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CAPITAL GAINS TAX & TYPICAL PROPERTY TRANSACTIONS IN SOUTH AFRICA

Upon the disposal of immovable property, the seller becomes liable for the payment of Capital Gains Tax ("CGT") on any capital gain (profit) that has accrued in respect of that property since the introduction of the tax by the South African Revenue Services (SARS) on 1 October 2001.

RATES AT WHICH CAPITAL GAINS TAX (CGT) IS CALCULATED

Individuals (Natural Persons)

40% of the gain made on the disposal of the immovable property is included in the individuals' taxable income for the year of assessment within which the property has been sold. As the maximum marginal rate of income tax for individuals is 45% of taxable income, it stands to reason that individuals will effectively pay a maximum of 18% of the capital gain to SARS.

Company/Close Corporation

80% of the capital gain made on disposal of the immovable property is included in the taxable income of the entity. As the tax rate for companies and close corporations is currently 28%, these entities will effectively pay 22.4% of the capital gain to SARS.

Trusts

Again, 80% of the capital gain made on disposal of the immovable property is included in the taxable income of the trust. As the income tax rate for trusts is 45%, an effective 36% of the capital gain will be payable to SARS.

EXCLUSIONS

Primary Residence (Individuals/Natural Persons)

Most primary residences will not be subject to CGT because - the first R2 million of any capital gain or loss on the sale is disregarded for CGT purposes. This means that you need to make a capital gain of more than R2 million in order to be subject to CGT (before 1 March 2012 the primary residence exclusion was R1.5 million).

In addition, if the proceeds on disposal of a primary residence do not exceed R2 million, any resulting capital gain or loss must be disregarded (this rule is subject to certain conditions, for example, no part of the residence must have been used for the purposes of trade).

It must be borne in mind that this exemption only applies to natural persons, and consequently a close corporation, company or trust may not claim this exemption. A person who does not ordinarily reside in South Africa can also not own a "primary residence" in South Africa.

Annual Exclusion

For each year of assessment an annual amount, known as the *"annual exclusion"* is excluded for CGT purposes. The annual exclusion in the 2017/2018 tax year is R40 000.00 (increased from R30 000.00 in the 2015/2016 tax year). Please note that this is in addition to the primary residence exemption, so an individual taxpayer selling his or her home can effectively make a gain of R2 040 000.00 before being subject to any Capital Gains Tax.

CALCULATION OF THE GAIN

The capital gain is calculated by deducting the base cost from the proceeds on the disposal of the property. Certain items may be included in the base cost for the purposes of calculating CGT:

1. The costs incurred in acquiring the property, ie the purchase price, transfer duty, VAT, transfer costs and any other professional fees incurred.
2. The cost of any improvements, alterations, renovations etc. (note: a distinction is to be drawn between improvements, which are deductible and maintenance expenditure, which is not deductible).
3. The costs associated with the disposal of the property, including estate agent's commission, advertising costs, and professional fees incurred.

The "base cost" may be calculated in one of the following ways where the property was acquired prior to 1 October 2001:

1. A fair market valuation of the property as at 1 October 2001. This would have had to have been compiled prior to 30 September 2004.
2. The "time-apportionment" method of determination of the value as at 1 October 2001.
3. A deemed value may be allocated to the property based on the purchase price achieved on disposal.

NON RESIDENTS AND S35A OF THE INCOME TAX ACT (WITHHOLDING TAX)

Non-residents are liable for the payment of CGT, and to provide for the collection of CGT prior to the repatriation of the proceeds of the sale, SARS introduced s35A in 2007.

This section imposes an obligation on a purchaser to withhold a portion of the purchase price and to pay this portion over to SARS to make provision for the seller's CGT liability. There is an obligation imposed on the estate agent and the conveyancer to inform the purchaser in writing of this obligation.

In order for s35A to apply, two factors are vital:

1. the seller must be a non-resident, and
2. the purchase price must exceed R2 million.

Please note that a SARS directive issued in 2014 stipulates that the R2 million threshold will apply per seller. ie where a property is owned jointly by 2 individual non-resident sellers, the purchase price must exceed R4 million to apply.

Where both of these factors are present, the following amounts must be withheld:

- 7.5% where the seller is a non-resident natural person
- 10% where the seller is a non-resident company
- 15% where the seller is a non-resident trust

Practically speaking, the conveyancer will withhold the relevant portion of the purchase price acting as the agent for the purchaser.

We recommend that any non-resident seller to whom this legislation applies approach SARS at the time of the sale and apply for the issue of a directive which will set out the actual CGT payable, and enable us to distribute the proceeds accordingly upon registration of transfer.

NOTE:
The above commentary is intended to set out the implications of Capital Gains Tax with regard to property transactions in broad strokes, and is by no means exhaustive. For further information pertaining to CGT, we refer you to SARS' ABC OF CAPITAL GAINS TAX FOR INDIVIDUALS which can be downloaded at **www.sars.gov.za**

+27 (0)21 790 6006 | +27 (0)82 340 3049 | +27 (0)84 626 5913| info@fha.law.za | www.fha.law.za
Unit 5, "16 on Victoria", 16 Victoria Ave, Hout Bay, Cape Town, 7806 | Suite #274, Private Bag X4, Hout Bay, Cape Town, 7872 | Deeds Office Box Number 330