

## XII. 外国法人投资美国不动产

### XII. Foreign Person Investing in Real Property

土地  
Land



别墅  
House



公寓  
Apartment



商业楼  
Commercial



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- Asset Protection Strategies, American Bar Association (two chapters); and
- Asset Protection Strategies Volume II, American Bar Association published Apr. 2005 (MM responsible for 1/5 of the text).

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- 《资产保护战略二》，美国律师协会出版

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The law is constantly changing at an unprecedented pace. Also, each client's separate fact situation must be carefully examined before applying any principals of law. Furthermore, this outline is not intended to be a substitute for the practitioner's own research into this area of law and how the law applies to a client's specific situation. Therefore, the author takes no responsibility how the areas of law covered by this outline apply to the reader or the reader's clients. Finally, to ensure compliance with requirements imposed by the IRS Circular 230, we hereby inform you that any U. S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any matter addressed herein.

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For more details regarding engaging our firm go to:

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Please note that we do not accept international taxation of foreign retirement plan type of work. Should you have individual foreign retirement plan type of work, the following person was recommended to us:

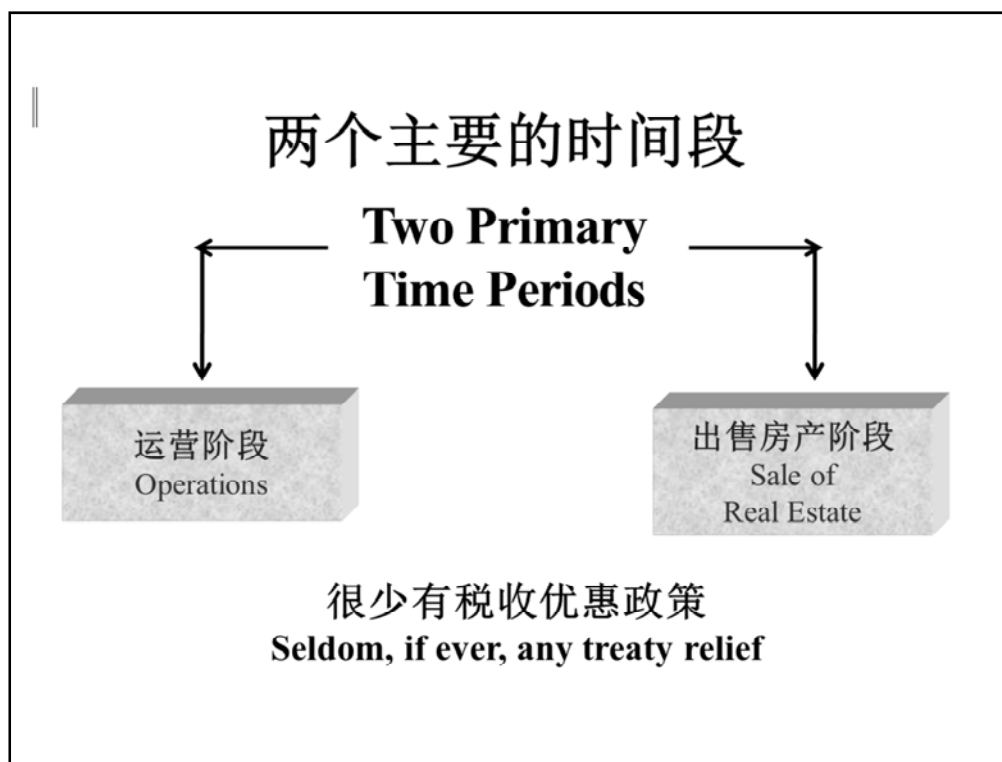
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## Table of Contents

A.	Two Primary Time Periods	4
B.	Operating Income	5
1.	Example of No Deductions	6
2.	Passive to Trade or Business Income Chart	7
3.	Election to Be Taxed as a Trade or Business	8
4.	Returns Must Be Timely Filed	10
C.	Foreign Person Investing in Real Property Act	11
1.	Foreign Person – Definition	12
2.	Direct or Indirect Ownership	13
3.	Purchaser Buys the Building or the Entity	15
4.	FIRPTA Does Not Apply	16
D.	Direct Interests	17
1.	Land	18
2.	Carryback Installment Note	19
E.	Indirect U.S. Real Property Interests	20
1.	Domestic Corporation Rule	21
2.	Partnership Rule	22
F.	Purchaser is Subject to the Withholding	26
1.	Potential Withholding Issues	27
2.	Withholding Agent	30
3.	Reduced Withholding Certificate	31
4.	Operating Partnership Withholding and FIRPTA	32
G.	Foreign Real Property Not Like-Kind	33

## 目录

A.	两个主要的阶段	4
B.	营业收入	5
1.	无抵扣费用的例子	6
2.	从被动收入到营业收入	7
3.	选择按营业收入制度缴税	8
4.	年度税表必须及时提交	10
C.	外国法人投资不动产法	11
1.	外国法人的定义	12
2.	直接所有权或间接所有权	13
3.	购买者购买房产或商业实体	15
4.	外国法人投资不动产法不适用的情况	16
D.	直接权益	17
1.	土地	18
2.	出售者接受期票付款的方式	19
E.	间接的美国不动产权益	20
1.	关于美国公司的制度	21
2.	关于合伙企业的制度	22
F.	购买者需要预提所得税	26
1.	潜在的预提税问题	27
2.	预提税代理	30
3.	降低的预提税许可证	31
4.	运营合伙企业的预提税和外国法人投资不动产法	32
G.	外国不动产交易不属于同类物交易	33



### A. Two Primary Time Periods

When a Chinese person invests in U.S. real estate, there are two time periods that the foreign person should review: (1) operations; and (2) the sale of the real property. While tax treaties almost always have an article that mentions U.S. real estate operating income, seldom, if ever, does a treaty provide any relief from taxation. Article 6, U.S. 2006 Model Income Tax Treaty. Rather, paragraph 1 merely states,

“Income derived by a resident of a Contracting State from real property, situated in the other Contracting State may be taxed in the other state.”

The same is true for the sale of real estate where Article 13, paragraph 1. states,

“Gains derived by a resident of a Contracting State that are attributable to the alienation of the real property situated in the other Contracting State may be taxed in the other State.”

