



# Legal Counsel

## Transfer Duty

### Transfer Duty

### Transfer Duty Guide



*South African Revenue Service*

## Preface

This document contains a discussion of the application of the Transfer Duty Act 40 of 1949, in respect of transactions involving immovable property such as land, buildings and other real rights in connection with immovable property situated in South Africa. Although fairly comprehensive, the guide does not deal with an analysis of all the legal detail which is sometimes necessary when dealing with immovable property transactions. However, it has been necessary to include a certain amount of technical and legal terminology to explain certain concepts which underpin the transfer duty legislation.

All references to the “Transfer Duty Act” are to the Transfer Duty Act 40 of 1949, and references to “sections” are to sections in the Transfer Duty Act, unless indicated otherwise. The Tax Administration Act 28 of 2011, the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991 are referred to as the “TA Act”, the “Income Tax Act” and the “VAT Act” respectively. The terms “Commissioner” and “Minister” refer to the Commissioner for SARS and the Minister of Finance respectively, unless indicated otherwise.

For the purposes of this guide, the following terms and definitions are regarded as having essentially the same meaning, unless the context indicates otherwise:

- The terms “Republic”, “South Africa” or the abbreviation “RSA” which refer to the sovereign territory of the Republic of South Africa, as set out in the definition of “Republic” in section 1(1) of the Transfer Duty and VAT Acts or section 1 of the TA Act (as the case may be).
- The terms “immovable property”, “land” as defined in section 1 of the Alienation of Land Act 68 of 1981, “property” as defined in section 1(1) of the Transfer Duty Act and “fixed property” as defined in section 1(1) of the VAT Act.
- The terms “fair value” as defined in section 1(1) of the Transfer Duty Act, “open market value” as defined in section 1(1) of the VAT Act and “fair market value” as defined in section 1 of the TA Act. These terms refer to the price which could be obtained upon a sale of an asset between a willing buyer and a willing seller dealing at arm’s length in an open market. It also includes reference to other factors which the Commissioner may consider, or be required to consider, in establishing a fair and reasonable value of property which is subject to VAT or transfer duty.
- The terms “Registrar”, “Deeds Registry”, “Registrar of Deeds” and the “Mineral and Petroleum Titles Registration Office” (also referred to as the MPTRO).

A number of specific terms used throughout the guide are defined in the Transfer Duty Act, the VAT Act or the TA Act. These terms and others are listed in the **Glossary** in a simplified form to make the guide more user-friendly. **Chapter 2** also discusses certain definitions in detail which are fundamental to the understanding of the Transfer Duty Act in the context of the law of property and the law of contract.

Some of the main topics discussed in this document include –

- the meaning of various definitions;
- the imposition of transfer duty on acquisitions of property;
- different kinds of transactions which are subject to either VAT or transfer duty;
- calculation of transfer duty;
- exemptions; and
- issues relating to the payment of transfer duty, the submission of returns and supporting documentation and other matters generally related to the administration of the Transfer Duty Act.

The information in this guide is issued for guidance only and is not intended to be used as a legal reference. Any statement made in this guide does not have a binding effect and may not be construed as a ruling of any sort contemplated in Chapter 7 of the TA Act or section 41B of the VAT Act.

The information in this guide is based on the transfer duty legislation (as amended) as at the time of publishing of this guide and includes the amendments contained in the following Acts:

- The Taxation Laws Amendment Act 15 of 2016 which was promulgated on 19 January 2017 (as per *Government Gazette* (GG) 40562); and
- The Tax Administration Laws Amendment Act 16 of 2016 which was promulgated on 19 January 2017 (as per GG 40563);
- The Rates and Monetary Amounts and Amendment of Revenue Act 14 of 2016 which was promulgated on 19 January 2017 (as per GG 40561); and
- The Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Act 13 of 2016 which was promulgated on 19 January 2017 (as per GG 40560).

The previous edition of this guide has been withdrawn with effect from 12 December 2017.

For more information on the VAT treatment of fixed property transactions, see the Legal Counsel webpage on the **SARS website** where you will find various guides to assist you.

For more details regarding the general operational aspects relating to the electronic submission of the relevant transfer duty forms and the payment of duty, see the Transfer Duty webpage on the **SARS website** where you will find various resources to assist you.

All guides, interpretation notes, binding general rulings, forms, returns and tables referred to in this guide are available on the **SARS website** and are as at the date of this publication.

Operational information contained in this guide is up to date as at the date of publishing. However, always refer to the **SARS website** and any external guides specifically issued on such operational matters, which may be updated from time-to-time.

