WITHHOLDING TAX WHERE NON-RESIDENTS DISPOSE OF IMMOVABLE PROPERTY

1 Introduction

A new section 35A has been inserted into the Income Tax Act 58 of 1962 by the Revenue Laws Amendment Act 32 of 2004, published in *Government Gazette* 27188 of 24 January 2005. It will come into operation on a date to be determined by proclamation in the *Gazette*. Essentially the new provision imposes a statutory duty on a purchaser of immovable property to withhold a certain percentage of the amount payable to the seller in respect of the sale, and to pay over such amount to SARS, where

(a) the seller is a non-resident; and

(b) the total amount payable by the purchaser to the seller (or to someone acting on behalf of the seller) is more than R2-million.

The duty to withhold the percentage in question rests on all purchasers of immovable property, residents as well as non-residents. To ensure compliance certain onerous duties are placed on estate agents and conveyancers rendering professional services in respect of the sale of immovable properties.

According to the memorandum published on the Bill, many countries that tax capital gains generated by non-residents impose a special withholding regime when the sale involves immovable property. This is necessitated by the fact that the recovery of the tax is often impossible if the seller moves abroad after the property is sold. It is relatively easy to recover the tax from the purchaser "because the purchaser is the party holding the local immovable property upon completion of the transaction". The memorandum goes on to state that:

> "As a side matter, this form of withholding is not internationally utilised in the case of capital gains generated by non-residents when those gains are associated with a local permanent establishment. No withholding is required in these instances because the non-resident's practical connection to the source country is much more extensive."

The principle underlying this statement did not, however, find its way into section 35A. The section draws no distinction between sales by non-residents of immovable property associated with a "local permanent establishment" and sales not having such association. As the section is worded, *all* sales of immovable property by non-residents fall into the net of section 35A if the amounts payable by the buyer exceed R2-million.

The key provisions of section 35A are analysed in more detail below. Unfortunately the section has not been drafted clearly in all respects and

many questions relating to its practical application arise. This is also referred to in the discussion.

2 The amount to be withheld and the person responsible to withhold

Subsection 35A(1) reads as follows:

> "35A(1) Any person (hereinafter referred to as 'the purchaser') who must pay any amount to any other person who is not a resident (hereinafter referred to as 'the seller'), or to any other person for or on behalf of that seller, in respect of the disposal by that seller of any immovable property in the Republic must, subject to subsection (2) withhold from the amount which that person must so pay, an amount equal to –
>
> (a) 5 percent of the amount so payable, in the case where the seller is a natural person;
>
> (b) 7,5 percent of the amount so payable, in the case where the seller is a company; and
>
> (c) 10 percent of the amount so payable, in the case where the seller is a trust."

It should be noted that the prescribed deduction is to be made from the amount to be paid by the buyer to the seller in respect of the disposal of the property, *not from the amount actually received by the seller in respect of the disposal.* This begs the question: what constitutes the amount to be paid by the buyer to the seller in respect of the disposal of the property? In a normal cash sale of immovable property (*ie* a sale where the purchase price is payable to the seller in full on transfer) the purchaser seldom pays any portion of the purchase price to the seller directly, whether before or after transfer. Usually the purchaser is required by the sale agreement to pay a deposit to the estate agent who negotiated the sale (or the conveyancer), such deposit to be held in trust until transfer. The balance of the purchase price is secured by a bank guarantee furnished by the purchaser to the conveyancer. The sale agreement may allow the buyer to take occupation of the property before transfer, in which event occupational interest is normally payable by the buyer to the seller. Once transfer is registered, the estate agent will pay over the deposit to the seller (or the conveyancer), usually after deduction of the agent's commission, and the conveyancer will account to the seller and pay over to him or her what is due. Against this background the following questions regarding subsection 35A(1) arise:

(i) Is the purchaser entitled and obliged to deduct the required percentage from the deposit entrusted to the estate agent or conveyancer in cases where the sale is unconditional?

(ii) Is the purchaser entitled and obliged to deduct the required percentage from the amount owing to the seller and to furnish the conveyancer with a bank guarantee securing the remainder?

(iii) Must a deduction be made in respect of monies other than the purchase price payable to the seller by the buyer, such as occupational interest?

(iv) Is the estate agent entitled and obliged to deduct the required percentage from the deposit released to the seller? If so, must the percentage be calculated on the full amount of the deposit paid by the purchaser, or on the amount paid over to the seller by the estate agent, *ie* the amount net of commission?

