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Policy and Strategy, Inland Revenue

Residential land withholding tax

The Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016 introduced a new withholding tax – residential land withholding tax (RLWT) – on sales of residential property made by “offshore RLWT persons” within two years of acquisition.

This special report provides early information on the new RLWT rules, and precedes full coverage of the new legislation in the July edition of the *Tax Information Bulletin*.

Background

Residential land withholding tax is primarily intended to support the “bright-line test” announced by the Government in Budget 2015 as part of a package of proposals to improve compliance with the residential investment property tax rules.

The bright-line test was enacted on 16 November 2015 in the Taxation (Bright-line Test for Residential Land) Act 2015. It requires income tax to be paid on any gains from the sale of residential property bought and sold within two years, with some exceptions – for example, if the property sold was the vendor’s main home. It applies to land acquired on or after 1 October 2015.

Proposals for the RLWT were consulted on in an officials’ issues paper, *Residential land withholding tax*, released in August 2015. It was originally proposed that RLWT apply when the vendor is an “offshore person”, using the definition introduced in the Tax Administration Amendment Act 2015 and Land Transfer Amendment Act 2015 (referred to as the “land information requirements” in this special report). Sixteen submissions were received. The issues paper also left open the question of whether the vendor’s conveyancer or solicitor, or the purchaser’s conveyancer or solicitor should be the withholding agent, and outlined the advantages and disadvantages of each approach.

Feedback from that consultation, including with the Auckland District Law Society, New Zealand Law Society, and New Zealand Society of Conveyancers, whose members are required to administer the withholding tax, helped to shape the RLWT measures in the new legislation.

A number of modifications were subsequently made to the original proposals, which were then introduced in the Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill on 16 November 2015. The main modifications included:

- broadening the scope of “offshore person” in response to submissions that the definition used for land information requirements would be too difficult for RLWT agents to determine and verify;

- requiring the vendor’s conveyancer or solicitor involved in the land disposal to be the RLWT withholding agent; and
- reducing the amount of RLWT payable, when payment would leave insufficient funds for a mortgage with a New Zealand-registered bank or non-bank deposit taker under the Non-bank Deposit Takers Act 2013 to be paid. This reduction is only available when the vendor’s conveyancer or solicitor is the RLWT agent.

Further refinements to the proposals were recommended by the Finance and Expenditure Committee in response to submissions made at the select committee stage of the bill. The main recommendations included:

- renaming “offshore person” to “offshore RLWT person” to avoid confusion with the land information requirements;
- narrowing the definition of “offshore RLWT person” as it applies to companies and trusts, to make it more consistent with the approach taken in the Overseas Investment Act 2005;
- introducing an RLWT exemption certificate regime to relieve cashflow pressures in certain situations. Offshore RLWT persons in the business of developing land, erecting buildings, or dividing land into lots will be able to apply for an RLWT exemption certificate if they have complied with all of their tax obligations or are able to provide sufficient security to the Commissioner (for example, a bank bond). Offshore RLWT persons who would be eligible for the main home exclusion under the bright-line test will also be able to apply for an RLWT exemption certificate;
- reducing the amount of RLWT payable, where payment of RLWT would leave insufficient funds for the vendor’s outstanding local authority rates to be paid;
- applying late filing penalties for RLWT agents to ensure the timely provision of information to Inland Revenue; and
- streamlining and simplifying the information provision requirements.

Key features

As the RLWT is primarily a collection mechanism for the bright-line test, the RLWT follows as closely as possible the concepts used in the bright-line test. However, there are some instances where the framework departs from that of the bright-line test to ensure that the RLWT is able to be administered by agents.

RLWT applies when:

- the property being sold is “residential land” located in New Zealand and defined for the purposes of the bright-line test as introduced in the Taxation (Bright-line Test for Residential Land) Act 2015;
- the vendor acquired the property on or after 1 October 2015 and has owned the property for less than two years before disposing of it (the two-year holding period used in the bright-line test); and
- the vendor is an “offshore RLWT person”.

RLWT does not apply when the vendor holds a certificate of exemption.

Offshore RLWT persons

An “offshore RLWT person” includes all non-New Zealand citizens and individuals who do not hold residence class visas granted under the Immigration Act 2009. It also includes a New Zealand citizen who is living overseas, if they have not been physically present in New Zealand within the last three years. A holder of a New Zealand residence class visa may be an offshore person if they are outside New Zealand and have not been in New Zealand within the last 12 months.

New Zealand trusts and companies may also be “offshore RLWT persons” if there are significant offshore interests in them.

A New Zealand company is an offshore RLWT person, if more than 25 percent of the directors or holders of the shareholder decision-making rights are themselves offshore persons. This 25 percent threshold rule also applies for limited partnerships and look-through companies, which are legal entities.

Similarly, a trust is an offshore RLWT person if more than 25 percent of the trustees or persons with the power to appoint or remove trustees or amend the trust deed are themselves offshore persons.

However, the general 25 percent rule does not apply to beneficiaries. A trust is an offshore RLWT person if any one of the following applies:

- all of the natural person or non-natural person beneficiaries (discretionary and non-discretionary) are offshore;
- a non-natural person offshore beneficiary has received a distribution from the trust within the previous four years;
- a natural person offshore beneficiary has received distributions from the trust totalling more than \$5,000 in any of the previous four years; or
- there is an offshore beneficiary and the trust has disposed of residential land within the previous four years.

These rules seek to ensure that a family trust where the beneficiaries are now living overseas or are on their OE will not be an “offshore RLWT person”.

For transparent entities like partnerships and co-ownership situations, the offshore status of each partner or owner needs to be considered and RLWT will be calculated and allocated accordingly.

Further detail on what constitutes an “offshore RLWT person” can be found in the section titled “When RLWT applies”, under the subsection “Offshore RLWT persons”.

Exemptions from RLWT

No exemption for the vendor’s main home is available for the purposes of the RLWT, unless the vendor has a valid RLWT exemption certificate from Inland Revenue and has provided this to the RLWT agent.

This is because RLWT only applies to offshore RLWT persons, so it is unlikely that the property being sold is an offshore RLWT person's main home. If it is the offshore RLWT person's main home, it would be difficult for the withholding agent to verify, so an exemption certificate regime is appropriate.

An RLWT exemption certificate is also available to persons in the business of developing land, erecting buildings or dividing land into lots. To obtain an exemption certificate, the developer, builder or subdivider must have either complied with all of their tax obligations or provided acceptable security to the Commissioner of Inland Revenue – for example, a bank bond.

Further detail on this can be found in the section titled “When RLWT applies”.

Alternatively, if the vendor does not hold an exemption certificate and RLWT is withheld and paid to Inland Revenue, the vendor may file an “interim claim” to obtain a refund of the overpaid RLWT before the end of the income year.

The section titled “Interim claims” has further information on the interim claim process.

RLWT agent

The obligation to pay RLWT primarily lies with the vendor's conveyancer or solicitor, as agent for the vendor. A conveyancer or solicitor provides conveyancing services as defined in the Lawyers and Conveyancers Act 2006 and must have a New Zealand-based trust account.

If the vendor does not have a conveyancer or solicitor, the obligation to pay RLWT is on the purchaser's conveyancer or solicitor. In the absence of either, the obligation to pay RLWT is on the purchaser themselves. In these situations, the person with the obligation to pay RLWT is referred to as the “paying agent”. If the vendor and purchaser are associated persons, the purchaser is liable for the payment of RLWT and is known as a “withholding agent”.

The person who is required to pay or withhold RLWT is referred to as the “RLWT agent” in this special report except when there are differences in the treatment between withholding agents and paying agents (for example, in relation to penalties and underlying liability). In these situations, this special report distinguishes between paying agents and withholding agents.

RLWT is not a traditional withholding tax in the sense that paying agents are not held jointly and severally liable for the RLWT if they have not retained the RLWT from the settlement funds.

This is the correct outcome when the paying agent has not retained RLWT from the settlement amount before paying the funds to the vendor. This is because the RLWT paying agent would not be able to recoup the debt from the vendor if the paying agent were held liable for the underlying RLWT debt.

As this is a departure from “normal” withholding tax treatment, the Commissioner of Inland Revenue is able to report cases of RLWT non-compliance to the conveyancing agent’s professional body – for example, the New Zealand Law Society or the New Zealand Society of Conveyancers – for appropriate action to be taken.

Note that when the vendor and purchaser are associated persons, the purchaser can be liable for the underlying amount of RLWT.

The RLWT agent must pay the required amount of RLWT to the Commissioner by the 20th of the following month, together with information relating to the transaction. However, they can also pay RLWT to the Commissioner on a transaction-by-transaction basis immediately following settlement, if desired.

The Commissioner of Inland Revenue can still apply the monetary penalties applicable to other withholding taxes (including both civil and criminal penalties) – for example, shortfall penalties, late payment penalties and late filing penalties.

Further detail on this can be found in the section titled “When RLWT obligations not met”.

Calculating RLWT

There are three calculations required to determine the amount of RLWT payable. The amount of RLWT required to be withheld will be the lowest of the following three amounts:

- 33% (or 28% if the vendor is a company) x (current purchase price – vendor’s acquisition cost);
- 10% x the current purchase price; and
- current purchase price – outstanding local authority rates – security discharge amount.

In general, RLWT must be paid before other disbursements are made at the time of settlement.

However, under the third calculation outlined above, an allowance has been made for the vendor’s outstanding local authority rates in relation to the property. If the payment of the vendor’s outstanding local authority rates would result in insufficient funds being available to pay RLWT, the amount of RLWT payable is reduced to the extent necessary to ensure that the outstanding local authority rates are able to be paid.

In addition, if the vendor’s conveyancer is the RLWT agent, the amount of RLWT payable is reduced to the extent necessary to discharge the vendor’s mortgage obligation with a New Zealand-registered bank or non-bank deposit taker licensed under the Non-bank Deposit Takers Act 2013.

Further detail on this can be found in the section titled “Calculating RLWT”.

Credit for and repayment of RLWT

RLWT is not a final withholding tax. The vendor is able to claim a tax credit for the amount of RLWT withheld and paid to the Commissioner against their final income tax liability in relation to the sale of the residential property.

In some cases, this may result in a tax refund. The vendor does not need to wait until the end of the tax year to do this. As long as they have no outstanding tax obligations, the vendor can file an “interim claim”, which includes all of the vendor’s land-related income and costs for the year to date.

Application dates

The RLWT rules apply to a “residential land purchase amount” made on or after 1 July 2016, but only in relation to residential land acquired on or after 1 October 2015 and subsequently disposed of.

Residential land acquired before 1 October 2015 is not subject to RLWT.

Detailed analysis

New tax type: Residential land withholding tax

The RLWT rules are set out in new subpart RL. RLWT applies to certain disposals of residential land.

New section RA 6C of the Income Tax Act 2007 provides that a person required to pay RLWT under new section RL 2 and a person required to withhold and pay RLWT under new section RL 3, must pay RLWT to the Commissioner of Inland Revenue by the due date. Section RL 5 provides that RLWT must be paid on a monthly basis and section RA 15(2) provides that the due date is the 20th of the following month.

RLWT is, in effect, a new type of withholding tax. However, it is only a true withholding tax if the vendor and purchaser are associated persons. This situation is specified in new sections BE 1(6) and RL 3. In this situation, the purchaser must withhold the RLWT calculated. The meaning of “associated person” is set out in sections YB 1–16 of the Income Tax Act 2007. In this case, the person required to withhold RLWT (the purchaser) is referred to as a withholding agent and may be liable for the underlying amount of RLWT.

Where the vendor and purchaser are not associated persons, the person required to pay RLWT on behalf of the vendor (“the paying agent”) is permitted to retain the amount of RLWT from the purchase price, similar to a withholding tax, but RLWT is instead listed in section BF 1(d) (and in section YA 1 as an ancillary tax). The ability to retain an amount of RLWT from the purchase price is provided for in new section RL 2(8) and the vendor is treated as receiving both the amount paid to them directly and the amount paid to the Commissioner. This provides assurance to the person correctly retaining or withholding RLWT from a payment to the vendor and paying this RLWT to the Commissioner that the vendor cannot say that they did not “receive” the full payment.

