



Legal Update

Foreign Resident CGT Withholding Regime Commences on 1 July 2016

The *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016*, introducing the new foreign resident capital gains tax (CGT) withholding regime was passed by Parliament and received Royal Assent on 25 February 2016. The regime will apply from **1 July 2016**. Under the new regime, purchasers of certain Australian assets from a relevant "foreign resident" will be required to withhold and remit 10% of the total consideration to the Commissioner of Taxation (Commissioner).

Overview

The following conditions must be satisfied for the withholding tax regime to apply:

- the asset acquired must be a relevant asset (*First Condition*).
- the vendor of the property must be a relevant "foreign resident" (*Second Condition*).
- the acquisition must not be an excluded transaction (*Third Condition*).

If all of the above conditions are satisfied, then (from 1 July 2016) on or before the day of becoming the owner of the asset, the buyer is required to pay the Commissioner an amount equal to 10% of the amount paid (or the market value of property given) to acquire the asset. The buyer must register for withholding with the Commissioner (if not already registered) and also provide a notification to the Commissioner in approved form when the amount is remitted.

The amount paid may be withheld from the payment the buyer is otherwise obliged to pay to the seller. The buyer is therefore "withholding and remitting" 10% of the purchase price to the Commissioner.

1. First Condition

The regime applies to the acquisition of the following assets:-

- taxable Australian real property (TARP), i.e. Australian real property, mining, quarrying and prospecting rights;
- an indirect Australian real property interest, i.e. an interest of 10% or more in a company or unit trust whose assets comprise more than 50% Australian real property by market value; or
- an option or right to acquire such property or interest.

2. Second Condition

The regime only applies if the vendor is a "foreign resident". A "foreign resident" is a person or entity that is not an Australian resident for tax purposes.

3. Third Condition

No withholding is required where:

- in the case of TARP, the transaction value is *less than \$2 million*;
- the value of an indirect Australian real property interest is *less than \$2 million*;
- in the case of an indirect Australian real property interest, the dealing is conducted through a stock exchange (or broker operated crossing system) or it is a securities lending arrangement; or
- the seller is subject to formal insolvency or bankruptcy proceedings.

Furthermore, no withholding is required if the seller obtains and provides the buyer with a clearance certificate from the Commissioner (stating that there is nothing to suggest that the seller is or will be a foreign resident). The buyer is entitled to rely on the certificate and no withholding is required. The certificate needs to be provided to the purchaser prior to settlement.

For transactions relating to assets other than TARP (e.g. indirect real property interests), purchasers can rely on a vendor declaration that confirms that the vendor is not a relevant foreign resident (and no withholding is required).

Further information in relation to the withholding regime can be obtained at <https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Foreign-resident-capital-gains-withholding-payments/>.

Practical considerations

Moving forward from 1 July 2016, it will be important to consider the following:-

1. Contracts for the sale of real property will need to include residency declarations or the requirement for a seller to supply an ATO clearance certificate (for real property transfers where the market value is \$2 million or more).

Specifically, Contracts for the sale of real property should confirm that the buyer can deduct any withholding amount from the purchase price. They should also declare that a buyer is not required to 'gross up' the amount payable to take account of any withholding tax.

2. Conveyancing processes will need to be mindful of the need to obtain a clearance certificate in time for settlement.

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