

**TAX CONSIDERATIONS
WHEN BUYING IMMOVABLE
PROPERTY IN YOUR
PERSONAL CAPACITY OR IN
AN ENTITY**

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Established in 1900, STBB is a firm of more than 100 business-minded lawyers practising from 12 offices throughout South Africa.

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INTRODUCTION


South Africa follows a system of land registration where every piece of land is reflected on a diagram and ownership recorded in one of the regionally located Deeds Registries. Documents are available for public viewing. South Africa is reputed to have one of the best deeds registration systems worldwide with an exceptional degree of accuracy and guaranteed security of tenure. Property can be owned individually, jointly in undivided shares, or by an entity such as a company, close corporation, or trust, or a similar entity registered outside South Africa.



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TAX FACTORS WHEN CHOOSING TO BUY IN YOUR PERSONAL CAPACITY OR IN AN ENTITY

TRANSFER DUTY

Transfer duty is paid by a purchaser on the acquisition of immovable property. It is payable to the South African Revenue Services ('SARS') on all transactions which are not subject to VAT. The rate is calculated on a sliding scale and is the same for natural persons, companies, close corporations, and trusts that purchase property.

Transfer duty is also payable on the transfer of a member's interest in a close corporation owning residential property, on the transfer of shares in a property-owning company, and on the transfer of the beneficial interest in a trust-holding property, subject to exemptions.

VAT

Purchasers must keep in mind that no transfer duty is payable if the transaction attracts VAT. VAT is payable where a seller is a VAT vendor and sells property that forms part of their VAT enterprise. If VAT is payable, the seller is liable to pay it to SARS. It is imperative that the Agreement of Sale ('the Agreement') clearly indicates whether the purchase price includes or excludes VAT at a zero rate. If the property is being sold as part of a going concern and both the seller and purchaser are VAT registered, then the transaction will be zero-rated



for VAT. The Agreement must then stipulate that the property is being sold as part of a going concern.

Whether VAT or transfer duty is payable, it is important to ensure that the parties are up to date with the filing of their returns with SARS, otherwise delays will ensue as SARS will not issue a receipt until the parties are compliant.

CAPITAL GAINS TAX ('CGT')

The first R2 million of any profit made on the sale of a property by an individual is exempt from CGT, provided the property in question is the individual's primary residence. This exemption only applies to South African residents and where the property is owned by the individual in their personal capacity.

ESTATE DUTY

Upon their death, an individual's estate (including the immovable property held in their personal capacity), with certain deductions, is subject to estate duty. A rebate of R3.5 million is allowed. Thereafter, estate duty is payable at a flat rate of 20% on the net value of a deceased estate up to R30 million and at a flat rate of 25% on the value exceeding R30 million.

CONCLUSION

Deciding on the appropriate entity to acquire immovable property is not to be taken lightly. The information included here is not meant to be exhaustive and it is therefore recommended that the purchaser consult an experienced conveyancer prior to signing an Agreement to obtain expert advice based on the purchaser's specific personal circumstances.



OWNING IN YOUR PERSONAL CAPACITY

ADVANTAGES

- Lower rate of CGT.
- First R2 million of profit is exempt from CGT if the property is a primary residence.
- No auditors' or accounting officers' fees.

OTHER CONSIDERATIONS

- R2 million exemption does not apply to non-residents.
- R2 million exemption does not apply to second or further properties.
- Estate duty is payable on death in respect of the assets in one's estate.

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BUYING IN A COMPANY

ADVANTAGES

- Buying in a company offers protection from creditors. If a purchaser intends to trade or run a business on the property, it may be to their advantage to purchase the property in an entity to ensure that their business creditors will only be able to lay claim to business assets, while the property owned in their private capacity generally remains protected.
- At the time of acquisition of the immovable property, the Agreement may be signed on behalf of a company 'to be formed' and ratified by the company after its formation. This *effectively* allows nominations at the time of signature without the entity being in existence at the date of sale.
- Note that if a purchaser signs the Agreement personally while reserving the right to nominate another person or existing entity as purchaser, then the nominee must be appointed on the same date on which the Agreement is signed. If the nominee is appointed later, SARS will construe it as a subsequent sale and double transfer duty will be payable.
- A purchaser must therefore have a clear idea of the entity they intend to use to acquire ownership at the time of contracting, since a nomination (and acceptance thereof by the nominee) offers limited time to make an informed decision. Alternatively, the provisions of the Companies Act must be invoked so that a promoter signs on behalf of a company to be formed. Specific requirements apply in this instance and one should consult a conveyancer for expert advice.