2 1 Questions (i) and (ii)

Section 35A clearly overrides any contractual provision imposing a duty on the purchaser to pay the full amount of the purchase price to the seller directly, without any deductions. The required percentage *must* be deducted from the amount paid by the buyer to the seller. Does it make any difference if the amount is not paid by the buyer to the seller directly, but indirectly via the estate agent and the conveyancer? It is submitted that the answer is no. A sale agreement obliges the buyer to pay the seller a certain amount in respect of the disposal of the property, and the way subsection 35A(1) reads the deduction must be made from that amount. Payment of the deposit to the estate agent and the furnishing of a guarantee to the conveyancer are the methods used by the buyer to make the payment. The buyer thus has no choice but to deduct the required percentage from the deposit entrusted to the estate agent and to furnish the conveyancer with a guarantee for the balance owing, minus the percentage to be deducted. This view is strengthened by the following considerations:

- Subsection 35A(14)(b) deals with the situation where a deposit is paid in respect of a *conditional* sale, for example a sale subject to the condition that mortgage bond finance is obtained on or before a certain date. The subsection is discussed more fully below, but what it says in essence is that in the case of a conditional sale any amount which would have been required to be withheld from the amount of the deposit must be withheld from the first following payments made by the purchaser after the condition is fulfilled. This clearly conveys the legislature's intention that in cases of unconditional sales the required deduction *must* be made from the deposit.
- Subsection 35A(1) requires the deduction to be made from payments to be made "for or on behalf" of the seller. A deposit payable to an estate agent is to be kept in trust and is not necessarily paid to the estate agent acting as agent *on behalf of* the seller. However, it is undoubtedly paid by the buyer to the estate agent "for" the seller. From the buyer's point of view it is not paid "for" anybody else. The obligation to deduct the percentage from the deposit therefore falls within the wording of subsection 35A(1) itself.
- Subsection 35A(1) obliges the purchaser not to pay the full purchase price to the non-resident seller, but to withhold a percentage thereof in favour of the Commissioner. Logically, therefore, the purchaser cannot be called upon to furnish a guarantee securing payment of the full purchase price to the seller; the seller is simply not entitled to the amount to be deducted by the purchaser in terms of subsection 35A(1).

- By virtue of subsection 35A(1) a non-resident seller of property is not entitled to demand from the buyer payment of the full purchase price if the property is sold for more than R2-million. The prescribed percentage must be deducted before any payment is made to the seller and the amount so deducted must be paid to SARS. The amount withheld is an advance in respect of the seller's tax liability (see below). In other words, from the seller's point of view there is no need for the buyer to secure the full purchase price: all that needs to be secured is the amount owing to the seller after the required percentage has been withheld. There is no risk for the seller if the buyer furnishes a guarantee covering that amount.
- The legislature must obviously have been aware of the fact that the majority of sales of immovable property in South Africa are structured on the basis that the purchase price is payable in full on transfer, and that in most instances the sale agreement provides for payment of the purchase price by way of a trust deposit and the furnishing of a bank guarantee for the balance. If it was not the intention that the buyer is to deduct the prescribed percentage from the deposit and the amount covered by the guarantee, why was it necessary then for the elaborate provisions of section 35A, placing estate agents and conveyancers under a duty to make certain disclosures to the buyer and imposing personal liability on the buyer for failing to make the deduction? It is hard to imagine the need for all of this merely to cover those rare instances where the buyer makes payment to the seller directly before or after transfer.

If this conclusion is correct, situations may arise where transfer in respect of a sale by a non-resident cannot be passed because the conveyancer has insufficient funds to settle the outstanding bond on the property. Take the case where a property is sold by a non-resident trust for R5-million. The amount to be withheld by the buyer is R500 000 (10%), and the conveyancer is furnished with a bank guarantee for R4,5-million. However, the seller's bond on the property is R4,8-million. The seller may apply to the Commissioner for a directive that the amount to be withheld by the purchaser should be reduced (see below), but there is no guarantee that the application will succeed or that it will even be considered by the time the seller is contractually obliged to pass transfer. If it fails or a response is not received by the time transfer is to be registered, transfer cannot proceed unless the seller would be willing and able to pay in the R300 000 shortfall. The sale agreement may perhaps provide some escape for a cash-strapped seller, but in the absence of a carefully worded provision the seller may well be compelled to commit breach of contract which, in turn, may expose him to a damages claim.

2 2 Question (iii)

Section 35A nowhere uses the expression "purchase price": what it says is that the prescribed deduction must be made from "any amount" which the purchaser must pay the seller in respect of the disposal of the property. Does this mean that the prescribed percentage must be withheld by the buyer from amounts, other than the purchase price, payable to the seller in terms of the sale agreement, such as occupational interest? The answer, it

seems, is affirmative provided the amount in question is payable "in respect of the disposal" of the property. It could be argued that any payment made by a buyer to a seller in respect of occupation prior to registration of transfer, is a payment made "in respect of the disposal" of the property. Occupational rent would not have been payable if the property had not been disposed of and to that extent there is a direct link between the disposal and the payment of the occupational interest. If this approach is correct, then the buyer is entitled and obliged to also withhold the required percentage from any occupational interest payable to the seller.

