

**ABA RPTE Spring Symposia 2009 Washington, D.C.**  
**Real Property Division – Hot Topics in Global Real Estate Investing**  
**The Global Financial Crisis – Impact on International Investing in Real Estate**  
**U.S. Tax Issues**  
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1. Original Foreign Owner/Borrower of Distressed Rental Real Properties
  - 1.1. Foreclosure – Special FIRPTA Withholding - Reg. Sec.1.1445-2(d)(3)
  - 1.2. Workout – Unclear COD Income and Corresponding Withholding and Tax Treaty Issues.
    - 1.2.1. ECI (Business income) v FDAP (Withholding income)- *Big Hong Ng v. Com'r*, TCM 1997-248, suggests COD arising from loan reductions against rental properties (unless triple net leased) is ECI and not subject to withholding, but not eligible for reduced treaty rates.
    - 1.2.2. Availability of section 108(a)(1)(A) bankruptcy (what laws) or 108(a)(1)(B) insolvency (what assets), or section 108(c) real property discharge exemptions to COD income, or newly enacted section 108(i) 10 year COD income deferral; for foreigners?
    - 1.2.3. COD or Currency Exchange Gain Under Section 988? (No section 108 exemptions to the extent of currency gain.)
  - 1.3. Sale of Distressed Realty – Loss deduction benefit available if other US business income, but FIRPTA withholding concerns even though there are no gains (need a no gain withholding certificate from IRS)
2. Original Foreign Lender to U.S. Borrower
  - 2.1. Foreclosure – Become owner subject to FIRPTA
  - 2.2. Workout – Potential bad debt deduction, relevant if lender is ETB (Engaged in business in the U.S.)
  - 2.3. Sale of Distressed Debt – Potential loss deduction, relevant if ETB
3. Foreign Vulture Secondary Purchaser of Distressed Realty
  - 3.1. Foreclosure - Same position as 1.1 above, except bought at discount
  - 3.2. Workout – Same as 1.2 above, except bought at a discount
  - 3.3. Sale of Realty – More likely to have gain than loss

4. Foreign Vulture Secondary Purchaser of Distressed Mortgage
  - 4.1. Foreclosure - Becomes owner subject to FIRPTA
  - 4.2. Workout - Modifications or write-downs may give rise to income if ETB, a significant difference from 2.2 above. But, foreign purchaser of debt may be exempt from US tax on sale or exchange of debt instrument under general "trading in stocks or securities" statute. Heavily fact driven.
  - 4.3. Sale of Distressed Debt – Relevant if ETB, but may be exempt, if not, under "trading in stocks or securities" statute.

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