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AUSTRALIA + NEW ZEALAND

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WEEKLY COMMENT: FRIDAY 8 APRIL 2016

1. This week I continue reviewing the property taxation amendments proposed in the version of the *Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill* as reported from the Finance and Expenditure Committee on 21 March 2016 (“the RLWT Bill as Reported”). As noted last week, there have been a number of changes so I have decided to re-review the RLWT rules in their entirety over last week and this week.
2. This week I look at the operation of the RLWT rules, the calculation of RLWT, tax credits and refunds, information requirements and certificates of exemption.

The basic rule: vendors must pay

3. 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.
4. 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.
5. The paying agent must file a RLWT return, even if the RLWT calculated is zero, by the time RLWT must be paid or within further time allowed by the Commissioner (see paragraph 47 below). If the return is not filed on time, a late filing penalty will be imposed.
6. 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 Part 9 of the *Tax Administration Act 1994* (“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:
- (i) The paying agent is treated as having failed to pay RLWT for the purposes of Part 9 of the TAA, but excluding the late payment penalties in s. 139B of the TAA; but
 - (ii) The paying agent is not liable for failing to subtract or retain RLWT if the paying agent has relied on a form and accompanying documents given to them under s. 54C of the TAA (see paragraph 49 onwards below) and the paying agent's reliance on the form and accompanying documents is reasonable;
- (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 on the Bill* ("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, however, officials commented in the *Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* ("the Officials' Report") that a person would be reported only when there are repeated or deliberate failures.
7. Officials have commented that the main civil penalty that may apply will be shortfall penalties. Where a paying agent has retained an amount of RLWT but not passed it onto the Commissioner, they may be subject to late payment penalties. However, late payment penalties will not be applied where the paying agent has not retained the RLWT. This is because they would be unable to rectify their late payment once the settlement funds have left their hands.
8. For determining whether a failure to withhold RLWT would attract penalties, officials agreed that a standard of "reasonable reliance" is appropriate and this has been clarified in the legislation. However, officials considered that if the conveyancer knows or suspects that a statement or other information is incorrect, then they are required to withhold RLWT, and Inland Revenue will use its powers to monitor situations where there are likely to be evasion or avoidance concerns.
9. Officials also commented that late filing penalties are a type of civil penalty and they are important in the context of RLWT because if an RLWT agent's statement is not received by the due date, it may negatively affect a taxpayer's ability to use their RLWT credit to offset their income tax liability arising from the disposal of residential land and obtain a refund from Inland Revenue.
10. 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.
11. The proposed definition of "conveyancer" in s. 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.
12. 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.

13. 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

14. 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 calculated under s. RL 4 (the requirement to hold the RLWT in a separate bank account has been deleted).

15. A submitter noted that the definition of "associated persons" in s. YB 1 does not provide for s. CB 6A to be included in the definition of the "land provisions" as defined in section YA 1. Officials have confirmed this is on purpose. The land provisions use a narrower version of the "associated persons" definition to prevent association in unnecessary situations. For example, one sibling should not be considered to be in the business of developing land or erecting buildings just because another sibling is, and so a restricted definition applies for the land provisions. However, in the context of RLWT, officials consider that this restriction is not appropriate and the broader definition of associated persons should apply.

16. Officials agreed that the appropriate time for the associated persons test to be triggered is the date on which a residential land purchase amount is made and the RLWT is to be retained from that payment. Officials considered that this is already provided for in the legislation as the RLWT rules apply to a residential land purchase amount paid in relation to a disposal, rather than the disposal itself.

Calculation of RLWT

17. 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, which 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 rates, and is the greater of zero and the amount calculated as:
$$[\text{Current purchase price}] - [\text{Security discharge amount}] - [\text{outstanding rates}]$$