This distinction between “paying agent” and “withholding agent” is necessary because, in general, paying agents are not liable for the underlying amount of RLWT. This is provided for in new section RL 2(5). One exception is when the paying agent has retained an amount of RLWT, but has not paid this to the Commissioner.

The section titled “Person required to pay RLWT (the paying agent and the withholding agent)” provides further discussion on this issue. The term “RLWT agent” is used throughout this special report to mean both paying agents and withholding agents.

When the obligation arises

The obligation to retain or withhold and pay RLWT generally arises upon settlement when, in most cases, the bulk of the purchase price is paid by the purchaser to the vendor via a conveyancer or solicitor. At this point the RLWT paying or withholding agent (RLWT agent) should retain or withhold RLWT from the funds being paid. Further information about who the RLWT agent is can be found in the section titled “Person required to pay RLWT (the paying agent and the withholding agent)”.

New section RL 1 provides that in general, the obligation to pay RLWT arises if there is a “residential land purchase amount” and the conditions for payment are satisfied. The section titled “When RLWT applies” discusses when RLWT applies.

The definition of “residential land purchase amount” inserted into section YA 1 means an amount paid or payable for the disposal of the residential land in question, but excludes deposits and part-payments as long as all deposits and part-payments total, in aggregate, less than 50 percent of the purchase price for the land. This rolling aggregate ensures that part-payments are not used to circumvent the application of the RLWT.

Example

Elizabeth is an offshore RLWT person. Elizabeth agrees to sell her house to Rebecca for \$500,000. The contract requires Rebecca to pay a 10 percent deposit of \$50,000, with the remaining \$450,000 to be paid upon settlement. The \$50,000 deposit is not a residential land purchase amount, but the \$450,000 paid upon settlement is a residential land purchase amount. RLWT is calculated based on the purchase amount of \$500,000.

The residential land purchase amount in itself is not income for tax purposes. It is an amount that is paid, which triggers a withholding or retention obligation. The residential land purchase amount forms part of the consideration for the disposal of residential land, which may be income for the vendor under another part of the Income Tax Act 2007.

The obligation to pay RLWT is not restricted to instances where consideration for the property is paid in cash. In-kind consideration may form part of the transaction and the situation will be monitored to ensure that RLWT obligations are not evaded or avoided through the use of non-cash consideration, as this could raise concerns under the general anti-avoidance rule in section BG 1 of the Income Tax Act 2007. As noted, a paying agent is not liable for the underlying amount of RLWT if they are unable to retain RLWT, but shortfall penalties may apply depending on the level of culpability of the paying agent. The section titled “When RLWT obligations not met” sets out the different types of penalties in further detail.

Due dates for RLWT to be paid to the Commissioner

Once the obligation for RLWT has arisen and the appropriate amount of RLWT has been withheld or retained from a residential land purchase amount, new section RL 5 and an amendment to section RA 15 provide that the standard due dates for interim and other tax payments made on a monthly basis apply. The due date is specified in section RA 15(2) as being the 20th day of the following month.

This provides for the “batching” of various RLWT amounts, which may be preferable for a RLWT agent who handles a number of RLWT transactions in a month. RLWT agents are also permitted to pay RLWT amounts to the Commissioner on a transaction-by-transaction basis before the stipulated due date.

The transaction-by-transaction approach may be preferred by RLWT agents who handle RLWT transactions only occasionally, and by vendors who want to square up the amount of RLWT paid with their income tax liability in relation to the disposal of the residential land fairly soon afterwards.

Example

Susanna is a conveyancer and retains RLWT from four transactions during the month of March. Susanna pays the retained RLWT amounts to the Commissioner on the stated due date, 20 April.

Example

Bill is a conveyancer who normally pays RLWT amounts to the Commissioner on the 20th of the following month. However, for a particular transaction, Bill agrees with his client to pay the RLWT amount to the Commissioner immediately.

Example

Scott is a solicitor who only occasionally handles RLWT transactions and prefers not to hold onto the retained funds. Scott retains RLWT from a residential land purchase amount on 1 August. He is not required to pay this amount to the Commissioner until 20 September, but chooses to pay the RLWT amount to the Commissioner the following week.

Tax credit for RLWT paid

Section LA 6 has been amended and section LB 6B inserted to provide that a person has a tax credit for a tax year equal to the amount of RLWT paid in relation to residential land they have disposed of. There is the possibility that a person’s tax liability in relation to the disposal of residential land arises in one tax year, but the RLWT is not collected until the following tax year due to the timing of a property settlement. Section LB 6B provides that the RLWT tax credit arises in the income year in which they dispose of the relevant residential land to ensure that it can be credited against the person’s income tax liability in the appropriate year.

The vendor is eligible for an RLWT credit for the amount retained or withheld by the RLWT agent. In some cases, this might not be the same as what is paid by the paying agent to the Commissioner. The Commissioner may need to investigate whether the full amount claimed was actually retained, in order to retain the integrity of the RLWT rules and to prevent fraudulent claims from being processed. Under existing law, the Commissioner is able to provide appropriate relief to the vendor, if satisfied that the paying agent has retained more than what was paid to the Commissioner and there is no underlying mischief. This addresses concerns surrounding the lack of visibility as to the true underlying relationship between the vendor and paying agent, combined with the fact that the paying agent is not automatically jointly and severally liable for the full RLWT debt.

Example

Bernard is an offshore RLWT person who has recently sold his house and has had \$15,000 of RLWT retained from the settlement funds by his paying agent. Inland Revenue has received \$10,000 that is allocated to Bernard's IRD number.

In his income tax return, Bernard declares in his tax return that his RLWT credit is \$15,000.

Following further investigation, the Commissioner is satisfied that there is no mischief on Bernard's behalf and that the paying agent did retain \$15,000. The Commissioner takes action against the paying agent and recovers the remaining \$5,000 and provides Bernard the full RLWT credit of \$15,000.

It is expected that a credit under section LB 6B will be used primarily to offset the person's income tax liability from the disposal of residential property.

Section LA 6 provides that the RLWT credit can be used to satisfy the person's other income tax liabilities, to the extent that the amount of RLWT paid exceeds their income tax liability, in relation to the disposal of the residential property.

The excess RLWT may be refunded if the person has no other income tax liabilities.

Example

Patrick is an offshore RLWT person who sold his residential property, and \$40,000 of RLWT was withheld from the settlement amount. Patrick's income tax liability in relation to the disposal is only \$35,000. Patrick has no other tax liabilities. Inland Revenue issues a refund to Patrick of \$5,000.

A person can lodge an interim claim before the end of an income year, returning their taxable income arising from land, to obtain a refund of excess RLWT. However, as this is merely an interim claim, it is not considered to be final, and the person will still need to lodge an income tax return at the end of the income year. RLWT generally needs to be received by the Commissioner before a refund is issued as part of an interim claim, to prevent fraudulent claims from arising.

Interim claims are provided for in new section RL 6 of the Income Tax Act 2007, and new section 54D of the Tax Administration Act 1994. Further detail on interim claims can be found in the section titled "Interim claims".

RLWT must be paid before other disbursements

RLWT must be paid before other disbursements, such as mortgages, are made as part of the settlement process. This is so RLWT cannot be circumvented by gearing up before disposal of the residential property or making a number of disbursements at the time of settlement, when RLWT must also be paid.

Normally this is not a problem because withholding taxes are generally paid by the payer of an amount at the first possible opportunity. For example, in other jurisdictions with an equivalent regime to RLWT, the withholding tax must be paid by the purchaser before the settlement funds are passed to the vendor or the vendor's agent. This means the withholding tax is paid before any other disbursements are made.

Sometimes, the payment of RLWT before other disbursements may leave insufficient funds for the vendor's mortgage obligation to be discharged.

New section RL 4(6) provides that in limited circumstances, the amount of RLWT payable is reduced to the extent required to discharge a mortgage obligation held with a New Zealand-registered bank or non-bank deposit taker licensed under the Non-bank Deposit Takers Act 2013. However, this is restricted to instances where the vendor's conveyancer or solicitor is the RLWT agent. If the RLWT agent is the purchaser's conveyancer or solicitor, or is the purchaser themselves, this reduction for a New Zealand mortgage is not available.

Section RL 4(6) also provides that when necessary, the amount of RLWT is reduced to take account of the vendor's outstanding local authority rates at the time of the disposal.

Further information can be found in the sections titled "Calculating RLWT" and "Person required to pay RLWT (the paying agent and the withholding agent)".

If there are other charges that are being cleared as part of the settlement process, for example, unpaid body corporate levies or a loan held with a party that is not a licensed security holder, the paying agent has a number of possible courses of action if there are insufficient funds for RLWT to be paid – for example, they may require the vendor to pay the additional funds to ensure those payments can be made. While a paying agent is not liable for the underlying amount they did not withhold, they may be subject to shortfall penalties depending on their level of culpability. For further information on civil and criminal penalties, refer to the section titled "When RLWT obligations not met".

Officials will continue to monitor the situation to ensure that this provision is not used to undermine the integrity of the new RLWT rules and the broader tax system.

Non-fulfilment of RLWT obligations

This is discussed in the section titled "When RLWT obligations not met", but generally the standard penalties that apply to other withholding taxes apply in the context of RLWT, including late filing penalties. In addition, an amendment has been made to section 81 of the Tax Administration Act 1994 to allow the Commissioner to report repeated or deliberate instances of non-compliance to an RLWT agent's professional body.

When RLWT applies

RLWT applies to disposals of residential land, where a “residential land purchase amount” is paid or payable on or after 1 July 2016. In most standard cases, the payment of a residential land purchase amount occurs upon settlement where the bulk of the purchase price is paid by the purchaser. A discussion on the meaning of “residential land purchase amount” can be found in the section titled “New tax type: Residential land withholding tax”.

RLWT applies to a disposal when all three following conditions are met:

- the land being disposed of must be residential land located in New Zealand;
- the vendor is within the two-year period for the bright-line period for the land, where the vendor originally acquires the land on or after 1 October 2015; and
- the vendor is an offshore RLWT person.

RLWT does not apply to residential land acquired before 1 October 2015.

Residential land in New Zealand

New section RL 1(2) provides that RLWT only applies to residential land located in New Zealand. This restriction is necessary, otherwise RLWT could apply to disposals of property situated overseas where the transaction has no link to New Zealand.

The meaning of “residential land” follows the definition used for the bright-line test, and is:

- land that has a dwelling on it;
- land for which the owner has an arrangement that relates to erecting a dwelling;
- bare land that may be used for erecting a dwelling under the rules in the relevant operative district plan;
- but does not include land that is farmland or used predominantly as business premises.

Further information on the meaning of “residential land”, including examples, is available in Inland Revenue’s February 2016 *Tax Information Bulletin* on the bright-line test legislation (Vol 28, No 1).

Within two-year bright-line period

New section RL 1(2)(a) provides that, in addition to being residential land located in New Zealand, the vendor must be within the two-year bright-line period for the property being disposed of.

More specifically, new section RL 1(2)(a) requires the residential land purchase amount from the disposal to be income of the vendor under section CB 6A, or it would be income of the vendor but for the main home exclusion in section CB 16A or the application of another land taxing provision in section CB 6A(6).

This means that the land needs to be acquired on or after 1 October 2015 and the person’s bright-line date for that land is within two years of acquisition. Land acquired before 1 October 2015 is not subject to the bright-line test or RLWT.

Further information on how to calculate the two-year bright-line period is provided in the *Tax Information Bulletin* item on the bright-line test legislation (Vol 28, No 1), but in most cases the bright-line period begins on the date the person’s title to the residential land is registered under the Land Transfer Act 1952, and ends on the date that the person enters into the agreement for the disposal of the residential land. If the end date (or “bright-line date”) is within two years of the start date, the requirement in section RL 1(2)(a) is met.

