

CGT withholding payments – practical examples

This bulletin contains practical examples of how the withholding requirements, which commenced 1 July 2016 and were amended with effect from 1 July 2017, work.

For more general information about the new regime please refer to the following two LPLC bulletins.

- [1 July 2017 amended CGT withholding payments for real property sales](#)
- [Amended CGT withholding payments for options, company title interests and indirect Australian real property transactions.](#)

The examples are classified into the following three categories.

- **In** - withholding regime applies.
- **Out** - withholding regime does not apply.
- **Not sure** - some uncertainty has arisen because comments have been made by Australian Taxation Office (ATO) representatives and contained in ATO publications which do not appear in the legislation. In addition, there are examples which do not seem to have been considered by the ATO when drafting the legislation.

Some examples have been provided by the ATO and are identified as such.

Taxable Australian real property acquired directly from registered proprietor(s)

The withholding obligation applies to taxable Australian real property with a market value of \$750,000 or more for acquisitions from 1 July 2017 (previously \$2M or more).

A capital gains tax (**CGT**) asset will be taxable Australian property if it is:

- real property situated in Australia (including a lease of land), if the land is situated in Australia and
- a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarrying materials are situated in Australia.

In example 1 – one vendor, one title, sale price \$750,000

Background

A vendor is the sole registered proprietor of a property used as a dwelling. There is one title only for

the property. The sale is input-taxed for GST purposes as the supply of existing residential premises. The property was sold for \$750,000 pursuant to a contract dated 1 July 2017. Settlement is due in 60 days.

Action

Unless the vendor provides a clearance certificate the purchaser should withhold 12.5 per cent of the price, must register as a withholder with the ATO and must pay the 12.5 per cent to the ATO at or prior to settlement.

The vendor may apply to vary the amount. The vendor would need to notify the purchaser prior to settlement of the ATO-approved variation amount.

In example 2 – two vendors, one title, sale price \$750,000

Two vendors are the registered proprietors of a property used as a dwelling. There is one title only for the property. The sale is input-taxed for GST purposes as the supply of existing residential premises.

The property was sold for \$750,000 pursuant to a contract dated 1 July 2017.

Settlement is due in 60 days.

Neither vendor provides a clearance certificate.

Action

The purchaser should withhold 12.5 per cent of the price, must register as a withholder with the ATO and must pay the 12.5 per cent to the ATO at or prior to settlement.

Each vendor may apply to vary the amount.

Note

The ATO states on their website that a purchaser is only required to withhold a proportional amount based on the number of vendors who have not provided clearance certificates. You can find information on the ATO website [here](#).

In example 3 - two vendors, each has an interest title, total price \$750,000

Background

Two vendors each hold a separate interest title for a 50 per cent share in a property. Separate interest titles can be created pursuant to section 32 of the *Transfer of Land Act 1958* (Vic).

Each vendor enters into a separate contract of sale with the same purchaser for \$375,000 per contract having a combined price of \$750,000.

Each contract is dated 1 July 2017. The sale is input-taxed for GST purposes as the supply of existing residential premises.

Settlement is due in 60 days.

Comments by the ATO

It is recognised that each state and territory has its own land title law, so whether the FRCGW regime applies to the acquisition of interests in real property will turn upon the facts and circumstance of each case and the land titles regime operating in the particular State

or Territory. However, the general view is that the FRCGW would apply in the example provided.

Although the transaction results in the purchaser acquiring two CGT assets – namely, each vendor’s separately transferrable lot recorded as separate folios (i.e. separate interests) on the certificate of title to the land – the fact is that the purchaser has two CGT assets that are similar namely (an interest in one parcel of land), each former vendor’s respective interest in the certificate of title as represented by the separate folios on the one certificate of title.

As a result of subsection 14-215(2), the market value for purpose of paragraph 14-215(1)(a) is the market value of each CGT asset of the similar interests in the parcel of land. Therefore the aggregate market value of \$750,000 is used to determining the amount of the withholding – with the withholding amount being proportionate to each vendor’s interest and will be \$46,875 for each sales transaction (12.5 per cent of the first element of the interest’s cost base = $0.125 \times \$375,000$).

In example 4 - three registered proprietors as tenants in common, only one registered proprietor selling their interest, sale price \$250,000, property value \$750,000

Background

Three registered proprietors each hold an interest as tenants in common in equal shares in a property.

Only one registered proprietor enters into a contract of sale for a price of \$250,000.

