

VAT, TRANSFER DUTY AND IMMOVABLE PROPERTY

CAN THE SALE OF A PROPERTY BE SUBJECT TO BOTH VAT AND TRANSFER DUTY?

No, the sale of property will be subject to either VAT or Transfer Duty. VAT takes preference over Transfer Duty. If the seller is a registered VAT vendor and the property forms part of the seller's enterprise, then VAT is payable. If the seller is not a registered VAT vendor, or if the seller is a registered VAT vendor but the property does not form part of the seller's enterprise, Transfer Duty is payable.

A COMPREHENSIVE APPROACH:

Value Added Tax is a tax on the value added by each Vendor in the production chain and is imposed each time a taxable supply of goods or services takes place. Each Vendor is required to account for the VAT on the Value Added by the Vendor. A Vendor is required to account for output tax on any taxable supplies made by the Vendor but is also entitled to deduct from this accounting any input tax incurred by the Vendor.

Fixed Property is defined in the VAT Act as land, a sectional title unit, a share in a share block company and any timesharing interest. The definition of goods in the Act includes fixed property and any real right in fixed property. A person who carries on an enterprise is liable to register as a Vendor if the turnover of the enterprise exceeds R1 Million in any twelve-month period. A person making taxable supplies with an annual value of less than R1 Million is not required to register as a Vendor but may apply for registration if the annual turnover is not less than R50 000, 00 and if the South African Revenue Services (SARS) is satisfied the person will carry on the enterprise, open a banking account and keep proper accounting records.

If a Vendor conducts business operations from fixed property which is used for the furtherance of the Vendor's Enterprise, the sale of that property by the Vendor will attract liability for VAT. The price is increased by the rate of VAT ruling at the time. The VAT is collected together with the purchase price and paid to SARS with the first VAT return submitted by the Vendor after registration of the property. A sale of Fixed Property is subject to VAT only if the seller is registered as a Vendor in terms of the VAT Act. This is the rule of thumb to determine whether a transaction attracts liability for VAT or for transfer duty. It is one or the other. If the seller is not a Vendor then VAT is not payable and the purchaser will pay transfer duty.

However, if VAT is payable, transfer duty is not.

Fixed Property transactions can be categorised in the following manner: -

1. A sale of a property where both the Seller and Purchaser is registered as a VAT Vendor:

The seller pays output tax of 15% of the purchase price and the purchaser claims an input tax credit of 15% of the purchase price. No transfer duty is payable. For example, the sale by a developer of sectional title units comprising mini factories or subdivisions of industrial land. If a property developer is unable to sell due to a lack of demand, the Vat becomes payable subject to temporary relief for a maximum period of 36 months.

2. If both the Seller and Purchaser is registered as a VAT Vendor and the Property is sold as a going concern:

The transaction is zero-rated for VAT purposes. The sale price is recorded to be inclusive of VAT at 0%. The type of enterprise must be stated, such as a farming enterprise. The most common form of a zero-rated transaction is the sale of commercial property subject to an existing lease, namely a letting enterprise. However, the sale of the property to the lessee would extinguish the lease and would not qualify as the sale of an enterprise as a going concern. If the lessee formed a separate legal entity to take transfer of the property subject to the lease then the transaction can be zero rated. Similarly, if a purchaser wishes to occupy a property through a separate entity, that entity should conclude a lease with the seller and thereafter the property and lease can be sold to the purchaser as a letting enterprise. A purchaser must intend at the time of sale to continue the rendering of supplies even though the manner of supply may change. For example, a Vendor could purchase a factory comprising ten mini factories and ten leases as a going concern but then elect to sell the factories with or without the leases on a sectional title or share block basis. The purchase would still qualify for zero-rating. A prudent seller should insist on a clause in an agreement to record that should the seller become liable for the payment of VAT that the seller will be able immediately to recover payment of the VAT, interest and penalties from the purchaser. A purchaser should not object to the insertion of such a clause as the purchaser would be entitled to claim back an input tax credit. If the clause were not inserted, SARS could, after transfer, resolve that the transaction did not qualify for zero-rating. The Seller would then be called upon to pay VAT of 15% on the purchase price. SARS has issued an Interpretation Note No. 57 date 31 March 2010 which specifies the criteria which must be met for the sale of an enterprise as a going concern to be zero rated.

3. If the Seller is a registered VAT Vendor and the Purchaser is not a registered VAT Vendor:

The seller pays output tax of 15% of the purchase price but the purchaser is not entitled to claim an input tax credit. No transfer duty is payable. A typical example is the sale of a residential unit constructed by a property developer. The purchaser is the end-user and is liable for the VAT.

4. If the Seller is a registered VAT Vendor and the property qualifies as of an exempt supply being fixed property which previously had been let for residential purposes:

No VAT is payable but the purchaser is liable for transfer duty. The exemption would not apply if the Vendor had claimed an input tax credit when buying the property or if the Vendor were to claim input tax in respect of expenses incurred with regard to the property.

5. If the Purchaser is a registered VAT Vendor and the Seller is not a registered VAT Vendor:

No VAT is payable but the purchaser will be liable for the payment of transfer duty. Fixed properties are classed as "second hand goods" and the purchaser is entitled, after registration of transfer, to claim a notional or deemed input tax credit equal to 15% of the purchase price. The purchaser pays a maximum of 8% transfer duty but is entitled to claim 15%.

6. Neither the Seller nor the Purchaser is a registered VAT Vendor:

No VAT is payable or claimable but the transaction is subject to payment of transfer duty by the purchaser.

7. A sale in execution by the Sheriff of the High Court:

A sale in execution of fixed property attracts VAT unless the Deputy Sheriff, after making enquiries, is satisfied that the execution debtor (whose property is being sold) is not a Vendor. In that event the purchaser will pay transfer duty.

WHEN IS VAT PAYABLE?

Output tax is payable at the time of supply which for fixed property is the date of registration of transfer of the property or the date upon which a portion of the purchase price is paid to the seller, whichever is the earlier. Payment of a deposit in trust to a Conveyancer or to an Estate Agent is not regarded as a payment and does not trigger liability for the payment of VAT. However, if payment is deferred, then VAT is deferred and the input tax credit is not claimable.

If output tax is not paid timeously the Vendor could be liable for the payment of penalty tax of 1% of the purchase price, interest on the unpaid VAT and an evasion tax. To claim an input tax credit or a notional input tax credit, the purchaser must be registered as a Vendor at the time of supply which is the date of registration of transfer or the date upon which a portion of the purchase price is paid, whichever is the earlier. If the transaction is zero rated, the purchaser must be registered as a Vendor at the date of signature of the agreement unless the agreement is subject to the fulfilment of a suspensive condition. It is preferable to register as a Vendor prior to signature of an agreement.

If a purchaser signs an agreement as Trustee for a company to be formed, the purchaser should, after incorporation of the company, first register as a Vendor before passing a resolution to adopt and ratify the pre-incorporation contract. The company will then be qualified to claim the input tax credit. Registration can be affected with retrospective effect to the date of sale.