

# IN-DEPTH OTP TRAINING

## SESSION 2

### PROPERTY DESCRIPTION

#### **EXCLUSIVE USE AREAS IN SECTIONAL TITLES**

Basically, there are two types of EU:

Registered as a **notarial contract** – in which case record of it will be found in a deeds office search where it has an “SK” number; or

Reflected in the **BC’s conduct or management rules**.

Make sure that if your seller tells you that he/she has EU, that this is the case.

Contact the managing agents or the conveyancer to be appointed BEFORE taking the property to market, to double check whether there are any EU’s registered and in what format.

NB – this forms part of the property and may be of material importance to the buyer.

The right to extend – this means that the developer may have reserved the right to do this and if this still exist it MUST be disclosed to the buyer else the buyer may cancel at any time when he discovers this.

### PRICE / PAYMENT CLAUSES

#### VAT v TRANSFER DUTY - WHEN IS VAT PAYABLE as against TRANSFER DUTY?

##### **What is the status of the SELLER?**

If the seller is a VAT VENDOR **for the sake of selling land** (not selling golf balls or operating a travel agency or own racehorses) then it is a VATABLE transaction.

But that does not always mean 15% VAT will be paid!

If it is a vatable supply, then it may be EITHER ZERO rated or VATABLE at 15%.

**ZERO RATED as against 15%.**

If a transaction is zero-rated, it still falls within the "VAT net" and all the provisions relating to VAT apply to the transaction - However VAT is payable at "0%" instead of "15%" AND NO TRANSFER DUTY WILL THEN BE PAYABLE.

**Requirements for applying the zero-rate.**

The zero-rate will only be applicable to a transaction if the following requirements have been met:

- A. the seller must be a VAT vendor and registered as such for the purpose of the trade;
- B. the purchaser must be a VAT vendor;
- C. The property being sold, must be a going concern, i.e. it is being rented out to a third party as at date of the transaction and vat is being paid on the rental (so it will only apply to commercially leased properties because you don't pay VAT on a residential lease);
- D. The parties must specifically agree in writing that the enterprise is being sold as a going concern.

**NB! Such sales MUST have a "Zero Rated" clause in!**

Example of a Zero-rated clause. This clause below is an example of a zero-rated clause. It should be incorporated in a deed of sale in order to protect the parties and to ensure that the transaction is indeed zero-rated by SARS when the transferring attorney applies for a transfer duty receipt: -

***"... The parties place on record that:***

- (a) the property is sold as a going concern, being the lease of premises for business purposes.***
- (b) the concern is, on the date hereof, an income generating enterprise;***
- (c) the seller is a registered VAT vendor, with VAT registration number .....***;
- (d) the purchaser is a registered VAT vendor, with VAT registration number .....***
- (e) In the event that SARS does not accept this as a Zero-rated transaction the PURCHASER shall be liable to pay VAT on the purchase price as determined by SARS, over and above the purchase price."***

## Transfer Duty

If not VATABLE, then transfer duty may apply. (So, it is either or!)

### When is a sale exempt from TD?

Section 9 of the Transfer Duty Act Provides for a number of instances where a transfer of immovable property will be transfer duty exempt. There are VERY few exceptions.

- 1 Divorce transfers
- 2 Deceased estate transfers (but only to the beneficiaries and not third parties)
- 3 Sale price is under the transfer duty threshold which changes nearly each year.

### WHAT IF I BUY SHARES IN A PROPERTY-OWNING COMPANY; CLOSE CORPORATION OR A TRUST THAT OWNS PROPERTY, INSTEAD OF THE PROPERTY ITSELF? DO I STILL PAY TRANSFER DUTY?

- 1 The Transfer Duty Act defines “property” as to include shares in a residential property-owning company, or membership interest in a property-owning CC, or even a contingent right in a discretionary trust which owns residential property.
- 2 If the buyer does not pay transfer duty within 6 months of acquiring such shares; member interest or contingent right, then the public officer of a company **and the seller** itself of the shares/interests or contingent right shall be personally held liable.
- 3 If it is a COMMERCIAL property, then this doesn’t apply.
- 4 Beware the CGT trap when buying a company but then selling the land one day! The base cost will be what the company **ORIGINALLY** paid - and not what you paid for the shares!

### CASH DEALS

Ensure availability of funds.

Divorce proceeds

Pension fund proceeds

MVA payout

Sale of shares

Fixed deposit

Foreign held funds

### **INTEREST ON DEPOSITS**

Please ensure that your buyer is made aware that the interest we get is very low. At present (2022) it is only 3.25% per annum, and of this, 1/20<sup>th</sup> (5%) goes to the Legal Practice Fidelity Fund! And we also charge an admin fee for investing the funds.

If they therefore plan to use money from an existing home loan account or which is invested in a fixed deposit where they might get twice as much interest, make sure they understand that they will get far less, when the funds are invested with us, and that they must realise that the seller is entitled to see that the funds are secured as soon as possible into the deal.

**Speaker: Robert Krautkrämer**