

TaxNewsFlash

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Initial impressions on Notice 2018-29, withholding on transfers of non-publicly traded partnership interests

The IRS today released an advance version of Notice 2018-29 to provide interim guidance regarding withholding of U.S. tax related to transfers of interests in non-publicly traded partnership under Code section 1446(f), under the tax law signed by the president on December 22, 2017 (Pub. L. No. 115-97) (the 2017 Act).

Notice 2018-29 [PDF 188 KB] (22 pages) confirms that section 1446(f)(1) withholding on dispositions of non-publicly traded partnership interests is effective as of January 1, 2018, but waives penalties and interest if all forms and payments due on or before May 31, 2018, are filed with and paid over to IRS on or before May 31, 2018.

Withholding agents must use FIRPTA procedures, pay over withheld amounts within 20 days of transfer, and modify FIRPTA withholding forms until forms and other guidance are issued under section 1446(f)(1). The IRS temporarily suspended section 1446(f)(4) withholding.

Background

Withholding under section 1446(f) relates to the rules codified in section 864(c)(8), also added to the Code by the new tax law, that treat as “effectively connected” with a trade or business in the United States a foreign person’s gain or loss from a disposition of an interest in a partnership that is engaged in a trade or business in the United States. The new withholding rules under section 1446(f) apply with respect to dispositions of certain partnership interests occurring after December 31, 2017, although the new substantive tax rules under section 864(c)(8) apply to transfers of interests in certain partnerships occurring on or after November 27, 2017.

Previously, on December 29, 2017, the IRS announced in Notice 2018-08 that the rules of section 864(c)(8) were currently in effect, and also that the application of withholding under new section 1446(f) as to interests in publicly traded partnerships (within the meaning of section 7704(b)) was temporarily suspended.

Notice 2018-29

Notice 2018-29, which addresses interests in non-publicly traded partnerships, does not affect a transferor's liability under section 864(c)(8), although Notice 2018-29 contains rules that modify or suspend withholding under section 1446(f).

The 2017 Act creates two new, alternative withholding regimes under new section 1446(f) that are triggered if a portion of the gain (if any) on any disposition of an interest in a partnership would be treated under section 864(c)(8) as effectively connected with the conduct of a trade or business in the United States.

- The primary new withholding rule in new section 1446(f)(1) requires a transferee to deduct and withhold a tax equal to 10% of the amount realized in such a disposition that occurs after December 31, 2017.
- A secondary new withholding rule added by new section 1446(f)(4) applies if the transferee fails to withhold under the primary new withholding rule, and requires the partnership whose partnership interest was transferred to deduct and withhold from any distributions to the transferee/new partner the amount of tax that the transferee should have withheld under the primary new withholding tax, plus interest.

Notice 2018-29 provides guidance on how to comply with the primary section 1446(f)(1) withholding obligations, and temporarily suspends the secondary section 1446(f)(4) withholding obligation.

Reporting and paying over section 1446(f)(1) withholding

Notice 2018-29 (Section 5) announces that persons required to withhold under section 1446(f)(1) must use the FIRPTA-related rules in section 1445 and the regulations thereunder for purposes of reporting and paying over the section 1446(f)(1) tax, except as otherwise provided, including:

- Using 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*. The transferee must:
 - Include the statement "Section 1446(f)(1) withholding" at the top of both the relevant Form 8288 and Form 8288-A.

- Enter the amount subject to withholding under section 1446(f)(1) on line 5b of Part I of the Form 8288 and on line 3 of Form 8288-A and enter the amount withheld on line 6 of Part I of Form 8288 and on line 2 of Form 8288-A.
- Reporting and paying over withholding within 20 days of a transfer of a partnership interest.

At present, the IRS will not issue withholding certificates under section 1446(f)(3), such as those provided on Form 8288-B, *Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests*.

Notice 2018-29 generally applies to section 1446(f) withholding the general Code rules that impose liability for tax, penalties, and interest for failure to withhold and timely pay over withheld amounts.

Notice 2018-29 (Section 5) effectively waives penalties and interest if withholding is properly reported and paid over to IRS on or before May 31, 2018, stating:

The Treasury Department and the IRS intend to issue regulations providing that with respect to any forms that were required to be filed, or amounts that were due, under section 1446(f) on or before May 31, 2018, no penalties or interest will be asserted if these forms are filed with, and such amounts are paid over to, the IRS on or before May 31, 2018.

More specifically, Notice 2018-29 provides:

- Definitions [Section 3 of Notice 2018-29]
- Rules of general applicability [Section 4 of Notice 2018-29] including when a transferor must have a U.S. taxpayer identification number (TIN), and that certifications must be signed under penalties of perjury
- Interim guidance on reporting and paying over the amount required to be withheld under section 1446(f)(1), and generally adopting the forms and procedures relating to dispositions of U.S. real property interests under section 1445 and the regulations thereunder
- Effective date [Section 5 of Notice 2018-29]
- Guidance on affidavits of non-foreign status by generally adopting the rules in section 1445 [Section 6 of Notice 2018-29]
- An exemption from withholding if the transferee receives a certification from the transferor that: (1) the disposition will not result in gain [Section 6.02 of Notice 2018-29]; or (2) less than 25% of the transferor's effectively connected taxable income from the partnership for each of the prior three years was less than 25% of

the transferor's total income from the partnership (this does not require a partnership level computation under section 864(c)(8) or other determination) [Section 6.03 of Notice 2018-29]; or (3) the transferor obtained from the partnership a record certifying that the partnership's effectively connected gain under section 864(c)(8) would be less than 25% of the total gain on the deemed sale of all its assets [Section 6.04 of Notice 2018-29]

- No withholding is required in a transaction in which no gain is recognized, pending future guidance on nonrecognition transactions (including coordination with rules under section 897) [Section 6.05 of Notice 2018-29]
- That, in computing the amount realized and generally subject to 10% withholding under section 1446(f)(1), a transferee may generally rely on: (1) a transferor's most recently issued Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, [Section 7.02 of Notice 2018-29] or (2) a certification from the partnership providing the transferor's share of partnership liabilities [Section 7.03 of Notice 2018-29]
- The total amount required to be withheld generally is limited to the total amount of cash and property to be transferred, although this limitation may cease to apply after future guidance is provided [Section 8 of Notice 2018-29]
- That section 1446(f) withholding applies to certain partnership distributions that result in gain under section 731, but that the partnership may generally rely on its books and records, or on a certification from the distributee partner to determine if the distribution exceeds the partner's basis [Section 9 of Notice 2018-29]
- Guidance on the interaction of section 1446(f) and section 1445 [Section 10 of Notice 2018-29]
- That withholding under section 1446(f)(4) will not apply until regulations or other guidance has been issued under that section [Section 11 of Notice 2018-29]
- Future regulations will address tiered partnerships, including to clarify that section 1446(f)(1) withholding will apply to the sale of an upper tier partnership owning a lower tier partnership that would have effectively connected gain under section 864(c)(8) [Section 12 of Notice 2018-29]
- A request for comments and IRS contact information [Section 13 of Notice 2018-29]

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