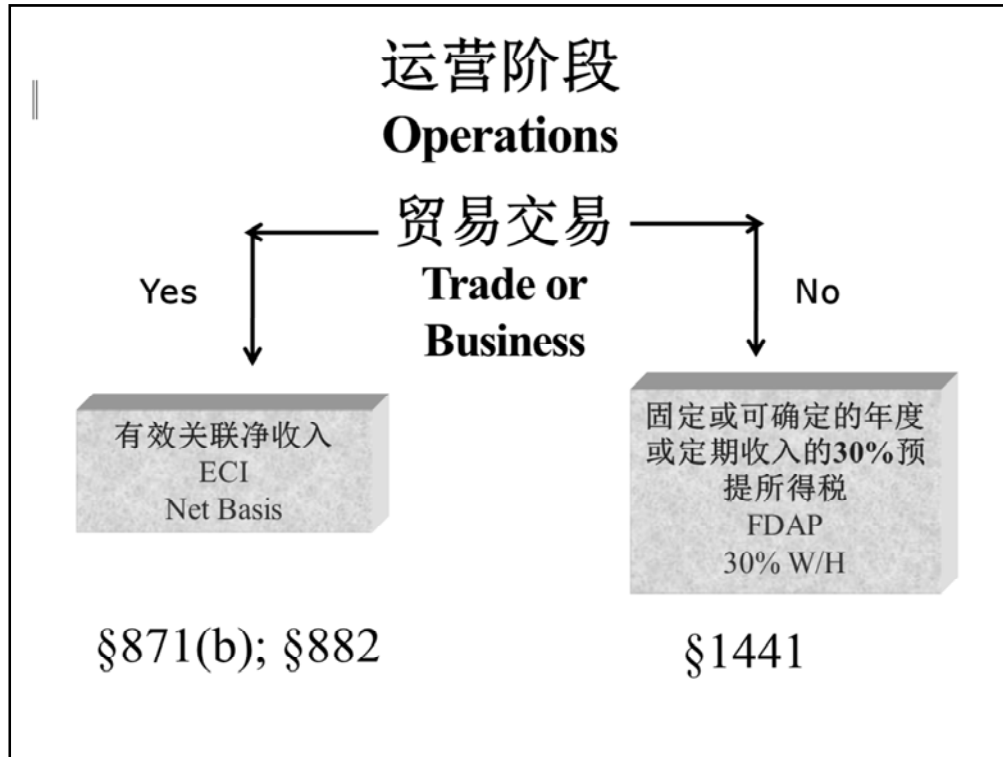
### A. 两个主要的时间段

当中国法人在美国投资房地产时，主要有两个阶段值得关注：(1)运营阶段；(2)出售阶段。虽然税收协定里经常提到美国房地产属于公司一般运营收益，但几乎没有税收协定条例在降低税赋方面提供了优惠。参见美国 2006 年所得税税收协定模版第六章。甚者，其第一段陈述到：

“允许协定地区公民在协定地区的房地产的收入在另一个地区被征收所得税。”

协定模版第 13 章第 1 段在房地产销售方面也提供了同样的税法政策：

“允许协定地区公民在协定地区的房地产销售收益在另一个地区被征收所得税。”



## B. Operating Income

As to foreign persons, operating income as to real estate is either taxed as effectively connected income or FDAP. If the real estate activity rises to the level of a “trade or business,” then it is classified as effectively connected income. Conversely, if the level of business activity does not rise to the level of a trade or business or an election discussed later in this outline is not made, then FDAP is always taxed on a gross basis with no deductions.

## B. 运营收入

对于外国法人，房地产的运营收入将被作为“有效关联收入”或者“固定或可确定、年度或周期性的收入”来征税。如果房地产的经营活动上升到了贸易经营活动的程度，那么收入将被归为有效关联收入。反之，如果经营活动没有上升到贸易经营互动的程度，或者如我们在之后会提到的纳税人没有做相关选择，那么收入将被归为“固定或可确定、年度或周期性的收入”，并且是在总收入的基础上征税，不允许抵扣任何费用。

## || 无费用抵扣税前收入,除非打勾选择 No Deductions – Unless Election

■ 租金收入	Gross Rent	\$ 12,000
■ 利息支出	Interest expense	7,500
■ 维修费	Repairs & maintenance	500
■ 折旧费	Depreciation	5,000
		-----
■ 总支出	Total Expenses	13,000
		-----
被动损失	Passive Loss	\$ (1,000)

### 1. Example of No Deductions

Assume a Chinese person purchases a residential single family home. Income and deductions on the single family home are detailed above. Chinese person may make an election to have non-trade or business real estate classified as effectively connected income and taxed on a net basis.

#### a. *No Deductions - FDAP*

FDAP withholding on the gross amount means that gross rents are multiplied by the withholding rate, 30% under IRC § 1441 and this is the income tax. In the above residential real estate example, the tax due would be \$4,000 (\$12,000 x 30%). All deductions for interest, repairs & maintenance, depreciation, and any other expenses would be disallowed. Therefore, even though the Chinese person realized a \$1,000 loss, he or she would owe income tax of \$4,000. Further, the Chinese person would be required to file a U.S. tax return. Problems with failing to file timely tax returns are discussed later in this outline.