2 3 Question (iv)

The opening words of subsection 35A(1) oblige *any person* who must pay an amount to the seller in respect of the disposal of the property, to withhold the prescribed percentage from the amount to be paid. Such person is referred to in the remainder of the section as "the purchaser", but it is clear that the expression "purchaser" is used merely for the sake of convenience. The obligation to withhold the prescribed percentage is not confined to the buyer only, but is imposed on any person obliged to pay an amount to the seller in respect of the disposal.

This raises the question referred to earlier, namely whether the estate agent to whom a buyer has entrusted a deposit is entitled and obliged to deduct the required percentage from the deposit when releasing same to the seller. As explained above, the buyer is obliged to withhold the prescribed percentage of the deposit when paying this over to the estate agent, but does this necessarily relieve the estate agent from the obligation to also withhold the required percentage when making payment to the seller?

It is submitted that section 35A neither entitles nor obliges an estate agent to deduct any amount from a deposit released to the seller, irrespective of when the deposit is paid over, unless the estate agent has been appointed by the buyer as his agent to make the deduction. The amount held by the estate agent in trust may be said to be an amount held in respect of the disposal of the property, but it is not money to be paid *by the estate agent to the seller in respect of the disposal*. The money is paid by the buyer in respect of the disposal and the estate agent is merely the custodian of that money pending transfer. When paying over the deposit to the seller on transfer the estate agent merely releases to the seller the amount paid by the buyer in respect of the disposal. Hence, there is no obligation to make a deduction in terms of subsection 35A(1).

2 4 The amount to be withheld

The amount to be withheld is clear: 5% if the seller is a natural person; 7,5% if the seller is a company, and 10% if the seller is a trust. If the amount payable to the seller is expressed in foreign currency, the amount to be withheld must be converted to South African currency at the spot rate on the date that the amount is paid to the Commissioner: ss(5).

3 Determining the seller's resident status

Determining whether or not a seller of immovable property is a non-resident requires an analysis of the definition of "resident" in section 1 of the Income Tax Act. It reads as follows:

> "*'resident'* means any –
>
> (a) natural person who is –
>
> (i) ordinarily resident in the Republic; or
>
> (ii) not at any time during the relevant year of assessment ordinarily resident in the Republic, if that person was physically present in the Republic –
>
> (aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the three years of assessment preceding such year of assessment; and
>
> (bb) for a period or periods exceeding 549 days in aggregate during such three preceding years of assessment,
>
> in which case that person will be a resident with effect from the first day of that relevant year of assessment: Provided that –
>
> (A) a day shall include a part of a day, but shall not include any day that a person is in transit through the Republic between two places outside the Republic and that person does not formally enter the Republic through a "port of entry" as contemplated in subsection 9(1) of the Immigration Act, 2002 (Act No. 13 of 2002), or at any other place in the case of a person authorised by the Minister of Home Affairs in terms of subsection 31(2)(c) of that Act; and
>
> (B) where a person who is a resident in terms of this subparagraph is physically outside the Republic for a continuous period of at least 330 full days immediately after the day on which such person ceases to be physically present in the Republic, such person shall be deemed not to have been a resident from the day on which such person so ceased to be physically present in the Republic; or
>
> (b) person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic,
>
> but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation."

Any person who is not a "resident" as defined is a non-resident.

As the definition reads, an enquiry into a seller's resident status is not confined only to determining how many days in a year of assessment the seller was physically present in South Africa. It also involves ascertaining whether the seller is "exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation".

Subsection 35A(1) does not state in clear terms at what stage in the sale process of immovable property the seller's resident status must be determined. Theoretically there are a number of possibilities, namely (i) the date of sale; (ii) the date of fulfilment of suspensive conditions, in the case of

conditional sales; (iii) the date when payment is made by the buyer, or (iv) the date of transfer. Knowing what date to use is important, since a seller may be a resident on the date of sale, a non-resident on fulfilment of suspensive conditions and again a resident by the time transfer is registered.

Having regard to the opening words of subsection 35A(1) ("Any person … who must pay an amount to any other person who is not a resident … must … withhold … an amount …") it may be argued that the date to use is the *date of payment* by the buyer to the seller: it is only when the buyer must *pay* a non-resident that the section applies, not when the seller is a non-resident at the time of sale but a resident at the time when payment is made. The better view, however, is that the section applies whenever the buyer is vested with a contractual liability to pay a non-resident seller in respect of the disposal of a property. The crucial date is the date when the liability vests, not the date when the payment can be enforced. In the case of an unconditional sale the contractual duty to make payment vests on the date of sale. In the case of a conditional sale the general common law rule is that on fulfilment of the condition the agreement is deemed to be enforceable retrospectively as from the date of signature, meaning that the contractual duty to make payment is deemed to have vested on that date. Based on this approach the date to determine the seller's resident status is the date of contract, that is, the date of acceptance of the offer.