Should there be aspects which are not clear or not dealt with in this guide, or should you require further information or a specific ruling on a legal issue, you may –

- visit the SARS website at **www.sars.gov.za**;
- contact your own tax advisor or conveyancer;
- contact your local SARS branch;
- contact the SARS National Call Centre –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093 (only between 8am and 4pm South African time);
- submit legal interpretative queries on the TA Act by e-mail to **TAAInfo@sars.gov.za**;  
or
- submit a ruling application to SARS headed “Application for VAT Class Ruling” or “Application for a VAT Ruling” by email to **VATRulings@sars.gov.za** or by facsimile on +27 86 540 9390.

Comments on this guide may be emailed to **policycomments@sars.gov.za**.

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12 December 2017

**Special acknowledgements:**

Prof. RCD Franzsen, as Advisory Editor; and  
SARS acknowledges the permission granted by the University of South Africa for the use and reproduction of materials contained in Tutorial Letter 102/2004 for the LLM paper Estate Duty, Donations Tax and Transfer Duty (MESDLW-G) in Chapters 1 to 3 and Annexure A.

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# Chapter 1

## Introduction

### 1.1 Brief historical perspective

The Transfer Duty Act was promulgated in *Gazette Extraordinary* 4193 on 28 July 1949. It came into effect on 1 January 1950 and applies to all acquisitions of property on or after that date. Any acquisitions before 1 January 1950 remain liable to duty under the relevant laws operative at the date of the transaction.<sup>1</sup> Particulars as to any liability and/or rates of duty or exemptions relevant to any such acquisitions may be obtained by referring the matter to the office of the Commissioner.

Transfer duty is a tax levied by the national sphere of government and is paid into the National Revenue Fund.<sup>2</sup>

### 1.2 Scope and application

As mentioned in the **Preface**, this document includes a discussion on the meaning of various definitions, how the imposition of transfer duty works, whether a transaction is subject to VAT or transfer duty, how to calculate the transfer duty which is payable, and how to establish if an exemption applies.

Although this guide is written as far as possible in plain English, its purpose is to provide technical guidance on the application of the Transfer Duty Act on property transactions in the context of the law of property, the law of contract and various other legislative acts with which it is integrally linked. It has therefore been necessary, to a certain extent, to include a discussion on how these other acts and areas of law affect the application of the Transfer Duty Act. This guide does not, however, purport to provide anything more than mere guidance on the application of those other acts and areas of law in so far as they relate to transfer duty matters.

Some areas of the transfer duty law have been explained in more detail than others because of the degree of complexity of the particular topic concerned. It has also been necessary to deal with other taxes such as VAT, Capital Gains Tax (CGT) and income tax to a certain extent, particularly when it concerns the transfer duty exemptions. These other taxes are only dealt with in so far as it is necessary to obtain a basic understanding of their link with transfer duty. The reader will therefore find numerous references to other legislation, case law and guides issued by SARS for more details relating to the tax type concerned.

The main purpose of this guide is therefore to assist the reader to –

- determine if “property” has been acquired, or if a transaction or event is otherwise subject to transfer duty in principle, or if an exemption from duty applies;
- determine if a transaction is subject to VAT or transfer duty;
- identify the factors which the Commissioner must (or may) take into account when determining the “fair value” of property as well as which amounts must be included or excluded from the consideration which is subject to duty;

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<sup>1</sup> 1<sup>st</sup> proviso to section 21.

<sup>2</sup> See section 2(1) of the Transfer Duty Act and section 213 of the Constitution of the Republic of South Africa, Act 108 of 1996.

- calculate the amount of duty (including any interest thereon) for different types of property transactions and determine the period within which transfer duty is payable;
- determine the administrative requirements which apply and the documents which must be submitted to SARS so that the transaction can be processed efficiently to allow the Registrar of Deeds to record the transaction (where applicable); and
- generally understand the application of the Transfer Duty Act with regard to property transactions.

Some aspects with regard to policies and procedures on the processing of transactions are mentioned in this guide, but this is not the focus of the publication. More details regarding the submission of returns and the processing of documents and payments can be found in the *Transfer Duty eFiling Guide*.

### 1.3 Approach of the guide

The approach of this guide in dealing with the topics mentioned in **1.3** is set out below.

**Chapter 1** – Provides a brief historical perspective and some background information relating to transfer duty. It also describes the scope of topics that will be covered in the guide and the approach adopted.