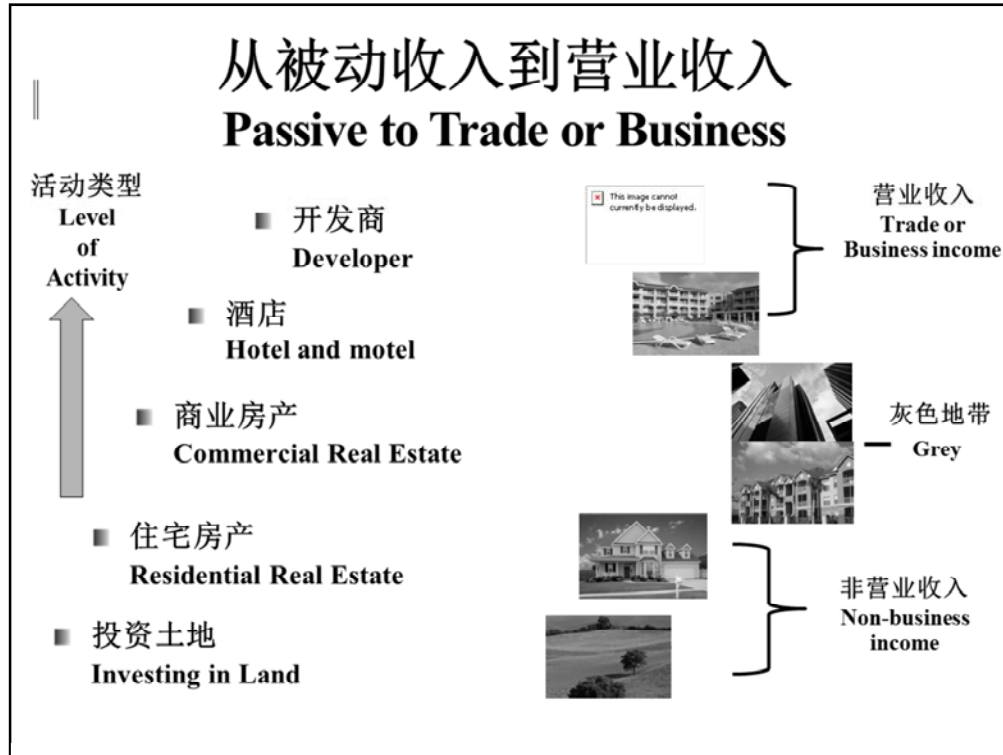
### 1. 无抵扣支出的实例

假设一个中国法人购买了一个住宅房，收入和支出的明细如上所列。该中国法人做了一个税法上的选择，将这个非商业用途的房产按照有效关联收入制度在净收益的基础上缴税。

#### a. *无抵扣-固定或可确定、年度或周期性的收入*

FDAP 总收入预扣税是指用总的租金收入乘以预扣税率 30%。在上面这个住宅房产的例子中，税赋为 4000 美金（12000 美金\*30%），所有的支出，包括利息，维修费，折旧费和其他，都不被允许抵扣税前收入。因此，即使中国法人产生了 1000 美金的损失，它也要交 4000 美金所得税。另外，它还需要提交美国年度税表，关于不按时提交会产生问题将在之后讨论。





## 2. Passive to Trade or Business Income Chart

The above bullet points represent a progression from passive to trade or business income. Investing in land as well as the rental of residential real estate are always passive income and are taxed as FDAP. Conversely, the activities of a hotel, motel, or developer are always active trade or business income. Therefore, these trade or business activities are taxed as effectively connected income. In the middle is the grey area of commercial real estate. This may be classified as an active trade or business or it may be classified as passive income depending on the facts. Unfortunately, there are few cases in determining exactly what level of activity makes commercial real estate an active trade or business.

Case Cites:

### **Land:**

*Herbert v. Commr.*, 30 T.C. 26 (1958);

### **Residential Real Estate:**

*Espinosa v. Commr.*, 107 T.C. 146 (1996);

*Swallows Holding, Ltd. v. Commr.*, 515 F. 3d 162 (3d Cir. 2008);

### **Commercial Real Estate:**

*Pinchot v. Commr.*, 113 F.2d 718 (2d. Cir. 1940);

*Lewenhaupt v. Commr.*, 20 T.C. 151 (1953); *aff'd*, 221 F.2d 227 (9<sup>th</sup> Cir. 1955)

## 2. 从被动收入到营业收入

上面所列出的几点表明了从被动收入到一般运营收入的渐变过程。一方面，土地投资和房产出租的收入总是属于被动收入，按照 FDAP 收入缴税。另外一方面，酒店或开发商的收入总是属于一般运营收入，按照有效关联收入缴税。在这两者中间有一个比较模糊的灰色地段属于商业地产，它既可能被划为一般运营收入，也可能被划为被动收入，这将取决于具体的情况而定。不幸的是，在这方面提供明确判别界限的案例非常少。

相关的案例有：

地产方面：

*Herbert v. Commr.*, 30 T.C. 26 (1958)

住宅地产方面：

*Espinosa v. Commr.*, 107 T.C. 146 (1996);

*Swallows Holding, Ltd. v. Commr.*, 515 F. 3d 162 (3d Cir. 2008);

商业地产方面：

*Pinchot v. Commr.*, 113 F.2d 718 (2d. Cir. 1940);

*Lewenhaupt v. Commr.*, 20 T.C. 151 (1953); *aff'd*, 221 F.2d 227 (9<sup>th</sup> Cir. 1955)

## 选择按商业贸易来缴税 Election to Be Taxes as a Trade or Business

- 选择将对所有的资产生效  
Election on an “all or nothing” basis
- 永久有效直到纳税人撤回  
It continues until revoked
- 一旦撤回，5年内不能再做选择  
If revoked, then it may not be reelected for another 5 years

### 3. IRC § 871(d) or § 882(d) Election

Due to the severe consequences of having non trader or business real estate denied deductions, foreign individuals, trusts, and partners, under IRC § 871(d) and foreign corporations under IRC § 882(d) may elect to have non-trader or business real property be taxed as effectively connected income.

#### *a. All or Nothing Election*

If an IRC § 871(d) or § 882(d) election is made, it is made for all properties owned by the foreign person. The foreign person may not pick and choose and have the election only apply to some properties. Treas. Reg. § 1.871-10(b)(1).

#### *b. Duration*

The election continues until it is revoked, and if it is revoked, another election cannot be made for five years.

#### *c. Who and Where the Election is Made*

Each foreign partner, not the partnership, makes the election. Treas. Reg. § 1.871-10(d)(3). An foreign individual, foreign trust, or foreign partner will make the election on Form 1040 NR. As a side note, if a foreign partner makes the election, a domestic partnership is now subject to withholding under IRC § 1446. Rev. Proc. 89-31.

#### *d. Retains Capital Gain Character*

While the property is classified as effectively connected income, it retains its IRC § 1231 and 1221(2) character when sold. Treas. Reg. § 1.871-10(c)(2).

## 选择按商业贸易来缴税 Election to Be Taxes as a Trade or Business

- 外国合伙人做选择，而非合伙企业本身

**Foreign partners make the election, not the partnership**

- 销售收益保持 § 1231 和 § 1221(2) 资本收益性质

**Retains § 1231 and § 1221(2) treatment**

### 3. 美国税法法典第 871(d) 章和第 882(d) 章的纳税人选择

由于房地产的非营业收入性质而导致的无法使用任何费用来抵扣税前收入给纳税人带来很重的负担，美国税法法典第 871(d) 给外国个人、外国信托和外国合伙人，第 882(d) 给外国公司提供了一个纳税选择，将房地产收入按照有效关联收入制度来缴税。

#### a. 零或一的选择

一旦做了 871(d) 或是 882(d) 的选择，该外国法人所有的资产都受制于该选择，纳税人不能选择只对部分资产作选择。参见财政法规第 1.871-10(b)(1)

#### b. 有限期

选择的有效期直到纳税人撤回为止，并且一旦被撤回，纳税人不能够在 5 年内再做选择。

#### c. 可做选择的人和地点

按照美国财政法规第 1.871-10(d)(3) 条，对于合伙企业，选择由合伙人而非企业本身来做。无论是外国个人、外国信托或是外国合伙人，都要通过 1040NR 的税表来做选择。如果一个美国合伙企业的外国合伙人做了选择，那么该美国合伙企业将需要按照税法法典第 1446 章来预扣所得税。税收程序第 89-31 号

