



LCG 2016/5 - Foreign resident capital gains withholding regime: the Commissioner's variation power

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Foreign resident capital gains withholding regime: the Commissioner's variation power

Relying on this Guideline

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953*.

This Guideline describes how the Commissioner will apply section 14-235 of Schedule 1 of the *Taxation Administration Act 1953*, to entities that rely on this Guideline in good faith.

If you rely on this Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Guideline if it does not correctly state how a relevant provision applies to you.

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What this Guideline is about

1. This Guideline considers the Commissioner's discretion to vary the amount to be withheld under the foreign resident capital gains withholding regime where an application for a variation has been received.
2. It describes some of the circumstances we consider would support a request to vary particular amounts under subsection 14-235(2) of Schedule 1 to the *Taxation Administration Act 1953*.¹
3. You may apply for a variation even if your circumstances are different to those described in this Guideline. We will consider each application on its merits and make a decision based on the particular facts.
4. We will review the administration of this regime periodically to consider whether there are additional circumstances in which classes of amounts should give rise to a variation under subsection 14-235(5).

Date of effect

5. This Guideline applies to acquisitions of assets that are:
 - 'taxable Australian real property' (TARP)²
 - an 'indirect Australian real property interest'³, or
 - an option or right to acquire such property or interestunder transactions entered into on or after 1 July 2016, where the vendor of the asset is a relevant foreign resident.⁴

Background

6. Under Subdivision 14-D, purchasers of certain types of capital gains tax assets (CGT assets) must pay an amount to the Commissioner if they acquire the asset from one or more relevant foreign resident vendors. The purchaser meets this obligation by withholding an amount from their payment to the vendor.⁵
7. The amount payable to the Commissioner is generally 10% of the asset's purchase price, unless the Commissioner exercises the discretion under section 14-235 (the variation power) to vary the amount or classes of amounts.⁶

The Commissioner's variation power

8. Under subsection 14-235(2), the Commissioner may vary the particular amount otherwise payable by the purchaser under section 14-200.
9. The variation must be in writing, and takes effect when the purchaser becomes aware of it. Usually this will be when the notice of variation is provided to the purchaser.⁷

¹ All legislative references are to Schedule 1 of the *Taxation Administration Act 1953* unless otherwise stated.

² Defined in section 855-20 of the *Income Tax Assessment Act 1997* (ITAA 1997).

³ Defined in section 855-25 of the ITAA 1997.

⁴ Section 14-210 sets out whether the vendor is a foreign resident for the purposes of the withholding obligation.

⁵ Subsection 16-20(2) discharges the purchaser from any liability to pay the vendor to the extent that an amount is paid to the Commissioner as required by this withholding obligation.

⁶ Subsection 14-235(2) allows the Commissioner to vary a particular amount payable by a specific purchaser, while subsection 14-235(5) allows the Commissioner to vary the amount payable by a class of purchasers (a class of amounts).

10. You or your representative may apply to the Commissioner in the approved form for a variation if you are:

- the purchaser of the CGT asset
- the vendor of the CGT asset (including the grantor of an option that has not yet been exercised), or
- an entity that is owed a debt by the vendor.⁸

11. This Guideline discusses some of the matters the Commissioner will take into account when deciding whether to exercise the variation power in the circumstances detailed below.

Applying for a variation

12. You should apply for a variation as soon as practicable in the sale process. This will help to ensure that we have sufficient time to assess the application and, if the request is granted, issue you with the notice of variation before the settlement date.

13. You may apply for a variation before the exchange of contracts. However, you will need to provide information to support your application. Where the sale is by auction, you can apply for a variation that is conditional on the purchase price not exceeding a certain amount.

Circumstances supporting a variation or conditional variation

14. The following scenarios indicate how the Commissioner will exercise the variation power under subsection 14-235(2) in the absence of any relevant factors to the contrary. We consider each application on its merits, and make the decision based on the particular facts.