A summary of the start and end dates to calculate the bright-line period for most types of property transactions is shown below:

Start date	End date (“bright-line date”)
<ul style="list-style-type: none"> • the date on which the instrument to transfer the land to the person was registered under the Land Transfer Act 1952 • the date of entry into a contract to purchase, for sales “off the plan” • the date of acquisition of the land according to ordinary rules, if an instrument to transfer the land to the person is not registered on or before the bright-line date. 	<ul style="list-style-type: none"> • the date that the person enters into an agreement for the disposal • the date on which the person makes a gift of the residential land • the date on which the person’s residential land is compulsorily acquired under any Act by the Crown, a local authority, or a public authority • if there is a mortgage secured on the residential land, the date on which the land is disposed of by or for the mortgagee as a result of the mortgagor’s defaulting • or if none of the above apply, the date on which the estate or interest in the residential land is disposed of.

If the residential land being disposed of was subdivided, the start date is when the title to the undivided land was registered. Further detail on subdivisions and other types of property transactions can be found in the *Tax Information Bulletin* item for the bright-line test (Vol 28, No 1).

The vendor is required to provide information under section 54C of the Tax Administration Act 1994 to the RLWT agent detailing whether the disposal is subject to RLWT. Further detail on what the vendor is required to provide can be found in the section titled “Information requirements”. To confirm that the information provided by the vendor is correct, the RLWT agent can obtain the title registration date from Land Information New Zealand’s Landonline system, which is available to conveyancers and solicitors. In most circumstances, the RLWT agent should be able to obtain the “bright-line date” from the agreement for sale and purchase for the vendor’s disposal.

In a standard scenario when a prospective purchaser makes an offer on a house, but the offer is conditional on the purchaser obtaining satisfactory financing and/or a builder’s report, the vendor’s bright-line date is the date on which they accept the purchaser’s conditional offer, not when the agreement goes unconditional. If the terms of the agreement are amended as a result of these conditions, the end of the bright-line period is still the date on which the vendor entered into the agreement to dispose of the property.

Example

Florence is selling her house. Ash is a prospective buyer and makes an offer on Florence's house on 18 April. The agreement is conditional on Ash obtaining financing within five working days of Florence's acceptance of Ash's offer. Florence accepts Ash's conditional offer and signs the agreement on 19 April. Ash obtains suitable financing on 22 April and the agreement goes unconditional that day. Florence's bright-line date is 19 April because this is the date that Florence enters into the agreement to dispose of the house.

If the vendor's bright-line date for the residential land is within two years, but the vendor is not taxed under section CB 6A because another land taxing provision applies, RLWT still applies. This is because the vendor has an income tax liability in relation to the disposal and the purpose of the RLWT is to act as a collection mechanism for income tax. The vendor should not be able to avoid RLWT merely because another taxing provision applies to the transaction.

There are implicit exemptions from RLWT or rollover relief for inherited property and for transfers of relationship property, which are provided for in the bright-line test. This is achieved through section RL 1(2)(a) which refers to an amount that is income, or would be income but for the main home exclusion or another land taxing provision.

During a marriage, civil union or de facto relationship, the parties hold any property according to the conventional laws relating to property. As a result, the parties are free to deal with their property during the relationship without regard to the provisions of the Property (Relationships) Act 1976. When a relationship breaks down, the Property (Relationships) Act 1976 may be invoked by a court order or an agreement between the parties. When this statutory regime is invoked, new property rights operate from the date of the court order or agreement. The property of the spouses or partners is reapportioned between them under principles from this statutory regime.

Rollover relief generally means that when part or all of a specific property is transferred from one party to another under a relationship property agreement, the transferee takes on the cost base of the transferor – that is, they are treated as having acquired their recently acquired portion at the same time for the same cost as when the transferor originally acquired the property. Through section FB 3A, this means there should be no RLWT to pay in relation to the transfer from one party to the relationship property agreement to the other. This is because the transfer is treated as a disposal and acquisition for an amount that equals the total cost of the residential land to the transferor at the date of transfer. However, depending on the circumstances, there may be a requirement to account for RLWT, even though the amount of RLWT calculated is nil.

If the transferee subsequently disposes of the residential land within two years from when the transferor originally acquired it, that sale is within the scope of the bright-line test and RLWT.

Offshore RLWT persons

New section RL 1(2) sets out the criteria for the RLWT rules to apply. In addition to the land being New Zealand residential land and being disposed of within the two-year bright-line period, the vendor must be an "offshore RLWT person" for RLWT to apply. "Offshore RLWT person" is defined in section YA 1 and covers both individuals and non-individuals, such as companies or trusts.

The vendor must provide a statement under section 54C of the Tax Administration Act 1994 that they are/are not an offshore RLWT person in a form prescribed by the Commissioner of Inland Revenue. At the time of writing, the IR1101 is the form required to be filled in by the vendor under section 54C. The person who fills in the form will be subject to criminal penalties if they knowingly provide false information, as it is information provided in relation to a tax law. Certain accompanying documents are also required.

New section RL 2(7) provides that a paying agent is able to “reasonably rely” on the information in the completed IR1101 form and the accompanying documents provided under section 54C. This “reasonable reliance” test enables paying agents to rely on the information provided to them by vendors, unless they know the information to be false or they suspect it to be false (for example, if the passport appears to be fraudulent). This reasonable reliance test does not extend to RLWT agents who are withholding agents under section RL 3.

Section 54C of the Tax Administration Act 1994 requires that the vendor must provide this information to the RLWT agent before a residential land purchase amount is made. If the IR1101 form has not been provided by the vendor, the RLWT agent may assume the vendor is an offshore RLWT person and therefore withhold RLWT if the other requirements for withholding have been met (New Zealand residential land being disposed of within the two-year bright-line period). An exception to this would be when the RLWT agent has reasonable grounds for establishing that the vendor is not an offshore RLWT person – for example, a long-standing client relationship such that the RLWT agent knows the vendor not to be an offshore RLWT person.

Further information on the information that must be provided as part of the section 54C requirements and what constitutes “reasonable reliance” can be found in the section titled “Information requirements”.

Natural persons

Subsection (a) of the definition of “offshore RLWT person” in section YA 1 sets out when a natural person is an offshore RLWT person. It is the same as the definition of “offshore person” in the Tax Administration Act 1994 as introduced by the Tax Administration Amendment Act 2015 and the Land Transfer Amendment Act 2015 for the land information requirements. The definition is used to determine who must have a New Zealand bank account (or have had customer due diligence identity verification carried out by a reporting entity) when applying for an IRD number, and who must provide their IRD number when buying or selling residential property.

An individual is an offshore RLWT person if they are not a New Zealand citizen and do not hold a New Zealand residence class visa as defined in the Immigration Act 2009. A residence class visa is a resident visa or a permanent resident visa. Student visas and work visas, for example, are not residence class visas.

Example

Mary is an investor in residential property. She sells a piece of residential land located in Auckland to Jim. Mary is in New Zealand at the time of the sale, but she is not a New Zealand citizen and does not hold a residence class visa granted under the Immigration Act 2009. Mary is an “offshore RLWT person”.

A New Zealand citizen is nevertheless an offshore RLWT person if they are outside New Zealand and have not been in New Zealand within the last three years. A single day (or part-day) of presence in New Zealand during the past three years is enough for a New Zealand citizen not to be an offshore RLWT person.

A holder of a New Zealand residence class visa is an offshore RLWT person if they are outside New Zealand and have not been in New Zealand within the last 12 months. Again, a single or part-day of presence in New Zealand within the past 12 months is enough to satisfy the physical presence test.

Example

Tane is a New Zealand citizen and is relocated overseas with his job. Eighteen months after moving overseas, he sells his residential property. Tane has not been back in New Zealand since relocating. Tane is not an offshore RLWT person at the time of the sale.

Generally, Australian citizens and permanent residents are granted a resident visa on arrival in New Zealand under the Immigration Act 2009 and subsequent regulations, but this visa expires when the individual leaves New Zealand. If they subsequently re-enter New Zealand, they are issued a new resident visa. This means that if an Australian citizen or an Australian permanent resident is physically present in New Zealand at the time of the sale, they are not an offshore RLWT person. However, they may be an offshore RLWT person if they are outside New Zealand at the time of the sale and have not applied for a New Zealand permanent resident visa or New Zealand citizenship.

In most cases it is likely that the reasonable reliance test can be satisfied when a New Zealand citizen or holder of a residence class visa who is selling their property within two years meets with the paying agent in person and shows them their passport. The conveyancing agent should take a copy of the documentation and record that they have seen the person in New Zealand. As the vendor is currently in New Zealand, this means they are not an offshore RLWT person.

If an individual is selling their property from outside New Zealand, they are required to provide suitable proof to the RLWT agent that they are not an offshore RLWT person. This could include a certified statement and copy of their New Zealand passport or residence class visa, as well as evidence of flights to New Zealand within the relevant timeframe. This enables the paying agent to “reasonably rely” on their statement that they are not an offshore RLWT person.

Partnerships and other joint or co-ownership situations

For partnerships and other cases where the vendors hold the property jointly (for example, as tenants in common or as part of a joint tenancy) the offshore status of each partner or co-owner is considered individually and then RLWT applies to the offshore RLWT person’s share in the property. This is provided for in section RL 1(3). In this case, each partner or co-owner is required to provide information in a separate IR1101 form under section 54C of the Tax Administration Act 1994.

In the case of a partnership, RLWT applies according to the income interests held by offshore RLWT persons. To enable the RLWT agent to do this, the partners must provide the RLWT agent with a copy of the partnership agreement or a statement regarding their income interests in the partnership. Knowingly providing incorrect information is a criminal offence.

For other co-ownership situations, the RLWT agent can assume that the property is equally divided between co-owners, unless evidence to the contrary is provided.

This is a different approach to that proposed in the Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill at the time of introduction. It was then proposed that an offshore partner or co-owner would taint the transaction, and RLWT would subsequently apply to the whole transaction.

Example

Rebecca is a New Zealand citizen and Sebastian is a holder of a residence class visa. They are both physically present in New Zealand when they purchase a New Zealand residential property and hold the property as joint tenants. For the purposes of RLWT, their respective shares are 50 percent each, even though as joint tenants they have the equal, undivided shares in the property. Rebecca and Sebastian go travelling immediately after purchasing the property. After 15 months, they decide to sell the property and neither of them has been back in New Zealand since they purchased the property. Sebastian is an offshore RLWT person, but Rebecca is not. The property is sold for \$500,000, so Sebastian's share is \$250,000. The RLWT agent calculates RLWT in relation to Sebastian's \$250,000 share and, in returning the retained RLWT to the Commissioner of Inland Revenue, allocates it to Sebastian's IRD number.

Companies and limited partnerships

This allocation rule does not apply for limited partnerships or look-through companies for example, which are corporate entities. Part (c) of the definition of "offshore RLWT persons" deals with legally corporate entities and covers both limited partnerships and look-through companies.

A non-natural person is an offshore RLWT person if any of the following conditions are met:

- it is incorporated outside New Zealand;
- it is registered outside New Zealand;
- it is constituted under foreign law;
- it is a company and more than 25 percent of the company's directors are offshore RLWT persons or more than 25 percent of the shareholder decision-making rights are held directly or indirectly by offshore RLWT persons;
- it is a partner in a limited partnership and more than 25 percent of the general partners are offshore RLWT persons or more than 25 percent of the partnership's shares are held directly or indirectly by offshore RLWT persons; or
- it is an owner of an effective look-through interest in a look-through company and more than 25 percent of the look-through company's effective look-through interests are held directly or indirectly by offshore RLWT persons.

A company (including a unit trust) is not an offshore RLWT person when all of the following conditions are met:

- the company is incorporated in New Zealand and not registered overseas; and
- no more than 25 percent of the directors of the company are offshore RLWT persons; and
- no more than 25 percent of the shareholder decision-making rights of the company are held by offshore RLWT persons.