#### d. 保持增本收益的性质

尽管在选择之下，资产的收入归属于有效关联收入税收制度，但当纳税人将它出售时，收益将维持税法法典第 1231 和 1221(2) 章下的资本收益税收性质。财政法规第 1.871-10(c)(2) 条

## 选择的机制

### Mechanics of the Election

- 做选择当年必须要有房地产收入

**Election can only be made in year RE has income**

- 购买资产-土地      **Buy property - Land**

- 支出:                      **Expenses:**

- 维修                      **Repairs**

- 房地产税                **Taxes**

- 利息支出                **Interest**

- 没有资本支出            **No capitalization expenses**

- 所有的支出 都不能被抵扣      **All expenses are lost**

#### *e. Must Have Income to Make the Election*

Both Treas. Reg. § 1.871-10 and Rev. Rul. 91-7 takes the position that there must be income from the real property in the first year the election is made. In other words, if a foreign person invests in land and there is no rental income, an IRC § 871(d) or § 882(d) election cannot be made. This would mean that any real estate tax as well as insurance or repairs on the property would be non-deductible. In this respect, advisors generally attempt to structure land purchases where the seller rents the land back for a period of time after the sale.

#### *e. 有收入才能做选择*

美国财政法规第 1.871-10 条和收入法规第 91-7 条都规定在纳税人做选择的当年必须要有不动产收入，也就是说如果外国法人投资地产之后没有租金收入的话，他将不能够做税法法典第 871(d)和 882(d)条的选择，这将使得相关的房地产税、保险费和维修费都不能够被抵扣。因此，行业专家一般会在规划时建议投资者在购买土地之后将土地出租出去一段时间。

# 必须按时提交税表

## Returns Must Be Filed Timely

- 财政法规 1.874-1(b)(1)      Treas Reg. 1.874-1(b)(1)
  - 允许16个月内提交税表      16 month delinquency permitted
    - 财政法规1.882-4(a)(3)      Treas. Reg. 1.882-4(a)(3)
  - 财政法规现在允许税务局免去截止时间  
Regs. Now allow IRS to waive deadline.  
1.874-1(b)(2), 1.882-4(a)(3)(ii)
  - 案例 P. 55 *Espinoza v. Commr.*, 107 TC 146 (1996)
  - 案例 P. 56 *Swallows Holding, Ltd. v. Commr.*, 515 F.3d 162

#### 4. Returns Must Be Timely Filed

Treas. Reg. § 1.874-1(b)(1) took the position that a foreign person must file his or her return within 16 months. This proved to be a particular harsh result for Espinoza, who had three U.S. residential rentals. Espinoza presumably did not file his U.S. tax return because after depreciation his rentals were a loss. Since Espinoza did not file his tax returns, he did not make an IRC § 871(d) election.

After repeated requests for his tax return, the Service filed the tax returns for Espinoza with no deductions and a 30% tax on the gross amount. Under Treas. Reg. § 1.874-1(b)(1), the 16 month period of time had passed. Therefore, when Espinoza sought to amend the returns and make the IRC § 871(d) election, the amendment was denied because the return was late.

Since Espinoza was decided, the Treas. Regs. now allow the Service to wave the deadline. Treas. Reg. 1.874-1(2)(b). Also, the code section may have been modified allowing a greater period of time than 16 months.

#### 4. 年度税表必须按时提交

财政法规第 1.874-1(b)(1)规定外国法人必须在 16 个月内提交他的年度税表。在 Espinoza 的案例中，我们可以看到这会造很大的问题，Espinoza 拥有三处美国房产的出租业务，在他将房产折旧从而产生了损失之后，他没有及时地提交年度税表，从而导致了他没有能够做第 871(d)的选择。

经过几次要求，税务局通过了 Espinoza 的年度税表，以他的总收入按 30%税率来缴税，没有任何费用抵扣。由于第 1.874-1(b)(1)条下的 16 个月提交时间已经超过，Espinoza 试图用提交“修正年度税表”的方式来 871(d)的选择，但他的修正要求被拒绝了，理由是年度税表没有被及时提交。

在该案例之后，美国财政法规现在允许税务局免去截至时间（参见财政法规 1.874-1(2)(b)），同时，税法典也可能修正法案将 16 个月的截至期延长。

# 外国法人投资不动产法 Foreign Person Investing in Real Property Act



## C. Foreign Investment in Real Property Tax Act – 1980 (FIRPTA)

As noted in the Non-Business Income of a Foreign Person Outline, a foreign person does not pay tax on capital gains. As much of the gain on the sale of real estate is capital gain, prior to FIRPTA, it was possible to structure real estate sales so that a foreign person paid no capital gain. FIRPTA ended this tax advantage for foreign persons, making all real estate gains taxable.

Similar to FDAP taxation and withholding, there are two code sections involved in FIRPTA: (1) IRC § 897; and (2) IRC § 1445. However, unlike the FDAP regime, the tax amount is not the same as the withholding amount.

IRC § 897 imposes a tax on a net basis on gains or losses of *U.S. real property interests* (“USRPI”). IRC § 1445 requires a 10% withholding of the sales price, not the gain on the sale.

In essence, §897 converts any non-trade or business property to effectively connected income for purpose of the sale. It does not matter whether an IRC §871(d) or §882(d) election was made treating FDAP income as trade or business income for operations.