- In the past, a company was prohibited from providing financial assistance to a purchaser for the purpose of, or in connection with, the acquisition of shares in that company.

Accordingly, a bond could not be registered over the company's property to finance the acquisition of shares. With effect from December 2007, such financial assistance is possible, albeit in limited instances only. This may assist with the acquisition of property.


OTHER CONSIDERATIONS

CAPITAL GAINS TAX AND ENTITIES

CGT will be raised on the profit made from the sale of an asset, as indicated in the table below:

	2024
Individuals and special trusts	18%
Companies	21.6%
Other trusts	36%

- Companies are subject to a higher rate of CGT compared to individuals.
- Bonds may only be registered over company property to pay for the acquisition of shares in limited instances.
- Annual financial statements must be submitted.
- Where the property being sold is the only asset (or the largest of all the assets) of the company, a special resolution must be passed by the company's shareholders, consenting to the sale.
- In order for a shareholder to access the profit made by the company, the company will have to declare a dividend which will attract dividend withholding tax.

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- The net value of the shares in a company or membership interest in a close corporation will form part of a shareholder or member's estate when determining any liability for estate duty. Shares in a company or membership in a close corporation are assets in an estate and can be attached by creditors in the event of sequestration.

CONSIDERATIONS WHEN BUYING IN A TRUST

- Trusts are effective estate planning tools.
- The assets held in a trust are not subject to estate duty.
- A trust eliminates potential complications arising when there are multiple heirs to an estate since the trust remains the owner even after the testator's death.
- The trust is a separate legal entity and trust assets cannot be attached by the beneficiaries' creditors.
- Trusts do, however, attract the highest rate of CGT if profits on the sale of the property are taxed in the hands of the trust. Note that profits can also be distributed to the beneficiaries and taxed at their applicable marginal rate of income tax, resulting in a maximum net CGT cost at a rate applicable to individuals. The same principle may be applied to income generated by the trust. It can either be taxed in the hands of the trust or distributed to the beneficiaries and included in their gross income.
- Income tax is levied at a flat rate of 45%, which is more than one would pay if the property was held by another entity.

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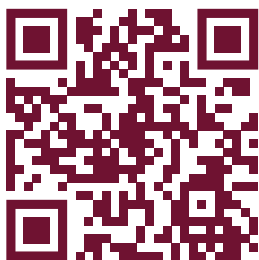
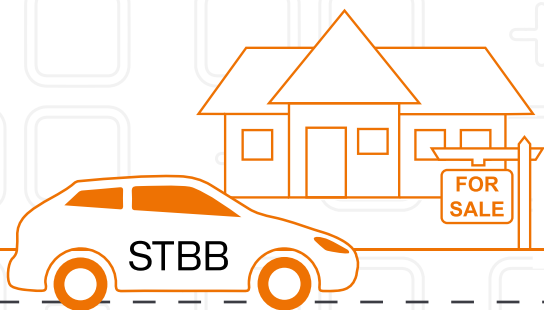
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CONTACT US

WESTERN CAPE

Cape Town Office

8th Floor, 5 St Georges Mall, Cape Town
Tel: 021 406 9100

Blouberg Office

24 Blaauwberg Road, Table View
Tel: 021 521 4000

Claremont Office

2nd Floor, Buchanan's Chambers,
Cnr Warwick Street & Pearce Road, Claremont
Tel: 021 673 4700

Helderberg Office

1st Floor, Titanium House, 19 Gardner
Williams Avenue, Paardevlei, Somerset West
Tel: 021 850 6400

Hermanus Office

Unit 6, 9 College Street, Hermanus
Tel: 028 753 0033

Noordhoek Office

4 Carlton Close, Sunnydale, Noordhoek
Tel: 021 784 1580

Tyger Valley Office

5 High Street, Rosenpark, Tyger Valley
Tel: 021 943 3800



GAUTENG

Bedfordview Office

105 Boeing Road East, Bedfordview
Tel: 011 453 0577

Centurion Office

F&S House, c/o John Vorster Drive
& Lenchen Avenue North, Centurion
Tel: 012 001 1546

Fourways Office

Ground Floor, Block A, The Pivot,
Montecasino Boulevard, Fourways
Tel: 010 001 2632

Sandton Office

112, 4th Street, Parkmore, Sandton
Tel: 011 219 6200

EASTERN CAPE

East London Office

1st Floor, Block B, Chesswood Office Park,
8 Winkley Street, Berea, East London
Tel: 043 721 1234



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info@stbb.co.za

stbb.co.za

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