

Sale of land for \$2m or more? Buyer beware (and seller)!



Foreign resident capital gains withholding payments will apply where a foreign owner sells land or land interests with a market value of \$2m or more requiring the purchaser to withhold and pay 10% of the purchase price to the Tax Office. At the time of writing, the legislation is before the Senate and expected to become law. The new law will apply to contracts signed from July 2016.

This is another step in the Government becoming tougher on capital gains for non-residents. It follows the removal of the 50% CGT discount for non-residents from the budget night in May 2012.

This is a new non-final withholding tax that requires the purchaser to pay the 10% withholding to the Tax Office as, in effect, an estimate of the vendor's capital gains tax on the sale of the property. The vendor is still required to lodge a tax return and may have to pay more capital gains tax or alternatively the vendor could get a refund of part or whole of the withholding tax. That all depends on the usual calculation of capital gains. The withholding tax is a refundable tax credit that is applied to the final capital gains tax calculated in the tax return.

What property is taxed?

Where the vendor, or one of the vendors is a foreign resident, the following property would be taxed if the total price is \$2m or more:

- Australian real estate; including
- A lease of Australian land;
- A mining, quarrying or prospecting right for minerals, petroleum or quarry materials in Australia;
- Shares or units in an entity where, broadly, you hold more than 10% of the membership interests and more than 50% of the market value of the assets of the entity are Australian real property (as set out above); or
- An option to acquire such property.

What are the exclusions?

The withholding tax does not apply where:

- The real estate has a market value less than \$2m (excluding most residential homes);
- Shares or units are transacted on a stock exchange or off-market broker-operated crossing system;
- Some other withholding tax obligation applies;
- There is a securities lending arrangement;
- The vendor is a foreign resident company under external administration; or
- The vendor is a foreign resident individual in bankruptcy.

How will the buyer know that the vendor is a foreign resident?

For both individuals and companies, determining Australian or foreign residency can be a very complex matter. However, the purchaser will not be required to pay the withholding to the Tax Office if:

- The vendor provides a Tax Office clearance certificate; or
- The vendor provides a residency declaration that you do not know to be false; or
- Where indirect real property interest (shares or units) or options are involved;
- You have no reasonable grounds to believe the vendor is a foreign resident; and
- You do not have a foreign address for the vendor; and
- You are not authorised to make payment to a place outside Australia; or
- You have reasonable grounds to believe the vendor is an Australian resident.

There are special rules and practices for either multiple vendors or multiple purchasers.

What happens where the vendor has made a capital loss?

Prior to the sale process, the vendor can apply to the Tax Office for a variation of the 10% withholding tax amount where they will not make a capital gain, they otherwise will not have an income tax liability or there are multiple vendors, only one of which is a foreign resident.

The variation issued by the Tax Office must be provided to the purchaser.

How and when is the withholding paid to the Tax Office?

The purchaser must pay the withholding to the Tax Office on or before the time that they become the owner (generally at settlement). If the contract falls through then no withholding tax needs to be paid.

Payments to the Tax Office will be through an electronic payment method or potentially alternate methods including cheque. The Tax Office will set up an approved form to register for and notify them of the withholding tax to meet existing requirements in the Tax Administration Act.

What happens if the purchaser does not withholding the tax?

There are penalties and offences already set out in the legislation where a payer does not withhold tax and send it to the Tax Office and they will apply in this circumstance. There are penalties for misleading declarations. The purchaser will have to pay the tax even if they fail to withhold it from the vendor.

What should the vendor do?

Estimate your CGT liability on sale and if your tax is nil or less than 10% of the expected sale price, apply for a variation and allow 28 days processing time at the Tax Office.

You should budget for the withholding tax and any eventual capital gains tax arising from lodgement of a subsequent tax return.

What should a purchaser do?

Seek declarations, clearance certificates, address details and payment details in due course during the contracting process.

Where appropriate, withhold and remit the funds so you are not subject to penalties or offences.

What should real estate agents, solicitors and conveyancers do?

Professionals working in the property sale industry should become familiar with the new laws so they can advise their clients or refer matters to expert taxation advisors. Standard contractual documents may need to be amended.

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