A limited partnership is not an offshore RLWT person when all of the following conditions are met:

- the limited partnership is incorporated in New Zealand and not registered overseas; and
- no more than 25 percent of the general partners are offshore RLWT persons; and
- no more than 25 percent of the shares (voting interest or income interest) in the partnership are held directly or indirectly by offshore RLWT persons.

Trusts

Subsection (b) of the definition of “offshore RLWT person” in section YA 1 sets out when a trustee of a trust is an offshore RLWT person.

A person that is a trustee of a trust is an offshore RLWT person for the purposes of the RLWT rules if any of the following conditions are met:

- more than 25 percent of the trustees of the trust are offshore RLWT persons;
- more than 25 percent of the people that have the power to appoint or remove a trustee of a trust, or to amend the trust deed, are offshore RLWT persons;
- all natural person beneficiaries (including discretionary beneficiaries) of the trust are offshore RLWT persons;
- all beneficiaries (including discretionary beneficiaries) of the trust are offshore RLWT persons;
- a beneficiary (including a discretionary beneficiary) that is not a natural person and is an offshore RLWT person has received a distribution from the trust within the last four years of a relevant disposal of residential land;
- a natural person beneficiary (including a discretionary beneficiary) that is an offshore RLWT person has received distributions from the trust of more than \$5,000 in any one year of the past four years prior to the relevant disposal of residential land; and
- a beneficiary or discretionary beneficiary of the trust is an offshore RLWT person and the trust has disposed of residential land within four years before the current disposal.

A 25 percent control test applies to trustees and persons with the power to appoint/remove trustees or amend the trust deed (set out in subsection (b)(i) and (ii) of the definition of offshore RLWT person). If the 25 percent threshold has not been breached, the trust may nevertheless be an offshore RLWT person depending on the status of the beneficiaries.

Generally, it is expected that the settlors of a trust would have the power to appoint/remove trustees or amend the trust deed. Looking at the offshore status of people with this power prevents the situation where a trust, with an offshore settlor and resident trustees, sell the property (without being subject to a withholding tax), with the settlor then replacing resident trustees with trustees who are offshore persons and beyond the reach of Inland Revenue. This requirement is consistent with the settlor focus for trusts in New Zealand's income tax rules.

In addition, the trustees of a discretionary trust have the ability to shift the tax liability to one of the beneficiaries by distributing the income to the beneficiary and treating it as beneficiary income. To ensure that the gain does not escape tax by being transferred to an offshore beneficiary, a trust can be an offshore RLWT person if a beneficiary is an offshore RLWT person and they have received certain distributions.

Note that there is no percentage test in relation to beneficiaries, even though there is a 25 percent control test in relation to trustees and settlors.

The first limbs of the test for beneficiaries (subsections (b)(iii) and (iv)) are relatively narrow in that all natural person beneficiaries (including discretionary beneficiaries) or all beneficiaries of the trust must themselves be offshore RLWT persons. The intention was that trusts that own the family home should not be an offshore RLWT person solely because some of the beneficiaries were offshore (for example, adult children working overseas), but it should not be possible to set up a trust in which all beneficiaries are foreign investors who are natural persons, with a New Zealand charity appointed as a discretionary beneficiary simply to avoid being classed as an offshore RLWT person.

Example

Matilda and Madeline are natural persons who are also offshore RLWT persons. They are the only natural person beneficiaries of a trust. A New Zealand charity is appointed as a discretionary beneficiary of the trust. The settlor and trustees of the trust are not offshore RLWT persons. The trustees are treated as offshore RLWT persons for the purposes of the RLWT rules, because all natural person beneficiaries of the trust (Matilda and Madeline) are offshore RLWT persons.

The remaining limbs of the test for beneficiaries (subsections (b)(v) and (vi)) address concerns about possible misuse of trusts in order to evade payment of RLWT, and therefore deal with distributions made to beneficiaries who are offshore RLWT persons, and situations when the trust has already recently disposed of residential land.

A trust is *not* an offshore RLWT person if a natural person beneficiary (discretionary or otherwise) who is an offshore RLWT person receives \$5,000 or less in distributions from the trust in each of the four years before the current disposal of residential land. However, the trust *is* an offshore RLWT person if that beneficiary has received more than \$5,000 of distributions from the trust in any of the four years before the current disposal of residential land.

There is no minimum threshold in the case of non-natural person beneficiaries, so that if a non-natural person beneficiary (discretionary or otherwise) who is an offshore RLWT person has received any distributions from the trust during the four years before the current disposal of residential land, the trust would constitute an offshore RLWT person.

This means that a small annual distribution of dividends paid to a beneficiary of a family trust, for example, does not result in the trust becoming an offshore RLWT person, but a distribution to a beneficiary that is a company and an offshore RLWT person does.

Example

Debbie and Greg are the settlors and trustees of a family trust. They are both New Zealand citizens and live in New Zealand. Dan and Natalie are discretionary beneficiaries of the trust and are also New Zealand citizens. Dan lives in New Zealand, but Natalie has lived in Australia for the past five years and has not been back to New Zealand.

The trust property consists of the family home in New Zealand as well as some shares and money held in a savings account. Each year, Dan and Natalie receive around \$1,000 each in distributions from the trust.

Debbie and Greg as trustees of the trust are not offshore RLWT persons, because they themselves are not offshore RLWT persons and, of the two beneficiaries, only Natalie is an offshore RLWT person, but she has not received more than \$5,000 in distributions from the trust in any of the previous four years.

It is not necessary to determine whether the offshore beneficiary (discretionary or otherwise) was an offshore RLWT person at the time of each distribution. The test looks at whether a beneficiary or discretionary beneficiary who is currently an offshore RLWT person has received a distribution from the trust within the past four years of the relevant disposal of residential land. In the case of natural persons, the test looks at whether a natural person beneficiary or natural person discretionary beneficiary who is currently an offshore RLWT person has received \$5,000 or more from the trust in any one year during the past four years.

A trust is also an offshore RLWT person, if any of the beneficiaries (discretionary or otherwise) are offshore RLWT persons and the trust has disposed of residential land within four years of the current disposal. While the offshore RLWT person definition should not capture family trusts where a beneficiary is an offshore RLWT person and the family's main home is being sold, if the trust has a history of buying and selling residential land and there is an offshore beneficiary, the trust is classified as an offshore RLWT person for integrity reasons.

Corporate trustees must satisfy both the trust and company criteria if they are not to be considered an offshore RLWT person.

It is important to note that the non-natural person component of the definition of offshore RLWT person differs from the definition of "offshore person" introduced in the land information requirements. The definition of offshore person as it relates to non-natural persons follows that used for "overseas person" in section 7(2)(b) to (f) of the Overseas Investment Act 2005. The main differences between the RLWT definition and the land information requirement definition for companies, limited partnerships, partnerships and trusts are outlined in the following table.

“Offshore RLWT person” – RLWT purposes	“Offshore person” – land information requirements
<p>It is a body corporate (such as a company) and:</p> <ul style="list-style-type: none"> • it is incorporated outside New Zealand; • it is registered outside New Zealand or constituted under foreign law; • it is a company and: <ul style="list-style-type: none"> – more than 25 percent of the company’s directors are offshore RLWT persons; or – more than 25 percent of the shareholder decision-making rights are held directly or indirectly by offshore RLWT persons • it is a partner in a limited partnership and: <ul style="list-style-type: none"> – more than 25 percent of the general partners are offshore RLWT persons; or – more than 25 percent of the partnership’s shares are held directly or indirectly by offshore RLWT persons; or • it is an owner of an effective look-through interest in a look-through company and more than 25 percent of the look-through company’s effective look-through interests are held directly or indirectly by offshore RLWT persons. 	<p>It is a body corporate (such as a company) and:</p> <ul style="list-style-type: none"> • it is incorporated outside New Zealand; or • 25 percent or more of its shares are owned by a body corporate incorporated outside New Zealand; or • an offshore person has (or offshore persons have): <ul style="list-style-type: none"> – 25 percent or more of any class of securities; – the power to control the composition of 25 percent or more of its governing body; or – the right to exercise or control 25 percent or more of the voting power.
<p>The offshore status of each partner is considered individually and RLWT calculated according to the income interests held by offshore RLWT persons.</p>	<p>It is a partnership or other unincorporated body of persons (other than a trust) and:</p> <ul style="list-style-type: none"> • 25 percent or more of its partners or members are offshore persons; or • an offshore person has (or offshore persons have) a beneficial interest in or entitlement to 25 percent or more of the profits or assets (including on winding up); or • an offshore person has (or offshore persons have) the right to exercise or control the exercise of 25 percent or more of the voting power at a meeting.
<p>A person that is a trustee of a trust, if:</p> <ul style="list-style-type: none"> • more than 25 percent of the trustees of the trust are offshore RLWT persons; or • more than 25 percent of the people that have the power to appoint or remove a trustee of a trust, or to amend the trust deed, are offshore RLWT persons; or • all natural person beneficiaries (including discretionary beneficiaries) of the trust are offshore RLWT persons; or • all beneficiaries (including discretionary beneficiaries) of the trust are offshore RLWT persons; or • a beneficiary (including a discretionary beneficiary) that is not a natural person and is an offshore RLWT person has received a distribution from the trust within the last four years of a relevant disposal of residential land; or • a natural person beneficiary (including a discretionary beneficiary) that is an offshore RLWT person has received distributions from the trust of more than \$5,000 in any one year of the past four years prior to the relevant disposal of residential land; or • a beneficiary or discretionary beneficiary of the trust is an offshore RLWT person and the trust has disposed of residential land within four years before the current disposal. 	<p>It is a trust and an offshore person (or offshore persons):</p> <ul style="list-style-type: none"> • constitute 25 percent or more of its governing body; or • has or have a beneficial interest in or entitlement to 25 percent or more of the trust property; or • are 25 percent or more of those that have the right to amend or control the amendment of the trust deed; or • are 25 percent or more of those having the right to control the composition of the trust’s governing body.

Exemption certificates

Section RL 1(4) provides that the RLWT rules in subpart RL do not apply if the vendor holds an RLWT exemption certificate that applies for the disposal of the relevant residential land.

Certificates of exemption for RLWT purposes can be issued if certain requirements are met, in the following circumstances:

- the person is disposing of their main home; or
- the person disposing of the residential land is in the business of developing land, dividing land into lots or erecting buildings.

The introduction of this exemption certificate facility was in response to submissions made to the Finance and Expenditure Committee, and is available for offshore RLWT persons selling their main home, or offshore RLWT persons who are in the business of developing land, dividing land into lots or erecting buildings. The interim claim process was originally designed in lieu of a certificate of exemption facility to mitigate cashflow problems for people whose tax liability is likely to be lower than the amount of RLWT withheld. As a certificate of exemption needs to be issued before the sale of property and this involves an assessment by Inland Revenue of whether the person satisfies the criteria for a certificate of exemption, there may be potential for some sales to be delayed if the vendor needs to wait for the certificate to be issued. It was for this reason that the interim claim process was initially considered, overall, to be more appropriate. However, the issue of housing supply is an important one, and it was considered that RLWT should not further inhibit housing development, but the certificate of exemption should only be provided in bona fide cases when it was the vendor's main home or when the taxpayer is increasing housing supply, not simply renovating or speculating.

It was not considered appropriate to directly provide for the main home exclusion under the bright-line test (in section CB 16A) in the RLWT rules because whether the residential land was the vendor's main home may not be readily ascertainable by the RLWT agent. In addition, it is unlikely that the property being disposed of was the vendor's main home, as RLWT only applies to offshore RLWT persons.

Section 54E of the Tax Administration Act 1994 sets out the circumstances in which the Commissioner may issue RLWT exemption certificates. If the Commissioner is satisfied that the taxpayer is eligible for a certificate of exemption, then section 54E(5) provides that one must be issued.

Section 54E(1) requires the taxpayer to apply for a certificate of exemption using the form prescribed by the Commissioner and to provide certified copies of relevant and appropriate documents as prescribed by the Commissioner. At the time of writing, the RLWT exemption certificate application form is the IR1103.

