

2 October 2015

Residential land withholding tax
c/- Deputy Commissioner, Policy and Strategy
Inland Revenue Department
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By email: policy.webmaster@ird.govt.nz

Submission on Residential Land Withholding Tax (“RLWT”) Proposals

1. This letter represents the views of the New Zealand Bankers’ Association (**NZBA**). NZBA is the New Zealand banking industry group, established to represent and promote policy outcomes that contribute to a safe and successful banking system, which benefits New Zealanders and the New Zealand economy.

The proposals

2. NZBA is pleased to have the opportunity to comment on the Officials’ Issues Paper, “Residential Land Withholding Tax” (**the Issues Paper**) released in August 2015.
3. In the Issues Paper, officials outline the proposals for a new RLWT to apply from 1 July 2016. The withholding would be undertaken by a conveyancer or solicitor involved in a residential land transaction where settlement of the transaction occurs on or after 1 July 2016. The withholder would be required to withhold and pay an amount to the Commissioner based on a formula included within the Issues Paper.
4. The RLWT would be limited in application to situations where the vendor is a non-resident of New Zealand who has sold the residential property within 2 years of purchasing it, and the Issues Paper seeks submissions on a number of points regarding the application and operation of the RLWT.

NZBA submission points

5. While NZBA broadly supports the Commissioner in proposing measures to minimise taxpayers failing to comply with their New Zealand tax obligations, NZBA has concern with these proposals for the following reasons:

RLWT and Commissioner's priority ranking

6. The first issue relates to the priority of payment the Commissioner is seeking to obtain through the introduction of RLWT.
7. An income tax liability of a taxpayer currently ranks lower than a security holder's priority, regardless that the income tax liability may arise from disposal of the residential land in question. The priority the Commissioner is seeking to achieve through the introduction of RLWT is anomalous to the current priority – in substance the RLWT is just an income tax prepayment for an income tax obligation that the vending party may have.
8. NZBA believes that this increase in priority favouring the Commissioner is not warranted. It is accepted that the RLWT mechanism is being considered to minimise the risk currently in place where a non-resident has a tax liability and the New Zealand government may have few enforcement options. However, the security holder's right of recovery is displaced to the extent of the elevation of the Commissioner, and naturally NZBA is concerned with this erosion of security rights.
9. We consider that the Issues Paper does not give adequate consideration to the question of priority. That matter is dealt with briefly in paragraph 5.24, where it is noted that if the payment of the tax ranked equally or behind other disbursements (and in that regard a repayment of a mortgage is considered a disbursement) the RLWT could easily be avoided and the paper notes that in any event through the use of the standard RLWT rate, where a property value has declined in value, there would be no RLWT in reality and so the repayment of mortgages and other obligations of the vendor would not be affected.
10. That may be one possible outcome, but not the only one. It is common practice for investors to regularly restructure their borrowing arrangements with their financial institutions taking out additional borrowings against the property which is the subject of the disposal transaction or even against multiple properties, with the consequence that borrowing secured against the property may exceed the original purchase price of the property.
11. As a consequence it is possible that the requirements to withhold (using the relevant withholding rate formula) may be present but the application of the RLWT renders insufficient funds to settle the security. Therefore the security holder would be unable to release the relevant security or, in the case of a distressed mortgagor, suffer a loss to the extent of the RLWT.
12. This may be particularly so where the non-default RLWT rate is applied (which NZBA considers could occur in many instances such as where the relevant solicitor is not aware of the original acquisition price in order to apply the 33% rate).
13. Given financial institutions take on credit, market and operational risk, what possible justification is there for the NZIRD to be elevated above the security holder? The

New Zealand government bears none of these commercial risks and yet is seeking to be elevated above the security holder.

14. Accordingly NZBA does not support the impact that the RLWT will have on priority ranking and believes that provision must be made in the legislation to restore the priority of the security holder above that of the Commissioner that exists currently.
15. A simple solution to the issue would be to reduce the amount of the RLWT by the amount of any outstanding liability under the security arrangements that could not be met if the RLWT were imposed. For example, if computation of the RLWT amounted to \$30,000 but the RLWT computation would render an insufficient amount to clear the debt by an amount of \$10,000, the RLWT could be reduced to \$20,000 and this latter amount would be paid to the Commissioner.

Which conveyancing agent should withhold?

16. NZBA's preference as to which agent should be responsible for the RLWT deduction is the vendor's agent. This is primarily because of the information available to the vendor's agent through the vendor relationship. The vendor will have the necessary data available to permit establishing an actual liability. This will include the price the vendor paid for the property.
17. In addition, because the vendor's agent will be addressing the discharge of any debt and clearing security arrangements it will be in a position to calculate the correct amount of the RLWT after ensuring the amount of the outstanding debt is discharged. As a consequence, this removes the hurdle regarding whether the transaction can proceed.
18. NZBA member experience in undertaking mortgagee sales, and dealing with the potential GST liabilities of the mortgagor, has confirmed that obtaining the necessary information on which to establish the tax liability can be challenging.
19. However, the ability to do this for the purchaser's agent will be more challenging as the relationship to the required information is even more remote.
20. Accordingly, it is NZBA's preference to place the RLWT obligation with the vendor's agent.
21. We trust that the above is helpful in outlining our concerns on this matter and we welcome your consideration. If you wish to discuss further, please contact us.

Yours faithfully

Campbell Rapley
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Head of Taxation
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