



PS LA 2006/10 - The Commissioner's discretion to vary foreign resident withholding amounts

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Practice Statement Law Administration

PS LA 2006/10

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT: The Commissioner's discretion to vary foreign resident withholding amounts

PURPOSE: To provide guidance on the use of the Commissioner's discretion under section 15-15 of Schedule 1 to the *Taxation Administration Act 1953* to vary amounts required to be withheld from a withholding payment

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BACKGROUND

1. All legislative references in this practice statement are to Schedule 1 to the *Taxation Administration Act 1953* (TAA) or the *Taxation Administration Regulations 1976* (the Regulations) unless otherwise specified.
2. The pay as you go (PAYG) withholding obligations, contained in Part 2-5, were extended from 1 July 2003¹ to enable application to payments prescribed in the Regulations which are made to foreign residents.
3. Sections 12-315 and 12-317 which contain these withholding obligations have not been included in the general exception from withholding for exempt income in subsection 12-1(1). Consequently withholding from prescribed payments to foreign entities who are not employees is required regardless of whether the payment is exempt income in the hands of the foreign entity.
4. Amounts required to be withheld have been specified in the Regulations. In some cases the specified amounts may result in an amount of withholding which exceeds the final tax liability of the foreign entity.
5. Under section 15-15 the Commissioner may vary the amount which would otherwise be withheld from withholding payments. For foreign entities, the Commissioner will use this power to reduce the rate of withholding to nil if the relevant income is not assessable in Australia, or to reduce the rate of withholding to a more appropriate level, where the prescribed withholding rates are excessive in comparison to the amount of tax which will ultimately be payable by the foreign entity.

STATEMENT

6. This practice statement provides guidance to ATO personnel on how the discretion to vary the amount to be withheld as provided by section 15-15 may be exercised.
7. It is not possible to set out all the circumstances in which the discretion may or may not be exercised. Cases that appear similar in nature may have different outcomes based upon their particular facts. Each case has to be considered on its merits and on the basis of all the relevant facts. ATO personnel must take care not to consider irrelevant considerations, and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias, and must not be made at the direction of another person.
8. While this practice statement instructs ATO personnel on the exercise of this discretion, foreign entities should not use the statement to anticipate the exercise of the discretion in their particular circumstances, as this may result in the entity being subject to failure to withhold penalties under section 16-30. Foreign entities should be encouraged to approach the ATO for advice on their particular circumstances and if necessary apply for a variation using the Foreign Resident Withholding Variation application form.

¹ Applies to prescribed payments made or received on or after 1 July 2004.

EXPLANATION

9. The PAYG withholding system is contained in Part 2-5 in Schedule 1 to the TAA.
10. Section 12-315 of Subdivision 12-FB requires an entity that:
 - carries on an enterprise, and
 - makes a payment of the kind prescribed in the Regulationsto withhold amounts from these payments if they are made to foreign residents.
11. Withholding is also required under section 12-317 of Subdivision 12-FB by an entity that receives a prescribed payment on behalf of a foreign resident.
12. Both sections 12-315 and 12-317 have rules to assist payers in ascertaining their obligation to withhold where the residency status of the recipient is not known to the payer.

Prescribed payments for foreign resident withholding purposes

13. The prescribed payments for foreign resident withholding purposes are payments made or received on or after 1 July 2004.
14. Regulation 44A prescribes a payment for operating or promoting casino gaming junket activities for the purpose of Subdivision 12-FB. It prescribes that the amount required to be withheld is 3% of the total payment.
15. Regulation 44B prescribes payments for entertainment or sports activities for the purposes of Subdivision 12-FB. These include the activities of a performing artist or sportsperson² and payments to support staff whose activities relate to the activity of the performing artist or sports person.
16. There are two ways to calculate the amount required to be withheld from payments for entertainment or sports activities. If the foreign entity is a company, the amount to be withheld is worked out by applying to the payment the company rate of tax or if the foreign entity is an individual, the amount to be withheld is worked out by applying to the payment the non-resident marginal rates.
17. Regulation 44C prescribes payments that are made under a contract entered into after 30 June 2004 for works or related activities and specifies an amount to be withheld equal to 5% of each payment under such a contract.
18. Payments excluded from the foreign resident withholding provisions are those already covered by existing withholding provisions such as dividends, interest and royalties, departing Australia superannuation payments, natural resource payments and mining payments.

Withholding rules

19. Foreign resident withholding is a mechanism to collect tax throughout the year as income is earned by foreign entities and is a compliance measure. Amounts withheld are remitted by the payer for credit against the foreign entity's tax liability for the year of income.

² 'performing artist' and 'sportsperson' are defined in section 405-25 of the *Income Tax Assessment Act 1997*.