15. You must provide sufficient evidence to support your application. The information required will reflect your reasons for seeking the variation. Penalties apply for making a false or misleading statement in the application.

16. We may grant the variation request on the proviso that certain conditions are met (for example, the purchase price does not exceed a specified amount, or the transaction occurs as described). Where those conditions are not met, and the purchaser is aware of those conditions not being met, the purchaser should withhold the full 10% from the purchase price to avoid having to pay a penalty equal to the amount that should have been withheld.

17. When a purchaser has specific knowledge of the conditions not being met, or knows that the conditions cannot be met in practice, we will treat them as knowing that the stated conditions are not met. For example, if the true purchase price of the CGT asset is greater than the price stated in the notice of variation, we treat the purchaser as knowing that a condition relevant to the variation is not satisfied.

⁷ Subsection 14-235(2).

⁸ Subsection 14-235(3).

Vendor makes no capital gain or a lesser capital gain

18. The Commissioner considers that where the vendor will not make a capital gain on the disposal of the CGT asset or a net capital gain for the income year, this factor supports a decision to vary the withholding amount to nil. This may occur where:

- the disposal of the CGT asset gives rise to CGT event A1 (disposal of a CGT asset) and the capital proceeds from the disposal are equal to or less than the asset's cost base⁹
- the vendor will not have a net capital gain for the income year due to:
 - total capital gains made, or expected to be made, during the income year being less than total capital losses for the income year (that is, the vendor has a net capital loss), or
 - unutilised net capital losses from previous years being greater than the result of capital gains for the current income year reduced by any current year capital losses, or
- the capital gain is deferred as a CGT roll-over applies, or
- the capital gain is exempt as a CGT exemption applies.

19. If the Commissioner is satisfied that the capital gain that the vendor will make on the disposal of the CGT asset, or the vendor's net capital gain for the income year, is less than the withholding amount, this supports a decision to vary the withholding amount.

20. If the vendor claims that they will not make a capital gain on the disposal of the CGT asset, or will make a capital gain that is less than the withholding amount, the vendor needs to provide evidence of the CGT consequences of the sale, such as the CGT calculation and a copy of the source documents used for the calculation, with their application.

21. Similarly, if the vendor claims that they will not make a net capital gain for the income year, or will make a net capital gain less than the withholding amount, they will need to provide evidence of all the capital gains and losses they have made, or expect to make, in the income year. The evidence must include the CGT calculations and a copy of the source documents used for each calculation, and evidence of any unused capital losses from previous years. If the vendor is a company, it must demonstrate that any unused capital losses remain available for deduction against current year capital gains under the company loss rules.¹⁰

22. If the vendor claims that the transaction is eligible for a CGT roll-over, they must identify which roll-over is available, explain how the roll-over applies to their circumstances, and provide supporting information that substantiates their claim. If the identified roll-over operates only when an entity chooses the roll-over, we will assess the application with the expectation that the vendor will choose the rollover by lodging their tax return on that basis. If the vendor fails to do so, they run the risk of having made a false or misleading statement in their variation application, and being subjected to penalties.

Example 1 – Disposal of asset does not give rise to capital gain

23. *Victor is a foreign resident who bought a residential property in May 2016 for \$3 million.*

⁹ Section 104-10 of the ITAA 1997.

¹⁰ The vendor will need to demonstrate that it satisfies the continuity of ownership test or same business test under Division 165 of the ITAA 1997.

24. Due to a change in his personal circumstances, Victor decides to sell the property. Based on the limited period of time he has held the asset, and the prevailing market conditions, Victor does not expect to sell the property for more than \$3 million (that is, he does not expect to make a capital gain). He obtains a valuation report from a licenced valuer, which confirms his view.

25. As Victor is a foreign resident, he is unable to obtain a clearance certificate from the Commissioner under section 14-220.

