THE TAX INSTITUTE
THE MARK OF EXPERTISE

27 November 2014

Mr Michael Atfield
International Taxation Unit
Corporate and International Taxation Division
The Treasury
Langton Crescent
CANBERRA ACT 2600

By email: tapwithholding@treasury.gov.au

Dear Mr Atfield,

Discussion paper on non-final withholding tax on transactions involving taxable Australian property

The Tax Institute is pleased to have the opportunity to make a submission to Treasury in relation to the Discussion Paper dated October 2014 on non-final withholding tax on transactions involving taxable Australian property (**Discussion Paper**).

Overview

It is important for Treasury to recognise that these new withholding tax measures have the potential to be far reaching and will have a significant compliance impact on many commercial transactions that take place in Australia. Buyers will need to consider the application of these rules in virtually *every* property, share or asset sale transaction going forward. For every transaction, a buyer will need to ascertain whether a seller is a foreign resident and whether the subject matter of the sale is taxable Australian property. As noted in our responses, these questions can give rise to very complex questions of fact and law.

Given the significant penalties which may result from not withholding in accordance with the legislation, buyers will be tempted to withhold if there is any uncertainty as to the correct position. This has the potential to lead to significant disruption in commercial transactions and additional compliance costs for all involved, including the ATO.

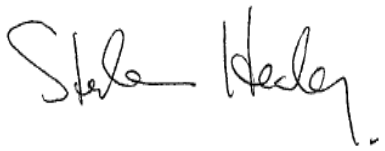
While the withholding onus is placed on the buyer, it is the seller who is ultimately liable for any tax payable on the sale of taxable Australian property. To ease the administrative burden on buyers and avoid the potential disruption in the market, we recommend placing more of the burden on the party ultimately responsible for the tax. Accordingly, we favour adopting a system modelled after the one used in Canada involving the use of clearance certificates. Such a system would also assist the ATO in monitoring compliance.

Our responses to the specific questions listed in the Discussion Paper are contained in the Appendix. All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise stated.

* * * * *

If you would like to discuss this submission, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely,



Stephen Healey
Vice President

Appendix

Specific responses to consolidated consultation questions

Question 1. Are any circumstances likely to arise that would prevent a payer from making enquiries about whether the payee is a foreign resident for income tax purposes or from identifying reasonable grounds to believe that the payee is a foreign resident for income tax purposes? If so, what are they and how could these issues be addressed?

Yes. Difficulties will arise in at least two situations.

The first involves transactions that take place on an open market such as a stock exchange. With 'on market' transactions, the payer/buyer will not know who the other party to the transaction is, let alone be able to enquire or attempt to determine that party's residency status.

There does not appear to be any easy way to overcome this obstacle other than to require the exchange to modify their systems to make this information readily available. Such modifications would likely come at a significant cost. As discussed further below, we recommend excluding transactions relating to listed securities from the proposed provisions.

Another situation involves transactions where the assets are held by an intermediary on behalf of the payee/seller such as by a trustee, custodian, agent or nominee.

In those circumstances, the payer/buyer could make an enquiry of the intermediary as to the residency status of the underlying beneficiary or principal. However, it would be preferable for the withholding obligation to lie with the intermediary, given their direct relationship with the beneficiary/principal. This is discussed further below.

Question 2. Are any circumstances likely to arise that would prevent a payer from making enquiries in relation to whether the transaction involves an asset that is 'taxable Australian property' or from identifying reasonable grounds to believe that the asset is 'taxable Australian property'? If so, what are they and how could these issues be addressed?

Yes. Difficulties will arise in several situations.

Some CGT assets will only be 'taxable Australian property' to certain non-residents. This will make it difficult for a payer/buyer to identify reasonable grounds for believing that the asset is 'taxable Australian property'.

For instance, a CGT asset will only be an indirect Australian real property interest if the interest passes the non-portfolio interest test, which in turn requires a determination of a minimum holding percentage, including fluctuations over a period of time. This test is very fact specific and requires information that would generally only be known by the

holding entity. This information will be difficult to obtain in open market transactions and transactions involving an intermediary.