### C. 外国法人投资不动产法-1980 (FIRPTA)

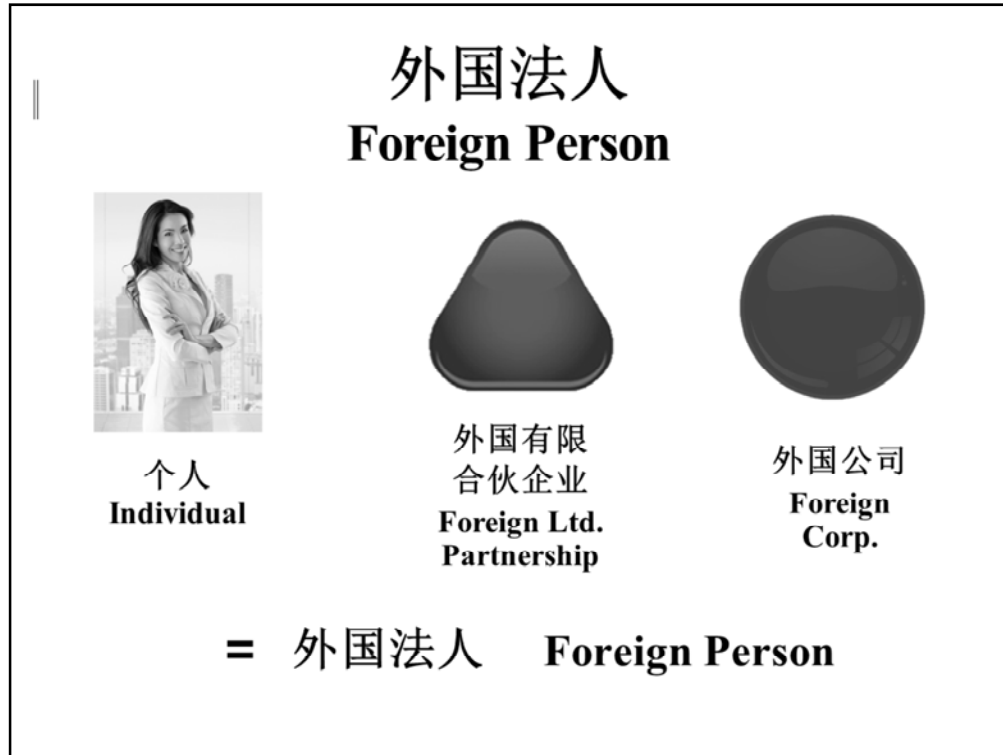
正如我们在外国法人的非营业收入一章里指出的，外国法人对于资本收益收入无需缴纳所得税，在外国法人投资不动产法通过之前，利用外国法人销售房地产的收益为资本收益的性质而不缴纳所得税来规划交易是可行的，但该法案的通过终止了这个对于外国法人的税收优惠政策，使所有的房地产收益都变成了应征税收收入。

类似于 FDAP 所得税制度和预扣税制度，FIRPTA 也有两个相关的法典：(1)税法法典第 897 章；(2)税法法典第 1445 章。但区别于 FDAP 税收制度的是，FIRPTA 所得税的额度和预扣税的额度是不同的。

税法法典第 897 章对于美国不动产权益(USRPI)的征税方式是在净收益的基础上。但税法法典第 1445 章在预提所得税上要求纳税人以销售价格而非销售收益按照 10%预提。

本质上，法典 897 将非营业收入转为了有效关联收入性质来征税，不论纳税人有没有做 871(d)或 882(d)的选择对 FDAP 收入按照有效关联收入税收制度来缴税。





### 1. Foreign Person - Definition

The term Foreign Person needs to be defined to make sure that the reader does not confuse the application of FIRPTA to the sale of indirect interests. For purposes of this outline, the term “foreign person” includes a foreign individual, a foreign partnership, a foreign corporation, a foreign trust, a foreign estate, or any other foreign entity. For most purposes, the primary foreign persons investing in U.S. real estate are a foreign individual, foreign partnership, or a foreign corporation.

### 1. 外国法人定义

在应用外国法人投资美国不动产法(FIRPTA)出售间接权益时，我们需要明确法案对于外国法人的定义，出于本演讲的目的，“外国法人”包括外国个人、外国合伙企业、外国公司、外国信托、外国遗产、或其他任何外国实体。出于大部分情况的目的，主要的投资美国房地产的外国法人有外国个人、外国合伙企业和外国公司。

## 直接所有权或间接所有权 Direct or Indirect Ownership



**直接拥有  
Directly Owns**







**间接拥有  
Indirectly Owned**



## 2. Direct or Indirect Ownership

A foreign person (e.g., foreign individual, foreign partnership, or foreign corporation) may own U.S. real estate directly or it may own the stock, partnership, or membership interest in an entity that owns the U.S. real estate.

## 2. 直接所有权或间接所有权

外国法人可以直接拥有美国房产，也可以通过拥有股票或合伙企业权益或有限责任公司权益来间接获得美国房地产所有权。



The above diagram limited to the indirect ownership repeats parts of the previous diagram, but adds the indirect real estate investment through a U.S. corporation or a U.S. Ltd. partnership. In the above diagram, it is the U.S. corporation or U.S. partnership that directly owns the real estate.

以上关于间接所有权的流程图重复了之前的部分流程图，也增加了一些通过美国公司或美国有限合伙企业来间接获取美国房地产所有权的方式。在上面的图中，直接投资美国房地产的是美国公司或美国合伙企业。

## 购买者购买 Purchaser Buys

大楼  
Building

或者  
or

美国公司的股票  
Stock of  
U.S. Company



### 3. Purchaser Buys Either the U.S. Real Estate or the Entity

FIRPTA applies when the purchaser buys either the U.S. real estate or the ownership interest in the U.S. entity that owns the U.S. real estate. Ownership interest for purposes of this outline include, but are not limited to stock, partnership interest, membership interest, or a beneficial interest in a trust.

### 3. 购买者购买美国房地产或美国实体

外国法人投资美国不动产法适用于购买者购买美国房地产或是购买拥有房产的美国公司的权益的情况。以本演讲为目的，所有权权益至少包括股票、合伙企业权益、有限责任公司权益和信托收益人权益。

# 外籍人士投资不动产法不适用 FIRPTA Does Not Apply



外国有限  
合伙企业

**Foreign Ltd.  
Partnership**



外国公司

**Foreign  
Corp.**

## 4. FIRPTA Does Not Apply

FIRPTA does not apply when a foreign person owns a U.S. real property interest directly through a foreign corporation or a foreign partnership and the foreign person sells the ownership interest. As discussed in the Estate Planning for a Non-Resident Alien outline, it is very common for a foreign individual to form a foreign corporation to hold U.S. real estate with the objective that the foreign corporation will not be included in his or her U.S. estate on his or her death. Remember, a foreign person only pays U.S. estate tax on U.S. situs assets.

Also, the sale of foreign corporate stock is classified as foreign source income and not taxable in the U.S. The same is true of the sale of a foreign partnership interest.

