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VAT OR TRANSFER DUTY?

Very often the question arises as to whether the purchaser must pay transfer duty on a particular transaction or whether there is no transfer duty payable as the transaction is in fact a VAT transaction. This question can arise where the seller is registered for VAT but the purchaser is not or the seller is not registered for VAT and the purchaser is registered for VAT or both parties are registered for VAT or neither party is registered for VAT. The answer is usually easily determined by looking at the status of the seller. As a general rule, if the seller is in fact registered for VAT purposes, VAT is payable on the transaction and no transfer duty is payable by the purchaser in the transaction. If the seller is not registered for VAT purposes, then transfer duty is payable on the transaction by the purchaser. There are a few technical exceptions to the general rule but an exception to the general rule happens so seldom that it does not serve any purpose in discussing such exemptions in an article of this nature.

The other question which arises is whether VAT is included in the purchase price or not. As a general rule in South Africa, any purchase price must be VAT inclusive. Accordingly, if the transaction is a VAT transaction, then the purchase price will be inclusive of VAT unless the contract specifies that VAT is excluded from the purchase price. One must therefore be very careful in calculating the purchase price where the seller is a VAT vendor as very often the VAT vendor does not take into account that the selling price of the property includes VAT and the seller is upset when the seller discovers that a portion of the purchase price which the seller has received from the purchaser must be paid to the Receiver of Revenue by way of a VAT payment. From the purchaser's point of view, the fact that the purchase price includes VAT and the purchaser does not have to pay transfer duty should mean that the purchaser should be willing to pay a higher price for the property being purchased as effectively the purchaser is getting the amount which the purchaser would have paid as transfer duty as a discount on the purchase price for the property.

If the sale of the property is one which is a VAT transaction and the purchaser is registered for VAT purposes, the purchaser is entitled to claim the VAT which forms part of the purchase price of the property as a VAT input. This effectively means that the purchaser will get a credit for this amount from the Receiver of Revenue on the purchaser's VAT when the purchaser submits the purchaser's next VAT return. The Receiver of Revenue may conduct a VAT audit on the purchaser before allowing the input particularly if any monies are to be paid by the Receiver of Revenue to the purchaser. Sometimes the audit does not take place if there is no actual payment of monies from the Receiver of Revenue to the purchaser.

If the purchaser is a VAT vendor but the seller is not registered for VAT, the purchaser is entitled to claim the transfer duty which the purchaser has paid on the transfer of the property as a VAT input. Effectively therefore the purchaser will recover the amount of the transfer duty from the Receiver of Revenue. Again the same will be by way of a claim for a VAT input on the purchaser's next VAT return and again the Receiver of Revenue may decide to audit the same prior to allowing the claim or paying a refund. Normally the Receiver of Revenue will not allow the claim unless he has received proof that the transfer has actually taken place and would normally require a copy of the transfer duty receipt as proof that the actual transfer duty was paid. One should therefore make arrangements with the conveyancing attorneys to expedite the relevant documentation after the transfer has been registered in order that the purchaser can obtain the relevant documentation as soon as possible to support a claim for the return of the transfer duty in the form of a VAT input.

In the event that the property forms part of a business and the business is sold as a going concern, if both the purchaser and the seller are registered for VAT purposes, then VAT will still be payable but the transaction would be zero rated. In other words effectively no VAT or transfer duty would be payable on the transaction.

To qualify however the assets which are necessary to carry on the enterprise must be disposed of by the seller to the purchaser and the enterprise must be an income earning activity on the relevant effective date. It would be wise in such instance to include a clause along the following lines in the contract for the sale of the business to ensure that the Receiver of Revenue will in fact agree that the VAT in the transaction should be zero rated:-

1. Both parties hereby warrant that they are registered as vendors in terms of Section 23 of the Value Added Tax Act No. 89 of 1991 ("(the Act"). The parties record that:-

a) The business together with the assets and the stock-in-trade constitutes an enterprise as the term is defined in the Act, and the supply of the enterprise as contemplated herein is that of a going concern chargeable with value-added tax ("VAT") at zero rate in terms of Section 11 (1)(e) of the Act.
b) The enterprise shall be an income-earning activity on the effective date, it being recorded that all of the assets which are necessary for the carrying on of such enterprise are hereby simultaneously being disposed of by the Seller to the Purchaser.

2. In the event of Vat being levied at a rate other than zero, the VAT so payable shall be paid by the Purchaser to the Seller on demand, provided that the Seller furnishes the Purchaser with a VAT invoice as contemplated in the Act to enable the Purchaser to claim an input credit in respect of the VAT so paid."

Although the question as to whether VAT or transfer duty is payable often presents problems to the lay person, in actual point of fact it is a question which can be determined relatively easily by looking at the status of the seller. Effectively the status of the seller determines whether VAT is payable and the status of the purchaser determines whether or not the purchaser can recover the VAT or the transfer duty from the Receiver as a VAT input. However it should be emphasized that if one is in doubt one should always first discuss the matter with either an auditor or an attorney before giving advice as to whether the transaction is a VAT transaction or not as the consequences of giving incorrect advice could be harmful for the parties involved.



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