Even if information were available, a payer/buyer would need to analyse the ownership over a 24 month period of time held at various levels and as between related entities. This would be very difficult for an outside party to do. The payee/seller may reasonably regard this information as commercial in confidence, and not for disclosure to a private entity which is not subject to confidentiality obligations (as opposed to making similar disclosures to the ATO).

A payer/buyer would also have difficulty identifying whether a CGT asset is 'taxable Australian property' on the basis that it is used in carrying on a business through a permanent establishment (ie, the third category of 'taxable Australian property' in Item 3 of section 855-155). Again, this is a very fact specific matter where the information would generally only be known by the holder.

The difficulties associated with applying the proposed provision to 'taxable Australian property' within Item 3 of section 855-155 are demonstrated by the example below indicating the proposed provisions could apply to the purchase of a bottle of milk at the local shop, for the reasons which follow:

1. Taxable Australian property includes a CGT asset that you have used at any time in carrying on a business through a permanent establishment in Australia. Query whether the seller of milk has 'used' the milk by selling it – at the least, they have 'used' the fridge it is stored in, so that the comments below would apply to a sale of the fridge, even if not to the sale of the milk.
2. CGT asset includes trading stock and plant (even though capital gains on disposal are not subject to tax under the CGT regime).
3. Paragraph 3 of the Discussion Paper confirms that the withholding tax will apply regardless of whether the gains would be assessed under the CGT regime.
4. Paragraph 13 of the Discussion Paper confirms that the proposed provisions will apply to assets attributable to a place in Australia where a business is carried on.
5. The local shop may be owned by a non-resident, and might therefore be a permanent establishment in Australia of that non-resident.
6. The purchaser of milk is therefore acquiring a CGT asset from a non-resident, and should withhold 10% of the purchase price.
7. Even if the corner shop is not owned by a non-resident, the purchaser should seek evidence of that before handing over their $2. It will not be sufficient that the local shop has an ABN and issues a tax invoice because that is not evidence of their residence status.

The above issue could be dealt with by broadening the de minimis regime applicable to residential properties to assets used in carrying on a business through a permanent establishment in Australia.

A similar issue also arises for 'taxable Australian property' referred to in item 5 of section 855-155 being a CGT asset that is covered by section 104-165(3). With those assets, only the payee/seller will be aware of whether a choice to disregard a capital gain or loss has been made.

Issues will arise with the application of the 'principal asset test' in section 855-30. This test is also very fact specific and requires information generally only available to the

target entity. A further difficulty arises with the application of the 'principal asset test' in that it requires a view to be taken on the relative market value of assets.

All of this gives rise to significant practical issues involved in requiring a payer/buyer to apply the tests.

Question 3. In relation to a membership interest that is an 'indirect Australian real property interest' is it reasonable to expect that a payer will be able to identify through due diligence whether the interest passes (i) the 'non-portfolio interest test' or (ii) the 'principal asset test'? If not, why not?

It is not considered reasonable to assume that a sufficient level of due diligence would be undertaken in all such acquisition cases of a membership interest. Even where an appropriate level of due diligence was to be undertaken, the tests are complex and difficult to apply. Some of the difficulties in applying the tests are described above.

It is not reasonable to expect a payer to undertake additional due diligence activities to determine a matter that is only relevant to the tax position of the payee. Such a process would be at additional cost to the payer and of no real benefit to them. There are also uncertainties involved in applying these tests. From a risk mitigation standpoint, many payers will be tempted to withhold rather than take the risk (and indeed incur the additional due diligence costs that may be required) of adopting an incorrect position and be subject to penalties and interest. Further, if a taxpayer chooses to withhold in circumstances where they are not required by law to do so, they may not be entitled to the protection of the law in any event, leaving them at risk of a breach of contract claim from the seller. Even if the Australian law provides protection in relation to withholding, the contract may be concluded under the law of a foreign state, meaning that action for breach of contract may be brought in that foreign state without regard to the protection granted by Australian law.