26. Victor applies to the Commissioner for a variation. He provides evidence to support his claim, including the valuation report. After assessing the application and supporting evidence, the Commissioner issues a notice of variation to Victor. This states that the amount the property's purchaser must pay to the Commissioner is reduced to nil. The variation is granted subject to the condition that the purchase price for the property does not exceed \$3 million.

27. In September 2016, Victor sells the property at public auction to Qiao for \$2.9 million. Before settlement, Victor provides a copy of the notice of variation to Qiao. As the condition in the notice of variation is satisfied, Qiao's liability to the Commissioner under section 14-200 is nil.

Example 2 – Same-asset roll-over

28. Gallant Company Ltd is an Australian resident company with wholly-owned Australian resident and foreign resident subsidiaries.

29. In December 2016, Gallant Company Ltd enters into a contract to purchase land in Australia from Nebula Co, one of its wholly-owned foreign resident subsidiaries. The purchase price is \$20 million. As Nebula Co makes a capital gain on the transfer, Gallant Company Ltd and Nebula Co will choose a roll-over available under the CGT provisions.

30. Nebula Co applies to the Commissioner for a variation, supplying all information and records necessary to demonstrate that roll-over relief is available under Subdivision 126-B of the ITAA 1997. After considering the application and supporting information, the Commissioner varies the withholding amount to nil. This variation is subject to the transaction occurring as described and the structure of the wholly-owned group not changing in a way that is material to the availability of the roll-over.

31. Before settlement, Nebula Co is acquired by Space Limited, an unrelated Australian resident company. The sale of land goes ahead as contracted, but Gallant Company Ltd and Nebula Co are no longer members of the same wholly-owned group. Therefore, Nebula Co is not entitled to the roll-over relief that was originally contemplated. Gallant Company Ltd, knowing that the ownership structure of the vendor has changed from that specified in the notice of variation, knows that it cannot rely on the variation. As Nebula Co cannot provide a clearance certificate, Gallant Company Ltd withholds \$2 million from Nebula Co at settlement, and pays this amount to the Commissioner.

Example 3 – Marriage or relationship breakdown roll-over

32. After 10 years of marriage, Jenny and Mark decide to separate. Mark is an American national, and returns to the United States. He ceases to be an Australian resident on 6 June 2016. Jenny continues to live in Australia and remains an Australian resident.

33. On 1 July 2017, Jenny and Mark file for divorce in the Family Court of Australia. Jenny and Mark jointly own two properties in Australia – a house in Melbourne valued at \$3 million and an apartment in Sydney valued at \$2 million. They have agreed that Jenny will keep the Melbourne house and Mark will keep the Sydney apartment. They file consent orders for Mark to transfer his interest in the Melbourne house to Jenny, and for Jenny to transfer her interest in the Sydney apartment to Mark. Both transfers are subject to the withholding obligation.

34. As Jenny is an Australian resident, she can obtain a clearance certificate for the transfer of her interest in the Sydney apartment. Mark is a foreign resident and cannot obtain a clearance certificate for the transfer of his interest in the Melbourne house. However, Mark will not make a capital gain, as he is entitled to a roll-over under Subdivision 126-A of the ITAA 1997 because the transfer is the result of the breakdown of his marriage with Jenny.

35. Mark has been away from Australia, and is not aware of the withholding obligation. He tells Jenny he does not know how to apply for a variation. Jenny decides to apply for a variation herself, as she is entitled to do so as a purchaser. She supplies a copy of the application for divorce and the draft consent orders to support her application. After considering the application and supporting information, the Commissioner determines that the roll-over in Subdivision 126-A of the ITAA 1997 applies and varies the withholding amount to nil.

Example 4 – Roll-over for business restructure

36. Foreign Co is a foreign resident company. Mining Co is its majority owned Australian resident company that holds substantial taxable Australian real property. The shares that Foreign Co holds in Mining Co are indirect Australian real property interests, and have a cost base of \$50 million. The other shareholders of Mining Co are Australian residents.