## 4. 外国法人投资美国不动产法不适用的情况

外国法人投资美国不动产法不适用于外国法人通过外国公司或外国合伙企业来获得美国房地产所有权，然后出售所有权的情况。就像我们在外国公民的遗产规划的章节中指出的，外国个人成立一个外国公司，以公司名义来获取美国房地产所有权的做法是很常见的，其目的是在他过世之后，该房产不会被列入他的美国遗产而受遗产税赋。请记住，外国法人在所有的美国资产中只需支付美国遗产税。

再者，出售外国公司股票的收益是被列为外国来源收入而不需缴纳美国所得税的。出售外国合伙企业权益的收益也是一样的。

## 直接的权益 Direct Interests

■ 美国不动产权益	<b>USRPIs</b>
■ 所有权	<b>Ownership</b>
■ 共同所有权	<b>Co-ownership</b>
■ 租赁	<b>Leaseholds</b>
■ 分时享有权	<b>Timeshares</b>

### D. Direct Interests

Direct interests include virtually all types of real estate owned directly by a foreign person. This includes ownership, co-ownership, leaseholds, and timeshares.

### D. 直接权益

直接权益几乎包括了外国法人直接拥有的所有类型的房地产，包括所有权，联合所有权，租赁权，以及分时享有权。

# 不动产 Real Property

- 包括      **Includes**
- 土地              **Land**
- 未开拓的土地农作物或地下资源  
        **Unsevered natural products of the land**
- 装修费用      **Improvements**
- 某一些和土地使用相关的个人资产  
        **Certain personal property associated with the use of  
        the land**

## 1. Land

Land also has a fairly expansive definition that includes unsevered minerals, oil and gas, improvements and certain personal property associated with the land.

## 1. 土地

土地包括的范围相当广泛，包括未开采的矿产、石油、天然气，土地整修，以及某一些和土地使用相关的个人资产。

# 接受期票付款

## Carryback Installment Note



在分期付款方法下，  
递延收益直到期票本金还清

**Gain is not recognized under the  
installment method until principal  
payments on note**



### 2. Carryback of an Installment Note

A subtle point is that a USRPI also includes installment obligations, where the foreign seller elected to defer part of the gain. In the above example, the young couple does not have the funds to obtain financing for a cash purchase. The foreign seller agreed to sell the property and carry back a promissory note. Under the installment sale method of taxation, gain is deferred by the foreign seller as principal is paid on the note. Treas. Reg. § 1.897-1(d)(2)(ii)(A).

### 2. 出售者接受期票付款的方式进行交易

另外，美国不动产权益也包括了定期付款债务，其中外国出售方选择递延收益。在上面的例子中，年轻的夫妇没有现金资产来购买，外国出售方同意采用期票的方式来交易。在定期支付的方法下，利润将先被看作期票的本金归还而不需缴税，超过的部分才需要缴税。美国财政法第 1.897-1(d)(2)(ii)(A) 条。



# 间接权益 Indirect Interests

美国公司  
U.S.  
Corp.



美国有限  
合伙企业  
U.S. Ltd.  
Partnership



## E. Indirect U.S. Real Property Interests

A foreign person may hold a USRPI indirectly through a U.S. corporation or a U.S. partnership (which includes a U.S. limited liability company taxed as a partnership). If the stock, partnership, or membership interest of the U.S. entity holding the real estate is sold, then in many situations FIRPTA taxes the gain.

## E. 美国不动产的间接权益

外国法人可以通过美国公司或美国合伙企业或有限责任公司来间接获得美国不动产所有权权益。如果之后出售了美国公司股票或企业权益，大部分的情况下，需要按照外国法人投资美国不动产法支付所得税。

## 美国境内公司的测试准则 Domestic Corporation Test

- 如果美国不动产市场价值超过以下资产总和的**50%**:  
**If FMV of USRPIs equal or exceed 50% of the sum of:**
  - 全球范围的不动产权益  
**Real property interests worldwide**
  - 加上运营资产  
**+ trade or business assets**
  - 投资资产不计  
**Do not count investment assets**

### 1. Domestic Corporation Rule

Only certain domestic corporations are classified as USRPIs. As previously discussed, the sale of the stock of a foreign corporation is not classified as a USRPI. Further, only U.S. corporations where 50% of its USRPI's exceeds the value of:

- (1) its real property interests world-wide; plus
- (2) its trade or business assets.

Investment assets are not counted in the above test. IRC §897(c)(2).

### 1. 美国公司的制度

只有某一些美国的公司是被归为美国不动产权益的。我们之前提到过的，出售外国公司的股票不属于美国不动产权益。只有当美国公司的美国不动产的价值超过了它的全球不动产权益和它的公司资产价值总和的 50%时，该公司的权益才会被归为美国不动产权益。

投资资产不算入以上计算其中（美国税法法典第 897(c)(2)条）。

# 美国境内公司实例

## Example of Domestic Corp.

美国不动产权益 <b>USRPI</b>	<b>\$ 7</b>
应收账款 <b>Rec.</b>	<b>1</b>
存货 <b>Inv.</b>	<b>2</b>
设备 <b>Equip</b>	<b>2</b>
商誉 <b>Goodwill</b>	<b>1</b>
总资产价值 <b>Total</b>	----- <b>\$ 13</b> =====



美国不动产权益 <b>USRPI</b>	<b>\$ 7</b>
测试资产价值 <b>Test Assets</b>	----- <b>13</b> ----- <b>54%</b>

Example:

Assume the fair market value of the corporations assets are as follows:

Building	\$ 7 M
Receivables	1 M
Inventory	2 M
Equipment	2 M
Goodwill	1 M
	-----
FMV of Assets	<b>\$ 13 M</b> =====

In the above example, the \$5 million building/ \$13 million total assets results in 54%, which is more than the 50% threshold. Therefore, the corporation is a USRPI, and all of its value is included for FIRPTA purposes.

举例:

假设一个公司的资产的市场价格如下:

大楼	\$700,000
应收账款	100,000
存货	200,000
设备	200,000
商誉	100,000
	-----
资产总市场价格	<b>\$ 1300,000</b>

在这个例子中, 大楼价值占总资产价值的 54%, 超过了 50%的测试门槛, 因此该公司属于美国不动产权益, 其所有的资产的市场价值都将属于外国法人投资美国不动产法的使用范围。

## 其他条例 Other Rules

- 可以利用非美国不动产权益账面价值不到**25%**的条例  
**May rely on presumption of non-USRPI book value is 25% or less**
- 零或一的测试条例  
**All or Nothing Test**
- 如果满足，要对所有的股票购买价格按照外国法人投资不动产法预扣所得税  
**If met, entire stock purchase is subject to FIRPTA**

Generally, corporations do not value their assets every year, let alone every day of every year. Therefore, the Treas. Regs. provide a safe harbor where book values, instead of fair market values, may be used. Under this alternative test, a domestic corporation will be classified as a USRPI if 25% or more of the book value of its USRPI's exceed its real estate world-wide plus its trade or business assets.