Furthermore, due diligence is not undertaken in all transactions or may need to be completed in a very short period of time. The required information may also not be available or correct.

Question 4. Could the ATO provide assistance in determining whether the payee is a foreign resident? If so, what would that be?

The ATO may have information available relating to the prior positions taken by the payee/seller as to their residency, although we note that these prior positions may not accurately reflect a payee's current residency position.

However, the ATO would need to be satisfied that divulging such confidential information concerning a taxpayer's affairs is not in breach of obligations imposed on the ATO and its officers by Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) and the *Privacy Act 1988* (Cth).

Question 5. Prima facie the obligation to withhold is on the payer. Are there circumstances where it is more appropriate to place the obligation on another party? If so, what are these circumstances, and who should have the obligation?

In our view, it would be more appropriate to place the withholding obligation on an Australian intermediary where the payer is paying to an Australian intermediary such as a trustee, custodian, agent or nominee.

Question 6. Are there other circumstances when imposing a withholding obligation would present difficulties? If so, please explain these circumstances.

As noted above, if the payer is in doubt as to whether a withholding obligation exists, they will have to choose between the risk of being subject to tax penalties, or the risk of a claim for breach of contract.

Question 7. Assuming the measure applies to CGT events that occur on or after 1 July 2016, what issues, if any, need to be considered in relation to transactions commenced prior to that start date but not completed until after that time?

If the withholding provisions only apply to CGT events that occur on or after 1 July 2016, it should generally be clear enough whether the obligation to withhold arises or not, even for transactions that commence prior to the start date.

For example, if a contract is entered into prior to 1 July 2016 and completed after that time, there should be no withholding as the CGT event occurred prior to the start date.

Similarly, other CGT events specify the time of the event, so it should be clear whether or not the CGT event is subject to the new withholding provisions..

We suspect that most transitional issues will be more practical in nature where parties to a transaction may not be aware of the new provisions and how the provisions would apply to their transaction.

Question 8. Where the consideration is payable in instalments, one approach would be to first withhold amounts from instalments until the total withholding obligation has been satisfied (for example, if the first instalment was less than 10% of the total proceeds, the payer would withhold the entire instalment). Are there any difficulties that would arise with this approach? If so, what are they? Is there an alternative approach? If so, what does that approach involve?

A payer/buyer should be able to determine the amount to withhold from any instalment provided that the total amount ultimately withheld having regard to subsequent instalments is sufficient to satisfy the entire withholding obligation. Any other approach would result in added administration and complexity for a payer/buyer, where the principal burden should lie with the payee/seller. Additionally, any approach requiring the effective withholding of the full amount of the initial instalment amounts payable in relation to a transaction may not be consistent with the commercial transaction between payee and payer.

In any event, over time as the rules become better known, we would expect parties to structure instalments to address any withholding issues.

However, to ensure certainty and ease of administration, it will be important to work out clearly what the withholding base is.

For a straightforward transaction involving one payment and only cash consideration, the withholding base should be relatively clear.

However, difficulties arise where the consideration includes non-cash consideration. If non-cash consideration is to be included in the withholding base, how is it to be valued for withholding purposes? Further, if the consideration is solely non-cash, it will not be

practical for the payer to withhold. Imposing such a requirement would impact on wholly scrip takeover offers in certain circumstances.

As a practical matter, the market value (and therefore the withholding base) of partially or wholly non-cash transactions will be a matter of opinion and (most likely) a range. Whilst there are non-cash withholding provisions at present in Division 14 of Sch 1 of the *Taxation Administration Act 1953*, the values involved are unlikely to have caused many taxpayers to incur substantial costs to determine appropriate valuation methodologies. That will not be the case in many transactions affected by the proposed rules.

Also, presumably, there is no intention to include deposits in the withholding base. How will the new measures deal with deposits? Deposits could be treated in a similar matter as with GST, where deposits are generally only subject to GST when applied or forfeited.