4 The nature of the disposal

The expression "disposal" is not specifically defined for the purposes of section 35A and does not by necessary implication carry the same meaning attached to it for CGT purposes in paragraph 11 of schedule 8 to the Income Tax Act. It is nevertheless safe to say that section 35A is not confined to cash sales of immovable property (*ie* sales where the purchase price is payable in full on transfer), but covers *all* sale transactions, including instalment sale agreements. In the case of an instalment sale the required percentage must be withheld from each instalment payment paid to the seller in terms of the sale agreement, and from any lump sum payment made on registration of transfer.

A donation ordinarily constitutes a disposal of immovable property but would not attract the application of section 35A since the donee would not be obliged to make any payment to the donor in respect of the donation. In terms of subsection 35A(1) the duty to withhold arises only when a payment is to be made in respect of the disposal.

The duty to withhold arises irrespective of the nature of the property sold, *ie* industrial, commercial, agricultural or residential.

For the purposes of section 35A "immovable property" means immovable property as contemplated in paragraph 2(1)(b)(i) and (ii) of the Eighth Schedule to the Income Tax Act. Paragraph 2(1)(b)(i) of the Eighth Schedule refers to "immovable property or any interest or right of whatever nature to or in immovable property". In terms of paragraph (ii) an "interest in immovable property" includes

> "a direct or indirect interest of at least 20% held by a person (alone or together with any connected person in relation to that person) in the equity share capital of a company or in any other entity, where 80% or more of the value of the net assets of that company or other entity, determined on the market value basis, is at the time of the disposal of shares in that company or interest in that other entity, attributable directly or indirectly to immovable property situated in the Republic, other than immovable property held by that company or other entity as trading stock".

The sale by a natural person of shares in a property owning company would therefore also be covered by section 35A where (i) such shares comprise at least 20% of the share capital of the company, and (ii) the value of the immovable property owned by the company comprises 80% or more of the value of the net assets of the company (excluding immovable property held as trading stock).

5 Directives

In terms of section (2) the seller may apply to the Commissioner, in a form and at the place as the Commissioner may determine, for a directive that no amount or a reduced amount be withheld by the purchaser, having regard to:

– any security furnished for the payment of any tax due on the disposal of the property by the seller;

– the extent of the seller's assets in the RSA;

– whether the seller is subject to tax in respect of the disposal of the property; and

– whether the actual liability of the seller for tax in respect of the disposal of the property is less than the percentage referred to above.

The section imposes no obligation on the Commissioner to furnish the directive within any period of time. If the seller has applied for a directive but has not been furnished with one at the time when the purchaser is contractually obliged to pay over the purchase price, the buyer would have no choice but to withhold the prescribed percentage. The same would apply if the seller's application is turned down and he wishes to take the decision on appeal. As explained earlier, the converse also applies: unless the sale agreement states otherwise, the seller will have to pass transfer on the date stated in the agreement irrespective of the outcome of an application for a directive.

6 Position of amount withheld

In terms of section (3) the amount withheld by the purchaser is an advance in respect of the seller's liability for normal tax for the year of assessment during which the property is disposed of by the seller. This provision comes into play when the amount in question has in fact been withheld by the purchaser, regardless of whether the amount withheld has been paid over to SARS. In other words, the seller enjoys the benefit of the advance even if the purchaser has failed to pay the amount over to SARS. There is no duty on the seller (or the conveyancer) to ensure that the purchaser makes payment to the Commissioner.

What would be the position if the purchaser is in breach of contract and the seller seeks an order for specific performance? Can the seller sue for payment of the full purchase price, or is the claim necessarily limited to the amount after deducting the percentage to be withheld by the buyer? The best approach, it seems, is for the seller to seek an order that the full amount is owing by the buyer but that only the amount net of the section 35A deduction be paid to the seller, the balance to be withheld by the buyer as prescribed by section 35A. Should the buyer then make payment to the seller pursuant to the court order, it would mean that the buyer has withheld the prescribed percentage, with the result that the seller would enjoy the benefit of the tax advance as stipulated in section (3).

7 Period within which payment must be made to SARS

In terms of subsection (4) the amount withheld by the purchaser must be paid to the Commissioner within 14 days after the date on which the amount was withheld, if the purchaser is a South African resident, and within 28 days if the purchaser is not a resident.