37. Foreign Co, along with the other shareholders of Mining Co, decide to restructure their Australian operations. They plan to interpose Aus Co as the holding company of all the shares in Mining Co. Each shareholder will receive one share in Aus Co for every share they hold in Mining Co.

38. As Aus Co will be acquiring indirect Australian real property interests from a foreign resident (Foreign Co), Aus Co will be required to withhold 10% of the amount that is its first element of the cost base of the Mining Co shares.

39. CGT event A1 (disposal of a CGT asset) will happen when Foreign Co disposes of its shares in Mining Co to Aus Co.¹¹ Foreign Co anticipates the market value of the Aus Co shares it will receive in exchange for the disposal will be \$100 million. Accordingly, Foreign Co anticipates it will make a capital gain of \$50 million (being \$100 million in capital proceeds minus the \$50 million cost base) from the disposal of its shares in Mining Co to Aus Co.

40. Foreign Co determines that it will be eligible for a roll-over under Division 615 of the ITAA 1997, and chooses the roll-over to defer the capital gain until it disposes of its shares in Aus Co. Foreign Co applies to the Commissioner for a variation, outlining its restructure plans, and provides all information and records necessary to demonstrate that it would be eligible for the roll-over relief. After considering the application and supporting information, the Commissioner varies the withholding amount to nil, subject to the condition that the restructure proceeds as outlined.

¹¹ Section 104-10 of the ITAA 1997.

41. *However, before the restructure happens, Foreign Co withdraws from its operations in Australia. It sells its shares in Mining Co to Boom Co, an unrelated Australian resident company, for \$100 million. As the restructure did not occur as outlined, Boom Co cannot rely on the variation issued to Foreign Co. As Boom Co knows that Foreign Co is a foreign resident, and Foreign Co cannot provide a valid declaration¹². Boom Co must withhold \$10 million from the payment it makes to Foreign Co.*

Vendor will not have an income tax liability

42. If a vendor is not expected to have an income tax liability for the income year, this supports a decision to vary the withholding amount to nil. This may occur when the vendor has tax deductions that exceed their assessable income, including any capital gain from disposal of a CGT asset.

43. The vendor needs to provide the following evidence to substantiate their position:

- analysis about the capital gain expected from disposing of the CGT asset, including the CGT calculation and a copy of the source documents used for the calculation
- evidence of any other income from Australian and (where relevant) non-Australian sources that the vendor expects to derive in the income year, and
- information about the deductions available to the vendor for the income year, including any evidence of unused losses, and unused capital losses, that will be used to offset the capital gain.

Example 5 – No income tax liability for the income year

44. *Priyani is a foreign resident who bought a commercial property in February 2010 for \$5 million.*

45. *In September 2016, Priyani enters into a contract to sell the property to Lia for \$6.5 million. Settlement of the contract is to take place in 2 months' time.*

46. *Priyani will make a \$1.5 million capital gain from the sale of the property in the 2017 income year. Priyani also has a commercial rental property in Australia from which she derives rental income. The deductions incurred in deriving that rental income are greater than the rental income received, and Priyani estimates that she will have a rental loss associated with that property of \$2 million for the 2017 income year. As the rental loss can be claimed as a deduction against other types of income, Priyani expects that she will have a tax loss for the 2017 income year of \$500,000.*

47. *Priyani applies to the Commissioner for a variation, providing sufficient evidence to support her claim. After assessing the application and supporting evidence, the Commissioner issues a notice of variation to Priyani. This states that the amount payable by the property's purchaser to the Commissioner is reduced to nil.*

48. *Before settlement, Priyani provides a copy of the notice of variation to Lia, whose liability to the Commissioner under section 14-200 is nil.*

¹² In accordance with section 14-225, this may be either a residency declaration or a declaration that the shares are not indirect Australian real property interests.