Question 9. How should the withholding obligation apply to payments made post completion (for example, adjustments to the purchase price under a performance arrangement)?

There are generally two types of post completion payments: post-completion adjustments determined by reference to an agreed upon formula in the agreement and payments of additional amounts as part of the purchase price, for instance, earn outs and royalties.

To ease compliance, we consider that post-completion adjustments should not be subject to additional withholding. Post-completion adjustments typically relate to a change in items such as inventory or assumed liabilities that is not fully determined at the time of completion. The adjustments can move either way (ie, increasing or decreasing the purchase price) and are generally not material as compared to the total purchase price. In any event, as the withholding tax is non-final, it is not necessary for the withholding amount to be precisely determined. The purpose of the non-final withholding is to ensure that the tax is collected and including post-completion adjustments in the withholding base will not appreciably assist in achieving that end.

For consistency and to reduce complexity, we consider that the treatment of additional contingent consideration should follow the tax treatment of such payments. For example, earn out payments should be treated in the same way that they are proposed to be treated for CGT purposes. Those payments would be subject to withholding as additional purchase price, provided that the Government legislates its announced position in relation to the treatment of earn out payments generally. Royalties, on the other hand, should not be included in this withholding base as they are treated differently for tax purposes and subject to a separate withholding tax regime.

Question 10. The amount is normally withheld at the time that the payment is made or credited (for example, at settlement). This raises a question in relation to the time for remitting the withheld amount to the Commissioner: is settlement the appropriate time, or is some other time appropriate?

The payer/buyer should be given a reasonable amount of time following settlement to remit tax to the Commissioner.

For consistency and to align with other administrative requirements, we suggest adopting the due date imposed on medium withholders for PAYG purposes with payment due by the 21st or 28th after the end of the month in which the amount was withheld.

Question 11. What impediments are there, if any, that would prevent the payer from being able to provide the Commissioner with the information referred to in paragraph 31? Is the information which may be required to be provided reasonable?

The information referred to in paragraph 31 would generally be apparent from the transaction documentation, subject to the following:

- It may be difficult to provide details, or make a determination, of taxable Australian property referred to in items 2, 3 and 5 of section 855-15 (ie, an indirect Australian real property interest, assets used in carrying on a business through a permanent establishment and a CGT asset covered by subsection 104-165(3)).
- It may be difficult to quantify total proceeds where the agreement provides for post-completion adjustments or part of the consideration is contingent, for instance, an earn-out.
- The information referred to in paragraph 31 includes a reference to an Australian company number (referred to as 'CAN', rather than 'ACN'). Is it expected that the obligation to withhold might arise in the case of a payee which is an Australian company, and therefore a resident for tax purposes?

Question 12. To ensure that withholding amounts are credited against the correct account, should there be a requirement for foreign residents to apply for a tax file number when they acquire 'taxable Australian property'?

Introducing this requirement will impose an administrative burden on foreign residents and add an unnecessary impediment to commercial transactions. We also understand from practical experience that for a foreign resident, the process in applying for a TFN can be time consuming and arduous, and there is no certainty that a TFN will be issued.

We query whether this is necessary as the ATO should be able to account for funds received without the need for a TFN. The detailed information received from the payee should suffice to identify the party entitled to the withholding tax credit. As this is a non-final withholding, the payee will have a clear incentive to claim this credit, so should be able to do what is required to prove their entitlement to it.

Under current law, where a TFN is not quoted, amounts are still withheld and matched up to a taxpayer as necessary. It is not clear why a similar process could not be implemented in these circumstances so as to lessen the 'red tape' burden.

In any event, there will undoubtedly be situations where a foreign resident has not applied for a TFN in advance of a sale (for instance, because they are new to Australian legal requirements) and such an accounting of the tax withheld from them will be necessary.

Alternatively, if this requirement were to be imposed, it would be important for the ATO to streamline the application process.