The periods referred to in subsection (4) commence to run *after the date on which the amount was withheld*. But when is the amount *withheld* - is it necessarily the date on which the *deduction* was made by the purchaser? As submitted earlier, in cash sales a purchaser is entitled and obliged in terms of subsection (1) to deduct the prescribed percentage from the deposit entrusted to the estate agent and from the amount covered by the bank guarantee securing the balance owing to the seller. Take the case where a non-resident trust sells a property to a buyer for R10-million. A deposit of R1-million is payable to the estate agent in trust on signature of the sale agreement and a bank guarantee securing the balance of R9-million is to be furnished to the conveyancer on demand. The buyer deducts R100 000 from the deposit (*ie* the prescribed 10%) and a bank guarantee is furnished for R8.1-million three weeks later (*ie* R900 000 was deducted in terms of subsection 35A(1)). Is the buyer now obliged to pay over the amounts deducted to the Commissioner within the prescribed period after it was *deducted*, or does the obligation to pay over only arise after registration of transfer?

A lot depends on the answer, since difficulties may arise if the purchaser is obliged to pay over the amount in question within the prescribed period after it has been *deducted* and transfer has at that stage not yet been passed. A purchaser who paid SARS before registration of transfer would obviously want the money back if the seller commits breach of contract and the sale agreement is cancelled by reason of such breach before transfer is effected. The section imposes no express duty on the Commissioner to refund the buyer when a disposal is cancelled before transfer and to then reverse the seller's tax advance. He may not be keen to do so in cases where the seller is in arrear with his tax payments. Is the buyer legally entitled to claim a refund from the Commissioner on the basis that the disposal was cancelled, or is the Commissioner entitled to take the stance that the disposal was still intact at the time when the money was deducted

and paid over, and that the buyer must therefore turn to the seller who by reason of the payment obtained the benefit of a tax advance at the buyer's expense?

A proper interpretation of section 35A seems to favour the buyer's entitlement to claim the refund from the Commissioner in cases of cancellation. However, a buyer may face serious difficulties if payment was made to SARS before registration of transfer in the erroneous belief that the seller was a non-resident. In such instances the buyer obviously remains liable to pay the seller the full amount owing in terms of the sale agreement, since there was no justification in the first place to withhold any money. The seller need not wait with his claim for payment until the buyer has received a refund from SARS. In other words, the buyer would have to raise the money irrespective of whether a refund has been made by the Commissioner. Failure to do so may expose the buyer to breach of contract and a claim for damages, unless the sale agreement contains provisions safeguarding his position until the refund is made.

It follows that a buyer would be better off not to make any payment to SARS prior to registration of transfer. But is a buyer *legally entitled* not to do so in terms of section 35A? The answer is by no means clear. On the one hand it can be argued that subsection (4) requires payment to be made to the Commissioner after the amount in question has been withheld by the purchaser *in terms of subsection 1.* Subsection (1) in turn states that a prescribed percentage must be withheld from the amount which the purchaser must pay to the seller. Unless the sale agreement states otherwise, the obligation to physically hand over money to the seller only arises on registration of transfer. In other words, the buyer can only be said to be *withholding* any moneys from the seller on or after registration of transfer. On this approach, the period within which the amount withheld must be paid to the Commissioner commences to run only on transfer. The counter-argument, which seems to be the better view, is that subsection (1) does not state that the amount in question must be withheld from monies *paid over* to the seller; the amount must be withheld from amounts that the purchaser *must pay* to the seller or any other person for or on behalf of the seller. As explained earlier, the amount that must be paid by the buyer includes the deposit and the amount covered by the bank guarantee. For the purposes of subsection (4) the issue is not the date when the seller *receives* that money; the question is the date when the prescribed percentage was withheld from that money. On this basis the Commissioner must be paid within the period stipulated in subsection (4) after the respective dates that the deposit was paid and the bank guarantee furnished. In most instances this would mean that the buyer will have to pay the Commissioner before the property is transferred into his name.

Most buyers and sellers would probably prefer to leave matters in the hands of the estate agent who negotiated the sale and the conveyancer instructed to attend to the registration of transfer of the property. It is submitted that any such arrangement would not absolve the buyer from the duty to make payment to SARS if, for some reason or other, the estate agent or conveyancer fails to pay over to the Commissioner the amount withheld. The buyer is not prohibited from appointing the estate agent and/or

conveyancer as his agent to make payment to SARS, but the buyer's statutory duty to make the payment does not fall away if his agents fail to carry out his instructions.

The purchaser's payment to SARS must be accompanied by a prescribed declaration: subsection (6).