The interim claim process is available for taxpayers who do not meet the requirements for, or have not been issued with, an RLWT exemption certificate. For further information on the interim claim process, see the section titled "Interim claims".

For a vendor disposing of their main home section 54E(4) provides that they must meet the requirements of section CB 16A of the Income Tax Act 2007, which provides the main home exclusion from the bright-line test. Whether the residential land was the vendor's main home for the period during which the vendor owned the property depends on the facts and circumstances, and appropriate evidence must be provided to the Commissioner so that she can make that determination. Further information about the main home exclusion in the bright-line test can be found in the *Tax Information Bulletin* on the bright-line legislation (Vol 28, No 1). An exemption certificate issued under section 54E(4) is only issued in relation to a particular disposal, rather than on an enduring basis.

Section 54E(2) and (3) provide that persons in the business of developing land, dividing land into lots or erecting buildings may apply for an RLWT exemption certificate. Evidence that they are in the business of one of these activities is required, and the nature of such evidence will be set out in further operational guidance. The terms "developing land", "dividing land into lots", and "erecting buildings" are already used in the Income Tax Act 2007 and have established meanings. It is important that RLWT exemption certificates are issued only to those who are increasing housing supply, not simply renovating or speculating.

Persons in the business of developing land, dividing land into lots or erecting buildings must also meet one of two additional criteria – they must have had tax obligations in New Zealand and have complied with all of them for the two years before they apply for an RLWT exemption certificate or they must provide a security that is acceptable to the Commissioner.

Section 54E(3)(b) and (c) provides that the person applying for the RLWT exemption certificate in relation to residential land must have had tax obligations under the Inland Revenue Acts before applying for the exemption certificate, and must have complied with *all* tax obligations for the two-year period before they apply for the certificate. The term "Inland Revenue Acts" encompass a number of different Acts and these are listed in the Schedule of the Tax Administration Act 1994. At the time of writing they are:

- Child Support Act 1991
- Estate and Gift Duties Act 1968
- Estate Duty Abolition Act 1993
- Estate Duty Repeal Act 1999
- Gaming Duties Act 1971
- Goods and Services Tax Act 1985
- Income Tax Act 1994
- Income Tax Act 2004
- Income Tax Act 2007
- KiwiSaver Act 2006
- Land Tax Abolition Act 1990
- Stamp and Cheque Duties Act 1971
- Stamp Duty Abolition Act 1999
- Student Loan Scheme Act 1992
- Student Loan Scheme Act 2011
- Tax Administration Act 1994
- Taxation Review Authorities Act 1994.

In addition, the Commissioner must be satisfied that the person will continue to comply with their tax obligations.

This provision is intended to cover established developers in the New Zealand housing market who have good tax compliance histories but happen to be offshore RLWT persons.

When a person disposing of residential land has not complied with all tax obligations under the Inland Revenue Acts over the previous two years, or has not been operating in New Zealand long enough to have the requisite compliance history, they can still apply for an RLWT exemption certificate if they provide security to the Commissioner to secure their income tax obligations in relation to the residential land. The intention is to avoid creating a barrier to entry for new developers in the New Zealand housing market, while also protecting the integrity of the tax system.

Section 54E(2)(b) provides that the security must be provided in accordance with section 7A of the Tax Administration Act 1994 and must be acceptable to the Commissioner to secure the performance of their income tax obligations in relation to the residential land. It was envisaged that bank bonds would be the most common type of security, but further operational guidance will be provided by Inland Revenue in relation to the type of securities that are acceptable for an RLWT exemption certificate.

While the wording in section 54E relates to a specific piece of residential land, it is envisaged that a person could include a schedule of different pieces of residential land that they intend to dispose of when they prepare their application under section 54E. This means the certificate of exemption will apply to multiple residential land titles.

Example

Alistair is an offshore RLWT person who has been in the business of developing residential land in New Zealand for ten years. Alistair has complied with all of his tax obligations under the Inland Revenue Acts since he started developing land in New Zealand, including the past two years.

Alistair acquired a piece of residential land which he has subdivided into ten lots, and is in the process of developing. Alistair thinks that he will be ready to sell the ten properties within the two-year bright-line period, so prepares his application for an RLWT exemption certificate. He includes a schedule listing all ten properties to be sold as part of his application and appropriate evidence that he is in the business of developing residential land.

The Commissioner is satisfied that Alistair is in the business of developing land, has complied with his tax obligations over the past two years, and will continue to comply in the future. Alistair is granted an RLWT exemption certificate in respect of all ten properties.

Note that when a vendor has an exemption certificate for RLWT purposes and the vendor is within the two-year bright-line period, they are still required to provide information to the RLWT agent under section 54C of the Tax Administration Act 1994. This is because section 54C stands alone from the RLWT rules in subpart RL of the Income Tax Act 2007. Further detail on the requirements under section 54C can be found in the section titled “Information requirements”.

Person required to pay RLWT (the RLWT agent)

As noted in the section titled “New tax type: Residential land withholding tax”, RLWT is generally not a true withholding tax in the sense that in most cases, the person required to pay RLWT is not liable for the underlying amount of RLWT if they did not retain the RLWT from the residential land purchase amount. Section RL 2 introduces the concept of “a paying agent” to account for this situation.

Section RL 3 provides that when the vendor and purchaser are associated persons, RLWT is a true withholding tax and the “withholding agent” is the purchaser.

What it means to be a paying agent or withholding agent is discussed in the section titled “New tax type: residential land withholding tax” and when the treatment between the two does not differ, the term “RLWT agent” is used.

Under section RL 2, the vendor is liable to pay an amount of RLWT, but the vendor’s conveyancer is treated as the vendor’s agent in relation to RLWT and must provide returns and satisfy the vendor’s liability. That is, the vendor’s conveyancer is the “paying agent” for RLWT purposes.

“Conveyancer” is a defined term in section YA 1 for the purposes of the RLWT rules. It refers to the 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) to the vendor or purchaser using a New Zealand-based trust account.

It is intended that only those who are able to describe themselves in New Zealand as lawyers, incorporated law firms, conveyancing practitioners or incorporated conveyancing firms under the Lawyers and Conveyancers Act 2006 should be paying agents for RLWT. This is because the paying agent is not jointly and severally liable for the RLWT debt and the compliance tools available to the Commissioner include the ability to report the RLWT agent to the appropriate professional body. It is expected that the professional body would take appropriate action in relation to the agent’s non-compliance.

If the vendor does not have a conveyancer, the purchaser’s conveyancer is the paying agent. This is provided for in section RL 2(2). If neither the vendor nor purchaser has a conveyancer, the purchaser is the paying agent. This is provided for by reading part (b) of the definition of conveyancer into section RL 2(2).

Associated persons

Under new section RL 3, if the vendor and purchaser are associated persons, the vendor is not liable to pay RLWT. Instead, the purchaser must withhold the requisite amount of RLWT and pay this to the Commissioner.

In this case, the purchaser has a withholding tax obligation under section BE 1 and the standard requirements for other withholding taxes apply.

The purchaser is *not* precluded from using the services of a conveyancer or lawyer to fulfil their RLWT obligations. However, this would be a contractual relationship between the purchaser and conveyancer that is not specifically provided for in legislation.

Paying agent is not the vendor's agent for other purposes

While the paying agent is considered to be the vendor's agent for the purposes of RLWT, new section RL 2(3) ensures that the paying agent is not considered to be the vendor's agent more generally, just because of their role as the RLWT agent. For example, the paying agent is not treated as the vendor's agent for income tax purposes.

New section RL 2(4) ensures that a paying agent who is only the vendor's agent in relation to RLWT is not subject to sections HD 2 to 4, which relate to agents.

No liability for underlying RLWT

New section RL 2(5) provides that a paying agent is not jointly and severally liable in relation to the vendor's RLWT debt, despite their obligation to satisfy the vendor's RLWT liability.

They may, however, be liable for the RLWT debt, if they have retained the RLWT amount from a residential land payment amount and have failed to pay the retained RLWT to the Commissioner.

New section RL 2(6) provides that the rules relating to penalties as set out in the Tax Administration Act 1994 apply. Further detail can be found in the section titled "When RLWT obligations not met".

Cost recovery by paying agent

While it is not specified in legislation, an RLWT agent is not precluded on a contractual basis from recovering the costs incurred in satisfying the vendor's RLWT obligations.

Calculating RLWT

Calculation steps

There are three calculation steps for RLWT, with the amount of RLWT payable being the lowest amount calculated. The third calculation step includes a deduction for a mortgage with a New Zealand-registered bank or non-bank deposit taker. This part of the third calculation step is only available when the vendor's conveyancer or solicitor is the paying agent.

New section RL 4 provides that the amount of RLWT to be paid is the **lowest** of the following three calculations:

- 33% (or 28% if the vendor is a company that is not acting as a trustee) x (current purchase price – vendor's acquisition cost) (set out in section RL 4(2)); and
- 10% x current purchase price (set out in section RL 4(4)); and
- current purchase price – security discharge amount – outstanding local authority rates (set out in section RL 4(6)).

New section RL 4(3)(b) defines “current purchase price” as the total price agreed by the vendor and purchaser for the disposal of the residential land that the residential land purchase amount relates to. This figure therefore includes deposits and part-payments. New section RL 4(3)(c) defines the “vendor’s acquisition cost” as being the purchase price paid by the vendor for their acquisition of the residential land being disposed of.

It is expected that the vendor’s acquisition cost is generally available from Quotable Value and the paying agent should be able to reasonably rely on this figure. If the vendor does not believe this is the correct acquisition price, they would need to provide the RLWT agent with sufficient evidence of a different acquisition price – for example, the original acquisition contract.

The current purchase price should be found in the agreement for sale and purchase between the vendor and purchaser. If, upon settlement, the parties agree to reduce the agreed purchase price, then this reduced purchase price is the figure that should be used to calculate RLWT. This may occur, for example, if the vendor has failed to carry out repairs prior to settlement, and instead, the purchaser takes responsibility for the repairs.

Example

Virginia is an offshore RLWT person who agrees to sell her residential property in Tauranga to Thomas. Thomas pays a \$100,000 deposit and another \$400,000 upon settlement. In determining Virginia’s RLWT liability, the “current purchase price” is \$500,000. Virginia originally acquired the residential property for \$350,000. The “vendor’s acquisition cost” for the purposes of determining Virginia’s RLWT liability is \$350,000.

Virginia does not have a mortgage on the property and she has no outstanding rates.

RLWT calculated using the formula in section RL 4(2) is $33\% \times (\$500,000 - \$350,000)$, or \$49,500. RLWT calculated using the formula in section RL 4(4) is $10\% \times \$500,000$, or \$50,000. Therefore the amount of RLWT payable is \$49,500.

The obligation to pay RLWT is not restricted to instances when consideration for the property is paid in cash. In-kind consideration may form part of the transaction and the situation will be monitored to ensure that RLWT obligations are not evaded or avoided through the use of non-cash consideration, as this could raise concerns under the general anti-avoidance rule in section BG 1 of the Income Tax Act 2007. RLWT should be calculated with respect to the total consideration for the residential land. While a paying agent is not liable for the underlying amount they did not withhold, they may be subject to shortfall penalties depending on their level of culpability. The section titled “When RLWT obligations not met” sets out the different types of penalties in further detail.

An option to acquire land is included in the definition of “an interest in land” so this means the payment of an option fee is within the scope of RLWT.

The prices used to calculate RLWT should be net of GST, if any. Whether GST has been levied in relation to a transaction is determined by the Goods and Services Tax Act 1985.

In some cases, the sale may be zero-rated for GST purposes if both the recipient and supplier are GST registered and the recipient is acquiring the goods with the intention of using them for making taxable supplies and the land is not intended to be used as the principal place of residence of the recipient. In addition, there is a specific provision under the GST rules relating to instances where an agent and nominated purchasers have different GST registration statuses, whereby the zero-rating rules look through the agent to the nominated purchaser. Whether the transaction is zero-rated for GST purposes is a matter of fact as the recipient is required to provide written information to the supplier under the GST rules so the supplier can determine if GST should be zero-rated.

