

FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING PAYMENT MEASURE: APPLYING TO REDUCE THE 10% WITHHOLDING REQUIREMENT

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Background

From 1 July 2016 (with some exceptions), purchasers acquiring the following CGT assets may be required to withhold 10% of the first element of the CGT asset's cost base (typically the purchase price) from the proceeds of sale:

- taxable Australian real property (**TARP**);
- an indirect Australian real property interest (**IRPI**); or
- an option or right to acquire such property or interest.

In broad terms, the 10% withholding obligation is triggered if the vendor is deemed to be, presumed to be, or is, a foreign resident for tax purposes pursuant to the applicable rules.

Usual flow of funds

If the transaction in question involves a relevant CGT asset (ie TARP, IRPI or an option to acquire TARP or IRPI) and the vendor is treated as a foreign resident for tax purposes and no exemptions apply (eg TARP where the market value is less than \$2 million, ASX transactions, an existing withholding obligation applies), the purchaser must withhold 10% of the proceeds of sale (**Withheld Amount**) and remit this amount to the ATO.

The Withheld Amount is a 'non-final withholding', which means that it may be refundable to the vendor after the vendor's net tax position has been assessed in respect of the relevant financial year. Ordinarily, the vendor will not have access to the Withheld Amount between the time that it is remitted to the ATO by the purchaser and the time that its tax return is finalised.

Variation

A vendor that has had a Withheld Amount withheld from the proceeds of sale can apply to have the Withheld Amount varied downwards (potentially to nil) in the following circumstances:

- the vendor is making a capital loss on the transaction or a CGT rollover applies;
- the vendor has carried-forward capital losses; or
- only one of multiple vendors is a foreign resident for tax purposes.

Applying for a variation permits the vendor to access and make use of the Withheld Amount sooner than if it had allowed the Withheld Amount to be refunded in the course of its ordinary tax return lodgement process.

Action

A vendor, purchaser or creditor (of the vendor) can apply for a variation by downloading and completing the online variation application. The ATO has indicated that its processing time for variation applications will be within 28 days. The ATO will provide the applicant with a variation notice if the variation application is successful. A copy of this notice must be given to the purchaser in advance of settlement.

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