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When Does Capital Gains Tax Liability Accrue From the Sale of Immovable Property?

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INTRODUCTION

Capital Gains Tax (CGT) is payable by individuals, trusts and companies to the South African Revenue Services (SARS), when property is sold. CGT was introduced into our law in October 2001, and it is payable based on the increase in value of property sold.

After a taxpayer enters into an agreement of sale for their property, there is often confusion about the tax year in which the CGT arising from the sale should be declared and paid to SARS. This article clarifies the confusion and provides a general guideline on the determination of the tax year in which a capital gain or loss is payable to SARS, after the sale of property.

THE LAW

CGT forms part of income tax, it is an additional income tax. CGT must be accounted for and declared in the annual income tax assessment (IT34) in each tax year.

Paragraph 13(1)(a) of the Eighth Schedule to the Income Tax Act (the Act): provides a guideline on the time of disposal of an asset and it further determines when a capital gain is payable by a taxpayer:

a. a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by the operation of law is, in the case of -

   i. an agreement subject to a suspensive condition, the date on which the condition is satisfied; and
   ii. any agreement which is not subject to a suspensive condition, the date on which the agreement is concluded.

CGT IN PRACTISE

From the above it follows that where the agreement is not subject to a suspensive condition, CGT is payable in the tax year that the agreement is entered into.

However, in circumstances where the agreement is subject to a suspensive condition, CGT is payable in the tax year that the suspensive condition is fulfilled.

The common mistake is in the assumption that CGT is payable only in the tax year that the registration of the transfer occurs or when the taxpayer receives the proceeds of sale.

For example: Where the agreement is entered into on 1 February 2021 and there is no suspensive condition and the sale registers in the deed's office in March 2022, CGT is payable in the 2021 tax year, which ends 28 February 2022 despite the fact that the sale proceeds are only received by the taxpayer in March 2022. The change in ownership is deemed to be the date on which the agreement is entered into.

Where the agreement is entered into on 1 February 2021 and there is a suspensive condition which is only fulfilled in March 2022 CGT is payable in the 2022 tax year, which ends 28 February 2023. The change in ownership is deemed to be the date on which the suspensive condition is fulfilled.

WHAT HAPPENS IF THE CGT IS PAID AND THE AGREEMENT IS CANCELLED?

Where CGT is paid to SARS in the tax year that the change in ownership occurred and in the subsequent tax year the agreement is cancelled, paragraph 4(b)(i) provides that the taxpayer will have a capital loss (equal to the proceeds of sale) in the year of assessment (when the agreement is cancelled). The proceeds of sale must have been accounted for in the previous tax year.

The taxpayer essentially gets to write-off the capital gain as a capital loss in the subsequent tax year (when the agreement is cancelled).

CONCLUSION

The above is a complex topic and this article should not be construed as legal or tax advice. Specific tax advice should be sought in each situation from a tax consultant.

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