

Alert

TAX

New Tax Issues for Real Property Transactions

By Julie Van der Velde

On 25 February 2015 new tax legislation was passed requiring 10% of the purchase price on a property transaction with a 'foreign resident' vendor to be withheld. This does not mean the vendor is not Australian!

Many ignore the new legislation not realising that where the property being acquired is land, a lease or a mineral right worth more than \$2 million dollars, the definition of 'foreign resident' is simply a person who does not have a Clearance Certificate from the Australian Taxation Office. Practically this means that you may have been born in Australia and lived here all your life but you will still be a 'foreign resident' under the new legislation if you do not have a Clearance Certificate from the Australian Taxation Office.

If you are selling shares in a land holding company or units in a land holding trust or options or other rights to acquire land you need not get a Clearance Certificate but can instead give the buyer a declaration that you are an Australian resident. A false or misleading declaration may result in you being subject to penalties of up to \$21,600.

Beware if you are the buyer; a declaration is only valid if you have reasonable grounds for believing that it is true.

A declaration is not acceptable for real property transactions. Buyers must withhold in a real property transaction unless a Clearance Certificate is provided before settlement. A buyer who fails to do this at settlement may be required to remit 10% of the purchase price

plus interest to the Taxation Office from their own funds.

The form on which you can apply for a Clearance Certificate is going to be made available on the Taxation Office website although it has not yet been placed there. All prospective vendors are advised to apply for a Clearance Certificate as early as possible before a transaction as the certificate will be valid for a full year once issued and the Taxation Office is known to experience frequent delays in processing times for many documents.

This law will apply to each relevant contract you enter into after 1 July this year although settlements on contracts entered into prior to that date are not affected.

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The tax payment is a withholding. This means that if the vendor lodges an income tax return they will be entitled to treat the amount withheld as a credit against any tax owed on the transaction. If the vendor's tax assessment is less than the 10% withheld then a refund will be available. This is not a good substitute for a Clearance Certificate as it may be almost two years before a return is lodged and a refund credited to the vendor.

For example: if you own a commercial or farming property worth \$2 million dollars and enter into a contract to sell it during July 2016 without having obtained a Clearance Certificate you will only receive \$1,800,000 on settlement. The buyer will be required to send the other \$200,000 to the Australian Taxation Office. When you lodge your tax return for the 2017 financial year which will be at least 12 and possibly up to 23 months later you will be entitled to offset the \$200,000 against any tax liability you may have or get a refund if \$200,000 is more than your tax liability for the year.

From 1 July it is important that property contracts are drafted in order to take the new tax law into account. You may want to protect your interests by ensuring there are clauses in the contract which allow for delayed settlement if there is a delay in obtaining a Clearance Certificate.

Equally, if a buyer withholds too much your cash flow will be affected, even worse a buyer may withhold money from you but not pay it to the Taxation Office thus affecting your ability to get a tax refund. All these issues may be dealt with in a well drawn contract.

The new law applies from 1 July 2016.

For more information and for review of relevant contracts please contact Julie Van der Velde or another member of the DW Fox Tucker Tax team.



MORE INFO

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