20. The withholding obligation is separate from the liability to taxation and hence the foreign entity who is subject to withholding under sections 12-315 or 12-317 is still required to lodge a tax return.
21. Subsection 12-5(1) states that where more than one provision covers a payment, only one amount is to be withheld from that payment. The provision to be applied is determined by the specific priority rules contained in subsections 12-5(2) and 12-5(3). Pursuant to subsection 12-5(3), foreign resident withholding applies only if a payment is not subject to withholding under any other withholding provision specified in the table (for example, a payment under a labour hire arrangement).

Exemption from Foreign Resident Withholding

22. In some circumstances, the Commissioner may under section 12-319 grant a foreign entity an exemption from withholding if he is satisfied that the foreign entity:
 - has an established history of compliance with Australian taxation laws, and
 - is likely to continue to comply with those obligations in the future.

This practice statement does not deal with applications for exemption.

Principles of Foreign Resident Withholding Variation

Underlying Policy

23. The foreign resident withholding rules require amounts to be withheld from the payments prescribed in the Regulations. In some cases the payments may be exempt from Australian tax or non-assessable under Australia's domestic taxation laws. This is a specific design element that ensures that where foreign entities claim their income to be exempt, that claim can be considered by the ATO. It is often the case that the claim to exemption can only be established on the facts after the event – for instance the time spent in Australia may be relevant which will be affected by many local factors notwithstanding what was intended or contracted for at the outset.
24. The rules also address the risk that foreign entities may avoid withholding on the basis of unverified claims that the income is exempt, for example due to the operation of a tax treaty or a misunderstanding of the particular provisions.
25. The withholding rules do not override the operation of a tax treaty as they do not impose tax on amounts which will, by operation of the treaty, be relieved of taxation. Rather, the withholding arrangements facilitate the efficient collection of amounts to be put towards discharging any liability by the foreign entity to taxation on assessment.
26. Section 15-15 provides the Commissioner with the authority to vary the amounts required to be withheld from withholding payments for the purpose of meeting the special circumstances of a case or class of cases. This includes the authority to vary the amount to be withheld to nil.
27. Where a foreign entity believes that the payment is income which is exempt from Australian tax or non-assessable under Australia's domestic tax laws, they may apply to the Commissioner for a variation of the amount to be withheld to nil.

28. The Commissioner may grant a variation where special circumstances exist. The Commissioner's policy is that a variation will be granted to ensure the amounts withheld match as closely as possible the amount of tax which will be payable when an entity lodges an income tax return for the relevant year. Where it can be established that there is no tax liability or likely to be no tax liability on the payment, the Commissioner will issue a variation to nil. However, a variation to nil does not preclude the foreign entity from the obligation to lodge an income tax return for the year the variation is granted. Refer to the appropriate Legislative Instruments for more information regarding income tax lodgment for foreign residents that are deriving Australian sourced income.³
29. Where the income tax liability on assessment is less than the amounts withheld during the income year, the foreign entity is entitled to a refund of the excess amounts withheld.
30. Where the income tax liability on assessment is more than the amounts withheld during the income year, the foreign entity will receive a debit assessment requiring payment of the difference.

Requirements for processing a Foreign Resident Withholding Variation application

31. Where a variation is sought, the foreign entity must complete a Foreign Resident Withholding Variation application for the financial year in which they will receive payments. A financial year for the purpose of this application is from 1 July to 30 June. If payments span two financial years, then a separate application is required for each year.
32. Variation applications must be lodged using the correct version of the ATO approved form – *PAYG foreign resident withholding variation application*. A new version of the form is issued for each financial year, and is usually available from May preceding that financial year.
33. The variation application can be lodged electronically or in paper format.
34. The foreign entity must provide all necessary information on the variation application including their reason for requesting a variation, evidence of identity or tax file number and/or Australian Business Number, as per the application and instructions.
35. The foreign entity must also provide any additional information required to process the variation application, as requested by the ATO.
36. It will generally be appropriate to approve a variation application if the foreign entity:
 - has lodged required tax returns or notified the ATO in writing if they have not been required to lodge tax returns in earlier years
 - did not receive a debit assessment on their last tax assessment if they had an approved variation application for that year
 - does not have any outstanding tax unpaid after its due date and/or does not have any outstanding debts under any other Acts administered by the Commissioner
 - supplies all the information requested by the Commissioner, and

³ These Legislative Instruments will change every year. They are available on ATOLaw (for internal readers) or the Legal Database (for external readers) under the heading of Legislative Determinations.

