

Selling property? Buyers must withhold and pay the ATO!

If you're selling property in Australia and you're a foreign resident, there are important tax rules you need to know.

Recent changes mean that buyers must withhold 15% of the property's market value and pay it to the ATO, unless the seller provides a residency clearance certificate.

What's changed?

From 1 January 2025, all property sellers must prove their residency status by obtaining a clearance certificate from the ATO. If they don't, the buyer is legally required to withhold 15% of the sale price and remit it to the ATO. This rule is designed to ensure foreign residents don't avoid capital gains tax (CGT) withholding obligations. The government now assumes all property sellers are foreign residents unless they provide an ATO-issued clearance certificate proving otherwise.

How does the withholding rule work?

If you're buying property from a foreign resident, you must:

- Withhold 15% of the purchase price (for contracts from 1 January 2025).
- Register as a withholder with the ATO before settlement.
- Pay the withheld amount to the ATO before the sale is finalised.

For contracts entered before 1 January 2025, the withholding rate is 12.5%, but only applies to properties worth over \$750,000.

If you're a foreign resident selling property in Australia, you'll receive a tax credit for the withheld amount when you lodge your Australian tax return.

What if the property is your former home?

Even if the property was your main residence, foreign residents can't claim the main residence CGT exemption when selling Australian real estate. This means that any capital gain from the sale is fully taxable in Australia.

In fact, foreign residents are always subject to CGT on property they own in Australia – whether or not they live here.

How do you know if the seller is a foreign resident?

As a buyer, you don't have to investigate the seller's residency status yourself. Under standard property contracts, the seller must declare whether they are a foreign resident and provide an ATO clearance certificate if required.

If the seller doesn't obtain a clearance certificate, the buyer must withhold 15% of the purchase price and pay it to the ATO. Your solicitor or conveyancer will typically handle this process.

continued overleaf ➡

This information has been prepared without taking into account your objectives, financial situation or needs. Because of this, you should, before acting on this information, consider its appropriateness, having regard to your objectives, financial situation or needs.

Selling property?.. cont

Are there any exceptions?

Yes. In some cases, the ATO may allow a reduced withholding amount – or even none at all. This happens when:

- The foreign resident seller obtains a variation certificate from the ATO.
- The seller is exempt from Australian tax (eg, a foreign charity).
- A CGT rollover applies, such as in a property transfer due to a marriage breakdown.
- The property is jointly owned by an Australian and a foreign resident – a situation becoming more common in today's global world.

Other assets affected by these rules

It's not just real estate – the foreign resident CGT withholding rules also apply to other assets that are closely connected to Australia such as “significant interests” in private unit trusts and companies.

Whether you're a buyer or seller, understanding these rules is crucial to avoid unexpected tax obligations. If you're unsure how these changes affect you, get in touch with us for expert advice. 💰

We may need to talk about your family trust... cont

If the “loan” remains unpaid at the time of lodgement of the company's tax return, the UPE amount is treated as an unfranked dividend in the hands of the trust unless the company and the trust enter into a complying loan agreement involving both capital and interest payments. This avoids the deemed dividend outcome but usually involves some tax costs and can also create funding and compliance issues for the trust.

The ATO has responded to the Full Court's decision by seeking special leave to appeal to the High Court. The outcome of the special leave application may not be known for some months, and if special leave is granted there is unlikely to be a decision much earlier than Christmas.

In the meantime, the ATO has revised its earlier Decision Impact Statement (DIS) by announcing that it will continue to apply its existing practice of treating UPEs as loans, in defiance of the Full Court's decision. This is not the first time the ATO has felt entitled to ignore the law of the land, and it is not something taxpayers could hope to get away with.

Even if its High Court challenge is unsuccessful, the ATO could approach the government for a law change. The previous Coalition government

announced in the 2018-19 Budget that it would legislate to make it clear that corporate UPEs are caught under Division 7A. To date, nothing has been done by either side of politics to follow through on that announcement but, depending on what happens in the High Court, a legislative response cannot be ruled out.

If the Full Court's decision stands (a big if) there will be major implications for discretionary trusts with corporate beneficiaries. In the longer term, it would make the funding of discretionary trusts a lot easier, while also reducing compliance costs.

In view of all this uncertainty, there is the question of what to do about 2023-24 UPEs. While taxpayers would be within their rights to rely on the Full Court's decision by not converting those UPEs into complying loan agreements, there are risks associated with that course of action which we need to discuss with you. A safer approach might be to follow the Commissioner's approach for now and lodge objections to protect your rights.

A decision needs to be made one way or the other by the time the relevant company returns are due for lodgement, which isn't far off. 💰

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