Methodology Used to Measure the Reported Benefit:**

We compared withholding information reported on Forms 8288 submitted by buyers during Processing Year 2017 to corresponding Form 8288-A information entered by tax examiners into the FIRPTA database. We identified 2,988 buyers that had a potential discrepancy between the withholding reported on their Form 8288 and what they reported on their related Forms 8288-A.

We selected statistically valid samples of buyers to determine if the Forms 8288-A were correctly entered into the FIRPTA database and if the buyer was assessed the correct amount of tax. Our review of statistically valid samples of 254<sup>1</sup> of the 2,988 buyers determined that the information in the FIRPTA database, if used to verify these claims, was not accurate for

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<sup>1</sup> We reviewed two statistically valid samples of 127 each of buyers that appeared to have reporting and payment discrepancies. See Appendix I for the details of the statistically valid samples reviewed.



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129 buyers. Based on the results of the review, we estimate that the FIRPTA database had potentially inaccurate information for as many as 1,499 buyers.<sup>2</sup>

While we estimate that 1,499 buyers have inaccurate information in the FIRPTA database, our analysis does not reflect the full extent to which the database is inaccurate. We validated the accuracy of only the information associated with the reporting and payment discrepancies we identified through our data analysis. We did not validate the accuracy of the information for every purchase of real property contained in the database.

**Type and Value of Outcome Measure:**

- Revenue Protection – Potential; \$264,114,578 less in FIRPTA tax than was required to be assessed for 3,184 taxpayers, *i.e.*, buyers (see page 9).

**Methodology Used to Measure the Reported Benefit:**

We reviewed 26,363 Forms 8288 in the BRTF for both Processing Years 2017 and 2018. We computed the percentage of withholding and withholding amount required on the Forms 8288 based on the transaction dates. We identified 17 Forms 8288 for which the buyer was assessed \$531,846 less in FIRPTA withholding tax than the reduced Withholding Certificate amount and 2,268 Forms 8288 for which the Withholding Certificate was not applied for timely and, as a result, were required to withhold and remit the full amount. These buyers were underassessed \$178,866,937 in FIRPTA withholding tax.

In addition, we identified 899 Forms 8288 processed in Processing Years 2017 and 2018 for which the buyer did not have an approved Withholding Certificate for reduced withholding, and the IRS potentially assessed \$84,715,795 less in tax than the buyer was required to withhold.

**Type and Value of Outcome Measure:**

- Revenue Protection – Potential; \$811,132 in FIRPTA withholding credits for 78 taxpayers, *i.e.*, sellers, due to IRS employee error (see page 12).

**Methodology Used to Measure the Reported Benefit:**

We reviewed 17,382 Forms 1040NR and Forms 1120-F processed in Processing Year 2017 that claimed a credit for FIRPTA withholding. We identified 1,835 forms for which the foreign seller potentially received more than \$60 million in FIRPTA withholding credits to which they were not entitled because IRS employees did not enter the Forms 8288-A into the FIRPTA

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<sup>2</sup> The point estimate projection of 792 Forms 8288 for one sample of 127 is based on a two-sided 95 percent confidence interval. We are 95 percent confident that the point estimate is between 691 and 893. The point estimate projection of 707 Forms 8288 for sample two is based on a two-sided 95 percent confidence interval. We are 95 percent confident that the point estimate is between 588 and 826.



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database accurately. Of these, 114 Forms 1040NR claimed more withholding credit than was reported on Forms 8288-A in the FIRPTA database.

We manually reviewed the 114 Forms 1040NR and found 78 taxpayer claims for which the withholding credit was not supported by the Forms 8288-A submitted with the tax return. The amount of unsupported withholding credit totaled \$811,132.

**Type and Value of Outcome Measure:**

- Reliability of Information – Potential; 1,145 taxpayers, *i.e.*, foreign sellers, that potentially received \$37,617,254 in FIRPTA withholding credits for which there was no evidence in the Credit Verification Section of the FIRPTA database that the credit was verified (see page 12).

**Methodology Used to Measure the Reported Benefit:**

We identified 15,460 Forms 1040NR and 1120-F in Processing Year 2017 that had a Form 8288-A in the FIRPTA database and received the FIRPTA withholding credit. We matched these records to the FIRPTA database to determine if the Credit Verification Section in the FIRPTA database was completed as required. There are 1,145 records that did not have the Credit Verification Section completed which received FIRPTA withholding credits totaling more than \$37 million.

**Type and Value of Outcome Measure:**

- Revenue Protection – Potential; \$22,312,573 in FIRPTA withholding tax that was not remitted by 278 taxpayers, *i.e.*, buyers, that did not properly file Forms 8288 (see page 13).