8 The buyer's position: money not withheld, or withheld but not paid over

Subsections (7) and (8) deal with the situation where the buyer fails to withhold any amount prescribed by subsection (1), while subsection (9) applies if money was withheld but not paid over to the Commissioner. The position is as follows:

8 1 Failure to withhold

A purchaser who knows or reasonably ought to have known that the seller is not a resident and fails to withhold the required percentage of the purchase price, is *personally liable* for payment of the amount to the Commissioner. However, in terms of subsection (8) this does not apply if an estate agent or conveyancer assists in the disposal of the property and *neither* has notified the purchaser in writing, before any payment is made to the seller, that (i) the seller is not a resident and (ii) the provisions of section 35A may apply. The practical effect, therefore, is that a buyer purchasing a property through the intervention of an estate agent need not give any thought to the withholding of any amount unless he is notified in writing of the seller's non-resident status by either the estate agent or the conveyancer. This applies even if the buyer knows for a fact that the seller is a non-resident.

A buyer cannot rely on the protection afforded by subsection (8) if the notice in question was *given* by the estate agent or the conveyancer, but not *received* by the buyer. The notice need not be sent by registered post or delivered by hand. It also need not be embodied in a separate document containing no other information. Accordingly, in cases where the seller is a non-resident it would be sufficient for the estate agent and conveyancer to include a clause in the estate agent's standard agreement of sale document to this effect, stating that section 35A may apply. There is no duty on them to repeat this in a later notice. A buyer should therefore read the agreement carefully; as a general rule he will have only himself to blame if he pays the seller in full without reading the agreement and is later held personally liable by the Commissioner for payment of the amount that had to be withheld. If the agreement contains no notice as contemplated by section 35A a prudent buyer should protect his interests by requesting the estate agent and conveyancer, before making any payment to anybody in terms of the sale agreement, to furnish him with a letter stating whether the provisions of section 35A apply.

An estate agent and conveyancer who furnished a buyer with a section 35A notice may well be ethically obliged not to accept a deposit or guarantee from the buyer from which no amount has been withheld, without again

drawing the buyer's attention to the requirements of the provision. However, failure on their part to do so would not absolve the buyer from personal liability to the Commissioner where the prescribed amount has not been deducted as required by section 35A.

In practice it would obviously be desirable if all parties concerned have clarity about the seller's resident status *before* the sale agreement is signed. If he is a non-resident, it would be advisable to record that fact in the sale agreement together with a clause setting out the buyer's duty to withhold the prescribed percentage. However, there may be situations where the estate agent and conveyancer at the time of sale in good faith believe the seller to be a resident, but obtain information indicating the opposite only *after* the sale is concluded. A buyer receiving a notice from the estate agent or conveyancer that the seller is a non-resident and that section 35A may apply is not *obliged* to accept the correctness of the information but may make independent enquiries and act accordingly. In practice, however, most buyers will accept what the notice conveys and proceed on the basis that the required percentage must be withheld to avoid personal liability to SARS. Difficulties may arise if the estate agent and conveyancer in good faith notify the buyer in writing that the seller is a non-resident, but the seller challenges the correctness of their view and threatens the buyer with cancellation and a claim for damages unless all amounts payable by the buyer to the seller in terms of the agreement are paid in full without any deduction. The buyer then faces a difficult choice: if he ignores the seller's protest he faces the risk of litigation and a claim for damages should the court find that the estate agent and conveyancer had erred; if he ignores the notices furnished by the estate agent and conveyancer and pays the seller in full, he faces the risk of personal liability to the Commissioner if it subsequently transpires that the seller was indeed a non-resident.

The same difficulty would arise if the buyer receives a notice from (say) the estate agent that the seller is not a resident, but a different notice (or no notice) from the conveyancer. Subsection (8) makes it clear that the buyer cannot shield behind the protection afforded by the provision if he has received a notice from *either* the estate agent *or* the conveyancer informing him about the seller's non-resident status and the application of section 35A. To escape the risk of personal liability to the Commissioner the buyer has no choice but to withhold the amount in question and pay it over to the Commissioner within the prescribed time period. If it subsequently transpires that the estate agent had erred, the buyer remains contractually liable to pay the seller in full. As explained earlier, he should get a refund from SARS but the cash-strapped buyer who cannot finance the shortfall unless he gets his money back from SARS may well be forced to commit breach of contract if the refund arrives too late.

To safeguard his position the buyer should include a clause in the sale agreement that the amount in question will be withheld in terms of subsection 35A(1) and paid over to SARS if he receives a notice from either the estate agent or the conveyancer, at any stage before payment, that the seller is a non-resident. The clause should state further that in the event of such amount being withheld the seller may not cancel the sale but will remain obliged to pass transfer.

8 2 Failure to pay over

A purchaser who has withheld money from the seller pursuant to the provisions of section 35A but fails to pay the amount over to SARS within the prescribed period, is liable for interest at the prescribed rate on any amount outstanding, calculated from the day following the last date for payment to the date that the amount is actually received by the Commissioner. In addition, the purchaser must pay a penalty equal to 10% of the amount payable, in addition to any other penalty or charge for which he may be liable under the Income Tax Act.