Secured and unsecured creditors

49. When exercising the variation power, the Commissioner must consider the creditor's right to recover a debt.¹³ This ensures the withholding provisions do not give the Commissioner a preferential position over other creditors.

50. A secured or unsecured creditor may apply to the Commissioner for a variation when the payment of the full withholding amount jeopardises the creditor's ability to recover a debt from the vendor. This may occur, for example, where:

- a creditor of the vendor has a mortgage or other security interest over the relevant property, and the proceeds of sale available at settlement are insufficient to cover both the amount to be withheld and to discharge the debt secured by the property, or
- a creditor acquires legal title to the property (that is, becomes the purchaser) as a result of an order for foreclosure, and its security would be further diminished as a result of having to comply with the withholding obligation.

51. When applying for the variation, the creditor must provide evidence of its security, and the effect of the withholding obligation on that security, including:

- the amount of the debt owed by the vendor or secured by the property
- when the debt was incurred
- the value of the creditor's security (for example, the market value of the CGT asset)
- whether other forms of security are available in relation to the debt
- the purchase price of the CGT asset under the contract of sale entered into between the vendor and purchaser, and
- how the remaining proceeds (after the 10% withholding) would be insufficient to discharge the vendor's debt to the creditor.

Example 6 – Mortgage over CGT asset

52. *Scotch Shoppe is a foreign resident and specialty scotch retailer that owns commercial property in Australia. Scotch Shoppe owes \$3 million to an unrelated Australian entity, Borrowers' Bank, which is secured by a mortgage over the Australian property.*

53. *In December 2016, Scotch Shoppe enters into a contract to sell the property to an Australian purchaser for \$3.2 million. As Scotch Shoppe is a foreign resident, the purchaser will be required to pay \$320,000 (10% of \$3.2 million) to the Commissioner on or before the day they become the owner of the property, unless this amount is varied. However, once the \$320,000 is accounted for, the net proceeds remaining at settlement, \$2.88 million, will be insufficient to discharge the mortgage.*

54. *Borrowers' Bank applies to the Commissioner for a variation, providing the necessary supporting information, including the final payout figure at settlement. After considering the information provided, and all the relevant facts, the Commissioner determines that, if the full withholding amount is paid, the remaining proceeds of sale at settlement will fall \$120,000 short of what is owed to the bank. The Commissioner issues a notice of variation that reduces the withholding rate to 6.25%, so the Australian purchaser will withhold \$200,000. This ensures that the proceeds remaining at settlement are sufficient to discharge the mortgage (\$3.2 million less \$200,000 leaves \$3 million). The*

¹³ Subsection 14-235(1).

variation is granted on the condition that the true final payout figure is the amount stated in the application.

Example 7 – Variation to nil

55. *Grimmwald's is a foreign resident and novelties retailer that owns commercial property in Australia. Grimmwald's owes \$3 million to an unrelated Australian entity, Borrowers' Bank, which is secured by a mortgage over the property.*

56. *The business has suffered from poor performance in the last few years, and has missed a number of repayments on the loan. Borrowers' Bank exercises its power of sale to recover the debt.*

57. *In December 2016, the property is to be sold to an Australian purchaser for \$2.9 million. As the proceeds from the sale will be insufficient to discharge the mortgage, Borrowers' Bank applies for a variation to the Commissioner, providing the necessary supporting information, including evidence that it has no other security over the debt. The Commissioner, after considering the information and all the relevant facts, determines that the purchaser's compliance with the withholding obligation would further diminish Borrowers' Bank's ability to recover its debt. Accordingly, the Commissioner issues a notice of variation reducing the withholding amount to nil.*

Example 8 – Foreclosure

58. *Zack, a foreign resident, owns a commercial property in Australia. Zack has a loan of \$3 million with Bank of Greater Melbourne, which is secured by a mortgage over the property.*