Question 13. What are the issues, if any, that would arise from adopting a definition similar to the term 'Residential property' as defined in the dictionary in Schedule 1 to the First Home Owner Grant Act 2000 (QLD)? Are there other definitions that would be more appropriate?

The term 'residential property', as defined in the *First Home Owner Grant Act 2000* (Qld), incorporates the concept of land containing a building that is 'suitable for occupation' as constituting residential property.

The Queensland Office of State Revenue has issued guidance, in the form of Public Ruling FHOGA000.1.4 and Practice Direction – FHOG – 4.2, as to how the term is to be interpreted, and in particular, on what basis residential property may be established to be 'suitable for occupation'.

Therefore, if a definition similar to that proposed was adopted, clarification should be provided as to when, and on what basis, a property would be considered 'suitable for occupation', and when, and with what evidence, this may be refuted.

Question 14. In circumstances where an asset is held via an Australian custodian, how could a payer identify that the Australian custodian's client (that is the beneficial owner of the asset) is a foreign resident?

The payer would need the assistance of the Australian custodian and there may be legal and/or contractual restrictions preventing the custodian from divulging this information.

As noted below in the response to question 16, it would be more appropriate for the withholding obligation to be imposed on the Australian custodian who has direct information concerning the beneficial owner. This would relieve the payer from the burden of seeking this information through an intermediary and avoid consequences arising from any legal or contractual restrictions that may be imposed on the intermediary.

Question 15. Would a declaration by either the custodian or the client (similar to the payee declaration 'safe harbour' discussed below under heading 4.2.1 of this paper) overcome the difficulties associated with the payer making enquiries into whether there was an obligation to withhold? Please explain why this is, or is not, the case.

Yes.

As noted in paragraph 42 of the Discussion Paper, the practical effect of a payer obtaining a declaration is that they will be taken to have discharged their obligation to make reasonable enquiries.

However, we query whether a custodian would be prepared to make such a declaration on behalf of their client, especially given the potentially serious consequences of making a false declaration. Under the US rules, we understand that making a false statement carries a penalty of perjury which could result in imprisonment.

Similarly, under section 11 of the *Statutory Declarations Act 1959 (Cth)*, a person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years.

Question 16. Where there is an Australian custodian, should they have an obligation to withhold from the proceeds they receive in relation to transactions with the 'taxable Australian property' of their foreign resident clients?

Yes.

This is clearly preferable to imposing the obligation to withhold on the payee who is one step removed from the foreign resident.

As noted above, the custodian is much better placed to consider the residency status of the payee and can also obtain a payee declaration from that party. In some cases, it is one of the custodian's functions to deal with administrative issues such as tax withholding.

Question 17. What are the other issues or options that should be considered in implementing this withholding tax measure? Where possible, please detail these issues or provide examples of how these other options may work.

No comments.

Question 18. Are there any issues that would make it difficult for the payee to provide the declaration referred to in paragraph 41?

Given potentially severe penalties for making a false declaration, a payee may be reluctant to take an uncertain position, for instance, if there is any uncertainty as to their residency status or any question of the status of the sale assets as 'taxable Australian property'.

Question 19. If a payee declaration safe harbour was provided, how should this declaration be provided to the payer? For example, would more integrity be provided by requiring the declaration to be made under oath or could the declaration be included as a term in the contract exchanged between the parties?

For integrity purposes, it would seem necessary for the declaration to be under oath. As noted above, this is similar to the US procedure.

Question 20. Are there any other issues that would need to be considered in providing the payer with a safe harbour in the form of the payee declaration?

No comments.

Question 21. Are there any difficulties in relation to imposing a withholding tax on 'on market' transactions involving listed securities? If so, what are they and how might they be addressed?

Yes.

The identity of the payee will not be known to the payer, so it will be impossible for the payer to determine whether an obligation to withhold exists.

There does not appear to be a clear way of addressing this other than to require the stock exchange to change its information systems.

