



Explanatory Statement

PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives

General Outline of Instrument

1. This instrument is made under subsection 14-235(5) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
2. All legislative references in this explanatory statement are to Schedule 1 to the *Taxation Administration Act 1953* unless otherwise stated.
3. Subdivision 14-D requires that an amount be paid to the Commissioner of Taxation in relation to the acquisition of certain assets from one or more entities where at least one of those entities is a foreign resident within the meaning of section 14-210 at the time the transaction is entered into.
4. The instrument varies to nil the amount that
 - a deceased's legal personal representative (LPR);
 - beneficiaries of a deceased estate; or
 - surviving joint tenants that acquire a deceased joint tenant's interest in a relevant assetwould otherwise have to pay to the Commissioner under section 14-200.
5. This is a legislative instrument for the purposes of the *Legislation Act 2003*.
6. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

7. This instrument commences on the day after its registration on the Federal Register of Legislative Instruments.

What is this instrument about

8. Subdivision 14-D introduced a new regime, commencing on 1 July 2016, which imposed withholding obligations on the purchasers of certain Australian

assets. The purpose of the regime is to assist in the collection of foreign residents' capital gains tax (CGT) liabilities.

9. The amount payable to the Commissioner under the withholding regime is generally 10% of the asset's purchase price, unless the Commissioner exercises the discretion under section 14-235 to vary the amount or classes of amounts.¹
10. This instrument removes the need for the LPR, beneficiaries or surviving joint tenants to make an application for a variation under subsection 14-235(2). As a result of this instrument, no withholding is required when, as a result of the death of an individual:
 - a) the LPR is taken to have acquired the relevant asset following the death of the individual; or
 - b) a beneficiary obtains ownership of the relevant asset by way of direct transfer from the deceased or by transfer from the LPR of the deceased; or
 - c) a surviving joint tenant acquires the deceased joint tenant's interest in the relevant asset.

What is the effect of this instrument

11. In the absence of a variation under section 14-235, as is provided under this instrument, subsection 14-200(3) would require an amount to be paid to the Commissioner equal to 10% of the first element of the cost base of the asset being acquired. When an asset is acquired at no cost, the first element of cost base of the asset is the asset's market value at the time of acquisition².
12. The purpose of this instrument is to provide certainty to the acquiring entities specified in paragraph 9 of this explanatory statement by stating that no amount is required to be paid to the Commissioner in the circumstances specified in that paragraph.
13. The variation of the withholding amount to nil is consistent with what would be the ultimate tax liability in relation to the asset for the deceased and the acquiring entities in those circumstances.
14. The new instrument is of a minor or machinery nature. An assessment of the compliance cost impact indicates that both implementation and on-going compliance costs will be minor. It reduces the on-going compliance costs of the entities listed at paragraph 9 of this explanatory statement.

Background

15. The PAYG system, introduced in *A New Tax System (Pay As You Go) Act 1999*, is a simple and convenient way for taxpayers to meet their annual income tax liabilities either through instalments or through withholding as their income is earned. This system aims to prevent large end-of-year tax bills for relevant entities. It also ensures that Government has the revenue it needs during the year to provide services and benefits to the community.

¹ 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).

² Section 112-20(1)(a) of the *Income Tax Assessment Act 1997* (ITAA 1997).

16. Subdivision 14-D forms part of the Pay As You Go Withholding system and its purpose is to assist in the collection of capital gains tax from foreign entities.
17. Paragraph 14-200(1)(a) provides that an amount is payable to the Commissioner if “you become the owner of a CGT asset as a result of acquiring it from one or more entities under one or more transactions;...”. Under subsection 14-200(2), the amount must be paid to the Commissioner “on or before the day you became the CGT asset’s owner”.
18. Following the death of an individual, an asset to which Subdivision 14-D applies may devolve to the LPR. Alternatively, the relevant asset may pass to a beneficiary directly or to a surviving joint tenant.
19. Section 109-55 of the *Income Tax Assessment Act 1997* (ITAA 1997) sets out circumstances in which an acquisition of a CGT asset is taken to occur. Within the items listed are:
 - Item 1 – a CGT asset devolves to you as legal personal representative of a deceased individual;
 - Item 2 – a CGT asset passes to you as beneficiary in the estate of a deceased individual; and
 - Item 3 – a surviving joint tenant acquires deceased joint tenant’s interest in a CGT asset.
20. Under section 109-55 of the ITAA 1997, the LPR, beneficiary or surviving joint tenant (as relevant) is taken to have acquired the relevant asset from the deceased person or LPR (as relevant) and might, but for this instrument, have a payment obligation to the Commissioner.
21. With respect to Item 1, the obligation is with the LPR. With respect to Item 2 and Item 3, the obligation is with the beneficiary or surviving joint tenant respectively.
22. However, depending upon the relevant State or Territory legislation, the actual date that ownership occurs may differ from the date of acquisition for CGT purposes. This leads to impractical outcomes as explained below.

Property

23. Where the relevant asset is taxable Australian real property, or an indirect Australian real property interest giving rise to a company title interest, and has a market value of less than \$2 million, then no withholding applies as these assets are specifically excluded from being subject to the withholding regime.
24. Where the property is of a type referred to in the preceding paragraph and has a market value of \$2 million or more, and the deceased was an Australian tax resident, the LPR would need to apply for a clearance certificate on behalf of the deceased (as disposer). Having a clearance certificate ensures that the LPR (as acquirer) does not have to pay the Commissioner an amount in accordance with section 14-200.
25. However, for the clearance certificate to be valid, it must be obtained by the LPR by the time they obtain ownership of the property. Depending on the applicable State or Territory legislation, there may not be any time between

the death of the deceased and when the LPR is taken to have received ownership of the property. Accordingly, the LPR may be unable to apply for a clearance certificate on behalf of the deceased that would be valid in accordance with subsection 14-210(2).

