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Foreign resident capital gains withholding payments

Background

The former government announced on 14 May 2013 that it would introduce a 10% non-final withholding tax on payments made to foreign residents that dispose of certain taxable Australian property. The Bill for this measure, introduced by the current Government has been passed and received Royal Assent on 25 February 2016.

The new withholding regime will apply to contracts entered into on or after 1 July 2016.

Broadly, where a **foreign resident** disposes of certain taxable Australian property, the purchaser will be required to withhold 10% of the purchase price* and pay that amount to the Australian Taxation Office (ATO).

* Note: the legislation specifies that the 10% withholding is actually on the "first element of the cost base". However, as purchase price is understood by vendors and purchasers, and in many instances will equate with the "first element of the cost base", we have used the term purchase price for simplicity.

While the withholding regime will protect the integrity of the foreign resident CGT regime, it also applies where the disposal of such taxable Australian property by a foreign resident generates gains on revenue account and, as a result, is taxable as ordinary income, rather than as a capital gain.

How will this be administered?

Legislation was enacted on 25 February 2016 to introduce a 10% non-final withholding on payments made to foreign residents under contracts entered into on or after 1 July 2016 to dispose of certain taxable Australian property.

Three online forms will be made available at ato.gov.au/FRCGW (/FRCGW) before 30 June 2016. These are:

1. Clearance certificate application for Australian residents
2. Rate Variation application for foreign residents and other parties
3. Purchaser payment notification

Where a taxpayer is unable to access the webpage they can call 132866 within Australia or +61 2 62161111 if they are outside Australia to obtain details of the information they need to provide.

Assets affected

This withholding is limited to taxable Australian property, being:

- Real property in Australia – land, buildings, residential and commercial property;
- Lease premiums paid for the grant of a lease over real property in Australia;
- Mining, quarrying or prospecting rights;
- Interests in Australian entities whose majority assets consist of the above such property or interests – this is called an indirect interest;
- Options or rights to acquire the above property or interest.

Exclusions

There are a number of exclusions. If the foreign resident vendor falls within one of these categories then the 10% withholding is not applicable:

- Real property transactions with a market value* under \$2 million, ensuring that the vast majority of residential house sales will be unaffected by this measure;

* Note: if a purchase price negotiated between a purchaser and vendor is on an arm's length basis, then the purchase price may be used as a proxy for market value.

- Transactions listed on an approved stock exchange;
- The foreign resident vendor is under external administration or in bankruptcy.

Clearance certificates

The legislation introduces a clearance certificate model to provide certainty to purchasers regarding their withholding obligations. The clearance certificate confirms that the withholding tax is not to be withheld from the transaction.

For real property transactions with a market value of \$2 million or above, the purchaser must withhold 10% of the purchase price unless the vendor shows the purchaser a clearance certificate from the ATO. This certificate can be provided to the purchaser on or before the settlement of the transaction. Where a clearance certificate is provided, the purchaser is not required to withhold an amount from the purchase price.

If the vendor fails to provide the certificate by settlement, the purchaser would be required to withhold 10% of the purchase price and pay this to the ATO. This means **Australian resident vendors** of real property with a market value of \$2 million or above will need to apply for a clearance certificate and provide this to the purchaser before settlement to ensure no funds are withheld from the sale proceeds.

The vendor may apply for a clearance certificate at any time they are considering the disposal of real property. This can be before the property is listed for sale. The clearance certificate will be valid for 12 months and must be valid at the time the certificate is given to the purchaser prior to settlement.

The ATO is implementing an 'automated' process for issuing a clearance certificate. This would involve:

- the vendor (or their agent) completing an online 'Clearance certificate application for Australian residents' form;
- the information on the application being automatically checked against information held by the ATO to assess if the vendor should be treated as an Australian tax resident for the purposes of the transaction; and
- the automatic issuance of a clearance certificate which removes the need for the purchaser to withhold the 10% from the sale proceeds.

In straightforward cases where the ATO has all the required information, it is expected that clearance certificates will be provided within days of being submitted.

However, where there are data irregularities or exceptions, some manual processing may be required and the clearance certificates will be provided within 14 – 28 days. Higher risk and unusual cases may also require greater manual intervention which could take longer.

Variation application

Where the vendor is not entitled to a clearance certificate, but believes a withholding of 10% is inappropriate, the vendor can apply for a variation. The vendor completes an on-line 'Variation application for foreign residents and other parties' form requesting a lesser withholding rate be determined by the ATO. In the majority of cases (where the ATO has all the required information), the variation will be provided within 28 days.

The notice of variation should be provided to the purchaser before settlement to ensure the reduced withholding rate applies.

Paying and reporting withholding amounts

Where a withholding obligation exists, the purchaser must withhold the relevant amount at settlement and pay it to the ATO without delay (general interest charge may apply to late payments). The penalty for failing to withhold is equal to the amount that was required to be withheld and paid. An administrative penalty may also be imposed.

Purchaser payment notification

Where an amount is withheld, the purchaser is required to complete an online 'Purchaser Payment Notification' form to provide details of the vendor, purchaser and the asset being acquired to the ATO.

The purchaser will then automatically receive a payment reference number, and a payment slip which includes a barcode for use if paying in person at Australia Post. The purchaser needs to pay the withholding on or before settlement. The ATO's preference is electronic payment (funds transfer), however the purchaser can choose to pay the withheld amount at a post office with the barcode, or they can mail a cheque to the ATO with the payment reference number.

Legislation and supporting material

On 25 February 2016 the Bill - Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2015 received Royal Assent. You can access:

- the legislation [here](https://www.comlaw.gov.au/Details/C2016A00010) (<https://www.comlaw.gov.au/Details/C2016A00010>)
- the explanatory memorandum [here](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5585) (http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5585)
- [Fact sheet for real estate agents \(PDF 196Kb\)](#) ([/uploadedFiles/Content/ITD/In_detail/Other_topics/Foreign_residents_factsheet.pdf](#))

See also:

- [Media release No.11](http://kmo.ministers.treasury.gov.au/media-release/011-2016/?utm_source=wysija&utm_medium=email&utm_campaign=Media+Release+%E2%80%93+Key+tax+changes+to+improve+the+) (http://kmo.ministers.treasury.gov.au/media-release/011-2016/?utm_source=wysija&utm_medium=email&utm_campaign=Media+Release+%E2%80%93+Key+tax+changes+to+improve+the+) issued on 23 February 2016 by the Minister for Small Business and the Assistant Treasurer.
- [Joint media release No. 061 – 2015](http://bfb.ministers.treasury.gov.au/media-release/061-2015/) (<http://bfb.ministers.treasury.gov.au/media-release/061-2015/>) issued on 8 July 2015 by the former Minister for Small Business
- [Joint media release No. 017 – 2013](http://jbh.ministers.treasury.gov.au/media-release/017-2013/) (<http://jbh.ministers.treasury.gov.au/media-release/017-2013/>) issued on 6 November 2013 by the Treasurer and the then Assistant Treasurer
- [Joint media release No.71](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/071.htm&pageID=003&min=djba&Year=&DocType=0) (<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/071.htm&pageID=003&min=djba&Year=&DocType=0>) issued on 14 May 2013 by the former Assistant Treasurer.

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