- has demonstrated sufficient reasons to justify the variation. For example, the deductions claimed in the application are allowable deductions under Australia's tax laws or the application demonstrates that a particular tax treaty applies.
37. If, in the opinion of the Commissioner, the foreign entity's application contains income that is understated or deductions that are overstated or not allowable under Australia's tax laws, the ATO will provide written advice to the foreign entity outlining a decision to make adjustments to this information (which in turn adjusts the requested withholding rate), or a decision to not grant a variation. Paragraphs 51 to 53 outline the review rights available to the foreign entity if the application is not approved.
38. If a foreign entity is granted a variation it does not mean that the Commissioner has accepted the tax treatment of the income and deductions in the foreign entity's application. If the foreign entity is required to lodge a tax return, their actual tax liability will be determined following lodgment of that return.
39. The foreign entity must keep records of their income and deductions in accordance with the requirements of the income tax laws.

Variation amendments

40. Should the foreign entity's circumstances change during the variation period the foreign entity can apply for an amendment to their variation application by lodging another variation application form with amended details.

Subsequent and/or multiple variations

41. The variation system allows foreign entities to lodge subsequent and/or multiple variation applications.

Class variations

42. In addition to individual variations, the Commissioner has the power to vary the amount required to be withheld from withholding payments in order to meet the special circumstances of a class of cases under section 15-15. The Commissioner will consider applications on behalf of multiple entities that will have no tax or a lower tax liability in Australia, for example when a group of performers from a not-for-profit company undertake performances in Australia and are paid token amounts which will not be sufficient to cover the expenses related to their performance.
43. Class variations can be lodged by payers or authorised representatives on behalf of a number of foreign entities. These applications must be lodged in a letter format on the payer's or authorised representative's letterhead.
44. In making a request for the Commissioner to exercise the power to vary the amount required to be withheld from withholding payments to meet the special circumstances of a class of cases, the payer makes a declaration about the relevant tax outcomes on behalf of those entities. For example where claims for deductions are involved the declaration states that the expenditure can reasonably be expected to be deductible on assessment. The payer should ensure that they are able to correctly make a declaration on behalf of all entities included in the request. Entities for whom the payer is unable to make this declaration can apply individually for a variation.

Processing time frames

45. Variation applications will be processed within taxpayer charter standards upon receipt by the ATO of all the required information.

Variation application outcomes

46. If a foreign entity's application is approved, a written notice is sent to the payer confirming the new withholding rate. A letter confirming the approval of the variation will also be sent to the foreign entity.
47. The payer must match the entity identity details on the notice with the entity identity details they have in their records.
 - If the payer cannot match the details, they must contact the ATO via the phone number provided on the notice.
 - If the payer can match the details they must use the rate to calculate how much to withhold from any future payments they make to the foreign entity that are covered by the variation. The payer must continue to do so until the expiry date shown on the notice or until the ATO advises the payer otherwise.
48. The payer must keep a copy of the variation notice with their business records for at least five years.
49. If a foreign entity's application is not approved, a letter advising of the reason the application was not approved is sent to the foreign entity. This letter will contain a telephone number so that the entity can phone the ATO to discuss the matter if they think that the decision is not correct.
50. If a payer's application for a class variation is not approved, a letter advising of the reason the application was not approved is sent to the payer. This letter will contain a telephone number so that the payer can phone the ATO to discuss the matter if they think that the decision is not correct.

Review of Decision

51. A foreign entity can apply for a review of the decision if their application is not approved.
52. The foreign entity must apply in writing, explaining why the decision should be overturned and should include any additional information in support of their claims.
53. Justifying decisions and review process: The taxpayers' charter outlines the taxpayer's rights under taxation law, their responsibilities in meeting their obligations and the service and standards they can expect from the ATO.

Valid period of variation

54. The valid period of variation is shown on the foreign entity's approval letter and the payer's notice of foreign resident withholding variation. If a payment is due before the variation is processed, the foreign entity and/or payer should contact the ATO for advice.
55. When the reason for variation is 'tax deductible expenses' the valid period of variation will be from the issue date on the notice of foreign resident withholding variation until the expiry date shown on the notice.

56. When the reason for variation is 'tax treaty applies' or 'exempt income – non tax treaty', the valid period of variation will be from date of first payment as nominated by the foreign entity on their variation application until the expiry date shown on the notice.

Amendment history

Date of amendment	Part	Comment
17 April 2014	Contact details	Updated.
29 October 2010	Contact details	Updated.

Subject references	Foreign resident withholding variation of foreign resident withholding rate
Legislative references	ITAA 1997 405-25 TAA 1953 Sch 1 TAA 1953 Sch 1 Pt 2-5 TAA 1953 Sch 1 12-1(1) TAA 1953 12-5(1) TAA 1953 12-5(2) TAA 1953 12-5(3) TAA 1953 Sch 1 Pt 2-5 Subdiv 12FB TAA 1953 Sch 1 12-315 TAA 1953 Sch 1 12-317 TAA 1953 Sch 1 12-319 TAA 1953 Sch 1 15-15 TAA 1953 Sch 1 16-30 TAR 1976 44A TAR 1976 44B TAR 1976 44C
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