The property has a value of \$750,000.

The contract is dated 1 July 2017. The sale is input-taxed for GST purposes as the supply of existing residential premises.

Settlement is due in 60 days.

The registered proprietor who is selling does not provide a clearance certificate.

Note

A clearance certificate is not required for the two registered proprietors who are not selling as the CGT withholding only applies to the one registered proprietor who is selling.

Action

The purchaser should withhold 12.5 per cent of the value of the interest in the property being sold, must register as a withholder with the ATO and must pay the 12.5 per cent to the ATO at or prior to settlement.

Out example 1 – one vendor, one title, price \$740,000

Background

A vendor is the sole registered proprietor of a property used as a factory. There is one title only for the property. The sale is treated as a going concern for GST purposes as the operation of a leasing enterprise.

The property was sold subject to a lease for \$740,000 pursuant to a contract dated 1 July 2017.

Settlement is due in 60 days.

Action

The regime does not apply as the price is less than \$750,000.

[Out example 2 – one vendor, one title, price \\$1.9M](#)

Background

A vendor is the sole registered proprietor of a property used as a factory. There is one title only for the property. The sale is treated as a going concern for GST purposes as the operation of a leasing enterprise.

The property was sold subject to a lease for \$1.9M pursuant to a contract dated 30 June 2017.

Settlement is due in 60 days.

Action

The regime does not apply as the price is less than \$2M which was the relevant threshold for acquisitions made prior to 1 July 2017.

[Out example 3 – one vendor, one title, price \\$2.2M, contract 30 June 2016](#)

Background

A vendor is the sole registered proprietor of a property used as a factory. There is one title only for the property. The sale is treated as a going concern for GST purposes as the operation of a leasing enterprise.

The property was sold subject to a lease for \$2.2M pursuant to a contract dated 30 June 2016.

Settlement is due in 60 days.

Action

The regime does not apply as the contract was entered into prior to 1 July 2016.

[Out example 4 – one vendor, farm land, two titles, price \\$750,000](#)

Background

A vendor is the sole registered proprietor of a property used as a farm. There are two titles for the farm of equal area. The sale is treated as a going concern as the supply of a farm.

The property was sold for \$750,000 pursuant to a contract dated 1 July 2017.

Settlement is due in 60 days.

Action

The new regime does not apply where the vendor splits the consideration between the two titles so that each title is worth less than \$750,000.

The vendor must have a reasonable basis upon which the price/value is apportioned to each title. Examples of reasonable methods to apportion the value between separate titles include the capital improved value as contained in the assessment by the local council/shire, an appraisal from a licensed real estate agent and/or a sworn valuation.

Consider also allocating the value between the titles in the contract.

Out example 5 – one vendor, two apartments each with own title, price \$750,000

Background

A vendor is the sole registered proprietor of two apartments. Each apartment is on a separate title and was purchased at the same time. The sale is input-taxed for GST purposes as the supply of existing residential premises.

Both apartments are sold to the same purchaser pursuant to one contract of sale for a combined price of \$750,000. The contract is dated 1 July 2017.

Settlement is due in 60 days.

Assume the purchaser is also the transferee.

Action

The regime does not apply as the vendor is entitled to split the consideration between the two titles according to their value. Each title will be less than \$750,000.

It would make no difference if:

- the vendor sold pursuant to separate contracts
- the vendor sold more than two apartments
- the purchaser nominated an additional or substitute buyer for one or both apartments

so long as the value of each apartment is less than \$750,000 and each apartment has a separate title.

Note comments in 'out example 4' about apportionment of the value and a special condition in the contract.

Out example 6 – one vendor, three titles (apartment title plus two car space titles), price \$750,000

Background

A vendor is the sole registered proprietor of one apartment with two car spaces. The apartment and car spaces are each on a separate title (three titles in total). The sale is input-taxed for GST purposes as the supply of existing residential premises.

The apartment and car spaces were sold pursuant to one contract of sale for a combined price of \$750,000. The contract is dated 1 July 2017.

Settlement is due in 60 days.

Action

The regime does not apply where the market value for each title results in each title being less than \$750,000.

It would make no difference if:

- the vendor sold pursuant to separate contracts
- the vendor sold more than three titles
- the purchaser nominated an additional or substitute buyer for one or more titles

so long as the value of each title has a value less than \$750,000.

Note comments in 'out example 4' about apportionment of the value and specifying the value of each title in the contract.

