

Legal Alert

Property and Development

June 2016

Foreign Resident Capital Gains Withholding Tax

*From 1 July 2016, purchasers of real property, including exploration & mining interests - with a value of \$2 million or more - must withhold 10% of the price and pay that to the ATO **unless** the vendor has provided a clearance certificate or a variation notice, or made a residency declaration. Even if the purchaser knows the vendor is an Australian resident.*

Capital gains tax withholding regime

The new regime will take effect from 1 July 2016.

The regime requires purchasers of Australian real property or real property interests, with a value of \$2 million or more, to withhold 10% of the price. The 10% withheld must then be paid to the ATO.

Clearance certificates – contracts to acquire real property, exploration & mining rights & leases

Even if the purchaser knows the vendor is an Australian resident, they must withhold 10% of the price unless the vendor produces a clearance certificate.

A clearance certificate is a certificate issued by the ATO confirming that the vendor is not a foreign resident. The certificate will be valid for 12 months so the vendor will be able to use it for multiple disposals.

The ATO anticipates that it will process clearance certificates within 14-28 days of application. So vendors who will be signing contracts on or after 1 July 16, which settle in mid-July, will need to make applications now.

Residency declarations – options & shares/units in 'land rich' entities

If parties enter into an Option Deed, or a contract to purchase an interest in a 'land rich' entity, the purchaser must withhold 10% of the price paid to purchase the option or the interest in the land rich entity, unless the vendor produces a residency declaration or a not an indirect Australian real property interest declaration.

Variation notice

If the foreign vendor knows that their capital gain will be less than 10% of the purchase price, they may apply to the ATO for a variation notice.

Purchasers who receive variation notices from vendors may rely on them to withhold at the varied (reduced) rate.

What if the purchaser fails to withhold?

If the purchaser fails to withhold 10% (or the varied rate) from the price, the purchaser will remain liable to pay 10% (or the varied rate) to the ATO. If no variation notice has been issued, the purchaser will therefore end up paying 110% of the purchase price. The purchaser may also be subject to fines, penalties and interest on the withholding amount.

Implications

Vendors will need to apply for clearance certificates or variation notices, or make residency declarations, to ensure they receive full sales proceeds.

All contracts for the sale of land, or interests in land, need to be reviewed to determine whether there are any withholding obligations.

Finlaysons can assist with applications for variations and clearance certificates, making residency declarations, and drafting or updating contracts. We can also provide advice in relation to compliance with the regime generally.

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