



E-alert: Changes to Foreign Resident Withholding Tax

By ,

On 9 May 2017, the Federal Government announced substantial changes to the rate and threshold of its Foreign Resident Capital Gains Withholding (**FRCGW**) regime which has been in force since 1 July 2016. By way of recap, the regime requires purchasers of certain assets to withhold and remit to the ATO on or before settlement a portion of the purchase price, unless the vendor can demonstrate it was an Australian resident at the time that the transaction was entered into. The way in which the vendor can demonstrate it is an Australian resident is to obtain and give to the purchaser a Clearance Certificate issued the ATO (or in the case of certain assets, by completing and providing a Withholding Declaration to the purchaser).

What are the changes?

The changes will be as follows:

1. Disposals of a direct interest in Australian real property from 1 July 2017 (where contracts are signed after 1 July 2017) will be captured by the FRCGW regime where the market value is \$750,000 or more. (Currently the regime is only invoked where there is a market value of \$2 million or more). Where the purchaser and vendor are at arm's length, the ATO will accept the purchase price as the market value; and
2. all such contracts settled on or after 1 July 2017 where the FRCGW applies will be subject to a withholding tax rate of 12.5% (currently the withholding tax rate is 10%).

When will the changes take effect?

The operation of the FRCGW regime is based on the time of acquisition of property. A purchaser is generally taken to have acquired property on the day they enter into the contract to purchase the property. Consequently:

- the changes will only be applicable to contracts entered into on or after 1 July 2017;
- if a contract is entered into prior to 1 July 2017, the existing \$2 million threshold and 10% withholding rate will apply, even if settlement occurs on or after 1 July 2017.

This interpretation has been confirmed in the Explanatory Memorandum to the relevant Bill that is presently in Parliament.

What should vendors and purchasers do?

Other than making themselves aware of the new threshold and rate, there should be no change to existing practice. That is, vendors of property captured by the regime should continue to promptly obtain and issue purchaser a Clearance Certificate in order to prevent the purchaser from withholding a portion of the purchase price, and purchasers should ensure that if they do not receive a Clearance Certificate they withhold the relevant portion so as to avoid substantial penalties.

The main consequence of the changes will be the massive increase in the number of transactions covered by the FRCGW regime. In cities such as Sydney and Melbourne in particular, where median house prices are substantially in excess of the proposed \$750,000 threshold, it can be expected that the vast majority of property transactions will be covered.

Should you wish to discuss any matters arising out of this article, please contact the author:

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