The Commissioner is empowered to remit the whole or any part of the penalty, but not the interest. Accordingly, a buyer who has withheld an amount but decided not to pay the Commissioner pending the outcome of a dispute with the seller as to whether section 35A applies, may escape payment of the penalty but not interest if it ultimately transpires that the seller was wrong.

9 Duties imposed on estate agents and conveyancers

Subsection (11) imposes a duty on both an estate agent and conveyancer to disclose certain information to the purchaser, if the estate agent or conveyancer renders services in connection with the disposal of the property and they are entitled to remuneration in respect of their services. Both the estate agent and the conveyancer must notify the buyer in writing (i) of the fact that the seller is not a resident and (ii) that the provisions of section 35A may apply. The disclosure must be made *before* any payment is made by the purchaser to the seller.

As stated earlier, the notice need not be sent by registered post or be delivered by hand. It also need not be embodied in a separate document containing no other information, but may be contained in the sale agreement itself.

In terms of ss (12) a failure by the estate agent or the conveyancer to fulfil the obligations imposed by ss (11) has the effect that each of them is jointly and severally liable with the purchaser for payment of the amount due by the purchaser to the Commissioner, limited to the remuneration they received for services rendered in connection with the disposal or transfer of the property. This applies only if the estate agent or conveyancer *knew* or *should reasonably have known* that the seller is not a resident. In other words, estate agents and conveyancers would incur personal liability if they in good faith but negligently arrive at an incorrect decision that the seller is a resident and that no notice need be given to the buyer as required by subsection (11).

Subsection (12) has far-reaching implications for both the estate agent and the conveyancer. Clearly they would have no difficulty in making the required disclosure to the purchaser where they know *for a fact* that the seller is a non-resident and that the provisions of section 35A may apply. The problem arises when they do not have such actual knowledge. Whether or not a person is a non-resident for tax purposes does not depend on the

question whether such person is a South African citizen or a foreigner. The Income Tax Act contains a wide, complicated definition of "resident" (see above) in terms of which South African citizens could be non-residents and foreigners could be residents. In other words, it would not be sufficient for an estate agent to conclude that a person is a resident or a non-resident by simply having regard to such person's ID document. There's a lot more to it than just that.

Would it be sufficient for an estate agent or conveyancer to simply ask the seller whether or not he is a resident and to accept the answer at face value? What is the estate agent's position if the seller denies that he is a non-resident but the agent has reason to believe that the seller might be withholding the truth? In such instances the estate agent clearly cannot state categorically that the seller is not a non-resident, because he may be wrong. Informing the buyer that the seller is *probably* a non-resident would not be helpful to the buyer and does not absolve the estate agent from the risk of personal liability under subsection (12). Keeping quiet exposes the estate agent to the risk that it may later transpire that the seller was indeed a non-resident and that the Commissioner may take the stance that he should reasonably have known the truth, thereby incurring personal liability.

It is submitted that subsection (11) does not allow an estate agent to simply include a clause in its standard form sale agreement stating that "the seller may or may not be a resident as defined in the Income Tax Act; the estate agent gives no warranty and makes no specific statement in this regard, and the buyer is to make independent enquiries". The section imposes a duty on an estate agent to make a categorical statement, namely that the seller is a non-resident, if the estate agent reasonably ought to have known this to be the case.

According to the memorandum that accompanied the Revenue Laws Amendment Act 2004 the purpose underlying subsection (11)

> "is to ensure that these professional parties (*ie* the estate agent and conveyancer) informed the persons acquiring the property of the section 35A withholding obligation. As experts, these professional parties are more likely to be aware of the withholding tax obligation arising from the transfer than the ordinary purchaser".

It is not unreasonable to expect of estate agents to be aware of the provisions of section 35A. However, it is an entirely different matter to impose on them a positive duty to investigate a seller's resident status and to make them face the risk of personal liability (even if only in part) for payment of the seller's tax if they negligently arrive at the conclusion that section 35A does not apply because the seller is a resident. Estate agents and conveyancers who have no actual knowledge about the seller's resident status would never know whether the enquiries made by them to determine the true state of affairs would be sufficient to satisfy SARS that such lack of knowledge was not due to negligence on their part.

Conveyancers, at least, are lawyers. Estate agents are not; they are salespersons. Their expertise lies in the field of marketing of immovable property. They are not required by law to have any legal or tax expertise. In fact, statutorily no specific standard of training or education is required of

any person wishing to become an estate agent. Given this background, is it reasonable to expect of an estate agent to make enquiries about a seller's resident status, and not to act negligently when analysing whether the facts fit the long and complicated definition of "resident" in section 1 of the Income Tax Act? Even seasoned tax lawyers find the definition difficult to apply. What are the chances that estate agents will cope? It is like having a law forcing laypersons to perform brain surgery on patients and subjecting them to personal liability for damages if they act negligently in the process.