For further information on the zero-rating of land supplies for GST purposes, see the *Tax Information Bulletin* item for the Taxation (GST and Remedial Matters) Act 2010 (Vol 23, No 1).

To maintain the integrity of the RLWT and the broader tax system, RLWT generally needs to be paid before other disbursements that are made out of a residential land purchase amount. In most cases, this means the disbursements made at the time of settlement, which normally appear on the settlement statement. However, a real estate agent's commission is normally paid out of the deposit, before the payment of a residential land purchase amount – this can continue to be paid before RLWT.

The third calculation set out in section RL 4(6) recognises that there are certain bona fide situations when absolute priority of RLWT could delay or prevent settlement from occurring. In particular, these would be the payment of certain New Zealand mortgages and the vendor's portion of outstanding local authority rates.

If the two calculations set out in section RL 4(2) and (4) would leave insufficient funds for the vendor to discharge their mortgage obligation with a New Zealand-registered bank or non-bank deposit taker and/or their outstanding local authority rates, the third calculation allows for RLWT to be reduced to the extent required to pay the mortgage and outstanding rates.

“Security discharge amount” is defined in section RL 4(7) and (8) as the total amount required by a New Zealand-registered bank or non-bank deposit taker (as licensed under the Non-bank Deposit Takers Act 2013) to discharge the mortgage or other security over the residential land being disposed of. A full list of registered banks and licensed non-bank deposit takers is published by the Reserve Bank of New Zealand. The list of registered banks is available at <http://rbnz.govt.nz/regulation-and-supervision/banks/register> and the list of licensed non-bank deposit takers is available at <http://rbnz.govt.nz/regulation-and-supervision/non-bank-deposit-takers/register>.

Note that the mortgage reduction part of the third calculation step is only available when the paying agent is the vendor's conveyancer or solicitor.

The reduction of RLWT payable for mortgages held with a New Zealand registered bank or a New Zealand non-bank deposit taker licensed under the Non-Bank Deposit Takers Act 2013 was inserted in response to consultation on the original issues paper, and concerns that the payment of RLWT could prevent settlement from occurring in some cases. By limiting the provision to mortgages held with New Zealand registered banks and non-bank deposit takers, the Government is more readily able to identify and react to any abuse as it is better equipped to monitor the regulatory environment in which the bank or non-bank deposit taker is operating. The situation is being monitored to ensure that it is not used to undermine the integrity of the RLWT and the broader tax system.

If the vendor's conveyancer is not the paying agent, the third calculation set out in section RL 4(6) effectively becomes "current purchase price – outstanding local authority rates".

The "outstanding local authority rates" component of the formula in section RL 4(6) is the amount of local authority rates in relation to the property that is still to be paid by the vendor for the period of ownership before the disposal. This is because under the Local Government Act 2002, unpaid rates amount to a charge on the land which has priority ahead of any mortgage. This reduction is available regardless of who the RLWT agent is.

It is not appropriate to extend the provision to other mortgages or other disbursements, even those that would be tax deductible for the vendor. To do so could undermine the tax system and it would be difficult for conveyancers who are not tax specialists to determine what payments are tax deductible.

If there are other charges that are being cleared as part of the settlement process – for example, unpaid body corporate levies or a loan held with a party that is not a licensed security holder, the RLWT agent has a number of possible courses of action if this leaves insufficient funds to pay the full amount of RLWT. For example, they may require the vendor to pay the additional funds to ensure those payments can be made. For further information on civil and criminal penalties, refer to the section titled "When RLWT obligations not met".

It is important to note that RLWT is simply on account of income tax and to the extent that RLWT has been over-withheld relative to the vendor's final income tax liability, a refund is available from Inland Revenue.

Example

Consider the previous example of Virginia and Thomas. Recall that the RLWT calculated using the methods set out in section RL 4(2) and (4) will be \$49,500 and \$50,000.

However, now Virginia has a mortgage with a New Zealand bank for \$460,000. In addition, Virginia has outstanding rates of \$360 owing to her local council. Since Virginia's conveyancer is the paying agent, the third calculation method set out in section RL 4(6) is relevant for both the mortgage and the local authority rates.

Using the third calculation method in section RL 4(6), the amount of RLWT calculated is \$500,000 – \$460,000 – \$360, or \$39,640. As this is less than \$49,500 and \$50,000, \$39,640 is the amount of RLWT payable.

As discussed in the section titled "When RLWT applies", rollover relief is provided in the bright-line test under section FB 3A when there is a transfer of property from one spouse or partner to the other under a relationship property agreement following the breakdown of a relationship. The transferee generally takes on the cost base of the transferor – that is, they are considered to have acquired their recently acquired portion at the same time for the same cost as when the transferor originally acquired the property. This means that for the purposes of the RLWT rules, when there is a transfer of residential land on a settlement of relationship property, the "current purchase price" for the transferor (as the "vendor" in this situation) under section RL 4(3)(b) should be the same as the "vendor's acquisition cost" in section RL 4(3)(c) and when the transferee eventually disposes of the property, the "vendor's acquisition cost" is what the transferor acquired the property for. The result is that the calculated amount of RLWT for the transfer under the relationship property settlement is nil, but depending on the circumstances, the reporting requirements for RLWT may still apply.

Co-owners

As discussed in the section titled “When RLWT applies”, where the vendors hold the property jointly (for example, as part of a partnership, as tenants in common, or as a joint tenancy), the offshore status of each partner or co-owner is considered individually and then RLWT applies to the offshore RLWT person’s share in the property. This is provided for in section RL 1(3).

In the case of a partnership, RLWT applies according to the income interests held by offshore RLWT persons. To enable the RLWT agent to do this, the partners must provide the RLWT agent with a copy of the partnership agreement or a statement regarding their income interests in the partnership. The partners, in providing information about their income interests in the partnership, are providing information in relation to a tax law, so if they knowingly provide incorrect information, they will be subject to criminal penalties.

For other co-ownership situations, the RLWT agent can assume that the property is equally divided between co-owners, unless evidence to the contrary is provided to the RLWT agent.

The retained or withheld RLWT amount is then allocated by the RLWT agent to the appropriate offshore RLWT persons when the RLWT is passed on to the Commissioner. Further information on this can be found in the section titled “Information requirements”.

Example

Hannah and Jack own a residential property as joint tenants, which they are selling within two years of acquisition. Jack is an offshore RLWT person and Hannah is a New Zealand citizen who has been physically present in New Zealand within the past three years. For the purposes of RLWT, their respective shares in the property are 50 percent each.

The RLWT agent calculates the RLWT applying to the whole transaction as \$25,000. This means that only \$12,500 (being 50 percent of \$25,000) needs to be retained from the settlement funds to be paid to the Commissioner of Inland Revenue. The RLWT agent allocates the \$12,500 to the IRD number provided by Jack.

Part-payments

A “residential land purchase amount” is defined in section YA 1 as an amount paid or payable for the disposal of the residential land in question, but excludes deposits and part-payments as long as all deposits and part-payments total in aggregate less than 50 percent of the purchase price for the land.

It is intended that the RLWT obligation arises as soon as that 50 percent threshold has been met. In most situations this should arise upon settlement, when the bulk of the purchase price becomes payable by the purchaser.

However, there may be situations when a number of part-payments are made by the purchaser, rather than one small deposit and then the remaining outstanding amount paid upon settlement. This may result in insufficient funds being available to pay the full amount of RLWT each time there is a residential land purchase amount. In this case, section RL 4(1) provides that the RLWT to be paid or withheld for each residential land purchase amount is capped at the amount of the relevant residential land purchase amount. Effectively, this allows RLWT to be paid in instalments and the due date is set in relation to each instalment.

This means that as soon as the 50 percent threshold is met, the RLWT agent must pay the **full** amount of each subsequent residential land purchase amount to the Commissioner as RLWT until the total amount of RLWT calculated under section RL 4(2), (4), or (6) has been paid.

Example

Stella purchases a residential property from Nicola for \$500,000. Stella agrees to pay in 20 instalments of \$25,000 each. Nicola is an offshore RLWT person and purchased the property for \$400,000 one year earlier. Nicola has a mortgage with a New Zealand bank in relation to the property for \$300,000 and no outstanding local authority rates. The RLWT agent calculates the amount of RLWT in relation to the property as being \$33,000.

The first nine part-payments made by Stella do not meet the definition of a residential land purchase amount. However, the 10th part-payment constitutes a residential land purchase amount as together, the first 10 part-payments equal 50 percent of the total purchase price. The subsequent part-payments also constitute residential land purchase amounts.

The RLWT agent pays \$25,000 from the 10th part-payment to the Commissioner because this is the maximum amount available from the relevant residential land purchase amount. The remaining \$8,000 is paid from the 11th part-payment. The due date for the \$25,000 payment of RLWT is set in relation to the date of the 10th part-payment and the due date for the \$8,000 payment of RLWT is set in relation to the date of the 11th part-payment. The RLWT agent is not required to pay RLWT from the remaining part-payments as the total amount of calculated RLWT has been satisfied once they have made the payment of \$8,000 to the Commissioner.

Information requirements

New section RL 1(6) of the Income Tax Act 2007 and new sections 54B and 54C of the Tax Administration Act 1994 set out the information requirements in relation to RLWT obligations.

New section RL 2(7) of the Income Tax Act 2007 provides that a paying agent is able to “reasonably rely” on the information provided to them by the vendor. Note that this ability to reasonably rely on information provided by the vendor is only available to paying agents, but not withholding agents.

Information to be provided by vendors to RLWT agents

New section 54C of the Tax Administration Act 1994 sets out the information that vendors are required to provide to the RLWT agent so that the agent is able to fulfil their RLWT obligations. At the time of writing, the IR1101 form is the form that must be completed and provided to fulfil any obligations under section 54C.

The information provision requirements in section 54C of the Tax Administration Act 1994 only apply if the vendor is within the two-year bright-line period and the residential land being disposed of was acquired on or after 1 October 2015. An amendment has been made to the definition of “bright-line date” in section YA 1, so that the calculation of the two-year period for the purposes of RLWT is the same as the bright-line test.

The calculation of the two-year period in new section 54C(1) of the Tax Administration Act 1994 is almost identical to section CB 6A(1) of the Income Tax Act 2007 in the bright-line test. The only exception is that section CB 6A(1)(a)(ii) is not required in the context of the RLWT, as it relates to land outside New Zealand. The bright-line date is defined in new section CB 6A and is discussed in further detail in the section titled “When RLWT applies”.

Essentially, the vendor only needs to provide information if the bright-line date (in standard scenarios, the date of the agreement for sale and purchase) is within two years of the date on which the instrument to transfer the land to the person was registered under the Land Transfer Act 1952 (or if there has not been a registration yet, the date on which they acquired the land). However, the vendor is required to declare in the IR1101 form under section 54C(5)(c)(ii) whether RLWT applies to the disposal and the RLWT agent should check whether RLWT does in fact apply – particularly if the paying agent is to “reasonably rely” on the information and documents provided by the vendor. If a paying agent is able to reasonably rely on the information provided, they will not be liable for a penalty under part 9 of the Tax Administration Act 1994.

The RLWT agent should be able to fairly easily determine on their own whether the vendor is within the two-year bright-line period, with little input from the vendor. This is because in most cases, the start-date of the two-year period is the date on which the instrument to transfer the land to the vendor was registered under the Land Transfer Act 1952, which is readily available on Landonline to conveyancers, and also on certain websites like Quotable Value.

If the RLWT agent is unable to find the title registration date because the instrument to transfer the land to the person is not registered on or before the bright-line date, the RLWT agent should ask the vendor for the acquisition date, and to reasonably rely on this information, certain documents may need to be provided. If this date is not provided by the vendor, the RLWT agent should assume that the vendor is within the two-year period for the purposes of RLWT.

The end-date or bright-line date is, in most cases, the date on which the person enters into an agreement for the disposal of the residential land. This date should be available to both the vendor’s and purchaser’s conveyancers from the agreement for sale and purchase for the vendor’s disposal.

