I WANT TO BUY A HOUSE THAT IS OWNED BY A COMPANY – SHOULD I BUY THE SHARES IN THE COMPANY OR SHOULD I BUY THE HOUSE FROM THE COMPANY?

In 99% of these cases, we would advise the purchaser to buy the house from the company, and not to purchase the shares. But why do we give this advice?

Hidden Debt:
Remember that a company is a legal entity all on its own. This means that while it can own its own property, it can also incur its own debts, and these debts might be hidden. If you take over the company, you run the risk that creditors of the company will appear out of the woodwork, and the company might be forced to pay these debts. Even if you have an indemnity against such debts from the seller, this indemnity might be difficult or impossible to enforce. It's just not worth taking the risk.

Transfer Duty:
Prior to 2002, if you sold shares in a company that owned property, the sale of these shares was not subject to transfer duty. Since December 2002 however this has changed. If the shares in a company which owns residential property are sold, the shares are treated as fixed property and the sale attracts transfer duty. There is accordingly no saving on transfer duty if you buy the shares instead of the property.

It is interesting that it is only the sale of shares in a company that owns residential property that are subject to transfer duty. A sale of shares in a company that own commercial property is not subject to transfer duty (but such a sale would be subject to Securities Transfer Tax).

Capital Gains Tax:
Here there are two aspects to consider.
Firstly, if the purchaser is intending to use the property as their primary residence, when the time comes to sell, the purchaser will not be entitled to receive the first R2 million profit free of CGT. This is because the R2 million primary residence rebate does not apply to companies.

Secondly, when the purchaser eventually decides to sell the property, and they cannot find someone else to take over the shares in the company, there will be forced to sell the property out of the company. The capital gains tax will then be calculated on the increase in value of the property from the time that the company purchased the property, not from the time that the purchaser acquired the shares. This could increase the capital gains tax liability quite substantially.

We hope that this short article has shed some light on the matter. There is however no substitute for proper legal advice that is specific to your situation. If you encounter a situation like this and you have any doubt about the matter, do not hesitate to contact us. We will make a proper assessment and advise you accordingly.