To avoid personal liability under subsection (12) estate agents cannot simply adopt the view that it is better to be safe than sorry and that in cases of doubt one should rather err on the side of caution and notify the buyer that the seller is a non-resident. As stated earlier, in particular instances this may expose the estate agent and conveyancer to a claim for damages at the instance of the seller if transfer is passed and it then transpires that the seller was in fact a resident. On the other hand, if the seller refuses to pass transfer, the buyer who withheld money from the seller based on incorrect information contained in the estate agent's or conveyancer's notice runs the risk of committing breach of contract and being held liable by the seller for damages: see the discussion above. If the buyer suffers a loss in the process he may argue that the estate agent and conveyancer owed him a duty to take care and that *they* are now liable to make good the loss based on their negligence in not ascertaining the true state of affairs about the seller's resident status.

For the purposes of section 35A the expression "estate agent" refers to an "estate agent" as defined in section 1 of the Estate Agency Affairs Act 112 of 1976. In terms of that section, for example, a company carrying on an estate agency business is an "estate agent", as well as all the directors of the company and the sales staff employed by the company to negotiate sale transactions. If a transaction is successfully negotiated by a particular estate agent employed by the company, the commission accrues to the company and the estate agent who handled the transaction is remunerated by the company. This raises certain questions concerning the application of subsection (11). Must *all* the estate agents who are remunerated in respect of a property transaction involving a non-resident seller make the disclosure required by subsection (11)? Is it open for SARS to argue that the salesperson who negotiated the transaction did not reasonably know of the seller's non-resident status, but that the company and/or directors (who are also estate agents) should reasonably have known otherwise? The wide wording of subsection (11), read with the definition of "estate agent" in subsection (15) seems to favour this interpretation.

10 Recovery from seller

In terms of subsection (13) a purchaser who becomes personally liable for payment of the amount which he failed to withhold, may recover from the seller any amount paid to SARS. The same applies where the estate agent or conveyancer incurs personal liability for failing to comply with subsection (11). These persons may find it ironic that they are empowered to recover their payment from the seller while the precise reason for the dispensation

introduced by section 35A is that SARS found it difficult, if not impossible, to recover from the seller the tax owing to it.

11 Conditional sales

Subsection (14)(b) deals with the position where the purchaser has paid a deposit in respect of a sale transaction. The subsection is badly worded but the intention is that if a deposit is paid in respect of a transaction which is subject to a suspensive condition, the buyer is not obliged or entitled to withhold any percentage of the deposit. If the suspensive condition is not fulfilled, the sale would lapse and the issue of withholding any money for payment over to SARS does not arise. If the condition is fulfilled, 5%, 7,5% or 10% of the amount of the deposit (depending on whether the seller is a natural person, company or trust) must be "withheld from the first following payments made by that purchaser in respect of that disposal".

What is meant by "the first following payments made by that purchaser in respect of that disposal"? If the argument is correct that the buyer is also to withhold the prescribed percentage from occupational interest payments, the logical conclusion would be that after fulfilment of the suspensive condition the buyer is entitled and obliged to deduct from the first occupational interest payment the full amount that had to be deducted from the deposit, plus the amount that has to be withheld in respect of the occupational interest itself.

A sale subject to a *resolutive condition* is binding immediately on signature and lapses should the resolutive condition be fulfilled. Subsection (14)(b) is not applicable in such instances, meaning that the buyer must deduct from the deposit the full percentage prescribed by subsection 35A(1) and pay the amount over to SARS within the period mentioned above. Should the sale lapse by reason of fulfilment of the resolutive condition, the buyer will have to reclaim from SARS any amount paid to it.

12 Conclusion

It is submitted that section 35A is fundamentally flawed. A far better approach would have been that in cash sales of immovable property, where there is reason to believe that the seller is a non-resident, a prescribed deduction must be made by the conveyancer from the amount actually paid over to the seller in respect of the disposal on registration of transfer. A seller wishing to avoid the deduction should get a directive from SARS. The conveyancer controls the entire transfer process and is professionally responsible to ensure that all interested parties are paid what they are due. Such an approach would have released most buyers (and estate agents) from involvement in section 35A and would have been more in line with the legislature's underlying intention, namely to enforce a non-resident seller's liability for capital gains tax on the disposal of immovable property. The amount payable by a buyer to a seller seldom, if ever, constitutes the seller's capital gain.

Henk Delport
Nelson Mandela Metropolitan University, Port Elizabeth