18. In the above formulae:

- (a) "RLWT rate" is either 33% (the rate in schedule 1, part A, clause 1, table 1, row 4) or, if the vendor is a company that is not acting as a trustee, 28% (the rate in schedule 1, part A, clause 2);
- (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 or, if there is no such amount, zero; and
- (e) “Outstanding rates” is the amount of local authority rates outstanding.
19. Officials noted that the legislation is currently silent on whether the prices used to calculate RLWT are inclusive or exclusive of GST, when GST has been charged. As the RLWT is designed to be a collection mechanism on account of a person’s income tax liability, officials considered it appropriate that the prices used to calculate RLWT should be net of GST since that is how their final income tax liability will be calculated.
20. 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:
$$[0.10] \times [\text{Current purchase price}]$$
21. 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 New Zealand mortgage and rates to be discharged first. Officials did not consider it appropriate to extend the provision to other mortgages secured by overseas mortgagees or non-associates of the vendor as it would create an increased risk of vendors gearing up prior to the sale just to avoid the payment of RLWT.
22. It was stated in the Commentary and confirmed in the Officials’ Report that the RLWT agent will be able to rely on information obtained from Quotable Value on regarding the vendor’s acquisition cost for the purposes of calculating RLWT. If the vendor does not believe this is the correct acquisition price, they would need to provide the RLWT agent sufficient evidence of a different acquisition price – for example, the original acquisition contract.
23. Officials noted in the Officials’ Report that the *10% x current purchase price* formula for calculating RLWT is the simplest of the three formulae. The other two formulae rely on information about the vendor’s acquisition cost or the value of a New Zealand bank or non-bank deposit taker mortgage.
24. Officials intended that if information about the vendor’s acquisition cost or New Zealand mortgage is unavailable, the default rate would be *10% x current purchase price*. This is because the values for the unavailable information will be zero, and calculation would simply become the lowest of *10% x current purchase price*, *33% (or 28%) x current purchase price* (for the vendor’s gain approach, where no acquisition cost is available), and the current purchase price (if no value for a New Zealand mortgage is available).

Non-cash transactions, option fees and special situations

25. A submitter noted that clarification is required where there is a transfer of trust property between trustees and where the purchase price is not cash-settled. Officials responded in the Officials' Report that the RLWT rules apply to money or money's worth. Further, the obligation to report to the Commissioner amounts that should be subject to RLWT would still apply to RLWT agents, even if RLWT agents are unable to withhold due to no cash being exchanged, however, the RLWT agent would not be penalised.
26. Inland Revenue considers this area should be monitored, particularly for situations when the transaction may involve a transfer of personal property or other non-land assets.
27. In response to a submission regarding the treatment of option fees, officials note that under current legislation, option fees are included in the definition of "an interest in land" and would be captured by the proposed RLWT.
28. In response to a submission that the definition of "disposal" should be clarified in situations when there is no Agreement for Sale and Purchase or registration of title – for example, company share arrangements and unregistered perpetual leases, officials responded that these issues are not unique to RLWT and are relevant in the context of land disposals more generally, but agreed that Inland Revenue should provide guidance and examples in relation to such matters.
29. In response to a submission that RLWT should not apply when the vendor is in liquidation or receivership, officials agreed that RLWT should be treated the same as other withholding taxes on income (such as RWT and NRWT) in situations of liquidation or receivership.
30. In response to a submission that transfers between trustees should not be caught, officials noted that in general, a transfer between trustees of the same trust would not be considered a disposal of residential land and therefore would not be subject to RLWT. Officials considered that this did not require legislation clarification.

Tax credits for RLWT

31. New s. LB 6B, proposed to be inserted by cl. 39 of the RLWT Bill as Reported, states that a person has a tax credit for the tax year corresponding to an income year in which they dispose of residential land equal to the amount of RLWT paid in relation to that residential land.
32. Tax credits for RLWT are included in definition of "residual income tax" in the list of tax credits that are deducted when calculating residual income tax.
33. However, if the Commissioner repays RLWT (see **paragraph 37 onwards** below), the amount repaid is not treated as part of the tax credit.
34. 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).
35. Officials have commented in the Officials' Report that it may be possible for a taxpayer's income tax liability in relation to a residential property disposal to arise in one tax year and the RLWT paid in relation to the disposal to occur in a later tax year. This is because in most cases, the income tax liability under the bright-line test will arise when the person enters into the agreement of the disposal of residential land, but the RLWT obligation will not arise until

settlement. Therefore, s. LB 6B now specifies that the tax credit will be available in the tax year in which the disposal occurs.

36. In response to a submission that clarification is required as to the availability of RLWT credits when there are a number of co-owners, look-through companies, limited partnerships, trustees and nominee legal owners, officials stated that the availability of RLWT credits in such situations should follow the procedure for other types of withholding taxes. Further guidance is to be provided in a *Tax Information Bulletin* item.

