

25.05.2022

NEWS

Foreign investors beware – Landmark FIRB penalty case

The rule that foreign persons wishing to acquire property in Australia require Foreign Investment Review Board (FIRB) approval is now well established. Where foreign investors failed to comply with this rule, the Treasurer only imposed disposal orders requiring the foreign person to divest the property. Although the Foreign Acquisitions and Takeovers Act (Act) also prescribes the maximum penalty available for contravening foreign investment rules, the Treasurer has never imposed those penalties.

This will no longer be the position, following a landmark Federal Court case where penalty orders were awarded against a foreign investor for failing to obtain prior FIRB approval.

BACKGROUND

Between July 2016 and February 2018, Mr Vijay Balasubramaniyan purchased four properties in Victoria. At the time of the acquisitions, Mr Balasubramaniyan was a temporary resident and therefore classified as a foreign investor for the purposes of the Act. Mr Balasubramaniyan was required to notify the Treasurer through FIRB and obtain the Treasurer's authorisation before acquiring the properties. The number and type of properties to be owned by Mr Balasubramaniyan were also restricted under the Act. However, Mr Balasubramaniyan failed to comply with both rules.

In July 2020, the Australian Tax Office (ATO) filed proceedings against Mr Balasubramaniyan for non-compliance with the foreign investment rules.

DECISION

In April 2022, the Federal Court issued Mr Balasubramaniyan with a civil penalty of \$250,000.

Previously under the Act, the penalty for non-compliance was the greater of capital gain on the property or 10 percent of the property value. In January 2021, the penalty was significantly increased to 25 percent.

Justice Beach adopted the increased penalty provision and considered the higher penalty would erase any capital gain Mr Balasubramaniyan would receive when he disposed of the properties in question.

KEY TAKEAWAYS

- This case sends a strong warning to all foreign investors that the ATO now has a precedent case to aid its pursuit of foreign investors who do not have appropriate FIRB clearance for investing in Australian property and business.
 - The consequence for failing to comply with the foreign investment rules may now include significant civil penalties.
 - All foreign persons or entities with a foreign interest looking to invest in Australian property and business should pay extra attention to the FIRB rules that may apply as non-compliance will likely attract large fines.
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Authors



HELEN WU

Senior Associate