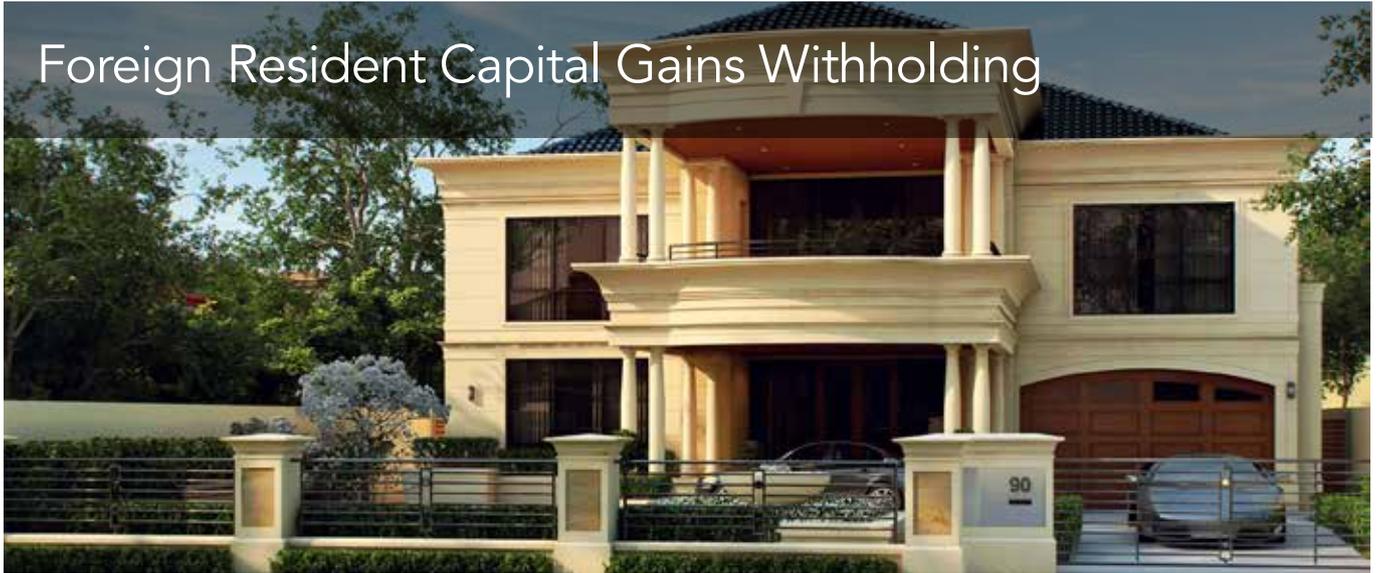


## Foreign Resident Capital Gains Withholding



**Foreign resident vendors.** New legislation imposes an obligation on purchasers to withhold 10% of the purchase price of certain Australian property.

For contracts entered from 1 July 2016, new rules will apply to vendors disposing of certain taxable Australian property. This includes a main residence with a market value of \$2 million or more.

Australian resident vendors selling real property will need to obtain a clearance certificate from the Tax Office prior to settlement. If the clearance certificate is not obtained, the vendor will be treated as a non-resident and a 10% non-final withholding tax will apply at settlement.

This legislation imposes an obligation on purchasers to withhold 10% of the purchase price and pay it to the Tax Office. A credit for the withholding tax may be claimed for the amount paid to the Tax Office in the vendor's tax return where the capital gains tax is assessed.

### **Australian resident vendors**

Australian resident vendors can avoid the 10% withholding by providing one of the following to the purchaser prior to settlement:

- Australian real property - a clearance certificate obtained from the ATO; or
- Other assets - a vendor declaration they are not a foreign resident.

### **Australian real property**

Taxable Australian real property with a market value of \$2 million or more includes:

- vacant land, buildings, residential and commercial property; or
- mining, quarrying or prospecting rights where the material is situated in Australia; or
- a lease over real property in Australia.

### **Other assets**

Other asset types includes:

- indirect Australian real property interests in Australian entities, whose majority of assets consist of the above asset types; or
- options or rights to acquire any of the above asset types.

### **Foreign resident vendors**

A vendor is treated as a foreign resident if the vendor either:

- the vendor does not provide the purchaser with a valid clearance certificate by settlement, if they are disposing of an asset that requires a clearance certificate to be provided to avoid the withholding being imposed; or
- the vendor provides the purchaser with a vendor declaration confirming they are a foreign resident.

