



CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

DavidCo Limited
CHARTERED ACCOUNTANTS

Level 2, Shortland Chambers
70 Shortland Street, Auckland
PO Box 2380, Shortland Street
Auckland 1140
T +64 9 921 6885
F +64 9 921 6889
M +64 21 639 710
E arun.david@davidco.co.nz
W www.davidco.co.nz

WEEKLY COMMENT: FRIDAY 11 MARCH 2016

1. This week I review the property taxation amendments proposed in the *Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill* (“the RLWT Bill”) introduced on 16 November 2015. The Bill has been referred to the Finance and Expenditure Committee, which is expected to report back by 8 June 2016.
2. The proposed amendments relating to residential land withholding tax (“RLWT”) are contained in Part 2 (clauses 34 to 45 which contain the amendments to the *Income Tax Act 2007*) and come into force on 1 July 2016.

Imposition of the obligation to pay RLWT

3. RLWT is imposed under proposed subpart RL in cl. 44 of the RLWT Bill.
4. Under s. RL 1(2), subpart RL applies, and RLWT would be imposed, if income under s. CB 6A would arise, ignoring the main home exclusion (i.e. income under the bright-line test rules assuming there was no main home exclusion):
 - (a) For a vendor who is an “offshore person; and
 - (b) In relation to a “residential land purchase amount”; and
 - (c) In relation to a disposal of “residential land” (as discussed in paragraph 13 onwards in *Weekly Comment* 19 February 2016) located in New Zealand.
5. The following points are made in the Explanatory Note to the RLWT Bill:
 - (a) There will be an exemption for disposals of inherited property as well as relief for relationship property; and
 - (b) It is proposed to impose RLWT at the point in time when New Zealand land is sold by an offshore vendor.
6. It is stated in the *Commentary on the Bill* (“the Commentary”) that the obligation to retain/withhold and pay RLWT is intended to arise upon settlement when, in most cases, the bulk of the purchase price will be paid by the purchaser to the vendor via a conveyancing agent. At this point the RLWT paying or withholding agent should retain or withhold RLWT from the funds being paid.
7. It is also stated in the Commentary that RLWT must be paid before other disbursements made as part of the settlement process – for example, mortgages. This is so RLWT cannot be easily circumvented by gearing up before disposal of the residential property.

Who is an offshore person

8. As discussed in *Weekly Comment* 12 February 2016, “offshore person” is very widely defined in the *Tax Administration Act 1994* (“the TAA”) for the information collection purposes – i.e. for the purposes of who should complete a tax statement.
9. The definition in cl. 45 of the RLWT Bill, proposed to be inserted into s. YA 1 of the *Income Tax Act 2007* for the purposes of RLWT, is narrower. Under this definition, “offshore person” for the purposes of subpart RL means:
 - (a) A natural person, if:
 - (i) The person is a New Zealand citizen who is outside New Zealand and they have not been in New Zealand within the last 3 years;
 - (ii) The person holds a residence class visa granted under the *Immigration Act 2009*, and they are outside New Zealand and have not been in New Zealand within the last 12 months;
 - (iii) The person is not a New Zealand citizen and they do not hold a residence class visa granted under the *Immigration Act 2009*;
 - (b) A person that is acting as a trustee of a trust, if:
 - (i) The person is an offshore person;
 - (ii) The person has a co-trustee that is an offshore person – these first two requirements mean that a discretionary trust will be an offshore person if any of the trustees is an offshore person;
 - (iii) A settlor of the trust is an offshore person – apparently to prevent a non-resident settlor from replacing resident trustees with non-resident trustees after selling property;
 - (iv) All natural person beneficiaries and all natural person discretionary beneficiaries of the trust are offshore persons – apparently to prevent a trust with all offshore natural person beneficiaries being set up with a New Zealand charity appointed as a discretionary beneficiary and thereby avoid the RLWT rules;
 - (v) All beneficiaries and all discretionary beneficiaries of the trust are offshore persons;
 - (vi) A beneficiary that is an offshore person has received a distribution from the trust within the last 6 years of a relevant disposal of residential land – these last three rules relating to beneficiaries are meant to avoid the gain escaping tax by being shifted to an offshore beneficiary as beneficiary income;
 - (c) A person, other than a natural person, if:
 - (i) The person is incorporated outside New Zealand;
 - (ii) The person is registered outside New Zealand;
 - (iii) The person is constituted under foreign law;
 - (iv) The person has a member that is an offshore person – i.e. a partnership will be an offshore person if at least one of the partners is an offshore person;
 - (v) The person has an executive or director that is an offshore person;
 - (vi) The person is a company and 25% or more of the company’s shareholder decision-making rights are held directly or indirectly by offshore persons.