**Chapter 2** – This chapter explores some of the main definitions and concepts which underpin the application of the Transfer Duty Act in the context of the law of property, the law of contract and various other legislative acts which govern property transactions in South Africa. The most fundamental definition is that of “property” which has a particular meaning in the legal context as well as a specific defined meaning in section 1(1). The definition also has a link with the definition of the term “fixed property” as defined in section 1(1) of the VAT Act which is explained in some detail in the guide.

**Chapter 3** – Describes the transactions and events which make up the tax base of transfer duty, being acquisitions of “property” either by way of a transaction or in any other manner, as well as renunciations of interests in “property” which has the effect of enhancing the value of property. As most of the important definitions and concepts would have already been explained in **Chapter 2**, this chapter provides a summary of the meaning of those terms and puts them into context within the meaning of the term “acquisition”. Also dealt with in this chapter is the cancellation of transactions and transactions which are concluded through representatives or agents who act on behalf of, or for the benefit of others.

**Chapter 4** – Briefly sets out aspects which relate to the date of liability for transfer duty and the period in which the duty must be paid. This chapter focuses on the practical aspects relating to the definition of the terms “date of acquisition” and “acquisition” which are explained in **Chapters 2** and **3**.

**Chapter 5** – Deals with determining who is liable to pay transfer duty in any particular situation. The general rule is that the transferee is liable, but the Transfer Duty Act also contains provisions which make other persons liable for the duty in certain types of transactions.

**Chapter 6** – Focuses on the determination of the dutiable value of the property acquired or the value by which property is enhanced by the renunciation of an interest therein. The applicable valuation rules as set out in the definition of the term “fair value” are discussed in the context of the different transactions and events. The chapter includes a discussion of different valuation factors that the Commissioner may consider (or which must

be considered) when an inadequate consideration is paid or where the declared value is less than the fair value of the property acquired or renounced. This chapter also sets out what is to be included and excluded from the consideration paid (or payable) which will be subject to duty.

**Chapter 7** – Sets out the rules for calculating transfer duty and the rates of duty that have applied over the years. Included are a number of different examples of how to calculate duty for past and current transactions as well as the application of the formula in section 2(5) for calculating the duty on an acquisition of an undivided share in property. The examples also demonstrate how to establish whether transfer duty or VAT is payable on a transaction.

**Chapter 8** – Deals with exemptions from duty. One of the most important of these is section 9(15) which provides for an exemption from transfer duty when a property transaction constitutes a taxable supply of “fixed property” as defined in section 1(1) of the VAT Act. This exemption, amongst others, are explained in more detail, mainly as a result of other legislation or legal principles which apply in certain transactions, or as a result of the complexity of the wording of the exemption itself.

**Chapter 9** – Deals with matters associated with the payment and recovery of duty. It covers the period for payment, the issuing of receipts and penalties or interest payable on late payments.

**Chapter 10** – Deals with compliance matters concerning the administration of the Transfer Duty Act generally in the context of the TA Act. It includes a discussion on how these aspects impact on the interpretation of definitions, the submission of returns and payments, recovery of unpaid duty, objections, appeals and dispute resolution.

## 1.4 Tax administration

The TA Act was promulgated on 4 July 2012 and came into effect on 1 October 2012. However, certain provisions relating to interest stipulated in the Schedule to Proclamation 51 dated 14 September 2012 (as per *Government Gazette* 35687) and Schedule 1 to the TA Act will only become effective from a future date to be determined by the President.

The TA Act only deals with tax administration, and incorporates into one piece of legislation certain administrative provisions that are generic to all tax Acts. It also seeks to align the various administrative provisions which were previously duplicated in the different tax Acts, and to simplify and harmonise the provisions as far as possible. This guide must therefore be read in the context of the TA Act and any public notices or proclamations issued in connection with any general tax administration matter.

See **Chapter 10** for more information in this regard.

Further information regarding the TA Act can be obtained from the TA Act webpage<sup>3</sup> which includes:

- *Short Guide to the Tax Administration Act, 2011;*
- *Electronic form of record-keeping under section 30(1)(b) in Government Gazette 35733 Notice 787; and*

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<sup>3</sup> [www.sars.gov.za](http://www.sars.gov.za) > Legal Counsel > Tax Administration.

- Interpretation Note 68 (Issue 2) dated 7 February 2013 “Provisions of the Tax Administration Act that did not commence on 1 October 2012 under Proclamation 51 in *Government Gazette* 35687”.

