

MARCH 2016

TAX ALERT: NEW WITHHOLDING TAX OBLIGATIONS ON PURCHASERS OF CERTAIN PROPERTIES

Introduction

Parliament recently passed legislation amending the taxation law to impose withholding obligations on the purchasers of certain Australian assets – generally real property purchased from a non-resident.

However, the changes will affect most purchases of property in Australia!

Where the land, or the interest in the land, is worth \$2 million or more, the new law requires the purchaser to withhold 10% of the purchase price and send it to the ATO **unless** the vendor has obtained a 'clearance certificate' from the ATO and provided it to the purchaser prior to settlement.

This obligation arises regardless of whether the vendor is a foreign resident or not.

These new obligations will generally apply where the contract to purchase an applicable asset is signed on or after 1 July 2016.

Clearance Certificates

A clearance certificate confirms that all amounts for which the taxpayer is liable to the Commonwealth have been paid, or that the Commonwealth has accepted some form of security for the payment of the tax liability from the vendor prior to substantial sums of monies being transferred offshore.

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.

Automated Process

The ATO is implementing an 'automated' process for issuing clearance certificates, and this would involve:

- the vendor (or their agent) completing an online application 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 issue of a clearance certificate which removes the need for the purchaser to withhold 10% from the sale proceeds.



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In straightforward cases where the ATO has all the required information, it is expected that clearance certificates will be provided within 1 – 14 days. Where there are data irregularities or exceptions, the clearance certificates may take up to 14 – 28 days. Higher risk and unusual cases may also require manual intervention which could take longer.

While we have not been able to preview the ATO's automated process in action to date, we expect that it will be up and operational before 1 July 2016.

Payment

Where a withholding obligation exists, the purchaser must pay 10% of the price to the ATO. The penalty for failing to withhold is equal to the amount that was required to be withheld and paid.

Where payment is withheld, the purchaser is required to complete and lodge with the ATO a 'Purchaser Remittance Form' advising details of the vendor, purchaser and asset acquired.

Nature of the Withholding

The amount withheld is a non-final withholding tax. If the vendor is a foreign resident they will be required to lodge an Australian income tax return in relation to the sale. At this point any amounts withheld will reduce any Capital Gains Tax payable on the disposal of the asset or be refunded.

Example

On 1 August 2016, Harvey enters into a contract to purchase a residential property in an affluent Melbourne suburb for \$2.5 million, with settlement proposed to occur on 1 October 2016. He does not know whether the vendor is a foreign resident.

Despite many requests from Harvey's lawyer, the vendor refuses to obtain a clearance certificate from the ATO to give to Harvey.

As Harvey is acquiring Australian land with a market value greater than \$2 million and he has not received a clearance certificate from the vendor by the time settlement occurs, Harvey will be required to withhold 10% of the purchase price, and pay \$250,000 to the ATO, whether the vendor is an Australian resident or not.

Conclusion

The new measures apply to all land sales above \$2 million, not just those involving a foreign resident vendor. Even in cases where the vendor is clearly an Australian resident, purchasers will be obliged to withhold 10% of the purchase price unless provided with a clearance certificate before settlement.

Clearly this is an important new obligation imposed on taxpayers, which could have serious implications on purchasers.

We recommend to all clients that if they plan to purchase (or sell) any real property, especially if the sale price is in excess of \$2 million, to contact their Lowe Lippmann Relationship Partner.

Please do not hesitate to contact your Lowe Lippmann Relationship Partner if you wish to discuss any of these matters further.



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