

NAVIGATING THE TAX LANDSCAPE: CLARIFYING TRANSFER DUTY V VAT ON THE SALE OF SHARES IN A PROPERTY-OWNING COMPANY CONNECTED TO AN ENTERPRISE

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In a property-related transaction, one is responsible for paying transfer duty or VAT. There is no division or apportionment of these payments, which are regulated under two separate Acts.

Under the Transfer Duty Act 40 of 1949 ('TD Act'), the purchase of shares in a company is subject to transfer duty if the company is a residential property company. As defined in section 1(1)(b) of the TD Act, a 'residential property company' is a company that holds residential property where the fair value of the property comprises more than 50% of the aggregate fair value of all assets held by said company. Under the same Act, a 'residential property' includes any dwelling-house, apartment, and holiday home, but excludes a hotel, guesthouse, and apartment complex of five or more units used for rental purposes. When a vendor disposes of shares in a company which has a residential property as its sole or main asset, the transaction will be subject to transfer duty if the property meets this definition.

The aforementioned definition expressly excludes properties held by business enterprises that are liable to be registered for VAT. The exclusion provides that if the supply of the residential property by a vendor constitutes a taxable supply of 'fixed property' as defined in section 1(1) of the Value Added Tax Act 89 of 1991 ('VAT Act'), the supply will be subject to VAT and thus won't be considered residential property for transfer duty purposes.

Since the residential property forms part of the vendor's enterprise, it is arguably excluded from the above by virtue of section 1(1)(b) of the TD Act. Consequently, the VAT Act finds application. Section 12(a) of the VAT Act provides an exemption for the supply of any financial services from VAT. The scope of 'financial services' for this purpose is outlined in section 2 of the same Act, and which includes the supply of an 'equity security' such as shares in a company or a member's interest in a close corporation ('CC'). This implies that the sale of shares in a company or a member's interest in a CC is regarded as exempt from VAT, unless it falls under the definition of a 'residential property company' in the TD Act.

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