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WITHHOLDING TAX IN TERMS OF SECTION 35A OF THE INCOME TAX ACT, 58 OF 1962

In terms of section 35 A of the Income Tax Act where the purchase price of a property exceeds R2 000 000, there rests a duty on the purchaser to withhold tax on the sale of land belonging to a non-resident of South Africa. Where the non-resident seller is a natural person, 7.5 % of the amount so due to him/her must be withheld, if the seller is a company 10 %, and if the seller is a trust, 15 % must be withheld.

How does one determine whether a party is a resident or not of SA?

There are two tests

1. Ordinary resident in terms of S A common law
(- ordinarily return to SA from his wanderings – usual/ principal residence – real home)
2. Residents to the Income Tax Act 1962 who passes the “physical presence test”

A person will be deemed to be a resident if during the year of assessment he is 1) or failing that 2)

Physical presence test (PPT) –

Individual must be physically present in SA for periods exceeding

- 91 days in total during the year of assessment;
- 91 days in total during each of the 5 years preceding the year of assessment and
- 915 days in total during the 5 years preceding the year of assessment

If the individual meets the PPT BUT is outside of RSA for a continuous period of at least 330 full days he will not be regarded as a resident from the day that the individual ceases to be physically present

The amount withheld must be paid to SARS within 14 days after ‘the date on which the amount was so withheld’ (usually date of registration, but in some cases the parties may agree that the money is payable to the seller before registration, in which case the 14-day period must be calculated from such a date), but where the purchaser is himself/herself a non-resident, then within 28 days.

Where the purchaser knew or ought to have known that the seller is a non-resident, and fails to so withhold the amount, that purchaser is himself/herself/itself liable to pay the amount to SARS, with interest and penalties, where late payment is made

Where the seller in a property transaction is a non-resident, the estate agent, if any, and the conveyancer who assists in or administers the transaction for a fee (the section phrases it as ‘....*who is entitled to payment of any remunerations or payment in respect of services rendered....*’) must each notify the purchaser in writing before payment is made to the seller that this section may be applicable.

If the estate agent and /or conveyancer knew or ought to have known that the seller is a non-resident, and then fails to warn the purchaser in writing, then that estate agent and / or conveyancer will be jointly and severally be liable for the amount, but (thank goodness for small mercies) limited to the amount of the remuneration he / she / they / it would have received.

A non-resident seller may apply to SARS for a directive that no amount or a reduced amount be withheld. The Commissioner will decide whether to 'trust' the seller to pay his tax, by considering the following factors:

- any security furnished by the seller for payment of the tax;
- extent of the seller's other assets in South Africa (if he has lots of other assets here he is less likely to 'run away');
- whether tax is indeed payable as a result of the disposal of the particular property; and
- whether the tax liability is less than the percentage that must be withheld by the purchaser.

Conclusion

The withholding tax provision can work very harshly against an honest tax paying non-resident, as the amount to be withheld could, depending on the purchase price, be much more than the actual tax liability. In addition, it could take a long time for SARS to process the information and refund any excess to the seller.

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