10. In relation to individuals, it is stated in the Commentary that:

- (a) In most cases it is likely that a New Zealand citizen or holder of a residence class visa who is selling their property within two years could satisfy the proof requirement by meeting with their New Zealand conveyancing agent in person and showing them their passport, which the conveyancing agent could copy the documentation and record that they have seen the person in New Zealand - as the vendor is currently in New Zealand, this means they would not be “an offshore” person.
- (b) If an individual is selling their property from outside New Zealand, a certified statement or other suitable proof from the vendor that they are not an offshore person should be provided to their conveyancing agent, which could include evidence of flights to New Zealand within the relevant timeframe.
- (c) The withholding tax will apply when two or more individuals jointly own a property, and at least one of them is an offshore person, to help to ensure the integrity of the RLWT rules.

11. In relation to non-individuals, it is stated in the Commentary that:

- (a) A company could satisfy the proof requirement by evidence such as:
 - (i) A copy of the company’s New Zealand registration; and
 - (ii) A copy of each director’s New Zealand passport or residence class visa sighted during a meeting with the conveyancing agent; and
 - (iii) A statement from each director that, to their knowledge, no more than 25 percent of the shareholder decision-making rights of the company are held by offshore persons.
- (b) A corporate trustee will be able to qualify for the non-offshore exemption if it meets both the company and the trust criteria listed in paragraph 9 above.

What is a residential land purchase amount

12. The proposed definition in cl. 45 of the RLWT Bill states that a “residential land purchase amount” means, in relation to residential land located in New Zealand, an amount paid or payable for the disposal of the land, but excludes a deposit or part payment (the “part-amount”) if deposits and part payments, including the part-amount, total, in aggregate, less than 50% of the purchase price for the land.

13. Officials have stated in the Commentary that “this rolling aggregate is to ensure that part-payments are not used to circumvent the application of the RLWT”.

Income under s. CB 6A ignoring the main home exclusion

14. It is stated in the Commentary that:

- (a) The reference to “income” under the bright-line test means that there will not need to be a land title transfer for an RLWT obligation to arise; there will only need to be a residential land purchase amount - off-the-plan sales, for example, will be subject to RLWT if other conditions are also met.
- (b) There will be an exemption or rollover relief from RLWT for inherited property and for transfers of relationship property, as provided under the bright-line test, which is achieved under s. RL 1(2)(a), which refers to an amount that is, or would be “income” under s. CB 6A but for the main home exception in s. CB 16A.

15. It is also stated in the Commentary that a disposal of New Zealand residential land that is income for the vendor under both s. CB 6A and another provision of the *Income Tax Act 2007* (for example, the intention test) will be subject to RLWT.

The basic rule: vendors must pay

16. The proposed rule in s. RL 2, as set out in cl. 44 of the RLWT Bill, is that the vendor is liable to pay the RLWT.

17. The vendor's conveyancer, or if the vendor does not have a conveyance, the purchaser's conveyance, is treated as the "paying agent" of the vendor in relation to RLWT, and must make assessments, provide returns, and satisfy the vendor's liability. However:

- (a) The paying agent is not the vendor's agent for income under s. CB 6A (i.e. under the bright-line test rules) or for any other tax obligation of the vendor;
- (b) The rules generally applying to agents in ss. HD 2 (joint and liability of principal and agent), HD 3 (agent's duties and liabilities), and HD 4 (treatment of principals) do not apply to a RLWT paying agent;
- (c) The paying agent is not jointly and severally liable in relation to the vendor's RLWT or a debt under s. RA 10: the vendor alone is liable to pay the RLWT.

18. If the paying agent fails to satisfy the vendor's liability:

- (a) When the paying agent has subtracted or retained an amount from a residential land purchase, the paying agent is treated as having failed to pay RLWT for the purposes of the penalties provisions in Part 9 of the TAA, including the late payment penalties in s. 139B of the TAA;
- (b) When the paying agent has not subtracted or retained an amount from a residential land purchase, the paying agent is treated as having failed to pay RLWT for the purposes of the penalties provisions in Part 9 of the TAA, but excluding the late payment penalties in s. 139B of the TAA;
- (c) Under a proposed amendment to s. 81 of the TAA, Inland Revenue will be able to report details of non-compliant paying agents to their relevant professional bodies and it is stated in the Commentary that this will allow professional bodies to take appropriate action against members who do not comply with their legal obligations under the proposed RLWT.

