

GMS Flash Alert



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Australia - Capital Gains Tax Changes Impacting Foreign Residents

On 21 July 2017, Australia's Treasury released an Exposure Draft containing the details of the legislation seeking to remove the Capital Gains Tax (CGT) main residence exemption for foreign residents.¹ This measure was announced as part of the "housing tax integrity" measures included in the 2017-18 Australian Federal Budget. (For coverage of this year's Federal Budget announcements and their impact on employers and expatriates, see GMS [Flash Alert 2017-088](#), 11 May 2017.)

WHY THIS MATTERS

- i. The Exposure Draft released on 21 July 2017 proposes that the entitlement to the CGT main residence exemption will be removed for all individuals that are not resident for Australian tax purposes at the time of entering into the contract for sale of the property.
- ii. The new legislation will also apply to Australian citizens or permanent residents who dispose of their Australian main residence while a foreign resident, e.g., while working overseas on secondment.
- iii. The proposed transitional provisions will allow foreign residents to still access the CGT main residence exemption provided the CGT event occurs on or before 30 June 2019, and the ownership interest in the residence was held throughout the period starting just before 7:30pm (by legal time in the Australian Capital Territory) on 9 May 2017 and ending just before the CGT event occurs.
- iv. For those individuals who do not qualify for the above transitional provisions, the removal of the entitlement to the CGT main residence exemption should mean heavier tax costs tied to ownership of main residences and sales thereof, as well as a change in how they would declare the gains and complete their tax returns.
- v. Employers should communicate these changes to their employees so that the necessary planning is undertaken to help ensure employees undertaking an overseas secondment are not caught out unnecessarily paying Australian CGT on their main residence. Planning might entail, depending on the individual's situation, deferring commencement of his or her secondment.

Background

Prior to the Federal Budget announcements in May, both resident and non-resident taxpayers had access to the CGT main residence exemption which generally allowed for an exemption from Australian CGT in relation to a property considered to be a taxpayer's main residence. The exemption continued to be available for a period of up to six years where a taxpayer vacated his or her main residence and used it to produce rental income.

This option was popular for expatriate employees who undertook an overseas secondment and became a non-resident of Australia for tax purposes (hereafter referred to as a "foreign resident"). Such taxpayers would rent out their main residence in Australia while on their overseas secondment and were still able to access the exemption provided they stopped using their main residence to produce income before the six-year period expired.

Exposure Draft for Removal of CGT Main Residence Exemption

As the draft legislation proposes to apply to "foreign residents," which, by definition, are those taxpayers that are not "resident" for Australian tax purposes, the new rules will also apply to Australian citizens or permanent residents who dispose of their Australian main residences while foreign residents, e.g., while working overseas on secondment.

The determining factor is the Australian tax residency status of the taxpayer at the time of the CGT event (i.e., when the contract for sale is signed). Therefore, for any Australian citizen and permanent resident who may be a foreign resident for a period of time and rents out his Australian main residence while working overseas, the CGT main residence exemption should still be available (provided all other requirements are satisfied) if the individual repatriates to Australia and dispose of his main residence after re-establishing Australian tax residency.

Transitional provisions will still allow foreign residents to access the exemption on sales occurring on or before 30 June 2019, if the ownership interest in the residence was held throughout the period starting just before 7:30pm (by legal time in the Australian Capital Territory) on 9 May 2017 and ending just before the CGT event occurs.

KPMG NOTE

While the Budget papers indicated that the CGT main residence exemption would be denied for both foreign residents and temporary residents, the Exposure Draft legislation makes reference only to foreign residents.

Changes to Withholding Tax on Sale of Australian Real Property

Effective 1 July 2017, the withholding tax for foreign residents on sales of Australian real property has increased from 10 percent to 12.5 percent, with the applicable market value threshold decreasing from A\$1million to A\$750,000.²

Purchasers now have the onus to withhold and remit withholding taxes to the Australian Taxation Office (ATO) on behalf of the vendor to the value of 12.5 percent of the property purchase price if the price of the property exceeds A\$750,000.

While the withholding taxes are intended to only be applicable to foreign residents, all vendors (including Australian tax residents) must apply to the ATO for a clearance certificate and provide it to the purchaser prior to settlement. As only Australian tax residents are eligible to receive the certificate, all purchasers will be required to withhold the tax from foreign residents. Furthermore, if a vendor fails to provide a clearance certificate, the purchaser is still required to withhold taxes regardless of the vendor's Australian tax residency.

Penalties apply to purchasers for failing to withhold and remit tax to the ATO in the absence of a clearance certificate.

KPMG NOTE

If the vendor believes that she will not make a capital gain upon the sale or the prescribed withholding tax would exceed her actual tax liability in respect of the capital gain, the vendor can apply for a variation by completing an online form. This also applies to foreign residents who are not able to obtain a clearance certificate but are eligible for the main residence exemption (under the new proposed transitional provisions). The variation notice will be issued by the ATO within 28 days and should be shown to the purchaser before settlement so that the reduced withholding rate is applied.

Where withholding tax is remitted to the ATO, the vendor will receive a confirmation from the ATO which will allow her to claim a credit for the taxes paid in her Australian tax returns when the capital gain from the sale of the property is declared, meaning the balance of the tax liability will be payable upon submission of the vendor's Australian tax return.

KPMG NOTE

Considerations and Action Steps

While it is not common for an expatriate employee on a fixed-term secondment to dispose of his or her Australian main residence in Australia when on secondment, it can and does happen.

Any expatriate employees that are currently foreign resident and considering selling their main residences should make sure they enter into a contract to sell the property before 30 June 2019 (provided they held an ownership interest in the property at 7:30pm by legal time in the Australian Capital Territory on 9 May 2017). This will allow them to access the exemption via the transitional provisions.

Taxpayers that did not hold their ownership interest at 7:30pm on 9 May 2017, or are looking to sell their main residences after 30 June 2019, should consider waiting until they resume Australian tax residency before selling their main residence, as this should allow them to still access the CGT main residence exemption (provided they meet the other requirements).

Any taxpayers that are currently Australian tax resident and considering selling their main residence should make sure they enter into the contract for sale of their residence while still Australian tax resident, and before commencing an overseas secondment if the secondment will result in them becoming a foreign resident for Australian tax purposes. They may need to consider deferring the commencement date of their secondment in this scenario.

Any foreign residents that are not able to access the CGT main residence exemption under the new legislation should include any associated capital gain from the sale of their Australian property in their Australian tax return, with regard to any CGT discount that may be available (if any).

It is important to note that the legislation seeking to remove the CGT main residence exemption for foreign residents is yet to be enacted and is currently only in draft. Our comments above are based on the Exposure Draft released by Treasury on 21 July 2017.

Any taxpayers anticipating a sale of an Australian investment property as a foreign resident should be aware of the withholding tax that will be imposed on them (where the A\$750,000 threshold is exceeded) and the ability to apply for a

variation where necessary. The changes to the withholding tax legislation have already been enacted and apply from 1 July 2017.

FOOTNOTES:

- 1 For the Exposure Draft and Explanatory Material, [click here](#).
- 2 To see “Capital gains withholding: Impacts on foreign and Australian residents,” [click here](#).

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A\$1 = US\$0.798
A\$1 = £0.615
A\$1 = €0.672
A\$1 = ¥87.91

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