Even if the payer was able to identify the payee so as to determine their residency status, the listed securities will only be 'taxable Australian property' if the 'non-portfolio interest test' and 'principal asset test' are passed.

There will be circumstances where the 'non-portfolio test' will only be satisfied after multiple acquisitions. It will be difficult (in many cases impossible) for a payer to work out whether this test has been satisfied in relation to a particular transaction as it will be necessary for the payer to know what interest the payee held in the company over the previous 24 month period.

Furthermore, without detailed access to the company's records, a payer will not be able to determine whether the company satisfies the 'principal asset test'. As noted in our response to Question 3, it is not reasonable to assume or require that sufficient additional due diligence would be undertaken by the payer in an effort to determine this.

Question 22. Do the same issues or different issues arise in relation to an 'off market' transaction?

Unlike with an 'on market' transaction, it will be possible to identity the payee in an 'off market' transaction.

However, the same issues will arise in relation to working out whether the 'non-portfolio interest test' and 'non-portfolio asset' tests are satisfied.

'Off market' transactions include most public company takeovers and schemes of arrangements. We consider that imposing additional 'red tape' on these transactions could impose further and unnecessary burdens on market participants and cause market distortions.

Seeking to distinguish between 'on market' and 'off market' transactions will also result in additional complexity in the legislation as well as added compliance and administration costs, and again potentially add to market distortions where different treatment is afforded to similar transactions.

We also note that the US and Canada saw fit to exclude listed securities from similar non-resident withholding tax rules, whether 'on market' or 'off market'. Accordingly, we suggest a similar exclusion be included in the proposed provisions.

Question 23. Are there practical benefits in implementing a clearance certificate process? If so, what are they?

Yes.

As noted above, we favour the adoption of a clearance certificate process for several reasons including the practical benefits for all parties concerned, including the ATO.

In this regard, we favour the adopting measures similar to the Canadian procedures for obtaining a clearance certificate. These measures are summarised in the following extract from Canada Revenue Agency Income Tax Information Circular IC72-17R6:

> *"1. Under section 116, non-resident vendors (from now on referred to as vendors) who dispose of certain taxable Canadian property (see paragraph 2 below) have to notify the Canada Revenue Agency (CRA) about the disposition either before they dispose of the property or within ten days after the disposition. When the CRA has received either an amount to cover the tax on any gain the vendor may realize upon the disposition of property, or appropriate security for the tax, the CRA will issue a certificate of compliance to the vendor. A copy of the certificate is also sent to the purchaser. If the purchaser does not receive such certificate, the purchaser is required to remit a specified amount to the Receiver General for Canada and is entitled to deduct the amount from the purchase price. Any payments or security provided by the vendor and/or purchaser will be credited to the vendor's account. A final settlement of tax will be made when the vendor's income tax return for the year is assessed.*
>
> *…*
>
> *58. The purchaser incurs no obligation to pay tax if, after reasonable inquiry, there was no reason to believe the vendor was a non-resident of Canada. There is a question as to what constitutes "reasonable inquiry." The purchaser must take prudent measures to confirm the vendor's residence status. The CRA will review each case on an individual basis whenever a purchaser assessment is being considered. The purchaser may become liable if, for any reason, the CRA believes that the purchaser could have or should have known that the vendor was a non-resident or did not take reasonable steps to find out the vendor's residence status. The CRA will not make inquiries on behalf of a purchaser in this regard."*

A copy of Information Circular IC72-17R6 is **enclosed**.

There are several practical benefits in adopting a procedure such as this.

From a payer's perspective, they will be relieved of the obligation to withhold, if the payee obtains a clearance certificate. Therefore, in many instances, the payer need not concern themselves with the residency status of the payee, the nature of the sale assets as 'taxable Australian property' and the level and extent of withholding. If a payee doesn't provide a clearance certificate, the payer can simply withhold tax unless they are certain that the payee is not a foreign resident or the assets are not 'taxable Australian property' (subject to the inclusion of a statutory safeguard which protects the payer even if they wrongly conclude that withholding is required).