26. As a clearance certificate obtained after the LPR has ownership of the property will not be valid, the LPR would be required to pay the Commissioner an amount equal to 10% of the first element of the property's cost base.

Other assets

27. Where the relevant asset is not of a type referred to in paragraph 22 of this explanatory statement, the LPR would need to complete a vendor declaration on behalf of the deceased to authorise themselves not to pay the Commissioner an amount under section 14-200.
28. However, for the vendor declaration to be valid, it must be made by the LPR by the time they obtain ownership of the asset. Depending upon the applicable State or Territory legislation, there may not be any time between the death of the deceased and when the LPR is taken to have received ownership of the asset. Accordingly, the LPR may be unable to complete a vendor declaration on behalf of the deceased that would be valid in accordance with subsection 14-210(3).
29. As a vendor declaration completed after the LPR has obtained ownership of the asset cannot be valid, the LPR would be required to pay the Commissioner an amount equal to 10% of the first element of the asset's cost base.

Variation application

30. In circumstances where a clearance certificate has not been (or cannot be) obtained, or a vendor declaration has not been (or cannot be) made, the LPR still has the option of applying to the Commissioner for a variation to the 10% withholding rate.
31. The LPR could also consider applying for a variation where the deceased was a foreign resident for Australian tax purposes, as neither a clearance certificate nor a vendor declaration concerning the tax residency status of the deceased is applicable in these circumstances.
32. However, for the variation to be valid, it must be obtained by the LPR by the time they obtain ownership of the asset. Depending on the applicable State or Territory legislation there may not be any time between the death of the deceased and when the LPR is taken to have received ownership of the asset. Accordingly, the LPR may be unable to apply for a variation that would be valid in accordance with paragraph 14-200(3)(b) and subsection 14-235(2).
33. If a variation cannot be obtained in this circumstance, the LPR would be required to pay the Commissioner an amount equal to 10% of the first element of the asset's cost base.

Beneficiaries and surviving joint tenants

34. Similar outcomes to those described in paragraphs 22 to 32 of this explanatory statement arise where the asset of the deceased passes directly to a beneficiary of the deceased estate, or where a surviving joint tenant acquires the deceased's interest in the asset.
35. Where a beneficiary obtains ownership of the relevant asset by way of transfer from the LPR of the deceased, the beneficiary would have to pay the Commissioner an amount equal to 10% of the first element of the asset's cost base unless:
- if the asset was of a type referred to in paragraph 22 of this explanatory statement – the LPR was able to provide the beneficiary with a clearance certificate prior to the beneficiary obtaining ownership of the asset; or
 - if the asset was any other type covered by Subdivision 14-D – the LPR was able to provide the beneficiary with a residency or interests declaration in accordance with section 14-225.
36. However, given that the LPR has no CGT liability in relation to the transfer of the asset to the beneficiary (refer to paragraph 41 of this explanatory statement), this instrument ensures that the beneficiary's withholding obligation is varied to nil. This will further reduce the compliance burden on LPRs by precluding the need for them to obtain clearance certificates or provide declarations to beneficiaries to ensure that the withholding obligation does not apply.

Intent of this instrument

37. The purpose of this instrument is to provide certainty to LPRs, beneficiaries of deceased estates and surviving joint tenants that no amount is payable to the Commissioner in the circumstances covered by this instrument. Beneficiaries covered by section 104-215 of the ITAA 1997 are excluded from this instrument.
38. The above discussion shows that an obligation to pay an amount to the Commissioner arises under subsection 14-200(1) when the LPR, beneficiary or surviving joint tenant acquires an asset from the deceased person or LPR (as appropriate). However, as discussed in paragraphs 2.9 – 2.12 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015, the aim of the withholding regime is to assist with the collection of foreign residents' Australian tax liabilities upon the disposal of certain CGT assets.
39. Division 128 of the ITAA 1997 sets out the income tax consequences that arise when a person dies and a CGT asset devolves to their LPR or passes to the beneficiary of the estate, or the surviving joint tenant acquires the deceased's interest in the asset.

40. At the date of death of the individual, section 128-10 of the ITAA 1997 provides that any capital gain or capital loss in relation to a CGT asset the individual owned just before dying is disregarded.
41. This means that any withholding obligation that applies to the LPR, beneficiary or surviving joint tenant in accordance with Subdivision 14-D would be counter to the policy intent of Subdivision 14-D, given that no CGT liability arises for the deceased.
42. Similarly, subsection 128-15(3) of the ITAA 1997 provides that any capital gain or loss the LPR makes on the passing of an asset to a beneficiary in the deceased estate is disregarded. Accordingly, it would be counter to the policy intent of Subdivision 14-D for there to be a withholding obligation on beneficiaries that obtain ownership of the relevant asset by way of transfer from the LPR of the deceased.

Consultation:

43. The ATO has consulted extensively with legal bodies and persons engaged in dealings involving deceased estates and LPRs about the impact of subdivision 14-D on the transactions discussed in this explanatory statement.
44. The necessity for this instrument was identified through that consultation process and there has been general agreement that there is an urgent need to put this instrument in place.

Steve Vesperman
Deputy Commissioner of Taxation
15 August 2016

Legislative references:

Taxation Administration Act 1953

Legislation Act 2003

Statement of Compatibility with Human Rights

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

This Legislative Instrument avoids the imposition of an unnecessary withholding obligation on legal personal representatives of deceased individuals, beneficiaries of deceased estates and surviving joint tenants following the acquisition of certain Australian assets.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms because the new instrument is of a minor or machinery nature. The instrument avoids unnecessary withholding in circumstances where no tax will be payable.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.