19. The vendor is treated:

- (a) For general purposes, as having received an amount subtracted or retained by a paying agent at the time the residential land purchase amount is paid to them; and
- (b) For the purposes of the *Income Tax Act 2007*, as having derived an amount subtracted or retained by a paying agent at the same time and in the same way as they derive the residential land purchase amount.

20. The proposed definition of "conveyancer" in section YA 1 means a lawyer, incorporated law firm, conveyancing practitioner, or incorporated conveyancing firm that provides conveyancing services, as that term is used in the *Lawyers and Conveyancers Act 2006*, using a New Zealand-based trust account.

21. It is noted in the Commentary that the purchaser will not be precluded from using the services of a conveyancer to fulfil their RLWT obligations.
22. It is also noted in the Commentary that while it is not included in the RLWT Bill, a paying agent is not precluded from recovering the costs incurred in satisfying the vendor's RLWT obligations.

The rule applying to associated persons

23. The basic rule does not apply if the vendor and purchaser are associated persons. The rule in proposed s. RL 3 if the vendor and purchaser are associated persons is that:
- (a) The vendor is not liable to pay the RLWT; and
 - (b) The purchaser must withhold the RLWT in a separate bank account, segregated from other money, for the benefit of the Commissioner.

Calculation of RLWT

24. In the case where the RLWT must be paid by the vendor or the vendor's conveyancer, the RLWT payable, under proposed s. RL 4, is the least of the following 3 calculated amounts:

- (a) The first calculated amount is based on the vendor's gain on sale, and is:
$$[\text{RLWT rate}] \times [\text{Current purchase price} - \text{Vendor's acquisition cost}]$$
- (b) The second calculated amount is 10% of the purchase price, and is:
$$[0.10] \times [\text{Current purchase price}]$$
- (c) The third calculated amount provides for the prior discharge of a mortgage, and is:
$$[\text{Current purchase price}] - [\text{Security discharge amount}]$$

25. In the above formulae:

- (a) "RLWT rate" is either 33% or, if the vendor is a company that is not acting as a trustee, 28%;
- (b) "Current purchase price" is the purchase price agreed by the vendor and the purchaser for the disposal of the residential land, including deposits and part payments, that the residential land purchase amount relates to;
- (c) "Vendor's acquisition cost" is the purchase price paid by the vendor for their acquisition of the residential land; and
- (d) "Security discharge amount" is the total amount required by "licensed security holders" (i.e. a registered bank or licensed NBDT as defined in s. 4 of the *Non-bank Deposit Takers Act 2013*) to discharge their mortgages or other securities over the residential land.

26. In the case where the paying agent is the purchaser's conveyancer or the RLWT must be withheld by a purchaser because the purchaser and the vendor are associated persons, any security discharge amount is ignored, and the RLWT payable is the least of the following 2 calculated amounts:

- (a) The first calculated amount is based on the vendor's gain on sale, and is:
$$[\text{RLWT rate}] \times [\text{Current purchase price} - \text{Vendor's acquisition cost}]$$

(b) The second calculated amount is 10% of the purchase price, and is:

[0.10] x [Current purchase price]

27. The distinction in the above 2 situations is because RLWT is generally to be paid before other disbursements. However, where the vendor's conveyance is the paying agent, the additional formula option allows a mortgage to be discharged first.
28. It is stated in the Commentary that it is expected that the vendor's acquisition cost will generally be available from Quotable Value.

Tax credits for RLWT

29. New s. LB 6B, proposed to be inserted by cl. 39 of the RLWT Bill, states that a person has a tax credit for a tax year equal to the amount of RLWT paid in relation to the residential land that they have disposed of.
30. A new paragraph (cc) is proposed to be inserted into s. LA 6(1), which will include the tax credit under s. LB 6B with other tax credits able to be used to satisfy other income tax liabilities (i.e. liabilities other than under the bright-line rules).
31. It is stated in the Commentary that this amendment to s. LA 6 will allow RLWT to be used as a tax credit in relation to a tax liability that arises on a disposal of residential land in the year before the year in which the RLWT is actually collected. The delay in collection of RLWT could be due to the timing of a property settlement.

Refunds of RLWT

32. It is stated in the Commentary that a person will be able to file an interim income tax return before the end of an income year, returning their taxable income arising from the disposal of residential land, in order to obtain a refund of excess RLWT. However, this return will not be considered final until the end of the income year.
33. RLWT will need to be paid to the Commissioner before a refund will be issued as part of an interim income tax return.

