

CAPITAL GAINS TAX AND THE WITHHOLDING PROVISIONS IN SECTION 35A OF THE INCOME TAX ACT

If you have been following our newsflashes and webinars on Capital Gains Tax (CGT) you might recall that when a person who is a non-resident of South Africa sells immovable property in SA, the purchaser, the estate agent, and the conveyancing attorney are all obliged to ensure that a portion of the purchase price is withheld and paid over to SARS as security for the seller's CGT liability.

The percentages to be withheld are 7,5% if the seller is a non-resident natural person, 10% if the seller is a non-resident company, and 15% if the seller is a non-resident trust. Usually, the implementation of this law is handled by the conveyancers and in most cases, we obtain tax directives for the correct amount of the CGT before transfer to ensure the seller does not overpay SARS.

This obligation to withhold a portion of the purchase price does however not apply to all sales by non-residents. It only applies if the selling price of the property is above R2 million. If it is R2 million or less there are no withholding obligations, and SARS will rely on the honesty of the seller to pay the CGT amount with their next tax return.

But what if a property is owned by more than one non-resident? If a property is sold for R3 million, but is owned by 2 non-residents in equal shares, each seller's share is worth R1,5 million. Can each seller then say the selling price of their share is less than the R2 million threshold and ignore the withholding provisions?

You would think that SARS would say no, and that they would insist on the withholding provisions being implemented in respect of each of these sellers. Strangely enough, you would be mistaken.

The current interpretation of the law by SARS allows us to ignore the provisions of section 35A if the value of the non-residents share in the property is R2 million or less. This means that if 2 non-residents who own a property in equal shares sell a property for R3 million, neither one of them need to be concerned about any portion of the purchase price being withheld as security for CGT. They should then just declare the income from the sale in the next tax return and pay what is due to SARS at that stage, just as an ordinary resident of South Africa would have to do. It is only if these 2 non-residents sell for more than R4 million that they would need to be concerned about the withholding provisions in section 35A.