A handy guide to Section 35A of the Income Tax Act

A topic very often only brushed on by estate agents when completing an offer to purchase (I know this as I was an estate agent myself for over 10 years), are the provisions embodied in Section 35A of the Income Tax Act (the Act). This section deals with the withholding tax payable by the purchaser to SARS when buying from a non-resident seller. Since the non-adherence to these provision have far reaching implications for the seller, purchaser, agent and conveyancer, a non-resident clause has become standard in most offer to purchase documents used by agents. It is in everyone interest involved in a property transaction to fully understands its implications and workings and to address this issue at the contracting phase.

Firstly, one would need to establish if this section of the Act is applicable to the transaction at all. The two most important questions to ask at onset are:

1) is the property sold for more than R2m (the current threshold), and
2) is the seller a non-resident for the purpose of the Income Tax Act.

In terms of 1 above, most agents won't have a problem establishing this fact, but note can be taken that only properties sold for more than R2m might fall under these provisions (up to R2m is thus automatically excluded).

The second qualifying criteria is a somewhat more complex matter. Something to bear in mind from the onset is that these provisions does not only apply to non-citizens, but can even apply to SA citizens not residing in SA and vice versa. Therefore, the question to be asked is if the seller is a resident of SA for tax purposes. There are two tests to be used in order to determine if an individual is a resident of SA for tax purposes:

1. Ordinarily resident – a common law concept

An individual will be considered to be ordinarily resident in South Africa, if South Africa is the country to which that individual will naturally and as a matter of course return after his or her wanderings. It could be described as that individual's usual or principal residence, or his or her real home. The following factors – stated only as a guideline - can be taken into account when determining if an individual is ordinarily resident is SA:

- nationality
- where the individuals fixed and settled place of residence is;
- place of business or work and personal interest;
- where the majority of personal belongings are kept;
- the individual's status in a country, i.e. immigrant, work permit periods and conditions, etc.;
- family and social relations (schools, church, etc.);
- political, cultural or other activities;
- are there any pending applications for permanent residence of a country;
- period abroad; purpose and nature of visits;
- frequency of and reasons of visits.

If the above test establishes that an individual is not ordinarily resident in South Africa, he or she may still meet the requirements of the physical presence test and will be deemed to be a resident for tax purposes.

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2. Physical Presence Test

To meet the requirements of the physical presence test an individual must be physically present in South Africa for a period or periods exceeding –

- 91 days in total during the year of assessment under consideration;
- 91 days in total during each of the five years of assessment preceding the year of assessment under consideration; and
- 915 days in total during those five preceding years of assessment.

An individual who fails to meet any one of these three requirements will not satisfy the physical presence test.

A non-resident, what now?

If one established that the purchase price is more than R2m and the seller is indeed a resident of SA for tax purposes, the enquiry stops there and the provisions will not be applicable. Should one find that the purchase price is more than R2m and the seller is a non-resident of SA for tax purposes, the Act requires from the purchaser to withhold the following percentages of the full purchase price and pay it over to SARS:

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

This amount paid act as an advance payment towards the seller's liability for normal tax for the year of assessment during which that property is disposed of by that seller, including but not limited to CGT (Capital Gains Tax). The seller does have the option to approach SARS for the following:

1) an order on the resident status of the individual;
2) for a directive that no amount or a reduced amount be withheld by the purchaser solely having 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 above.

The above act as a guideline to help real estate agents, sellers and buyers when dealing with the sale and purchase of a property and completing the deed of sale. This is not formal legal or tax advice and a practitioner should rather be contacted when in doubt of any of these provisions.

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