Refunds of RLWT

37. 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.
38. RLWT will need to be paid to the Commissioner before a refund will be issued as part of an interim income tax return.
39. Proposed new s. RL 6 states that RLWT paid on a disposal of residential land may be repaid by the Commissioner to the person if, and to the extent to which:
- (a) The tax credit for RLWT is likely to be a surplus credit for the relevant tax year, treating the person as having only income and deductions for land for the tax year and using the appropriate tax rate under s. RL 4(3) – see paragraph 18 above; and
 - (b) The person has no outstanding tax obligations under the Inland Revenue Acts; and
 - (c) The person gives the Commissioner the information in the form prescribed under s. 54D of the TAA, including any accompanying documents.
40. Under s. 54D of the TAA, the Commissioner must prescribe a form that requires, among other relevant particulars:
- (a) A person's income and deductions for land from the beginning of the income year to 1 month after the relevant disposal of residential land; and
 - (b) Whether or not the person, for the relevant disposal of residential land, will meet the requirements of s. CB 16A (the main home exclusion).
 - (c) The Commissioner may also prescribe any appropriate documents to accompany the form.

Withholding and payment obligations and due dates for RLWT

41. 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).
42. 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).

43. 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.
44. 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.
45. 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

46. New sections 54B and 54C, proposed to be inserted into 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.
47. New s. 54B(1) in the TAA will require a person who must pay RLWT to give the Commissioner a statement in relation to their RLWT obligations, in the prescribed form (“the return”), by the time RLWT must be paid or within further time allowed by the Commissioner. New s. 54B(2) requires the return to be filed even if there is no RLWT to pay as calculated under s. RL 4.
48. New s. 139A(2)(iiic) of the TAA includes a statement for payment of RLWT in the list of returns for which a late filing penalty will be charged if it is not paid on time (see also paragraph 5 above).
49. Under new s. 54C in the TAA, the following information must be given, before the relevant residential land purchase amount is paid, 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 conveyance or the purchaser, 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) applies to the disposal (i.e. whether the vendor would have income under the bright-line test ignoring the main home exclusion).
50. The information requirements in s. 54C do not apply if the registration date of the land transfer to the vendor or, if the land transfer is not registered by the vendor’s bright-line date, the date the vendor acquired the land, is before 1 October 2015.
51. Under s. 54C(5), the information must be accompanied by relevant and appropriate documents, as prescribed by the Commissioner, to evidence the information in the form. If the vendor is not an offshore RLWT person, the following people must verify, as prescribed by the Commissioner, the information and any relevant and appropriate documents:

- (a) In the case of a vendor company or a look-through company, a director who is not an offshore person;
 - (b) In the case of a vendor limited partnership, a general partner of the partnership who is not an offshore RLWT person;
 - (c) In the case of a vendor trust, a trustee of the trust who is not an offshore RLWT person.
52. Officials have stated in the Officials' Report that to be able to provide the statement, the director (or director equivalent in the cases of entities that are not companies), will need to prove to the RLWT agent that they themselves are not an offshore person. They could satisfy this requirement by meeting with the RLWT agent and providing their New Zealand passport, for example. However, in some cases it may not be possible to do this and providing a certified copy may be more appropriate. As such, officials consider that requiring certified documents to be provided isn't necessary and should be removed from legislation.
53. As noted above, 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.
54. Under proposed s. 54C(6), the person who receives the information must keep and retain the information for a period of at least 7 years, unless they receive the information as the purchaser. If they receive the information as the purchaser, they must give a copy of it to the Commissioner within 1 month of receiving it, but they do not have to keep and retain the information afterwards.

Certificates of exemption

55. Section RL 1 in the RLWT Bill as Reported states that subpart RL does not apply if the vendor holds an RLWT certificate of exemption that applies for the disposal of the relevant residential land.
56. Section 54E of the TAA provides for the issue of RLWT certificates of exemption to vendors. Under s. 54E, the Commissioner must issue a certificate of exemption to a person when:
- (a) The person applies for an RLWT certificate of exemption in the form prescribed by the Commissioner; and
 - (b) The form is accompanied by certified copies of relevant and appropriate documents, as prescribed by the Commissioner; and
 - (c) The Commissioner is satisfied that the person meets the requirements in 1 of sections 54E(2), 54E(3) or 54E(4).
57. The requirements in s. 54E(2) are that the person, for the residential land:
- (a) Is a person who carries on a business of developing land or dividing land into lots or erecting buildings; and
 - (b) Has provided, in accordance with s. 7A of the TAA, a security that is acceptable to the Commissioner to secure the performance of their income tax obligations in relation to the land.
58. The requirements in s. 54E(3) are that the person, for the residential land:
- (a) Is a person who carries on a business of developing land or dividing land into lots or erecting buildings; and
 - (b) Has had tax obligations under the Inland Revenue Acts before applying for the certificate; and
 - (c) Has complied with all tax obligations for the 2 years before they apply for the certificate, and the Commissioner is satisfied that the person will continue to so comply.
59. The requirements in s. 54E(4) are that the person, for the residential land, will meet the requirements in s. CB 16A.



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