The test is an all or nothing rule. If met, all of the purchase price is subject to the FIRPTA withholding. If less than 50% fair market value (or 25% book value), then none of the purchase price is subject to the 10% withholding.

一般来说，公司不会每年对资产估价，更不用说每一天了。因此美国财政法规提供了一个更便捷的方式：使用账面价值。在该方法下，如果公司的美国不动产权益账面价值占了它的全球房地产和公司运营资产总价值的 25% 或更多的，那么该美国境内公司将被列为美国不动产权益。

该条例（包括 50% 的市场价值和 25% 的账面价值测试）是一个“零或一”的条例，也就是说，如果满足，那么将要对所有的购买价格将要按照外籍人士投资房地产法预扣 10% 所得税，如果不满足，那么无需在任何购买价格上预扣所得税。

## 合伙企业条例

### Partnership Pass Through Rules

- 对于公司，有一个零或一的**50%**的测试  
**Corp has an all or nothing test based on the 50% test.**
- 对于合伙企业，有两个条例  
**Partnership has two rules**
  - 如果**50%**的测试满足，零或一制度  
**All or nothing if 50% test is met**
  - 如果小于**50%**，按比例预扣所得税  
**Proportional share if less than 50% is subject to FIRPTA**

#### 2. Partnership Rule

Any USRPI owned by a partnership is deemed proportionally owned by the partner. Therefore, if the partnership assets are comprised of 20% USRPIs, a 40% foreign partner would be deemed to own 8 percent of these USRPIs. Further, the partnership has the same 50% test, where the entire partnership will be deemed a USRPI if the 50% test is met.

#### 2. 合伙企业条例

任何为合伙企业所有的美国不动产权益都被看作为合伙人所有，因此如果合伙企业资产里 20%为美国不动产权益，那么一个拥有 40%合伙企业权益的合伙人将被税法系统视为拥有 8%的美国不动产权益。另外，合伙企业也有 50%的所有权测试，满足该测试的合伙企业本身将被认为是美国不动产权益。

# 合伙企业实例

## Example of Partnership

美国不动产权益	USRPI		\$ 4
应收帐款	Rec.		1
存货	Inv.		2
设备	Equip		2
商誉	Goodwill		1
资产总值	Total		\$ 10
			=====



美国不动产权益	USRPI		\$ 4
测试资产总值	Test Assets		10
			----- = 40%

**40%的购买价格按外国法人投资不动产法预扣所得税**  
**40% of purchase price subject to FIRPTA**

Example:

Assume the fair market value of the corporations assets are as follows:

Building	\$ 4 M
Receivables	1 M
Inventory	2 M
Equipment	2 M
Goodwill	1 M
	-----
FMV of Assets	\$ 10 M
	=====

In the above example, the \$4 million building/ \$10 million total assets results in 40%, which is less than the 50% threshold. However, the partnership rules require that 40% be deemed a USRPI and that the purchaser withhold 10% on 40% of the purchase price allocated to each foreign partner.

举例:

假设公司资产的市场价值如下:

大楼	\$400,0000
应收账款	100,0000
存货	200,0000
设备	200,0000
商誉	100,0000
	-----
资产总市场价格	\$ 1000,0000

在这个例子中, 虽然大楼占总资产价值的 40%, 低于 50%的门槛, 但合伙企业的制度将该 40%的资产划分为美国不动产权益, 因此购买者需要按照购买价格分摊到每个合伙人身上的 40%预提所得税。

## 购买者需要预扣10%的所得税 Purchaser Subject to 10% Withholding



- 以销售价格预提10%的所得税，并在20天内支付给税务局--  
§ 1445(a); 1.1445-1  
10% of total consideration and pay it to IRS w/in 20 days.  
§ 1445(a); 1.1445-1
- 土地在美国，税务局可能会对土地资产保留税收滞留权  
Land is in U.S. and the Service may place a tax lien against it

### F. Purchaser Subject to Withholding

When the USRPI is sold, the purchaser must withhold 10% of the sales price and remit it to the Service within 20 days. It does not matter whether the purchaser is a U.S. or a foreign person. Further, if the purchaser does not withhold and remit the 10% withholding, the Service may proceed directly against the purchaser for the withholding or lien and then force the sale of the real estate that was purchased.

### F. 购买者预提所得税

当美国不动产权益被出售时，购买者必须按照销售价格预提 10%的所得税，并且在 20 天内交给税务局，不论购买者是美国法人还是外国法人。并且，如果购买者没有预提所得税，那么税务局可以直接向购买者追讨预提所得税然后要求购买者将房产重新出售。

## 潜在的预扣所得税问题 Potential Withholding Issues

- 无销售收益  
No gain of sale



- 有足够的现金预扣所得税  
Enough cash to provide for withholding

### 1. Potential Withholding Issues

The 10% withholding is the general rule, regardless of the economics of the actual deal. For example, if the foreign person sells the real estate at a loss, then no tax will be due. Also, if the foreign person sells the building solely for a note that is carried back, the purchaser must remit the withholding tax even if there was not cash in the deal. These examples are detailed on the following pages, as well as a reduced withholding certificate that may be applied for.

### 1. 潜在的预提所得税问题

10%的预提所得税是一个一般制度，举例来说，如果外国法人销售房产时产生了损失，那么该交易不受任何税赋。如果一个外国法人接受期票出售了一栋大楼，那么购买者将需要预提所得税，尽管他没有收到任何现金。这几个例子以及降低的预提税许可证在接下来的几页中有详细的描述。



## 如果有销售损失呢？

### What if Sold at a Loss?

■ 销售价格	Sales Price	\$ 20 M
■ 购买价格	Purchase Price	\$ 24 M
■ 累计折旧	Acc. Depr.	( 2 M)
有效成本	Basis	----- 22 M
损益	Loss	----- \$ (2 M)

#### a. *What if Property is Sold at a Loss?*

In the above diagram, the commercial property was originally purchased for \$24 million. Over the next few years, there was \$2 million of depreciation. Therefore, the adjusted basis is \$22 million. Since the purchase, the value of the property has dropped to \$20 million and the building is sold for cash. There is a \$2 million loss on the transaction.

It does not matter that there is a loss, the title company must still withhold 10% of the sales price or \$ 2 million and remit it to the Treasury.

