Capital Gains Wsithholding: Impacts on Foreign and Australian Residents

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What is foreign resident capital gains withholding ("FRCGW")

Foreign resident capital gains withholding (FRCGW) applies to vendors disposing of taxable property under contract from 1 July 2016.

Since 1 July 2017:

- the FRCGW tax rate is 12.5% (previously 10%)
- it applies to sales of Australian real property where the contract price is $750,000 or more (previously to sales over $2m).

The legislation imposes an obligation on the purchaser (whether an Australian or foreign resident) to withhold 12.5% of the purchase price and to pay that amount on settlement to the ATO.

The vendor must lodge a tax return at the end of the financial year declaring their Australian assessable income, including any capital gain (or profit) from the disposal of the property.

The objective of the legislation is to assist in the collection of a foreign residents' capital gains tax ("CGT") liabilities.

When the rules apply

- A purchaser becomes the owner of a Capital Gains Tax (CGT) asset as a result of acquiring it from a vendor(s) under one or more transactions
- At least one of those vendors is a relevant foreign resident at the time at least one of the transactions is entered into
- The CGT asset is a certain type of Australian property or an option or right to acquire such property
- The purchaser acquires the CGT asset under a contract entered into on or after 1 July 2016

Exceptions

Australian resident vendors can avoid the requirement of the purchaser to withhold the 12.5% by serving on the purchaser prior to settlement a clearance certificate obtained from the ATO.

A foreign resident vendor cannot obtain a clearance certificate.

FPCGW Clearance Certificate

The Australian resident vendor (or their representative) will need to complete and lodge a Clearance certificate application for Australian residents.

Where there is more than one Australian resident vendor each vendor must apply for a separate clearance certificate in their name only.

Australian residents not required to lodge tax returns, such as aged pensioners, are still required to obtain a clearance certificate.

The application can be completed and lodged online with ATO at the following:

https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/

A clearance certificate is valid for 12 months from the date issued, so the vendor may use it for other sales of real property which occur within the 12 month period.

It may be provided to the purchaser at any time during the transaction but must be provided to the purchaser by settlement.

The ATO's timeframe for issuing clearance certificates is usually 1 to 14 days if the information on the application conforms with that already in the ATO’s system, 14 to 28 days if any information needs to be checked and over 28 days for “high risk” or “unusual” transactions.

So the application should be done as soon as possible once the decision has been made to sell the property. If there are any potential complexities then special conditions may need to be drafted. Any actual complications after contract may impact the settlement and put the vendor in breach of contract.

Australian Resident or Foreign Resident

An Australian resident is one that is an Australian resident for tax purposes.

This is not the same as the definition of residency for immigration purposes or for the Foreign Investment Review Board (FIRB) applications to buy Australian property.

So you

- can be an Australian resident for tax purposes without being an Australian citizen or a permanent resident
- may have a visa to enter Australia but are not an Australian resident for tax purposes

Further information on this can be found at:

https://www.ato.gov.au/Individuals/International-tax-for-individuals/Work-out-your-tax-residency/