

# Proposed Legislation Relating to Capital Gains Tax & Non-Residents



Draft legislation has been released for public comment in terms of which a Section 35A is to be inserted in the Income Tax Act to provide that:

1. Any person such as the purchaser or the conveyancer appointed to attend to the registration process who must pay an amount to a person who is not a resident in respect of a disposal of any immovable property in the Republic must withhold from the amount due to such seller an amount equal to:
  - 5 per cent of the amount so payable where the seller is a natural person;
  - 7,5 per cent of the amount so payable where the seller is a company; and
  - 10 per cent of the amount so payable where the seller is a trust.
  
2. The seller may apply to the Commissioner for a directive that no amount, or a reduced amount, must be withheld having due regard to: -
  - any security furnished for the payment of any tax due on the disposal of the immovable property by the seller;
  - the extent of the assets of the seller in the Republic;
  - whether that seller is subject to tax in respect of the disposal of the immovable property; and
  - whether the actual liability of that seller for tax in respect of the disposal of the immovable property is less than the amount contemplated in clause 1 above.
  
3. The amount to be withheld is an advance payment in respect of that seller's liability for normal tax for the year of assessment during which that property is disposed of by the seller.
  
4. If the purchaser knows, or reasonably should have known, that the seller is not a resident, and fails to withhold any amount as required in terms of the draft amendment bill, then that purchaser: -
  - is personally liable for the payment of the amount which he or she failed to withhold; and
  - must pay that amount to the Commissioner not later than the date on which payment should have been made if the amount had in fact been withheld. The amount must be paid within 10 business days (if the purchaser is a resident) or 20 business days (if the purchaser is a non-resident) after the date on which that amount should have been withheld.
  
5. If a purchaser fails to pay the amount contemplated to the Commissioner then that purchaser: -
  - is liable for interest at the prescribed rate on any amount outstanding reckoned from the day following the last date for payment to the date that the amount is received; and
  - must pay a penalty equal to ten per cent of that amount in addition to any other penalty or charge for which he or she may be liable under the Act.

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6. Any estate agent and any conveyancer who is entitled to any remuneration or other payment in respect of services rendered in connection with the disposal of the immovable property by the seller or the registration of transfer, as the case may be, must each inform the purchaser in writing of the fact that the seller is not a resident and that the provision of this section may apply.
- If an estate agent or conveyancer knows or should reasonably have known that the seller is not a resident and fails to comply with the above, that estate agent or conveyancer is jointly and severally liable for the payment of the amount which the purchaser is required to withhold to pay to the Commissioner in terms of this section, but the amount is limited to the amount of remuneration payable to such person.

However, the amendment does not apply: -

- if the amount payable by the purchaser to the seller, in respect of the acquisition by that purchaser in aggregate does not exceed R1-million; or
- in respect of any deposit paid by a purchaser for purposes of securing the disposal of the immovable property by the seller to that purchaser until the agreement for that disposal has been entered into, in which case any amount which would have been required to be withheld from the amount of that deposit must be withheld from the first following payment made by that purchaser in respect of the disposal.

A non-resident is required to pay capital gains tax on the gains made from buying and selling immovable property, but unfortunately many non-residents merely take their profit and leave the country without paying the capital gains tax. The draft Revenue Laws Amendment Bill is a mechanism that the Receiver of Revenue will use to prevent this.

The amendment is aimed at ensuring that a purchaser must deduct the withholding tax from the selling consideration paid to non-resident individuals, companies and trust.

This will enable the Receiver of Revenue to extract the tax before the non-resident takes the money out of South-Africa where the proceeds are effectively beyond the control of the Revenue Services.

Although the amendment places the obligation on the purchaser to deduct the withholding tax and pay it to the Commissioner, in practice the conveyancer will work together with the estate agent and the purchaser to determine the seller's status. If it is determined that the seller is a non-resident then clearly the act will apply, and withholding tax must be deducted. The role of the conveyancer will become crucial as the conveyancer controls the flow of money between the purchaser and the seller. It will be important that all parties involved in the conveyancing process be made aware of the proposed amendment in order to ensure that the withholding tax is deducted from the seller's proceeds and paid over to the Commissioner and to avoid a situation where the conveyancer, agent and purchaser are held personally liable for payment of the withholding tax.

The above discussion merely relates to the draft legislation to be included in the Revenue Laws Amended Bill of 2004 and is subject to change depending on public comment.