#### a. *如果销售资产产生损失呢？*

在上面的例子中，购买者原先以 2400,000 美金的价格买进资产，若干年后，累计折旧费为 200,000 美金，因此调整成本为 2200,000 美金。资产的市场价格跌至 2000,000 美金，因此交易产生 200,000 美金损失。

但无论是收益还是损失，出售的公司都必须要以销售价格预提 10% 的所得税，也就是 200,000 美金，并支付给税务当局。

## 如果使用期票呢？ What if Carryback a Note?

■ 销售期	Sales Terms	
■ 现金	Cash	\$ 0 M
■ 出售方期票	Seller carries back note	20 M
		-----
购买价格	Purchase Price	20 M
		=====
预扣所得税	Withholding	\$ 2 M
		=====

### *b. What if Note Carried Back?*

Another problem happens when the Seller finances almost all of the sales price. Here, the Seller carried back a note for \$20 million of the \$20 million sales price. The withholding obligation is \$2 million. Therefore, no cash will be available to pay the broker, title company, and any of the remaining closing costs. Sales with foreign persons, must always be structured to have enough cash for the withholding or the foreign person must apply for a withholding certificate.

### *b. 如果使用期票呢？*

另一个需要讨论的问题是当销售者提供了大部分的销售价格的融资。假设销售者获得一个 200,000 美元的期票，那么预提税为 200,000 美元。同时，也没有足够的现金支付给经纪人、所有权公司和其他的成交成本。因此在出售给外国法人时，需要合理的规划以保证有足够的现金支付预提所得税，或者由外国法人申请降低预提税许可证。

## 预扣税代理商 Withholding Agent

- 购买者有责任对**200**万美金预扣所得税，除非：  
**Purchaser liable for the \$ 2 Million unless:**
  - 出售方的实际税赋为**0**  
**Transferor's actual tax liability is 0**
  - 出售方不是外国法人  
**Transferor is not a foreign person**

### 2. Withholding Agent

The purchaser is primarily liable for withholding the tax. However, if the purchaser does not remit the tax, the title company is responsible. Therefore, title companies almost always make sure that the 10% tax is withheld and remitted to the Service.

As noted above, there is a procedure to ask the Service for a reduced withholding amount.

## 预扣税代理商 Withholding Agent

- 出售的权益不是美国不动产权益  
**Transferred interest not a USRPI**
- 有预扣税证书允许预扣更低的额度  
**Reduced w/h under successful withholding certificate**
- 如果购买者没有支付，产权公司负有责任  
**If purchaser not able to pay – Title Co.**

### 2. 预扣税代理商

购买者通常需要对预扣所得税负责，但如果购买者不预扣税的话，那么产权公司将要对此负责。因此，产权公司通常会确保 10%的所得税被预扣给了税务局。

正如在之前所提过的，通过某一个程序可以向税务局申请预扣更低的所得税额。

## 降低预扣税的证书

### Reduced Withholding Certificate

- 税表 **8288 B**  
Form 8288 B
- 降低合理的额度（例如，收益损失）  
Reduced w/h appropriate (e.g., loss)
- 美国税收程序 第**2000-25**号  
Rev. Proc. 2000-35
- 如果通过，购买者将可以免于预提税  
If approved, the purchaser is relieved from w/h
- 但外国法人必须最终的提交年度所得税表  
However, foreign person must still file income tax return with final numbers

### 3. Reduced Withholding Certificate

A foreign person may request for a reduced or no withholding certificate on Form 8288 B. The previous transaction where the foreign person would have a loss on the sale, would be an appropriate request. In order to file the return, the foreign person must have filed his or her individual tax returns related to the property. These tax returns will serve as the basis for making the computation of gain or loss on a rental property.

If the Service issues a withholding certificate, the purchaser is relieved of the withholding obligation. However, the foreign person is still obligated to file the income tax return with final numbers.

### 3. 降低预提税的许可证

外国法人可以通过 8288B 税表来申请降低或者豁免预提税。在之前的交易例子中，外国法人在出售时产生损失的例子就会成为一个很好的申请理由。外国法人必须要提交和销售的资产相关联的个人年度税表来申请。这些税表中会有销售的损益的计算。

如果税务局批准了降低预提所得税，那么购买者将能够大大减轻预提税的负担。但外国法人需要在年度税表上提交最后的准确的年度收入和支出。

## 经营合伙企业的预扣税 Operating Partnership Withholding

- 美国税法法典 第1446 和1445 章适用吗？

Does § 1446 or § 1445 apply?

- 第1446章要求35%预扣税

§ 1446 – 35% w/h

- 第1445章要求10%预扣税

§ 1445 – 10% w/h

#### 4. Operating Partnership Withholding and FIRPTA

FIRPTA treats the sale of real property as effectively connected income. Under IRC § 1446, a domestic partnership must withhold quarterly at the highest marginal tax rates for a foreign partner, regardless of whether or not the foreign partner received a distribution. Currently, the highest marginal tax rate is 35%. IRC § 1446. However, the FIRPTA rate is 10%.

The 35% rate under IRC § 1446 is based on net income where as the 10% FIRPTA tax is based on sales price. Naturally, there is a conflict and a potential double withholding: (1) By the purchaser under FIRPTA; and (2) by the domestic partnership under IRC § 1446. In this, the foreign person may wish to seek a reduced withholding.

## || 经营合伙企业的预扣税 Operating Partnership Withholding

- 外国法人投资不动产法将资产视为有效关联收入  
**FIRPTA treats property as ECI**
- 一般情况下，第1446章适用  
**Generally, § 1446 will apply**
  - 在降低的预扣税方面的应用  
**Application for reduced w/h**

#### 4. 运营合伙企业预提税和外国法人投资美国不动产法

外国法人投资美国不动产法将不动产的销售归为有效关联收入。按照美国税法法典第 1446 章，一个美国合伙企业必须要按季度按照当下最高的边际所得税税率来预提所得税，无论合伙人有没有实际收到所得。目前，美国最高的边际所得税税率为 35%，但外国法人投资美国不动产法的税率为 10%。

法典 1446 下的 35%的税是在净收入的基础上计算的，但外国法人投资美国不动产法中的 10%的税是要在销售价格的基础上计算。这很自然的产生了一个潜在的二次预提税问题，一次由购买者按照外国法人投资美国不动产法预提，一次由美国合伙企业按照法典 1446 预提。因此，对外国法人来说比较有利的做法是申请降低预提所得税许可。

# 外国不动产交易不属于同类资产交易 Foreign Real Property Not Like-Kind



## G. Foreign Real Property Not Like-Kind

Not related to FIRPTA, but IRC § 1031(h) denies like kind exchange treatment of U.S. property to foreign real property.

## G.外国不动产交易不属于同类资产交易

最后一点和外国法人投资美国不动产法无关的，美国税法法典第 1031(h) 章规定外国不动产交易不属于美国的同类资产交易。