Withholding and payment obligations and due dates for RLWT

34. An obligation to pay RLWT on the part of a paying agent arising under the basic rule in s. RL 2 is included in "other obligations" in s. BF 1 with the insertion of new s. BF 1(d), which refers to RLWT if the person is described in s. RL 2. The obligation for a paying agent to pay RLWT for a "residential land purchase amount" by the due date is imposed by proposed new s. RA 6C(1).
35. The obligation to withhold RLWT where the purchaser and vendor are associated persons is included in withholding liabilities in s. BE 1 with the insertion of new s. BE 1(5B), which requires RLWT to be withheld from a "residential land purchase amount" by a person described in s. RL 3. The obligation to withhold and pay RLWT for a "residential land purchase amount" by the due date is imposed by new s. RA 6C(2).
36. Proposed amendments to s. RA 10, in cl. 42 of the RLWT Bill, will mean that section will apply if a person required to withhold an amount from a "residential land purchase amount" fails to do so, or a vendor who is required to pay an amount of RLWT does not do so. The amount is treated as a debt payable to the Commissioner.

37. A proposed new s. RL 5 states that a person who is required to pay or withhold RLWT must pay the amount of tax to the Commissioner under s. RA 15 on a monthly basis.
38. Under proposed s. RA 15(1)(d) in cl. 43 of the RLWT Bill, the payment of the amount due to be paid to the Commissioner under s. RA 6C(1) or the amount due to be withheld and paid under s. RA 6C(2), will be due to be paid by the 20th of the month following the “end date” being for RLWT, under an amendment to s. RA 15(3)(b), the last day of the month in which the RLWT liability arose. It is confirmed in the Commentary that the due date for RLWT will be the 20th day of the following month.

RLWT statement and information in relation to RLWT

39. New sections 54B and 54C, proposed to be inserted into the *Tax Administration Act 1994* (“the TAA”) by cl. 72 of the RLWT Bill, contain the obligation to provide a RLWT statement and the obligation to provide information in relation to RLWT.
40. New s. 54B in the TAA will require a person who must pay RLWT to give the Commissioner a statement in the prescribed form by the time RLWT must be paid or within further time allowed by the Commissioner.
41. Under new s. 54C in the TAA, the following information must be given, before the disposal is completed, by the vendor to their conveyancer or, if they do not have a conveyance or they are associated with the purchaser, given to the purchaser’s conveyancer, in the form prescribed by the Commissioner:
- (a) Their full name, address and tax file number;
 - (b) Whether or not they are an offshore person;
 - (c) If they are an offshore person:
 - (i) Whether or not they are associated with the purchaser; and
 - (ii) Whether or not s. RL 1(2)(a) of the *Income Tax Act 2007* applies to the disposal (i.e. whether the vendor would have income under the bright-line test ignoring the main home exclusion).
42. The information must be accompanied by certified copies of relevant appropriate documents, as prescribed by the Commissioner, to evidence the information in the form (for example, a certified copy of a vendor’s New Zealand passport, to support information in the form that they are not an offshore person).
43. The information requirements in s. 54C in the TAA apply if the bright-line date for a disposal of residential land by a vendor is within 2 years of either the registration of the land transfer to the vendor or, if the transfer is not registered by the bright-line date, the date of acquisition of the land. It is stated in the Commentary that:
- (a) The calculation of the two-year period in s. 54C(1) will be almost identical to s. CB 6A(1) in the bright-line test, except that equivalent foreign transfers are not included because they relate to land outside New Zealand.
 - (b) In most cases, the start-date of the two-year period will be the date on which the instrument to transfer the land to the person was registered under the LTA, and the information will be readily available on Landonline to conveyancers, and on Quotable Value’s website.

- (c) The end-date will, in most cases, be the date on which the person enters into an agreement for the disposal of the residential land. This date will be available to both the vendor's and purchaser's conveyancers.
 - (d) As a result, the paying or withholding agent should, in most situations, be able to determine, with little involvement from the vendor, whether the vendor is within the two-year bright-line period.
 - (e) If the paying or withholding agent determines that the vendor is outside the two-year bright-line period, RLWT will not apply and the vendor will not need to provide any further information to the paying or withholding agent.
 - (f) If a vendor states that they *are* an offshore person (and will therefore be subject to RLWT), there should be no need for the vendor to provide evidence to support that statement.
44. Under proposed s. 54C(5), the person who receives the information must keep and retain the information for a period of at least 7 years.



Arun David, Director,
DavidCo Limited