Not sure example 1 – one vendor, three titles (apartment title plus two car space titles), price \$750,000

Background

Same as 'Out example 6' with the differences being:

- the titles are restricted units on a strata plan of subdivision so the car spaces must be sold with the apartment; or
- the planning permit for the property provides that any car spaces on separate titles cannot be sold without an apartment title.

Issue

The issue is whether the regime applies to each title separately or to the property as a whole because of the restriction on the transfer of the titles.

Leases

Taxable Australian real property is defined to include leases.

However, the withholding obligation only arises where the market value of the lease is more than \$750,000 (for example, if a lease premium is paid by the lessee to a foreign resident lessor).

According to the ATO, market rent is not taken into account.

In example

A foreign resident owns a commercial property and grants a lease to a company.

Under the terms of the lease, the company agrees to pay the foreign resident landlord \$750,000 as a lease premium plus rent and outgoings.

The tenant should withhold \$250,000, must register as a withholder and must pay this amount to the ATO on or prior to the grant of the lease.

Indirect Australian real property interests

Interests in an entity such as shares and units, known as membership interests, are indirect Australian real property interests where the following two tests are satisfied.

- A foreign resident holds an associate inclusive interest of 10 per cent or more in the relevant entity for 12 months in the 24 months prior to the dealing (non-portfolio interest test).
- The majority of the value of the entity's assets consist of real property, or interests in real property (principal asset test).

Certain transactions which would otherwise be caught are excluded, for example transactions on an approved stock exchange.

In example – sale of shares in company

Background

This example is based on an ATO example.

A foreign resident holds 15 shares out of 100 issued shares in an Australian company and enters into an agreement to sell eight shares.

The company's assets are:

- plant and equipment \$4.1M and mining information \$2.8M – total \$6.9M
- land \$5M and mining rights \$1.7M million – total \$6.7M.

Action

The mining information and plant and equipment do not come within the scope of taxable Australian real property.

This means the market values of the taxable Australian real property of the mining company is \$6.7M and of the other assets \$6.9M.

As the sum of the market values of the non-taxable Australian real property assets exceeds that of the taxable Australian real property, the principal asset test is not satisfied.

Consequently, the eight per cent interest the foreign resident has disposed of is not an indirect Australian real property interest, so no foreign resident capital gains withholding would apply to the disposal by the foreign resident.

Membership interest declarations

ATO example 1 – declaration that vendor is an Australian resident

Andrew enters into an off-market transaction to acquire all of the shares in a company. The majority of the company's investments are in real property holdings throughout Australia. The shares, therefore, constitute indirect Australian real property interests.

Andrew does not know the vendor of the shares. Under the terms of the sale contract, Andrew is to transfer the purchase price of the shares to an overseas bank account in the name of an associate of the vendor.

At this stage, the knowledge condition in subparagraph 14-210(1)(c)(ii) of Schedule 1 to the TAA is satisfied. Andrew notifies the vendor that he intends to withhold a portion of the purchase price unless the vendor can provide Andrew with further information about his residency (or a declaration).

The vendor provides Andrew with a declaration that states that the vendor is an Australian resident for income tax purposes, which Andrew does not know to be false. The knowledge condition is no longer satisfied because Andrew has a declaration that the vendor is an Australian resident, that he is entitled to rely on.

Even if Andrew could not verify the declaration to the extent necessary for him to have a reasonable belief in its accuracy, he could rely on it (provided he did not know it to be false) and no payment obligation would arise.

ATO example 2 – declaration that the interest being sold is not an indirect Australian real property interest

Lulu enters into an off-market transaction to acquire all of the shares in a company. The company's investments include real property holdings throughout Australia.

Lulu does not know the vendor of the shares, but under the terms of the sale contract, she is to

transfer the purchase price of the shares to an overseas bank account in the name of the vendor. Lulu at this point believes the vendor is a foreign resident.

However, before settlement, the vendor provides Lulu with a declaration that states that the interest being sold is not an indirect Australian real property interest.

Even if Lulu could not verify the declaration to the extent necessary for her to have a reasonable belief in its accuracy, she could rely on it (provided she did not know it to be false) and no payment obligation would arise.

The knowledge condition

ATO example

Zack and Belinda enter into an off-market transaction to acquire all of the shares in a company from a friend of their family. The majority of the company's investments are in real property holdings throughout Australia. The shares, therefore, constitute indirect Australian real property interests.