**Methodology Used to Measure the Reported Benefit:**

Our review of 1,206,125 Tax Year 2017 Forms 1099-S from the Information Returns Master File reporting the sale of U.S. property identified 723 Forms 1099-S which had an indicator that the seller of the property was a foreign seller and the sale of the property was over \$300,000. We compared these Forms 1099-S to the Forms 8288 and Forms 8288-B in the FIRPTA database and the Forms 8288 in the BRTF. We identified 278 Forms 1099-S for which the buyer of the U.S. property from a foreign individual did not file a Form 8288. These buyers would be required to pay \$22,312,573 in FIRPTA withholding tax.



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**Appendix V**

*Form 8288, U.S. Withholding Tax Return  
for Dispositions by Foreign Persons of  
U.S. Real Property Interests*

<b>Form 8288</b> (Rev. February 2017) Department of the Treasury Internal Revenue Service		<b>U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests</b>		OMB No. 1545-0902	
Information about Form 8288 and its separate instructions is at <a href="http://www.irs.gov/form8288">www.irs.gov/form8288</a> .					
If this is an amended return, check here <input type="checkbox"/>					
Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A. Attach additional sheets if you need more space.					
<b>Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)</b>					
1 Name of buyer or other transferee responsible for withholding. See instructions.			Identifying number		
Street address, apt. or suite no., or rural route. Do not use a P.O. box.					
City or town, province or state, country, and ZIP or foreign postal code			Phone number (optional)		
2 Description and location of property acquired					
3 Date of transfer			4 Number of Forms 8288-A attached		
5 Complete all items that apply. Enter dollar amounts on applicable lines.			6 Total amount withheld		
a Amount subject to withholding at 15%					
b Amount subject to withholding at 10%					
c Withholding is at a reduced rate. See instructions <input type="checkbox"/>					
<b>Part II To Be Completed by an Entity Subject to the Provisions of Section 1445(e)</b>					
1 Name of entity or fiduciary responsible for withholding. See instructions.			Identifying number		
Street address, apt. or suite no., or rural route. Do not use a P.O. box.					
City or town, province or state, country, and ZIP or foreign postal code			Phone number (optional)		
2 Description of U.S. real property interest transferred or distributed					
3 Date of transfer			4 Number of Forms 8288-A attached		
5 Complete all items that apply. Enter dollar amounts on applicable lines.			6 Total amount withheld		
a Amount subject to withholding at 15%					
b Amount subject to withholding at 10%					
c Amount subject to withholding at 35%					
d Withholding is at a reduced rate. See instructions <input type="checkbox"/>					
e Large trust election to withhold at distribution <input type="checkbox"/>					
Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.					
<b>Sign Here</b>					
Signature of withholding agent, partner, fiduciary, or corporate officer			Title (if applicable)		Date
Print/Type preparer's name			Preparer's signature		Date
Firm's name			Firm's EIN		Check <input type="checkbox"/> if self-employed PTIN
Firm's address			Phone no.		
<b>Paid Preparer Use Only</b>					
For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.					
Cat. No. 82260A Form 8288 (Rev. 2-2017)					



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**Appendix VI**

*Form 8288-A, Statement of Withholding  
on Dispositions by Foreign Persons of  
U.S. Real Property Interests*

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	<b>Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests</b>  OMB No. 1545-0902	
		2 Federal income tax withheld		
Withholding agent's Federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	<b>Copy A For Internal Revenue Service Center</b>  For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.
Name of person subject to withholding		5 Description of property transferred		
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is: An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ▶		
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)		
Form <b>8288-A</b> (Rev. 2-2016) Cat. No. 62261L <b>Attach Copies A and B to Form 8288</b> Department of the Treasury - Internal Revenue Service				





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**Appendix VII**

*Management's Response to the Draft Report*




WAGE AND INVESTMENT DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
ATLANTA, GA 30308

FEB 04 2020

MEMORANDUM FOR MICHAEL E MCKENNEY  
DEPUTY INSPECTOR GENERAL FOR AUDIT

FROM: Kenneth C. Corbin   
Commissioner, Wage and Investment Division

SUBJECT: Draft Audit Report – Millions of Dollars in Discrepancies in Tax  
Withholding Required by the Foreign Investment in Real  
Property Tax Act Are Not Being Identified or Addressed  
(Audit # 201840038)

Thank you for the opportunity to review and comment on the subject draft report. We appreciate the opportunities for improvement identified in the report and are dedicated to improving the quality and reliability of the Foreign Investment in Real Property Tax Act (FIRPTA) database. Under the FIRPTA, buyers of interests in U.S. real estate purchased from foreign persons must withhold and remit to the IRS the applicable percentage of the amount realized by the foreign person from the sale. The withheld tax reported and remitted to the IRS is available to the seller as a refundable credit, should it exceed reported tax liability, upon the filing of a tax return.