Importantly, this will reduce the 'red tape' burden imposed on the payer which is appropriate given that they are not the party ultimately liable for tax on the sale.

The practical benefit from a payee's perspective is that, if they obtain a clearance certificate, they will receive the sale proceeds without any withholding. Any amount paid by them to the ATO could then be more reflective of the actual tax liability, rather than just a flat sum. Further, instead of paying the tax at a preliminary stage, the payee could seek to provide security to the ATO for future payment.

The practical benefit from the ATO's perspective is that they will have up-front engagement with the ultimate taxpayer and will be able to control the process by way of issuing a clearance certificate or not.

We also feel that a clearance certificate procedure appropriately places the administrative burden on the payee/buyer who is the ultimate taxpayer as well as the party who has the best information to determine whether, and to what extent, a transaction is subject to tax.

In our view, it is inappropriate to burden a payer/seller with administration that can be best done by another party.

Question 24. Assuming all relevant information has been provided to the Commissioner, what timeframe would be required for the Commissioner to issue a clearance certificate?

We consider that the Commissioner should attempt to provide a clearance certificate 'as soon as possible' once all necessary information and documentation has been provided. As this will not be a complete assessment and security could be obtained, we consider that an expedited process is workable and necessary given commercial realities and dynamics. In issuing a clearance certificate, the Commissioner should be required to work on the basis of the 'base' contractual price, without regard to post-contractual, or post-settlement, adjustments. Otherwise, the Commissioner may not be a position to issue the clearance certificate until after settlement has occurred.

We note that the CRA says that it will issue the certificate of compliance at the earliest possible date once the necessary information and supporting documentation have been received and validated, and acceptable payment or security has been received: paragraph 45 of Information Circular IC72-17R6.

Question 25. Does this approach provide an incentive for the payee to engage with the Commissioner to relieve or reduce the withholding obligation? If not, why not?

Yes, especially in circumstances where the ultimate tax liability is less than the amount that would have otherwise had been withheld.

A payee may also prefer the provision of security for payment than withholding of a flat sum as an estimate of the total tax liability.

Question 26. If the Commissioner has the discretion to vary the withholding amount, what steps could be put in place for the payee to request the Commissioner to exercise this power?

Similar steps to those used under the clearance certificate model could be employed. That is, the payee could approach the Commissioner and request a withholding

variation and in doing so, provide the Commissioner with all necessary information and documentation relevant to working out an estimate of the tax liability.

However, such a process would be unnecessary, if the Government adopts the clearance certificate model.

Question 27. There may be circumstances where the transaction proceeds (less the withheld amount) are insufficient to discharge a mortgage or other loan secured over the asset. How should the withholding tax measure deal with these circumstances? For example, could a surety or guarantee be provided in lieu of the withholding?

Any special measures to address such circumstances would require complex legislative measures and also involve the Commissioner and the payer/buyer in potentially difficult issues pertaining to the credit standing of the payee/seller. We also query whether such a payee/seller would be able to obtain a suitable surety or guarantee.

We consider that the adoption of a clearance certificate approach would deal with this potential circumstance and indeed is another reason why this approach should be adopted.

In most cases where transaction proceeds are insufficient to discharge the security (or in other words, the payee/seller is underwater), the payee/seller will not have a taxable gain. Therefore, in most of these cases, there will be no tax liability to discharge.

The circumstance described above therefore could be avoided by permitting such a seller to obtain a clearance certificate on the basis that no tax is payable, and no tax needs to be withheld.

In circumstances where a payee/seller has a tax liability, the Commissioner and the payee/seller can work out an appropriate plan to satisfy the tax liability in conjunction with other debts. As these matters primarily relate to the position of the payee/seller and the Commissioner, it is appropriate for the payer/buyer to be relieved of having to deal with these matters.

Question 28. Are there other circumstances where the requirement to withhold 10 per cent from the sales proceeds may disrupt transactions? Please provide examples of these.

No comments.