## Chapter 2

### Definitions and concepts

#### 2.1 Introduction

The Transfer Duty Act imposes a transfer duty on the **value of any property** acquired by any person by way of a **transaction**, or **in any other manner**, or on the **value by which any property is enhanced** by the **renunciation of an interest** in or restriction upon the use or disposal of that property. It is therefore necessary to have a look at the underlying concept of acquisition and important definitions in section 1(1) in order to establish whether there is a liability for transfer duty. The following key definitions will be discussed: “acquisition”, “date of acquisition”, “fair value”, “property”, “residential property”, “residential property company” and “transaction”. Also see **Chapter 10** for the general interpretation rules which apply in the context of the TA Act when interpreting definitions contained in the Transfer Duty Act.

#### 2.2 “Acquisition”

The concepts of “acquire” and “acquisition” are not defined in the Transfer Duty Act. However, the courts have repeatedly interpreted the meaning of the term “acquisition” in the context of section 2(1), which is the main charging provision in the Transfer Duty Act. In *CIR v Freddie's Consolidated Mines Ltd*,<sup>4</sup> Centlivres CJ states the following (at 311C):

“The word ‘acquired’ in the charging section (section 2) must therefore be construed as meaning the acquisition of a right to acquire the ownership of property. It has been said to be a misnomer to call the duty a transfer duty: it is in fact a duty imposed, inter alia, on the consideration given by a purchaser of property for the right conferred on him to acquire the ownership of property.”

In *SIR v Hartzberg*,<sup>5</sup> Botha JA confirms this view by stating (at 409A-B):

“Although the ordinary legal meaning of the word ‘acquire’ implies the acquisition of dominium, it is clear that in section 2 of the Act the word is used in its wider meaning and includes the acquisition of a jus in personam ad rem acquirendam... Transfer duty therefore becomes payable under section 2 upon the acquisition by a person of a personal right to obtain dominium in immovable property.”

This interpretation is confirmed in several other cases<sup>6</sup> and is supported by the definition of the term “date of acquisition” in section 1(1) as well as the wording of sections 5(2)(a), 12(1) and 13. In other words, the “acquisition of property” refers to the acquisition of a personal right that entitles the person who acquires the property to claim transfer. The close association of the Deeds Office and conveyancers with regard to the collection of transfer duty may create the impression that the liability arises at the time when a property transfer is entered in the Deeds Registry.

This is not the case, as the liability arises at the date of acquisition or at the date that the renunciation of an interest in property takes place. The liability therefore exists at the time that the transaction is completed regardless of whether or not the actual transfer of the property or the renunciation of the right has been recorded in the Deeds Registry. Transfer duty can therefore not be avoided by the failure to register the transfer of the property.

<sup>4</sup> 1957 (1) SA 306 (A).

<sup>5</sup> 1966 (1) SA 405 (A)

<sup>6</sup> Refer, for example, to *SIR v Wispeco Housing (Pty) Ltd* 1973 (1) SA 783 (A) 791C-D, *SIR v Estate Roadknight* 1974 (1) SA 253 (A) 258B-C; *CIR v Collins* 1992 (3) SA 698 (A) 707I-J.

See **Chapter 3** for further discussion on the concept of “acquisition”.

## 2.3 “Date of acquisition”

“date of acquisition” means—

- (a) in the case of the acquisition of property (other than the acquisition of property contemplated in paragraph (b) by way of a transaction, the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not or was entered into on behalf of a company already registered or still to be registered and, in the case of the acquisition of property otherwise than by way of a transaction, the date upon which the person who so acquired the property became entitled thereto: Provided that where property has been acquired by the exercise of an option to purchase or a right of pre-emption, the date of acquisition shall be the date upon which the option or right of pre-emption was exercised;
- (b) in the case of the acquisition of property under item 8 of Schedule 1 to the Share Blocks Control Act, 1980 (Act No. 59 of 1980), and if section 9A of this Act does not apply to that acquisition, the date of the written request referred to in sub-item (1)(b) of the said item 8;
- (c) ...

### 2.3.1 General rule

Most cases involve the acquisition of rights to receive transfer of immovable property **by way of a transaction** in terms of an agreement of purchase and sale. In these cases, the date of acquisition will be the date on which the transaction was entered into, being the date that the last contracting party has signed the agreement.

This rule applies even if the contract –

- stipulates a different effective date;
- is subject to any resolutive or suspensive conditions (for example, if an offer to purchase a property is accepted on 10 February 2016, subject to the purchaser obtaining finance, the date of acquisition is 10 February 2016 and not the date when the finance is granted);
- was entered into on behalf of a company (whether registered or still to be registered);  
or
- takes a form other than a normal sale, for example, a donation, an expropriation or a renunciation of rights.