We agree with the twelve recommendations made in the report. In addition to evaluating procedural guidance and improving its content and clarity, we will also assess the accuracy of processing Form 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*. As we review documents and correct inaccurate data in the FIRPTA database, when it is determined an inaccurate tax assessment was made, we will refer those accounts for treatment under deficiency procedures. Consideration of referred accounts by our compliance functions will be subject to the remaining period in which an additional tax assessment may be made within the statute of limitations and to prioritization with other identified work.

We disagree with the outcome measures stated in Appendix IV. We believe the Taxpayer Inspector General for Tax Administration's (TIGTA's) methodology was incomplete and the amount of potential protected revenue is overstated. We are unable





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to agree because the auditors did not review the documentation associated with the data extracts for most of the discrepancies. We believe the measurable impact for the 4,547 cases at \$789,013,497 is to the reliability of information. For the reasons stated above, we also disagree the 1,608 cases at \$163,101,850 measurably impact taxpayer rights and entitlements. We agree with the protected revenue of \$1,342,978 for the 95 cases in which the TIGTA reviewed the documentation, and the 278 cases at \$22,312,573. We agree that all 2,644 cases at \$37,617,254 impacted the reliability of information.

Attached is a detailed response with our planned corrective actions to your recommendations. If you have any questions, please contact me, or a member of your staff may contact Dietra Grant, Director, Customer Account Services, Wage and Investment Division, at 470-639-3504.

Attachment



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Attachment

**Recommendations**

The Commissioner, Wage and Investment Division, should:

**RECOMMENDATION 1**

Initiate actions to address the accuracy of existing data in the FIRPTA database. Subsequent to an initial clean-up, implement processes and procedures to ensure accuracy of the information input into the FIRPTA database.

**CORRECTIVE ACTION**

We agree with this recommendation and will develop and implement a strategy to improve the quality of data entered into the Foreign Investment Real Property Tax Act (FIRPTA) database. Our strategy will include training, work-in-process reviews, and improved procedures.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 2**

Conduct additional training to ensure that tax examiners understand established procedures for processing Forms 8288 and Forms 8288-A.

**CORRECTIVE ACTION**

We agree with this recommendation. We will ensure tax examiners responsible for processing Form 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, complete the appropriate training course. This will include either Course 19801, *Coding & Editing Foreign Investment Real Property Tax Act (FIRPTA) Form 8288 New Hire Training*, or its companion, Course 28936, *Coding & Editing Foreign Investment Real Property Tax Act (FIRPTA) Form 8288 Refresher Training*.

**IMPLEMENTATION DATE**

June 15, 2020



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**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 3**

Ensure that tax examiners are aware of the procedures to properly allocate FIRPTA withholding among multiple sellers when the buyer does not correctly submit a Form 8288-A for each seller.

**CORRECTIVE ACTION**

We agree with this recommendation. We will conduct regular work-in-process reviews to ensure tax examiners understand the Internal Revenue Manual (IRM) procedures. We will use the review results to identify areas of the IRM where procedures need strengthening.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 4**

Review the 2,988 buyers we identified with a discrepancy between the withholding reported on Form 8288 and the withholding reported on the associated Form 8288-A and correct the withholding recorded in the FIRPTA database or the buyer's tax account as appropriate.

**CORRECTIVE ACTION**

We agree with this recommendation. We will review the documents associated with the identified buyers and update the FIRPTA database as needed. When it is determined an incorrect assessment was made, we will either correct the buyer's account or refer it for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.



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**IMPLEMENTATION DATE**

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**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 5**

Implement processes and procedures to ensure that tax examiners accurately determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay when the application for the Withholding Certificate attached to the Form 8288 was not filed on or before the date of transfer of the property.

**CORRECTIVE ACTION**

We agree with this recommendation. Training, as addressed in our responses to related recommendations, will address the correct processing of Form 8288 and any accompanying Withholding Certificate. The determinative date for assessing the validity of the Withholding Certificate, as it applies to ascertaining the correct rate of withholding, is the application date. The application is not attached to Form 8288, and the application date is not present on the Withholding Certificate. We will request a programming change for the FIRPTA database that will print the application date on the Withholding Certificate when it is issued. We anticipate the programming will be implemented by mid-year 2021; however, it is subject to the availability of funding, limited resources, and competing priorities. Therefore, we cannot provide an implementation date.

**IMPLEMENTATION DATE**

N/A

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 6**

Ensure that tax examiners are aware of the processes and procedures to determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay



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when the buyer reports reduced withholding and no Withholding Certificate is attached to the Form 8288.