In a standard scenario when a prospective purchaser makes an offer on a house, but the offer is conditional on the purchaser obtaining satisfactory financing and/or a builder’s report, the vendor’s bright-line date is the date on which they accept the purchaser’s conditional offer, not when the agreement goes unconditional. This is discussed in further detail in the section titled “When RLWT applies”.

If the RLWT agent determines that the vendor is outside the two-year bright-line period, RLWT does not apply and the vendor does not need to provide further information as part of the IR1101 form to the RLWT agent under section 54C.

If the RLWT agent determines that the vendor is within the two-year bright-line period, the vendor is required to complete the IR1101 and provide accompanying documents under section 54C.

While the section 54C information requirements must be complied with if the vendor's bright-line period is within two years, in some cases it may be simpler for the vendor to provide their completed IR1101 form and accompanying documents before the bright-line period is determined. As three conditions must be met for RLWT to apply, it may, in some cases, be easiest to first determine whether the person is an offshore RLWT person, in some cases, the two-year disposal requirement, and in other cases, whether the land being disposed of is residential land.

For example, it may be straightforward if the vendor is a New Zealand citizen or holder of a residence class visa, and is physically present in New Zealand to sit down with their RLWT agent in New Zealand, complete their 54C form and show the RLWT agent their New Zealand passport or evidence of their residence class visa. The RLWT agent must take a copy of the passport or visa, but this (along with their physical presence) is sufficient to prove that the vendor is not an offshore RLWT person and that RLWT does not apply to the transaction. Sometimes, when a New Zealand citizen who is not an offshore RLWT person and does not have a New Zealand passport, an RLWT agent may consider that in order to reasonably rely on the statement that the vendor is not an offshore RLWT person, they need to see the vendor's birth certificate and government-issued photographic identification.

A paying agent can rely on information and accompanying documents provided by the vendor under section 54C, as long as their reliance on the information and the documents is "reasonable". This is provided for in section RL 2(7) of the Income Tax Act 2007. For example, this means that a paying agent is entitled to rely on the statement that the vendor is not an offshore RLWT person, unless there are reasonable grounds for doubt – for example, if it appears that the passport has been altered or the vendor is unable to provide their New Zealand passport or residence class visa.

If the vendor claims they are not an offshore RLWT person, but does not provide evidence to support this claim, relying on the statement would not be "reasonable". This is because there is an inherent incentive for an offshore RLWT person to claim that they are not an offshore RLWT person, to avoid paying RLWT.

If the vendor is required to provide information under section 54C, section 54C(3) provides that the vendor must provide the information prescribed by the Commissioner of Inland Revenue (including any accompanying documents) in the form prescribed by the Commissioner before a residential land purchase amount is made. In a standard scenario, this generally means that the IR1101 needs to be provided before the purchaser is required to pay the settlement funds to the vendor. This ensures that the RLWT agent has all the necessary information and documentation required to determine if RLWT applies.

If the IR1101 form and accompanying documents are not provided before the payment of a residential land purchase amount, the RLWT agent may assume the vendor is an offshore RLWT person and therefore withhold RLWT if the other requirements for withholding have been met (New Zealand residential land being disposed of within the two-year bright-line period). An exception to this would be where the RLWT agent has reasonable grounds for establishing that the vendor is not an RLWT person – for example, a long-standing client relationship such that the RLWT agent knows the vendor is not an offshore RLWT person.

Section 54C(5) provides that the minimum information required by the Commissioner of Inland Revenue to be provided by the vendor consists of:

- their full name and address;
- their IRD number;
- whether they are an offshore RLWT person; and
- if they are an offshore RLWT person, whether they and the purchaser are associated persons and whether the disposal would be subject to RLWT – that is, if the disposal would be income under the bright-line test, ignoring the main home exclusion and other land taxing provisions.

Any additional information specifically required is set out on the IR1101 form prescribed by the Commissioner of Inland Revenue.

Information provided under section 54C, including on the IR1101 form, is information provided in relation to a tax law, so the person signing the form could be subject to criminal penalties if they knowingly provide false information.

Section 54C(4) requires the vendor to provide relevant and appropriate documents as prescribed by the Commissioner, to support the information they have given under section 54C(5) – for example, in relation to the assertion that the disposal would not be income under the bright-line test, ignoring the main home exclusion and other land taxing provisions. If a vendor is claiming that RLWT does not apply, for whatever reason, they must provide documentation to support this assertion.

If a vendor states that they *are* an offshore RLWT person (and therefore subject to RLWT, depending on whether other requirements have been met), there is no need for the vendor to provide accompanying documents and evidence to support the statement that they are an offshore RLWT person.

However, if a vendor states that they are *not* an offshore RLWT person, accompanying documents must be provided. This is to allow the paying agent to “reasonably” rely on the information provided to them by the vendor. It would not be reasonable to rely on a claim that the vendor is not an offshore RLWT person without sufficient supporting evidence.

If the vendor can show the RLWT agent their New Zealand passport or residence class visa, the RLWT agent can take a copy and rely on this as evidence of their client’s onshore status. If the vendor is unable to meet the RLWT agent in person, a certified copy of the vendor’s New Zealand passport or residence class visa may need to be provided for the documents to be reasonably relied upon by a paying agent, in addition to evidence of physical presence within New Zealand during the requisite timeframe.

Where there are a number of vendors for a given disposal, for example, in the case of co-owners and partnerships, each co-owner or partner needs to separately provide information under section 54C in their own IR1101. This is so the RLWT agent can calculate the correct amount of RLWT and allocate it to the appropriate vendors.

Example

Hannah and Jack own a residential property as joint tenants, which they are selling within two years of acquisition. For the purposes of RLWT, 50 percent of the proceeds belong to Hannah and the remaining 50 percent belongs to Jack, even though they each own an undivided share in the property.

Jack is an offshore RLWT person and Hannah is a New Zealand citizen who has been physically present in New Zealand within the past three years. They each complete an IR1101 form and provide these to the RLWT agent. Hannah and Jack are not physically present in New Zealand at the time of the sale, Hannah also provides a certified copy of her passport and evidence that she has been in New Zealand.

The RLWT agent calculates the RLWT applying to the whole transaction as \$25,000. As 50 percent of the proceeds belong to Hannah and the remaining 50 percent belong to Jack, only \$12,500 (being 50 percent of \$25,000) needs to be retained from the settlement funds to be paid to the Commissioner of Inland Revenue. The RLWT agent allocates the \$12,500 to the IRD number provided by Jack in his section 54C form.

To provide a statement under section 54C of the Tax Administration Act 1994 that a non-natural person vendor is *not* an offshore RLWT person, section 54C(6) requires that the information and documents provided under section 54C must be verified by a natural person who is not an offshore RLWT person themselves and is:

- a director, in the case of vendor companies and look-through companies;
- a general partner of the partnership, in the case of vendor limited partnerships; and
- a trustee of the trust, in the case of vendor trusts.

In the case of other entities or arrangements, the equivalent of a non-offshore director is required to provide the statement, if the entity or arrangement is claiming that it is not an offshore RLWT person.

Only one person is required to verify the information and documents provided under section 54C, as long as they meet the requirements of section 54C(6).

A paying agent can “reasonably” rely on the director, general partner, or trustee’s statement under section 54C on the offshore status of the entity without personally looking into the shareholding of the company. However, they must be satisfied that the person making the statement is not an offshore RLWT person themselves. This means the person completing the IR1101 form on behalf of the entity or arrangement must provide evidence of their New Zealand citizenship or residence class visa and presence in New Zealand in the same way that a natural person vendor does. For example, they could meet with the RLWT agent in person and show them their New Zealand passport. However, in some cases this may not be practical and providing a certified copy may be more appropriate.

The rationale is that it would sometimes be difficult to provide evidence of the offshore status of all shareholders. For example, companies may be widely held, but the paying agent could reasonably rely on the person’s statement if they are satisfied that the person is not an offshore RLWT person. Furthermore, as the non-offshore director, general partner, or trustee would be providing information in relation to a tax law, they would be subject to criminal penalties, if they knowingly provide false information.

It was not considered appropriate to allow an offshore RLWT person to provide a statement under section 54C stating that an entity or arrangement is not an offshore RLWT person. This approach ensures that the RLWT rules maintain their integrity and appropriate follow-up action can be easily taken by the Commissioner in the event that information provided by the director, general partner or trustee is incorrect.

If no director, general partner or trustee who is not an offshore RLWT person can verify the information provided under section 54C, the outcome is as though no information has been provided.

In the case of a mortgagee sale, for example, the vendor (the mortgagor) is still required to provide the requisite information under section 54C. The standard consequences apply if the required information is not provided.

Information to be provided by RLWT agents to the Commissioner of Inland Revenue

Section 54B of the Tax Administration Act 1994 requires RLWT agents to provide a statement detailing their RLWT withholding obligations at the time they pay RLWT to the Commissioner. This is to enable the Commissioner to match the payment of RLWT by the RLWT agent to the appropriate vendor.

As previously discussed in the section titled “New tax type: Residential land withholding tax”, the RLWT agent is permitted to pay amounts of RLWT to the Commissioner either on a monthly basis (by the 20th of the month following the month in which RLWT was withheld or retained) or a transaction-by-transaction basis.

The form of the section 54B statement is prescribed by the Commissioner and includes, at a minimum, the IRD number of the taxpayer to whom the RLWT should be allocated, the amount of RLWT calculated under section RL 4 of the Income Tax Act 2007 and the amount of RLWT ultimately retained and paid to the Commissioner.

Where an amount of RLWT has been retained or withheld on behalf of a number of offshore co-owners or partners in relation to a particular transaction, the RLWT agent must allocate the appropriate amount of RLWT to each of the offshore co-owners or partners using the IRD numbers provided to them under section 54C.

Note that section 54B(2) provides that when RLWT applies, but the calculation methods set out in section RL 4 have resulted in a nil amount of RLWT to be paid, the RLWT agent must still provide a 54B statement to the Commissioner. This may happen, for example, if the vendor’s acquisition cost exceeds the current purchase price, or a New Zealand mortgage has reduced the amount of RLWT payable to zero. This enables more efficient data matching with information collected by Land Information New Zealand as part of the land transfer tax statement to determine that RLWT obligations have been considered and met.

It also allows the Government to monitor the RLWT rules for any potential abuse of the rules and respond appropriately.

Section 54B(1) provides that the Commissioner may also allow further time for paying and withholding agents to furnish their RLWT statements. However, this may affect a vendor’s ability to apply for a refund if he or she wants to file an interim claim shortly after the disposal, as refunds for an interim claim are generally not issued until the payment of RLWT to the Commissioner is reconciled with the vendor’s account.

Information retention and the Privacy Act 1993

New section 54C(7) of the Tax Administration Act 1994 requires anyone who receives information under section 54C of the Tax Administration Act 1994 to retain that information for at least seven years. The seven-year period is a standard feature of record-keeping requirements. This rule applies to an RLWT agent who receives information under this section, irrespective of whether RLWT is ultimately retained or withheld.

However, if the RLWT agent is the purchaser themselves, they are not required to retain the information if they provide to the Commissioner a copy of the information given to them by the vendor within one month of receiving it. This is because they are not a professional conveyancer or lawyer and may not be aware of their record-keeping obligations.

The provisions of the Privacy Act 1993 also apply to information collected under section 54C of the Tax Administration Act 1994. When the recipient of the information is a conveyancer, there are also professional obligations regarding confidentiality.

Interim claims

Section RL 6 of the Income Tax Act 2007 and section 54D of the Tax Administration Act 1994 provide for the new interim claim process. This allows vendors who have had RLWT withheld to calculate their income tax liability in relation to land before the end of the relevant income year, and obtain a refund when the amount of RLWT paid exceeds the person's income tax liability.

The interim claim is not a full and final income tax return and the vendor is still required to file an income tax return at the end of the income year. This is because the purpose of the interim claim process is to relieve cashflow pressures for the vendor.

