

WITHHOLDING OF FUNDS PAYABLE TO NON-RESIDENTS

From the 1st of September 2007 it is imperative that an estate agent notify the conveyancer that the seller is a non-resident otherwise the agent can forfeit his commission to SARS.

The provisions of Section 35A of the Income Tax Act will come into operation on the 1st of September 2007. This new section provides that:

1. Any person such as the purchaser of immovable property or the conveyancer appointed to attend to the registration process who must pay an amount to a person who is not a resident in respect of a disposal of any immovable property in the Republic must withhold from the amount due to such seller an amount equal to: a) 7,5 percent of the amount so payable where the seller is a natural person; or b) 10 percent of the amount so payable where the seller is a company; or c) 15 percent of the amount so payable where the seller is a trust.
2. The seller may apply to the South African Revenue Services (“SARS”), for a directive that no amount or a reduced amount must be withheld having due regard to: –
 - a. any security furnished for the payment of any tax due on the disposal of the immovable property by the seller;
 - b. the extent of the assets of the seller in the Republic;
 - c. whether that seller is subject to tax in respect of the disposal of the immovable property; and
 - d. whether the actual liability of that seller for tax in respect of the disposal of the immovable property is less than the amount contemplated in clause 1 above.
3. The amount to be withheld is an advance payment in respect of that seller’s liability for normal tax for the year of assessment during which that property is disposed of by the seller.
4. If the purchaser knows or reasonably should have known that the seller is not a resident and fails to withhold any amount as required in terms of the Act then that purchaser: –
 - a. is personally liable for the payment of the amount which he or she failed to withhold; and

- b. must pay that amount to SARS not later than the date on which payment should have been made if the amount had in fact been withheld.

5. The amount must be paid within 14 business days (if the purchaser is a resident) or 28 business days (if the purchaser is a non-resident) after the date on which that amount should have been withheld.

6. If a purchaser fails to pay the amount contemplated to the SARS then that purchaser: –

- a. is liable for interest at the prescribed rate on any amount outstanding reckoned from the day following the last date for payment to the date that the amount is received; and
- b. must pay a penalty equal to ten percent of that amount in addition to any other penalty or charge for which he or she may be liable under the Act.

7. Any estate agent and any conveyancer who is entitled to any remuneration or other payment in respect of services rendered in connection with the disposal of the immovable property by the seller or the registration of transfer, as the case may be, must each inform the purchaser in writing of the fact that the seller is not a resident and that the provision of this section may apply.

8. If an estate agent or conveyancer knows or should reasonably have known that the seller is not a resident and fails to comply with the above, that estate agent or conveyancer is jointly and severally liable for the payment of the amount which the purchaser is required to withhold to pay to SARS in terms of this section, but the amount is limited to the amount of remuneration payable to such person.

9. However, the section does not apply: –

- a. if the amount payable by the purchaser to the seller, in respect of the acquisition by that purchaser in aggregate does not exceed R2-million; or
- b. in respect of any deposit paid by a purchaser for purposes of securing the disposal of the immovable property by the seller to that purchaser until the agreement for that disposal has been entered into, in which case any amount which would have been required to be withheld from the amount of that deposit must be withheld from the first following payment made by that purchaser in respect of the disposal.

Every seller of immovable property is required to pay capital gains tax on the gains made from buying and selling of such immovable property but unfortunately many non-residents merely take their profit and leave the country without paying the capital gains tax. The new Section 35A is a mechanism that SARS will use to prevent this. The amendment is aimed at ensuring that a purchaser must deduct the withholding tax from the selling consideration paid to non-resident individuals, companies and trusts. This

will enable SARS to extract the tax before the non-resident takes the money out of South-Africa where the proceeds are effectively beyond the control of SARS. Although the section places the obligation on the purchaser to deduct the withholding tax and pay it to SARS, in practice the conveyancer will work together with the estate agent and the purchaser to determine the seller's status. If it is determined that the seller is a non-resident then clearly the act will apply, and withholding tax must be deducted. The role of the conveyancer will become crucial as the conveyancer controls the flow of money between the purchaser and the seller. It will be important that all parties involved in the conveyancing process be made aware of the proposed amendment in order to ensure that the withholding tax is deducted from the seller's proceeds and paid over to SARS and to avoid a situation where the conveyancer, agent and purchaser are held personally liable for payment of the withholding tax.

PROVISION FOR WITHHOLDING TAX IN AGREEMENT OF SALE

We suggest that estate agents amend their agreements of sale to cater for the event where a Seller is a non-resident by adding the following clauses:-

“Residence

**The Seller hereby warrants that he/she is a resident of the Republic of South Africa; or*

**The Seller is a non-resident of the Republic of South Africa. The Seller accordingly hereby irrevocably authorizes and instructs the conveyancers to deduct the applicable withholding tax from the purchase price on behalf of the Purchaser if the purchase price is R2 000 000.00 or more and to pay the same to the Receiver of Revenue within 14 (fourteen) days after date of registration of transfer of the property into the name of the Purchaser.*

** Delete whichever clause is not applicable.”*

Inwonerskap

**Die Verkoper waarborg hiermee dat hy/sy ‘n inwoner van die Republiek van Suid-Afrika is; of*

**Die Verkoper is ‘n nie-inwoner van die Republiek van Suid-Afrika. Gevolglik magtig die Verkoper hiermee onherroeplik en gee opdrag aan die aktebesorgers om die toepaslike terughoudingsbelasting van die koopprys af te trek namens die Koper indien die koopprys R2 000 000.00 of meer is en dit oor te betaal aan die Suid-Afrikaanse Inkomstediens (SAID) binne 14 (veertien) dae na registrasie van oordrag van die eiendom in die naam van die Koper.*

(Skrap (a) of (b) soos van toepassing)”*

The above should be seen as a brief comment and our interpretation thereof and should not be seen as an extensive guideline. Please obtain a full legal opinion if you wish to act on any aspect hereof as the guideline is not fully comprehensive.

COMPANIES



Going Beyond

The DVH group is a national group of attorney practices with offices situated in the Western Cape, Gauteng, and Kwa Zulu Natal.

www.dvh.law.za or scan the QR to contact us.



This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.