The friend has not provided a declaration to Zack or Belinda stating that the shares **are not** an indirect Australian real property interest, or that the friend **is** an Australian resident.

In deciding that they did need to withhold from the payment, Zach and Belinda considered their relationship with the vendor. They had known the family friend for many years, and had no reason to ever think that the family friend had an address outside of Australia. They also knew that the funds were being paid into an Australian bank account.

Consequently, Zach and Belinda are satisfied that they have met the knowledge condition as they reasonably believe the family friend to be a resident. Hence, they do not withhold from the payment.

Other issues

Price v cost base

In this bulletin reference is made to the 'price'.

The ATO has indicated it will accept the price as the cost base when calculating the 12.5 per cent to be withheld.

There is a risk the ATO will change its position which may expose a purchaser to a liability.

Severing a joint tenancy

According to the ATO website:

For CGT purposes, joint tenants are treated as tenants in common having equal shares in the asset. Each party therefore has an equal share of any capital gain or capital loss from a CGT event. For example, a couple that owns a rental property as joint tenants splits the capital gain or capital loss equally when they sell the property.

Issue

The new regime does not specifically exclude severing a joint tenant.

For this reason LPLC recommends that an application be made stating that nil should be withheld given this would not usually trigger a CGT payment.

It is expected that the ATO will treat the severing of a joint tenancy to any share other than tenants

in common as triggering a withholding obligation as this would be an acquisition.

Sale of business and freehold

Background

It is not uncommon for a vendor to be selling their business and freehold at the same time. This may be to one entity, to two unrelated separate entities or to two related entities – one to own the business and the other to be registered as the proprietor of the freehold.

Issue

Are these transactions caught by the new regime? There are a number of factors to be considered.

Comments – acquisition of Australian real property

- Where the acquisition is directly from the proprietor of the business and the land then from 1 July 2017 the \$750,000 or more (previously \$2M) test applies to the land value.
- Where the value of the land from 1 July 2017 is \$750,000 or more (previously \$2M) or more then the transaction would be caught (subject to the application of any other exception to the regime).
- Where the contract price is an un-dissected lump sum there would usually be an apportionment of the value between the business and land. Where the land value is less than \$750,000 from 1 July 2017 (previously \$2M), the transaction is not caught by the new regime, even if the combined value of the land and business is more than \$750,000 (previously \$2M).

The real issue is how the value is allocated. Consider the need to refer the client to a valuer especially where:

- the parties are related / associated and/or
- the value of the land is close to the \$750,000 threshold for acquisitions from 1 July 2017 and previously \$2M.

Comments – indirect Australian real property

If in the above scenario the vendor of the business and land is a company, the purchaser may acquire the shares in the company instead of the underlying assets.

Assume for the purpose of this scenario there is one vendor shareholder.

Where the value of the Australian real property in the company exceeds the value of the other assets in the company (ie the business) then the transaction is caught by the new withholding regime.

The withholding would apply on the value of the shares, not the value of the land, unless a valid variation, interest declaration or residency declaration was made by the vendor.

Deceased estates and trusts

The regime applies to the acquisition of a CGT asset from a deceased estate. This would include the transfer of an asset to a legal personal representative and a beneficiary.

The ATO has issued Legislative Instrument about deceased estates. You can find the instrument [here](#). You can also find information on the ATO website about this instrument [here](#).

A similar issue arises where there is a retirement of a trustee and appointment of a new trustee.

Family law

The change in ownership of assets in the family law context would ordinarily be caught by the new regime and the same rules would apply.

Issue

One issue which may arise is that an agreement is entered into prior to 1 July 2016 and/or court orders made prior to 1 July 2016 but the transfer does not occur until after 1 July 2016.

In this scenario a party may have an obligation to withhold but by doing so may be in breach of the agreement and/or court order.

Solution

One possible solution would be to seek to amend the agreement and/or court order.

Action

Family law practitioners also need to consider the amendments they need to make to their precedents to ensure the purchaser's obligation to withhold is taken into account, in particular under financial agreement and consent orders.

The ATO has issued Legislative Instrument about family law matters. You can find the instrument [here](#).

Gifts

The regime may apply. Whether withholding is required depends on the circumstances of the matter.

Transfer between spouses

The regime may apply. Whether withholding is required depends on the circumstances of the matter.

Transfer to beneficiary of a trust

The regime applies. Whether withholding is required depends on the circumstances of the matter.