As previously discussed, section LB 6B provides a tax credit for the year in which a person disposes of the residential land equal to the amount of RLWT paid. Generally, this tax credit is used to offset the person's income tax liability arising from the disposal of residential land. If the amount of RLWT paid exceeds the person's income tax liability for the disposal of residential land, section LA 6 provides that the credit can be used to satisfy the person's other income tax liabilities. If an excess RLWT credit still exists, a refund may be given.

To retain the integrity of the RLWT rules, and to prevent fraudulent refunds from being processed, the vendor is provided a credit only for the amount of RLWT that has actually been paid to the Commissioner when the interim claim application is processed.

The Tax Administration Act 1994 already provides for special returns in specific circumstances (for example, an early return when a taxpayer no longer has an enduring relationship with New Zealand and will not derive any further income that will be taxed in New Zealand), and sections 79 and 80 allow the Commissioner to require the furnishing of annual returns and other returns in addition to those already prescribed. However, section 54D has been inserted to specifically provide for the interim claim process for RLWT.

Under section RL 6(1)(a), the Commissioner may refund an amount of RLWT to the extent that an RLWT tax credit is a surplus credit when looking only at the person's income and deductions for land for the tax year.

To calculate the amount of the surplus credit, the company tax rate (currently 28%) is used for companies, and the top marginal tax rate (currently 33%) is used for individuals. The rationale for using the top rate for individuals is that the interim claim process only takes into account the person's income for land and does not consider the person's other income for the year. Using a lower marginal tax rate (for example, the lowest marginal rate of 10.5%) could result in a larger refund being issued than the person would be entitled to if they have other income that may be taxed in New Zealand.

In addition, for a refund to be issued as an interim claim, section RL 6(1)(b) requires that the person must not have any outstanding tax obligations under the Inland Revenue Acts. This is because the person's tax debts should be paid before a refund is issued.

A person may lodge an interim claim regardless of whether they were eligible for an RLWT exemption certificate.

Under sections RL 6(1)(c) and 54D of the Tax Administration Act 1994 the person must provide information using the interim claim form prescribed by the Commissioner for an interim claim to be processed.

The information that must be provided is set out in section 54D(1). At a minimum it must include the person's income and deductions relating to land for the part of the income year until one month after the disposal of residential land for which RLWT was paid. This means all income relating to land for the income year to date, not just income relating to the disposal from which RLWT was withheld or retained, must be provided. During development of the policy it was not considered necessary to require the person to disclose all income and deductions for the year to date, but equally, it was considered inappropriate to limit the "snapshot" of the person's tax position captured by the interim claim only to the RLWT transaction.

Example

Phoebe is an offshore RLWT person who sells three properties during the 2017 income year – one in May, one in August, and the other in September. All three disposals are taxable for Phoebe. Phoebe is liable for RLWT on the property sold in August. RLWT has been paid in relation to the sale made in August. Phoebe works out the amount of RLWT exceeds the tax to pay on the property sales. Phoebe prepares an interim claim using the form prescribed by the Commissioner and includes her income and deductions relating to all three sales. Phoebe also has salary and wage income that is taxable in New Zealand, but she does not include this income in her interim claim.

As it is possible that a person who has had RLWT paid in relation to a disposal qualifies for the main home exclusion, as part of the interim claim the person must also state whether or not they qualify for the main home exclusion in section CB 16A of the Income Tax Act 2007.

In addition, section 54D(1)(c) and (2) provides that the Commissioner may request further information and accompanying documents as part of the interim claim process. This will be clarified in further operational guidance.

When RLWT obligations not met

The standard penalties that apply to other withholding taxes also apply in the case of RLWT. This is despite RLWT not being a true withholding tax, as in most cases, paying agents are generally not jointly and severally liable for the RLWT that should have been paid.

If there are insufficient funds available to pay the full amount of RLWT due to other disbursements or a non-cash consideration, for example, a paying agent has several possible courses of action. They may, for example, require the vendor to pay the additional funds to ensure those payments can be made. While a paying agent is not liable for the underlying amount they did not withhold, they may be subject to certain penalties depending on their level of culpability.

Penalties

Under new section RL 2(6), the rules relating to penalties as set out in part 9 of the Tax Administration Act 1994 apply to paying agents as though they have failed to pay an amount of withholding tax equal to the amount of RLWT they failed to satisfy.

This means the general penalties rules that apply to withholding taxes (such as late filing penalties) also apply to RLWT, irrespective of whether the person required to satisfy RLWT is a paying agent or a withholding agent. No corresponding penalties provision is required for when the RLWT agent is a withholding agent as the penalties that apply to “true” withholding taxes are implicit through the addition of RLWT in sections BE 1(6), RA 6C(2) and RA 10(1)(a).

As discussed in the section titled “Information requirements”, a paying agent is able to “reasonably rely” on information provided to them as part of a section 54C form. If a paying agent fails to retain an amount of RLWT from a residential land purchase amount because they have reasonably relied on the information provided to them under section 54C by the vendor, section RL 2(7) provides that the paying agent is not liable for a penalty under part 9.

Generally, the main civil penalty that may apply is a shortfall penalty. An RLWT agent may be liable for shortfall penalties if they take a tax position that is inaccurate and satisfies one of the following:

- not taking reasonable care;
- gross carelessness;
- an abusive tax position; or
- evasion.

Penalties increase in proportion to the seriousness of the breach and apply across different tax types. Official guidance and interpretation is available on how the Commissioner applies each type of shortfall penalty. In addition, there are provisions which determine to what extent taxpayers may be eligible for a reduction in the shortfall penalty.

When an RLWT agent retains and pays an amount of RLWT to the Commissioner, but this is less than the amount calculated using the three calculation steps, shortfall penalties may apply to the shortfall. (That is, the difference between the calculated amount and what is actually paid to the Commissioner, depending on the RLWT agent’s level of culpability the Commissioner considers was present in the transaction.)

Late payment penalties may also apply in the context of RLWT, but unlike shortfall penalties, they are applied automatically to the amount that should have been paid. The late payment penalties are set out in section 139B of the Tax Administration Act 1994.

When the RLWT agent is a true withholding agent (because the vendor and purchaser are associated persons), late payment penalties apply if the required amount of RLWT is not paid to the Commissioner by the due date (the 20th of the following month). While the new legislation is silent on this point, use-of-money interest (UOMI) should also apply.

Under new section RL 2(6)(a), a RLWT agent who is a paying agent and has subtracted or retained *an* amount of RLWT from a residential land purchase amount, but has failed to pay the calculated RLWT to the Commissioner, late payment penalties apply. Late payment penalties generally continue to accrue until the core debt (in this instance the RLWT) has been cleared. UOMI should also apply in this instance.

Under new section RL 2(6)(b), when the paying agent has *not* retained *an* amount of RLWT from the residential land purchase amount, late payment penalties do not apply. This is because in most cases, the paying agent is not liable for the underlying amount of RLWT and once they have released the funds to the vendor, they are not able to rectify their failure to retain and pay RLWT. While the new legislation is silent on this point, UOMI should not, in this situation, apply to the paying agent. However, as the RLWT liability and resulting debt is ultimately the vendor's, where penalties do not apply to the paying agent as a result of section RL 2(6)(b), they will instead apply to the vendor. UOMI will also apply to the vendor.

The correct legal result is that late payment penalties are calculated in relation to the amount of RLWT that should have been retained under section RL 4. In some cases, this may not equal the amount that the paying agent retained and subsequently paid to the Commissioner. In this case, late payment penalties should ultimately apply only to the amount they retained because they are unable to rectify their failure to retain the full amount as the funds will have already left their possession. However, this should be determined on a case-by-case basis to ensure the integrity of the RLWT rules is maintained. To achieve this result, the existing rules surrounding remission of penalties and interest apply so that the paying agent may be able to seek relief in appropriate circumstances.

When relief is sought, the paying agent must show they have retained what they claim to have retained and provide full information about why they have not retained and paid the correct calculated amount of RLWT. This enables the Commissioner to determine to what extent relief should be appropriately provided and to make an assessment on whether shortfall penalties should also apply.

Example

Manny is an offshore RLWT person whose bright-line period for the house he is selling is less than two years. RLWT therefore applies when Manny sells his house. Manny's paying agent is Evan. Evan calculates the amount of RLWT that needs to be retained from the proceeds of the sale to be \$25,000. Evan only retains \$20,000 from the settlement funds on 15 August, but then only pays \$15,000 to the Commissioner on the due date of 20 September.

Evan is subject to late payment penalties, because he has not paid the full amount of RLWT to the Commissioner by the due date (20 September). Late payment penalties are automatically calculated based on the difference between what Evan paid (\$15,000) and what Evan should have paid (\$25,000). UOMI also applies.

While Evan can rectify his late payment in relation to the difference between the \$15,000 and what he actually retained (\$20,000), he is unable to rectify his late payment in relation to the difference between the \$20,000 and \$25,000 as the settlement funds have left his hands and he is not jointly and severally liable for the portion of the RLWT he did not retain.

Evan contacts Inland Revenue and provides information on the amount he did actually retain and why he did not retain the full amount that was calculated under the RLWT rules.

Late payment penalties and UOMI continue to accrue in relation to the retained \$20,000 until Evan has paid to the Commissioner the full amount that he retained from Manny.

Late filing penalties are important in the context of RLWT because if an RLWT agent's section 54B 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 as part of the interim claim process. Late filing penalties apply to tax types when the timely provision of information to the Commissioner is important (for example, employer monthly schedules and annual imputation credit account returns) and does not apply to withholding taxes such as RWT and NRWT as that information is not required until 31 May in the following year.

The possibility of having late filing penalties imposed encourages agents to provide RLWT statements by the due date. The imposition of late filing penalties in the context of RLWT is provided for in sections 139A(1), 139A(2)(iiic) and 139A(4). Section 139A(4) provides that the late filing penalty for RLWT statements is the same as that for employer monthly schedules – \$250.

The RLWT agent may also be liable for criminal penalties. These are applied by a court of law. Criminal penalties include absolute liability offences, such as failing to keep documents required to be kept under the Tax Administration Act 1994. The different types of criminal penalties are set out in sections 143–148 of the Tax Administration Act 1994.

Liability for underlying RLWT

As noted previously, under new section RL 2(5), a paying agent is not jointly and severally liable in relation to the vendor's RLWT debt, despite their obligation to satisfy the vendor's RLWT liability. However, if a paying agent has retained RLWT from a residential land purchase amount, but has not paid the RLWT to the Commissioner, they are liable for the amount of RLWT they retained and did not pay to the Commissioner.

Example

In the example above with Evan as a paying agent, the amount of RLWT calculated is \$25,000, but Evan only retains \$20,000 and pays \$15,000 to the Commissioner. Evan is not liable for the full \$25,000, only the \$20,000 that he did retain from Manny.

If the vendor and purchaser are associated persons, the purchaser is the withholding agent and is therefore liable for the underlying RLWT, in a similar way to standard withholding taxes.

Reporting to professional body

An amendment to section 81 of the Tax Administration Act 1994 has been made to allow the Commissioner of Inland Revenue to provide details of a RLWT agent to their relevant professional body when they have failed to fulfil their RLWT obligations. These professional bodies might include, for example, the New Zealand Law Society and the New Zealand Society of Conveyancers. This allows professional bodies to take appropriate action against members who do not comply with their legal obligations under the RLWT rules.

This is an important feature that supports the integrity of the RLWT rules, as paying agents are not liable for the underlying RLWT in most circumstances, so the exception from section 81 ensures there are sufficient consequences for RLWT agents who do not fulfil their legal obligations. However, it is expected that reporting to a professional body will only occur where the RLWT agent repeatedly or deliberately fails to correctly account for RLWT.

For the RLWT rules to retain their integrity and be effective, it is expected that the relevant professional body would take appropriate action against the member. This is why it is intended that only conveyancers and lawyers who are allowed to hold themselves out as such in New Zealand and are therefore a member of a professional body in New Zealand should be paying agents for the purposes of RLWT.