CAPITAL GAINS TAX IN RELATION TO PROPERTY

2012

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When immovable property is disposed of, the seller becomes liable for the payment of Capital Gains Tax ("CGT") on any profit made in respect of that property after 1 October 2001, which is the date on which this tax was first introduced in South Africa.

AT WHAT RATE IS CGT CALCULATED?

If the property is owned by an individual or a special trust, 25% of the capital gain made on disposal of the property must be included in their taxable income for the year of assessment in which the property is sold. The present maximum marginal rate of income tax for individuals is 40% and therefore individuals will pay a maximum of 10% of the capital gain.

Likewise, if a property is owned by a company, a close corporation or an ordinary trust, 50% of the capital gain must be included in their taxable income. The income tax rate for a company or close corporation is 28% and these entities will therefore pay 14% of the capital gain in CGT, while trusts, whose income tax rate is 40%, will pay 20% of the capital gain.

If a capital loss is made on disposal of the property, it may be offset against any capital gains made in that year of assessment and, if no capital gains have been made, the loss may be carried forward to subsequent years of assessment.

For individuals in the year 2011 / 2012, the first R20 000 of their capital gain or loss in any year of assessment will be exempt and thus disregarded. This figure increases to R200 000 in the year in which an individual dies.

ARE NON-RESIDENTS ALSO LIABLE TO PAY CGT?

Yes. Non-residents are liable for the payment of CGT on the disposal of any immovable property owned by them in South Africa, or on the disposal of an interest of at least 20% in the share capital of a company where 80% or more of the net asset value of the company is attributable to immovable property.

- S35(A) INCOME TAX ACT

  Legislation imposed in September 2007 provides for the withholding of a provisional CGT from non-resident sellers' proceeds which must be paid to SARS by the buyer in such transactions on date of registration. Important to note is that the legislation places an obligation on the estate agent and/or conveyancer to disclose this payment responsibility to the buyer. In practise conveyancers will obtain a mandate from a buyer in order to make the payment to SARS on the buyer's behalf.

- WHAT MUST BE PAID?
  - If the sales price exceeds R 2 000 000.00, 5% must be withheld if the seller is a natural person and a non-resident;

- 7,5% if the seller is a non-resident company or close corporation;
- 10% if the seller is a non-resident trust.

Non-resident sellers can apply to SARS for a CGT directive, prior to the registration of the transfer, in which case payment of the amount shown on the directive is made to SARS, and not the percentages shown above.

HOW IS PROFIT CALCULATED?

A capital gain is calculated by deducting the base cost from the proceeds on disposal of the property. Disposal includes a sale, donation, exchange, vesting of the property in a beneficiary of a trust or emigration.

The following may be included in the base cost:

1. the cost of acquiring the property, including the purchase price, transfer costs, transfer duty, VAT and professional fees (eg. paid to attorneys and surveyors);

2. the cost of improvements, alterations, renovations, etc, but only where the costs and payment thereof can be proved by presentation of invoices/receipts;

3. the cost of disposing of the property, including agent's commission, advertising costs, valuation costs (including valuing the property for CGT purposes) and professional fees. (Expenditure on repairs,

maintenance, insurance and rates and taxes are not deductible.) It is therefore essential to maintain accurate records of the above costs. If such records are not retained, no deduction from the proceeds will be allowed when determining the capital gain.

All records must be kept for a period of 4 years from the date of submission of the income tax return for the year in which the capital gain or loss is reflected. If no return is lodged, the records must be kept for 5 years from the date of disposal of the property. If an objection or an appeal against a CGT assessment is lodged, all records must be kept for the above periods and thereafter until the assessment is finalised.

HOW IS PROFIT CALCULATED IF THE PROPERTY WAS ACQUIRED PRIOR TO 1 OCTOBER 2001?

If the property was acquired before 1 October 2001, the following methods of valuing the property at that date may be used:

1. a fair market value of the property as at 1 October 2001, ie. the price obtainable on a sale between a willing buyer and a willing seller at arm's length in an open market. The valuation must have been carried out within 3 years from the effective date (ie. before 30 September 2004), but the property must have been valued according to its condition

and in terms of the prevailing economic and market conditions as at 1 October 2001. If no valuation was obtained before 30 September 2004, this method may not be used;

2. the time-apportionment base cost, ie. the percentage of the total gain that was made after 1 October 2001;

3. where no fair market valuation was submitted and no accurate records maintained, the value as at 1 October 2001 will be deemed to be 20% of the proceeds on disposal.

IF THE PROPERTY IS BEING SOLD AS A PRIMARY RESIDENCE, IS CGT APPLICABLE?

Yes. However, there is a primary residence exemption which applies only in cases where the primary residence is registered in the name of an individual or in the name of a special trust. In such a case, upon disposal of a primary residence (on land not exceeding 2 hectares), any capital gain or loss up to R1.5 million can be excluded. This will not apply to properties registered in the name of a company, close corporation or trust. A person who does not ordinarily reside in South Africa cannot have a primary residence in South Africa and this exemption can therefor not apply in the event of a non-resident disposing of his/her property.

When the residence is used partially for residential and partially for business purposes, an apportionment must be done. Likewise, where the residence is occupied for a certain period, an apportionment will be required.

However, where the residence was not inhabited because it was being offered for sale, in process of erection or renovation or had accidentally been rendered uninhabitable, the exemption will apply for a period not exceeding 2 years.

If the owner is employed or trading more than 250km from his or her residence and rents it to a tenant for a period not exceeding 5 years, the exemption will apply if the owner lived in the premises for a continuous period of at least 1 year prior to and subsequent to the letting period and does not treat any other residence as his or her primary residence during that period.

Where more than one person holds an interest in a primary residence (eg. spouses married to each other out of community of property), the exclusion will be in proportion to the interest held by each party in the residence.

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