NOVEMBER 2017

TECHNICAL UPDATE

VACANCY TAX PASSES PARLIAMENT BUT WILL IT RELIEVE PRESSURE ON RESIDENTIAL PROPERTY PRICES?

In the May 2017 Federal Budget, the Government announced a raft of proposals it hoped would relieve the pressure on residential property prices. One of the measures sought to introduce a tax on foreign owned residential properties that are kept vacant by their owners. The vacancy tax has now been substantially enacted after Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 (new law) passed the Senate on 15 November 2017 without amendment. The Bill now awaits Royal Assent.

The new legislative measures are part of the Federal Government's attempt to be seen to be doing something about the runaway housing prices in Australia and the lack of rental accommodation in some of Australia's major cities. Other Budget measures also included the elimination of tax deductions for travel expenses associated with residential property investments and restriction of deductions for depreciation of items in residential rental properties. While the vacancy tax may have some effect by increasing rental accommodation, it will not have much of an effect on the purchase prices of residential properties. While this measure has the possibility of freeing up some accommodation for the rental market, it will cause an increase in compliance requirements for foreign owners, even if they have their properties occupied for the full year.

WHO IS AFFECTED?

The new law will apply to foreign persons who own Australian residential property. The definition of 'foreign person' is drafted widely, and includes:

- Individuals who are not resident in Australia
- Companies that are controlled by individuals who are foreign persons
- Trusts that are controlled by individuals who are foreign persons.

WHAT PROPERTIES ARE COVERED?

The new law will apply to properties with the following characteristics:

- Residential properties with a dwelling constructed on the land (vacant land will become subject to these rules when a dwelling is constructed on the land)
- Owned by a foreign person
- Acquired after 7:30pm on 9 May 2017
- The acquisition was a notifiable acquisition (with the Foreign Investment Review Board) or would have been but for an exemption (such as acquisitions of new dwellings)
- The property is residentially occupied for less than 183 days in the year.

WHICH YEAR?

The liability to tax arises where the property is residentially occupied for less than 183 days in a year. For the purposes of the new rules, 'year' does not have a standard year end (such as a calendar year or a 30 June standard year-end).

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Instead, the vacancy year (as it is referred to in the new law) is a unique 12-month period for each property. The vacancy year commences on the first day in which the foreign person acquires the right to occupy the dwelling. This can be:

- Settlement day (for purchased dwellings)
- The day on which the occupancy certificate is issued (for new and renovated dwellings).

The liability to the tax only arises where the foreign person continues to hold the property at the end of the vacancy year. Therefore, when a property is sold during the year, there will be no liability to the vacancy tax.

WHEN IS A PROPERTY OCCUPIED?

A property is occupied where:

- The foreign person, or their relative, genuinely occupies the dwelling as a residence
- The dwelling is genuinely occupied, as a residence, under a lease or licence with a term of 30 days or more, or
- The dwelling is genuinely available for occupation, as a residence, under a lease or licence with a terms of 30 days or more.

A dwelling will be genuinely available for occupation under a lease or licence where it is available for rent, advertised publicly, and available at a market rent (i.e. a realistic rent).

The imposition of a minimum 30-day lease term effectively excludes short term and holiday rentals, and rentals over Airbnb (which is specifically identified in the Explanatory Memorandum to the new law).

HOW IS THE LIABILITY CALCULATED?

Where a dwelling is vacant for more than 183 days in the relevant year, the tax payable by the foreign owner is the same amount as the fee paid when the acquisition of the land or dwelling was notified to the FIRB. Where the acquisition did not have to be notified to the FIRB because of an exemption (such as acquisition of new dwellings), the vacancy tax is the amount that would have been payable if the acquisition was not exempt from FIRB approval.

The amount of the tax is based on the market value of the land or dwelling when it was acquired.

The Government notes that, at this stage, there is no intention to index these amounts, but any amendments in the future may impact the amount of tax payable.

COMPLIANCE

The operation of the vacancy tax is vested with the ATO. The sleeper in the vacancy tax provisions is the requirement for all foreign owners of residential dwellings acquired after Budget Night (May 2017) to lodge a vacancy tax return. The return must be lodged with the ATO on the approved form (yet to be issued) within 30 days of the end of the vacancy year for the relevant property. As the annual vacancy tax return is not based on the usual tax year (i.e. 1 July to the following 30 June) but rather based on the year starting on the date the foreign person obtains the right to occupy the dwelling and the subsequent anniversaries of that date, in most cases this will not mesh well with the lodgement dates of the owner's income tax returns.

Where the dwelling has been vacant for more than 183 days in that year, the foreign owner will be liable for the vacancy tax. A notice of assessment will be issued by the ATO, and the liability will be payable within 21 days of that assessment.

Many of the compliance powers available to the ATO under the income tax laws have been made available in these new rules. The ATO will be given the powers to require a foreign person to produce evidence that their property was occupied in excess of the 183-day minimum for any given year, and the foreign owner is required under the new law to keep records to allow them to prove the property was occupied during the year. The records must be retained for five years following the disposal of the property.

There are also penalties for foreign owners who fail to lodge vacancy returns, or for owners who fail to produce records to the ATO as required. In addition, the new law provides the Government with the power to create a charge over property, or seek other forms of recovery, where there are outstanding and unpaid vacant tax liabilities.

BDO COMMENT

It remains to be seen whether these proposals will achieve the Government's aim to reduce the price of residential properties, predominantly in Sydney, Melbourne and Brisbane. That can only be assessed once the new law is in operation. Of greater concern for foreign owners of residential property are the increase in compliance requirements, including the requirement to lodge vacancy tax returns and maintain records in the event of an audit. The difficulty for some owners will be establishing the date on which their vacancy year commences, and where they have multiple properties, keeping record of the starting dates for the respective properties, and the records keeping requirements to prove the properties were occupied.

MORE INFORMATION

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