

CA Withholding Tax on Sale of Real Property

What is the California law for withholding on the sale of California real property?

Buyers must withhold 3 1/3 percent of the gross sales price on sales of California real property interests from both individuals (e.g., "natural" persons) and non-individuals (e.g., corporations, trusts, estates) and pay this amount to the Franchise Tax Board (FTB). However, most sellers qualify for an exemption, meaning that usually no California withholding is required.

Escrow holders are legally required to give buyers written notice of these withholding requirements. As a standard practice, escrow holders typically oversee the completion of the necessary seller declaration forms, and they submit both the forms and money withheld (if required) to the FTB.

What are the exemptions when withholding is not required by the buyer?

- The sale of property for less than \$100,000
- For individuals, the sale of a principal residence or a property last used as a principal residence
- The sale of a decedent's principal residence by the estate
- The sale of property by a corporation with a permanent place of business in California
- An Internal Revenue Code (IRC) § 1031 exchange (without any recognized gain)
- An involuntary conversion under IRC § 1033 combined with acquisition of a replacement property
- The sale of property at a net loss (or a net gain not required to be recognized) for California income tax purposes
- Alternative Withholding Amount: Seller's tax liability, calculated at the maximum rate (currently 12.3%) on the taxable gain, regardless of seller's actual rate, will be less than 3 1/3% of the gross proceeds and seller certifies that fact under penalty of perjury. (For tax rate for corporations, see Cal. Rev. & Tax Code § 23151 or 23186)
- The buyer does not receive written notification of the withholding requirement from the "real estate escrow person."
- The property is acquired under a deed of trust or mortgage through judicial or nonjudicial foreclosure or by a deed in lieu of foreclosure
- Other exemptions including some partnerships, LLCs, tax-exempt entities, pensions and bank trustees
- Installment sales allow a partial exemption where the buyer will withhold 3 and 1/3% on each payment

How do the buyer and seller take advantage of the exemptions so that no withholding is necessary?

The seller fills out an affidavit on FTB Form 593-B, C or E. In the vast majority of transactions, this is handled by the escrow. If the seller cannot qualify for an exemption, then the buyer must withhold.

What C.A.R. form should be provided to the buyer to indicate that seller will comply with the law?

C.A.R. Form AS "Seller's Affidavit of Nonforeign Status" can be provided to the buyer. Previously, the seller could sign it as a declaration to indicate the California exemption they qualified for. But the industry practice now is for the escrow to oversee the seller's completion of the affidavit. As a result, C.A.R. Form AS has been updated. The Form now gives notice to the buyer that the seller will be providing the necessary information to the escrow.