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NON RESIDENTS PURCHASING PROPERTY IN SOUTH AFRICA

The build up to the 2010 soccer is creating a growing interest among non residents about purchasing property in SA and they pose the question - can this be done?

ANSWER

There is nothing to prohibit a non resident from buying property in SA personally or through an entity subject to certain requirements.

A non-resident is a person whose normal place of residence, domicile or registration is outside the Common Monetary Area. These individuals enter South Africa purely for visiting or business purposes and would not be the holders of a valid work or study permit in their foreign passport.

There are formalities beyond signing a formal sale agreement which must be observed by non residents buying property in SA.

PURCHASE BY AN INDIVIDUAL

If a non-resident individual is purchasing a residential property in his/her personal capacity in SA then funds to do so would be remitted from an overseas source into a designated bank account (usually the trust account of the conveyancer or estate agent) with a registered SA Bank. The deposit of the international transfer of funds would be proof of the introduction of funds from a foreign source to pay the purchase price. The record of the deposit of the funds received from a foreign source is referred to as a "deal receipt". A copy thereof should be given by the conveyancer/estate agent to the purchaser. This record is important and is required for repatriation of funds. If the non resident requires a bond the maximum amount permissible would be 50% of the purchase price and approval required by the Exchange Control Authorities **which will include being able to prove the introduction to South Africa of an amount equivalent to the bond amount sought.** To qualify for a bond the non resident will have to satisfy the lending bank's usual requirements acting as agent for the Exchange Control Authorities like proof of earnings, furnish copy of the sale agreement, proof that the price is fair and market related, and of course satisfy the FICA requirements. On approval of the bond the non resident is required to open a non resident account at the registered commercial bank in order to facilitate bond repayments. This account would be funded from abroad and/or from rent if the property is leased. A copy of the lease agreement must be lodged with the bank holding the account together with an estate agents confirmation that the rent is fair and market related. The practice was that upon registration of transfer the title deed would be submitted to the Bank (which received the foreign funds) to be endorsed "non-resident". This is no longer a requirement as in 2009 the South African Reserve Bank referred the matter to the Department of Land Affairs whose response was that no title deed can be endorsed by anyone other than by a Registrar of Deeds. Therefore it is essential to retain your "deal Receipt".

Upon the non resident selling the property and desiring repatriation of funds the Bank would require:

- a copy of the purchase and sale agreement;
- be satisfied that the price was fair and market related;
- proof of the original introduction of funds from a foreign source to pay the purchase price being the "deal receipt" and/or endorsement of the title deeds
- Confirmation that the investor is a genuine non-resident i.e. has never been a permanent resident or has formally emigrated for exchange control purposes.
- The money from the foreign source and any profit thereon can be repatriated.

PURCHASE THROUGH AN ENTITY

- a non resident wishing to acquire property in SA not in his/her personal capacity but through the vehicle of a company, close corporation or an inter vivos trust would need to register such entity in SA complying with SA laws;
- funds introduced into such entity as loan accounts from a foreign source are regarded as a loan to the entity and require Exchange Control approval;
- funds introduced from a foreign source into a company's share capital do not require Exchange Control approval but the share certificates must be endorsed "non resident" by the bank;
- repatriation of funds is similar as above for individuals
- as this method is less used and more involved it is suggested that professional advice be obtained

CAPITAL GAINS TAX

Non residents are on the sale of immovable property or of an interest or right of an entity holding immovable property taxed on the capital profits arising from such disposal. They have to register in the year of disposal as a SA taxpayer and submit a tax return regarding the capital gain and pay the tax calculated thereon. The R2m exemption on primary residence does not apply to non residents. To facilitate collection SARS has legislated that where the seller is a non resident it is the duty of the conveyancer to retain 5% of the purchase price on registration where sales are R2m or more. Estate Agents are also under a duty to see that this is done. The conveyancer is to pay this to SARS on account of any CGT liability. In this instance the conveyancer and/or estate agents should ascertain from the start of a deal as to whether or not the seller is a non resident and have the seller declare this in writing.

INCOME TAX

A non resident is taxed on income accruing from a SA source. Thus if the property is rented the rental income would be taxable. The rent is usually used to pay any bond installments. A copy of the lease agreement must be lodged with the bank

SALE AGREEMENT

We suggest that where a non resident purchaser is remitting funds from overseas that the condition that they be received in SA by a certain date be conditional. So that, if the funds are not received on time, then the sale is automatically cancelled. This would eliminate the necessity of having to serve and/or institute any legal process on the non resident purchaser which could be a time consuming and costly legal exercise. If necessary, the parties can always agree that the time for payment be timeously extended.

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