



MEUMANN WHITE

ATTORNEYS

NON RESIDENT SELLERS CAUGHT IN SARS TAX NET

Prepared by Meumann White Attorneys

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Section 35A of the Income Tax Act, inserted into the Act by section 30 of the Revenue Laws Amendment Act, 2004 deals with the withholding of tax in respect of non-residents who dispose of property in South Africa.

This section was inserted into the Income Tax Act during 2005 and was originally to come into operation on a day to be proclaimed by the President. The Taxation Laws Amendment Bill, 2007 has now been introduced in the National Assembly, and provision is made therein to amend the 2004 Revenue Laws Amendment Act so that s35A of the Income Tax Act will come into operation on 1st September 2007 and will apply to any disposal of immovable property on or after that date.

So what is Section 35A all about? Briefly it imposes an obligation to on a purchaser, who purchases immovable property for a price that exceeds R2million from a seller who is a non-resident, to withhold part of the purchase price from the seller on registration of transfer, and pay this withheld portion to SARS. Such amounts withheld, and paid to SARS are treated as an advance in respect of the seller's liability for tax for the year of assessment.

The amount of the purchase price to be withheld is, where the seller is a natural person, 5% of the purchase price, a company or close corporation 7.5% and a Trust 10%. The withheld amount is to be paid to SARS within 14 days of transfer, or if the purchaser is also a non-resident, within 28 days.

If the purchaser knows, or reasonably ought to have known, that the seller is not a resident, and he fails to withhold the amount required, the purchaser becomes personally liable to pay the amount to SARS on due date.

The conveyancer and estate agent have an obligation to notify the purchaser, if they know or ought to have known, that the seller is a non-resident, and if the estate agent and conveyancer fail to do so, they are jointly and severally liable for the tax payable, to the extent of their remuneration.

FICA already imposes an obligation on the conveyancer and estate agent to "know their client" but it is not always easy to determine whether a seller is, for tax purposes, a resident of South Africa or not.

A natural person is regarded as a resident for income tax purposes by being ordinarily resident in the republic of South Africa, or complying with all the requirements of the physical presence test set out in the Income Tax Act.

A legal entity is considered a resident in South Africa if the entity was incorporated, established or formed in South Africa, or if the effective place of management thereof is in South Africa.

To complicate matters SARS may deem a legal entity to be exclusively a resident of another country in terms of an agreement concluded with that other country to avoid double taxation.

So what should the estate agent be doing to protect the purchaser and to avoid personal liability? We recommend that:

1. the seller warrant his residency status in the sale agreement, and
2. that the conveyancers be irrevocably authorized and instructed to withhold the required percentage of tax from the proceeds of the sale and to pay these to SARS within fourteen days of registration of transfer if:
 - the seller is indeed a non-resident, or
 - if the seller has warranted that he is a resident, but the estate agent or conveyancers have cause to believe or suspect that the seller is a non-resident.

Although section 35A imposes further responsibilities upon the estate agent and the conveyancer, it also creates another reason for the use of an estate agent by a purchaser, as the involvement of an estate agent in the transaction, immediately and significantly reduces the purchaser's level of responsibility for compliance with Section 35A.

So, if you as a purchaser want to limit your liability to the SARS for your non-resident seller's tax obligations – engage the services of an estate agent!