

CAPITAL GAINS WITHHOLDING TAX APPLYING TO PROPERTY SALES

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The Federal Government has passed legislation requiring the withholding of 10% of the purchase price of property sold for more than \$2million, as well as some other transfers of certain property interests.

Implications of the new regime

- Essentially a seller of property valued at more than \$2m is assumed to be a foreigner unless they prove otherwise to the buyer.
- Proof of Australian tax residency is only in the form of an ATO clearance certificate. The buyer can not rely on any alternative “proof”.
- If a seller does not obtain an exemption certificate from the ATO and give it to the buyer, then the buyer must withhold 10% of the purchase price and pay it to the ATO. Failure to do so can be disastrous for the buyer, because if the seller turns out to be a foreign person the buyer must pay that amount from their own pocket and possibly this amount may be increased with interest costs and penalties.

Whilst the standard REIQ and ADL contracts have been amended to provide for the new regime, regard should be had to whether any special conditions are required to deal with particular circumstances.

Transactions affected

- Purchase of real property, or other real property interests (including certain leases and mining rights) where contract is legally formed after 1 July, 2016.
- Purchase of interests in companies, trusts, or partnerships that own real property where certain tests are met where contract is legally formed after 1 July, 2016.
- The grant of an Option to do any of the above where option is exercised after 1 July, 2016. **In respect of options the withholding requirement applies regardless of the price (i.e. there is no \$2m threshold).**
- Multiple transactions between the same parties are aggregated so that the \$2m threshold is determined by taking all transactions into account.

Obligation to pay withholding tax

- Withholding Tax places an obligation on the Buyer to pay money to the Australian Tax Office, even though it is the Seller’s obligation to pay the tax. The Buyer can be responsible for the Seller’s tax and penalties and interest if it does not comply with its obligations to withhold same.

Exceptions

- Where the property rights are acquired for less than \$2m.
- \$2m exception does not apply to acquisitions of land rich companies or property rights by way of options.
- Where the Seller provides a clearance certificate from the ATO (or a variation certificate adjusting the withholding amount)

Steps for a foreign Seller

- They must have an accountant complete a tax return and the 10% shall be applied as a credit to any tax payable.
- An accountant may apply for a clearance certificate proving their Australian tax residency status.
- An accountant may apply to the ATO for a variation of the 10% withholding amount. If provided with a copy of the variation certificate the buyer will only be obliged to withhold the varied amount.

Steps for Buyers

- Withholding amount should be retained at settlement if required to be paid.
- Ensure what clauses are required to make it clear the withholding amount may be taken, or that clauses cater for particular circumstances.
- Check with accountant if PAYG registration is required to make the withholding payment.

Steps for real estate agents

- Ensure that the Seller is aware of why a clause is needed and alert the Seller to get accounting advice to apply for a Certificate of Clearance from the ATO quickly, to avoid the risk of a withholding.
- Ensure that the Buyer realises that a legal obligation for payment exists and that the clause in the Contract is there for the Buyer's protection.

For further assistance please contact the author.

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