Adjustments – acquisition of taxable Australian property

According to the ATO, where the purchase price is used as a proxy for market value, the market value is the purchase price before adjustment for any disbursements at settlement (e.g. for council rates, water and sewer charges and strata levies). Therefore, the \$750,000 threshold test from 1 July 2017 (previously \$2M) is applied to the purchase price before adjustment for disbursements

Adjustments example

Background

- Sale of an existing residence subject to a residential lease (input-taxed for GST purposes).
- Contract sale price is \$745,000.
- Contract date 1 July 2017.
- Vendor has paid in advance all council, water and land tax and rent is also to be adjusted.
- Purchaser makes an allowance by way of an adjustment of \$5,000.

- This means in total the vendor will receive \$750,000 at settlement.

Question

- Does a purchaser have to withhold the 12.5 per cent?

Answer

Adjustments do not change the price of the asset. As the purchase price is being used as a proxy for market value the adjustments are irrelevant. As the purchase price is below \$750,000 there is no withholding.

GST

According to the ATO, where the purchaser is entitled to an input tax credit, the GST-inclusive purchase price less the input tax credit may be used by the purchaser as the amount upon which the 12.5 per cent withholding is applied.

This calculation also applies in determining if the \$750,000 market value (purchase price as proxy) threshold has been met.

Conversely, where the margin scheme is used or the purchaser is not entitled to an input tax credit, the GST-inclusive price will be the amount upon which the 12.5 per cent withholding is applied.

GST example 1

Background

- Sale of a commercial property used as a factory with no tenant (assume this is a taxable supply for GST purposes).
- Sale as at 1 July 2017.
- Sale price \$740,000 plus GST.
- Assume total paid to vendor at settlement \$814,000.
- Assume purchaser is entitled to an input tax credit.

Question

Does a purchaser have to withhold the 12.5 per cent?

Answer

The purchaser is able to claim an input tax credit so the market value / purchase price is a GST-inclusive purchase price less the input tax credit (which the example assumes is \$74,000). Consequently, the purchase price is below \$750,000 therefore no withholding applies.

GST example 2

Background

- Same as example 2 but assume purchaser is not registered or required to be registered for GST.
- Total paid to vendor at settlement is \$814,000.

Question

Does a purchaser have to withhold the 12.5 per cent?

Answer

The purchaser is not able to claim an input tax credit so the GST-inclusive price will be the amount upon which the 12.5 per cent withholding is applied. As this is \$814,000 withholding applies as the market value is above \$750,000.

GST example 3

Background

- Sale of a commercial property used as a factory subject to a lease (assume this supply qualifies as a going concern).
- Sale as at 1 July 2017.
- Sale price \$740,000 plus GST but no GST payable as the supply is of a going concern.
- Total paid to vendor at settlement \$740,000.

Question

Does a purchaser have to withhold the 12.5 per cent?

Answer

The purchaser is not entitled to an input tax credit on the purchase as there is no GST amount included in a GST-free supply of a going concern. It is the GST-exclusive purchase price that is used to determine if the \$750,000 market value (purchase price) threshold is met. Purchase price ex-GST was \$740,000 so there is no withholding required.

GST example 4

Background

- Sale of vacant land on the margin scheme (assume this is a taxable supply for GST purposes.)
- Sale as at 1 July 2017.
- Sale price \$740,000 plus GST.
- GST payable on the margin \$40,000.
- Total paid to vendor at settlement \$780,000.
- The purchaser is not entitled to an input tax credit for GST because the margin scheme applies.

Question

Does a purchaser have to withhold the 12.5 per cent?

Answer

The margin scheme applies so the purchaser is not able to claim an input tax credit. The total amount payable including GST is \$780,000. Withholding applies as the market value (purchase price) must be below \$750,000 to be excluded from the measure.

Further information on the ATO website

Online forms and instructions

- [Online Clearance Certificate Application form – Foreign resident capital gains withholding](#)
- [Online Variation Application form – Foreign resident capital gains withholding](#)

- [Online Purchaser Payment Notification form – Foreign resident capital gains withholding](#)

Law companion guides

- [LCG 2016/5](#) - Foreign resident capital gains withholding regime: the Commissioner's variation power
- [LCG 2016/6](#) – Foreign resident capital gains withholding regime: amount payable to the Commissioner
- [LCG 2016/7](#) - Foreign resident capital gains withholding regime: options