The vendor may apply for a variation of the withholding rate or make a declaration that a membership interest is not an indirect Australian real property interest and therefore not subject to withholding.

# Foreign Resident Capital Gains Withholding

## **Clearance certificates**

A clearance certificate provides certainty to the purchaser(s) regarding their withholding obligations. It confirms the withholding tax is not applicable to the transaction.

The clearance certificate can be applied for at any time and is valid for 12 months from the date of issue. The Tax Office can take up to 28 days to issue the clearance certificate.

The Australian resident entity (for example: individual, company, trust, SMSF) will need to complete an online form, through the Tax Office, to apply for the clearance certificate. Please note that even Australian residents not required to lodge tax returns (i.e. aged pensioners) are still required to obtain a clearance certificate.

### ***Example 1: resident entity treated as a foreign resident vendor***

James purchases real estate in Subiaco, from Michael, for \$2.75 million. This is taxable Australian real property and James believes that Michael is an Australian resident.

Despite James's belief, unless Michael can provide James with a clearance certificate from the Tax Office, Michael is treated as a relevant foreign resident.

James must make a withholding payment to the Tax Office.

### ***Example 2: reliance on clearance certificate***

Andrew is buying a villa in Cottesloe for \$3 million from a vendor whose legal representatives are based in China. The vendor's Australian conveyancer has provided a clearance certificate obtained from the Tax Office to Andrew.

The contract instructions advise that the funds should be transferred to an overseas bank account.

Andrew and his representatives are certain they are acquiring the villa from a foreign resident. Despite this, the vendor has provided a valid clearance certificate to Andrew. Therefore, Andrew is able to rely on this clearance certificate and not withhold and pay foreign resident capital gains withholding.

## **Vendor declarations**

For all other asset types subject to foreign resident capital gains withholding, the vendor may provide the purchaser with a vendor's declaration to identify that withholding isn't required on the acquisition. There are two types of vendor declarations:

- 1 residency declaration; and
- 2 not an indirect Australian real property interest declaration.

A vendor's declaration is valid for 6 months from the date it's signed by the vendor. It is only valid for the listed vendor and specified period on the declaration.

There is no approved form for the declaration, however, the Tax Office does have templates available.

## **Residency declaration**

Where the purchaser believes the vendor is a foreign resident, they can request the vendor to make a declaration confirming their Australian tax residency. This belief may occur when:

- the purchaser knows the vendor has an address outside of Australia; and/or
- sale proceeds are to be paid to a place outside of Australia.

When a vendor makes a declaration they are an Australian tax resident, the purchaser will not treat them as a foreign resident. Alternatively, the vendor may provide a declaration to the purchaser without being asked to supply it.

### ***Not an indirect Australian real property interest declaration***

A vendor may provide the purchaser with a declaration confirming the interest they are disposing of in an Australian entity is not an indirect Australian real property interest.

This is allowed where the vendor would be in the best position to determine if the interest being disposed of is an indirect Australian real property interest.

# Foreign Resident Capital Gains Withholding



## Purchasers

Purchasers must pay the amount withheld on or before the date of settlement to the Tax Office. The purchaser will need to complete an online form, through the Tax Office, in order to obtain the payment reference number (PRN).

If the purchaser fails to obtain a PRN and pay the withholding when they become the owner of the asset, general interest charges will be imposed by the Tax Office.

## Tax return lodgement

### *Australian tax resident vendor*

If an Australian tax resident vendor had withholding taken from their sale proceeds, they will be able to claim a credit for that amount when they lodge their tax return. This credit may be refunded in the relevant tax return if they don't have to pay capital gains tax on the sale of the property. For example, if the property was the main residence of the vendor.

### *Foreign resident vendor*

The foreign resident vendor must lodge a tax return at the end of the financial year declaring their Australian assessable income, including any capital gain from the disposal of the asset. In certain circumstances, an early income tax return may be submitted. The vendor will claim a credit for any withholding amount in their tax return.

Westcourt is a mid-sized practice of accountants and business consultants, centrally located in East Perth. We specialise in providing financial and strategic advice to private business. At Westcourt, we take the time to get to know our clients so that we can recommend the best solutions for their business.

Our team has an in-depth knowledge of the accounting regulations, financial strategies and tax laws relating to private business. This allows us to provide our clients with first-rate advice and superior solutions.

Contact us today.



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