59. *Zack is in default on his loan repayments, and the bank exercises its power of sale to recover the debt. In August 2016, the property is offered for sale in a public auction but is passed in. There is no change of ownership at this time.*

60. *In September 2016, Bank of Greater Melbourne seeks an order for foreclosure. The order will allow Bank of Greater Melbourne to take legal title of the property from Zack. That is, the bank becomes the purchaser of the property. For the purposes of the withholding obligation, Bank of Greater Melbourne will be taken to have acquired the property from Zack, and therefore will be required to withhold and pay an amount to the Commissioner on or before the day it acquires the legal title.*

61. *Before seeking the order, the bank applies to the Commissioner for a variation. When assessing the application, the Commissioner takes into account the need to protect the bank's right to recover the debt. The market value of the property is less than the amount Zack owes to the bank, and the Commissioner concludes that compliance with the withholding obligation would further jeopardise the Bank of Greater Melbourne's ability to recover the debt and varies the withholding amount to nil.*

62. *Note: Where a lender is granted an order for foreclosure, and the market value of the property is sufficient to cover the vendor's debt, the lender's expenses and all or part of the lender's withholding obligation, there may not be grounds for a nil variation. However, a lender can request that the Commissioner exercise the power under subsection 255-10(1) to defer the time at which the amount payable under section 14-200 becomes due and payable to the time the lender sells the property to recover the debt. Lenders whose circumstances support the exercise of the power under subsection 255-10(1) may notify the Commissioner and provide the relevant supporting information through the variation process.*

Non-cash consideration

63. When the purchaser gives non-cash consideration to acquire a CGT asset, the purchaser must pay the withholding amount to the Commissioner from a source other than the consideration payable to the vendor.

64. In these situations, to determine the first element of the CGT asset's cost base (and therefore the amount required to be withheld under section 14-200), the purchaser must determine the market value¹⁴ of the non-cash consideration given for the asset (worked out at the time of the acquisition).¹⁵

65. To meet the obligation under section 14-200, a purchaser providing only non-cash consideration may choose to reduce the amount of non-cash consideration they pay to the vendor by the amount they are required to pay to the Commissioner.¹⁶ Where the consideration for the CGT asset is partly cash and partly non-cash, the purchaser should make the payment to the Commissioner out of the cash component, or, where the cash component is insufficient to cover the full withholding amount, adjust the cash and non-cash components to allow them to meet their withholding obligation.

66. To ensure that all parties to the contract are aware of their withholding obligations early in the sale process, purchasers entering into non-cash transactions could consider negotiating a contractual adjustment of the non-cash consideration.

67. Alternatively, where the vendor is able to provide security to the Commissioner for their ultimate CGT liability for disposing of the asset, the vendor may seek a variation from the Commissioner. In the application, the vendor must provide evidence of:

- the consideration the purchaser is providing to acquire the CGT asset, including cash and non-cash components
- the vendor's CGT liability relating to the disposal of the asset, including the CGT calculation and a copy of the source documents used for the calculation, and
- the type of security the vendor is proposing to provide (for example, a security bond or deposit).

68. We will consider, on a case by case basis, whether the proposed security provides sufficient assurance that the vendor's ultimate CGT liability will be met. Where we are not satisfied with the adequacy of the security, we will work with the vendor to determine whether alternative forms of security are available. The provision of acceptable security by the vendor is the primary factor supporting the grant of a request to vary the withholding amount to nil.

Commissioner of Taxation

27 June 2016

¹⁴ Further guidance on market valuation can be found on our website. Go to ato.gov.au and search for 'market valuation'.

¹⁵ Paragraph 110-25(2)(b) of the ITAA 1997.

¹⁶ Subsection 16-20(2) discharges the purchaser from any liability to pay the vendor to the extent that an amount is paid to the Commissioner as required by this withholding obligation.

References

| ATOlaw topic | International issues ~ Non-resident Australian income ~ Other |
|------------------------|---|
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