

# REAL ESTATE ALERT

15 FEBRUARY 2022



INCORPORATING  
**KIETI LAW LLP, KENYA**

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### When non-resident sellers sell their immovable property in South Africa

From 1 September 2007, non-resident sellers who sell their immovable property in South Africa for more than R2 million, are under certain circumstances liable for payment of withholding tax to the South African Revenue Service (SARS) in terms of section 35A of the Income Tax Act 58 of 1962 (the Act).



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## When non-resident sellers sell their immovable property in South Africa

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As section 35A of the Act only applies to Sellers who are non-resident, the first step would be to determine whether or not the Sellers are regarded as residents in South Africa. According to the Act, there are two tests to determine "residency", namely the;

1. ordinary residence test, and
2. physical presence test.

A person will be deemed to be a "resident" for tax purposes, if during the year of assessment they pass the ordinary residence test or, failing this, the physical presence test. For a person to be considered an "ordinarily resident" in the country in terms of South African common law, such person would ordinarily return to South Africa from their "wanderings", and regard South Africa as their usual or principal residence, or their "real home". To meet the physical presence test, a person must be physically present in South Africa for the following periods: :

- longer than 91 days in total during the year of assessment;
- longer than 91 days in total during each of the 5 years preceding the year of assessment, and
- longer than 915 days in total during the 5 years preceding the year of assessment.

If the individual meets the physical presence test but is outside of the country for a continuous period of at least 330 full days, they will not be regarded as a resident from date of exiting the country.

From the above one can deduce that if a person does not fulfil the requirements to be deemed a "resident" for the purposes of the Act, then such person will be perceived and treated as a non-resident and therefore charged the required taxes as set out in section 35A of the Act.



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### Calculations

Withholding tax is in essence a provision for Capital Gains Tax (CGT), and the following percentages of the Gross Selling price will determine the amount of the required provision:

- 7,5% where the seller is a natural person;
- 10% where the seller is a company; and
- 15% where the seller is a trust.

The Conveyancer will have to hold back the relevant amount, in the firm's Trust account, before accounting to the Seller for the balance of the net sale proceeds, and payment needs to be made to SARS within 21 business days from date of Transfer.

### Exemptions

The Sellers have the option to request a Directive from SARS to exempt the transaction from withholding tax, or to reduce the rate of withholding tax payable, by submitting the necessary form. The Sellers can submit the form with supporting documents to

SARS themselves or grant a Power of Attorney to their tax advisor or to the Conveyancer to submit the necessary to SARS on their behalf.

The reasons why a sale would attract a lower rate of tax will depend on the facts of the particular case. For example, the Seller may be fully exempt from income tax, or in the case of an individual, have a low taxable income or may have disposed of the property at a loss.

Even if SARS issues a negative directive, the amount should ultimately be refundable (if there is a capital loss) or it will simply be applied towards taxes owed by the Sellers.

Although the Sellers may be applying for a Tax Directive, the duty remains on the Conveyancer to retain the withholding tax funds in Trust pending receipt of the SARS Directive. Ideally application therefore needs to be made at the commencement of the transaction, to allow sufficient time for a Directive to be issued before registration of Transfer.

SARS generally processes the directive application within 21 business days, depending on whether they require additional information or documentation.

Non-resident Sellers need to be made aware of the possibility that a portion of their net sale proceeds may be withheld once their Transfer registers and understand that their expected net proceeds may be less than they had anticipated.

Transferring Attorneys need to communicate the provisions of section 35A to non-resident Sellers as soon as possible, to allow such Sellers to timeously apply for a Directive (that tax be withheld at a lower or zero rate) so as not to negatively affect their cashflow. Likewise, there is a duty on Sellers to inform their transferring attorneys if they have immigrated so that the necessary "residents" test can be done, and provision made for withholding tax if necessary.

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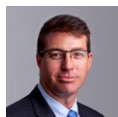
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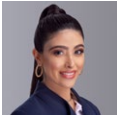
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### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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