**CORRECTIVE ACTION**

We agree with this recommendation. Work-in-process reviews will be performed on a regular basis to ensure tax examiners understand the IRM procedures. We will use the review results to identify areas of the IRM where procedures need improvement.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 7**

Implement processes and procedures to ensure that tax examiners accurately determine and assess the proper amount of FIRPTA withholding tax a buyer should report and pay when an approved Withholding Certificate is attached to the Form 8288.

**CORRECTIVE ACTION**

We agree with this recommendation. Work-in-process reviews will be performed on a regular basis to ensure tax examiners understand the IRM procedures. We will use the review results to identify areas of the IRM where procedures need improvement.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.





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**RECOMMENDATION 8**

Ensure that the correct amount of FIRPTA withholding tax is assessed for the buyers who filed the 2,268 Forms 8288 we identified in which the Withholding Certificate was not submitted timely and the 916 Forms 8288 we identified in which the assessed withholding is not supported by an approved Withholding Certificate.

**CORRECTIVE ACTION**

We agree with this recommendation. We will review the documents and records associated with the identified buyers. When it is determined an incorrect assessment was made, we will either correct the buyer's account or refer it for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 9**

Review the 1,835 taxpayers we identified that potentially received erroneous FIRPTA withholding credits and take the appropriate steps to recover credits paid in error.

**CORRECTIVE ACTION**

We agree with this recommendation. We will review the documents and records associated with the identified taxpayers. When it is determined an erroneous withholding credit was allowed, we will either correct the buyer's account or refer it for resolution under deficiency procedures, as appropriate and within the assessment statute of limitations period.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division



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**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**RECOMMENDATION 10**

Ensure that tax examiners document the steps taken to verify the claim in the Credit Verification section of the FIRPTA database as required.

**CORRECTIVE ACTION**

We agree with this recommendation. We will conduct regular reviews to ensure employees responsible for verifying credits in the FIRPTA database are following Job Aid 19801-001, *2020 Foreign Investment Real Property Tax Act (FIRPTA) NSA Data Base*, which covers the procedures for updating the database.

**IMPLEMENTATION DATE**

October 15, 2020

**RESPONSIBLE OFFICIAL**

Director, Submission Processing, Customer Account Services, Wage and Investment Division

**CORRECTIVE ACTION MONITORING PLAN**

We will monitor this corrective action as part of our internal management control system.

**Recommendations**

The Commissioner, Large Business and International Division, should:

**RECOMMENDATION 11**

Develop a process to identify Forms 1099-S for which the buyer of U.S. property from a foreign individual did not file Form 8288 to report and pay FIRPTA withholding from the sale of the property.

**CORRECTIVE ACTION**

We agree with this recommendation. As part of a proposed treatment stream for a FIRPTA campaign under development, the campaign team developed a process to identify withholding agents that have not filed Forms 8288 or 8288-A, using Forms 1099-S, *Proceeds From Real Estate Transactions*, for tax year 2017 as a starting point. The campaign team's method is similar to the Treasury Inspector General for Tax Administration's method except the team added two additional steps: (1) determine if the sellers filed U.S. income tax returns and reported the dispositions, and (2) confirm the sellers are not U.S. persons. Of the 278 Forms 1099-S referenced in Recommendation 12 below, our campaign development work thus far has identified 38



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buyers who appear to have not filed Forms 8288 or 8288A for dispositions during the 2017 tax year.

**IMPLEMENTATION DATE**

Implemented

**RESPONSIBLE OFFICIAL**

Director, Withholding and International Individual Compliance, Large Business and International Division

**CORRECTIVE ACTION MONITORING PLAN**

N/A

**RECOMMENDATION 12**

Take actions to address the reporting and payment noncompliance of the buyers we identified that did not file Form 8288 or remit withholding reported on the 278 Forms 1099-S.

**CORRECTIVE ACTION**

We agree with this recommendation. The Large Business and International Division selected a sample of the 278 Forms 1099-S by highest gross sales amount and contacted the settlement agents. We determined that a majority of the sampled Forms 1099-S were not foreign sellers. Thus, the buyers were not liable for FIRPTA withholding tax and did not have a Form 8288 or 8288-A filing obligation. The reasons that Line 5 was incorrectly checked include: (1) the seller had a foreign address but was actually a U.S. citizen working overseas, and (2) an error made by settlement agent personnel. Of the 278 Forms 1099-S, our campaign development work thus far has identified 38 buyers who appear to have not filed Forms 8288 or 8288A for dispositions during the 2017 tax year.

**IMPLEMENTATION DATE**

Implemented

**RESPONSIBLE OFFICIAL**

Director, Withholding and International Individual Compliance, Large Business and International Division

**CORRECTIVE ACTION MONITORING PLAN**

N/A