The date of acquisition of property by a person **otherwise than by way of a transaction**, is the date upon which the person acquiring the property became entitled thereto. In some of these cases the date of acquisition (being the date of entitlement) may have to be determined by a court. For example, in the case of an acquisition by way of prescription, the view is that the date of entitlement is the date of the court order and not the exact date upon which prescriptive title would have vested after the 30 year period of free and undisturbed possession.<sup>7</sup> Typically ownership will not be registered in the new owner’s name without the sanction of a court.

<sup>7</sup> Prescription Act 68 of 1969, section 2(1).

It should be noted that when any announcement is made by the Minister to reduce the rate of transfer duty before the effective date of the change, the parties to an agreement may not merely cancel an existing agreement and enter into a new agreement in respect of the same property to take advantage of the lower transfer duty rates. Should this occur, SARS will not regard the transaction as a true cancellation, but rather, a transaction entered into for the purpose of avoiding or evading transfer duty.

Similarly, the conclusion of an addendum setting out further negotiated terms or amendments to the original agreement will not alter the date of acquisition for transfer duty purposes, as an addendum cannot be read or applied independently of the original agreement. Transfer duty will therefore be calculated in such cases using the original date of acquisition as if the original agreement had not been cancelled.<sup>8</sup>

### 2.3.2 Conversion from share block to sectional title

The date of acquisition of property by virtue of a conversion of share block rights to sectional title<sup>9</sup> is the date that the written request for conversion<sup>10</sup> has been lodged with the share block company by the person who has the right of use under the use agreement.

### 2.3.3 Transactions on behalf of companies and conditional transactions

In the case of conditional transactions, or transactions on behalf of companies, the date of acquisition is also reckoned from the date on which the transaction was entered into as discussed in 2.3.1, and not –

- the date that the condition is fulfilled (that is the date that the contract becomes operational); or
- the date that the company ratifies the acquisition.

This applies whether the company is already registered or still to be registered. Although the definition of the term “date of acquisition” refers to a “company”, the definition of a “company” in section 1(1) includes a close corporation. The principle explained in this paragraph will also apply in the case of a trust which exists at the time of the transaction. However, in the case of trusts (unlike companies), no transaction may be entered into on behalf of the trust before it has been formed. In other words, the condition must be ignored for purposes of determining the date of acquisition for transfer duty purposes. (Suspensive and resolutive conditions are discussed in 3.2.6.)

Any transaction on behalf of a company which is still to be formed (pre-incorporation contract) is governed by section 21 of the Companies Act 71 of 2008 (the Companies Act). Under this provision, a person (the promoter) may enter into a written agreement or purport to act in the name of an entity that does not exist at the time, if it is to be incorporated as a company under the Companies Act. Within three months after incorporation, the board may completely, partially or conditionally ratify or reject the pre-incorporation contract. Alternatively, if during that period the company does not ratify or reject the transaction, it is deemed to have been ratified and accepted.

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<sup>8</sup> *Secretary for Inland Revenue v Hartzenberg* 1966(1) SA 405 (AD).

<sup>9</sup> As contemplated in Item 8 of Schedule 1 to the Share Blocks Control Act 59 of 1980.

<sup>10</sup> This is required under sub-item (1)(b) of Item 8 of Schedule 1 to the Share Blocks Control Act 59 of 1980.

To the extent that a pre-incorporation contract has been ratified, the agreement is enforceable against the company as if the company had been a party to the agreement when it was made and any liability of the promoter is accordingly discharged to that extent. Whether the company (once formed) or the promoter turns out to be liable for the transaction, the date of transaction remains the date on which the original contract was concluded, and not the subsequent date of ratification (or deemed ratification) by the company, or the date of registration of the entity as a company.

Section 21 of the Companies Act does not apply in the case of transactions concluded in the name of shelf companies. This is because the shelf company already exists at the time of signing the sale agreement and cannot qualify as a pre-incorporation contract. It must therefore be ascertained whether that person had the legal capacity to act on behalf of that shelf company at that time, so as to constitute a valid transaction. Further, that if that person had the required capacity, it must be established whether or not the shelf company had been identified as the principal (the actual purchaser) on the date of the transaction as required under section 16 of the Transfer Duty Act. In this regard the question of legal capacity applies not only in respect of shelf companies, but also as a generally applicable principle. For example, if a person acts in a representative capacity in purchasing immovable property, section 16 prescribes that not only must the name and certain other details of the principal be disclosed at the time of the transaction, but also that the documents authorising that person to act on behalf of the principal in the matter must be provided to the seller (for example special power of attorney).

The person who signed the agreement of the transaction entered into, before purchasing the shelf company, would be regarded as the purchaser, as that person could not have been acting in a representative capacity for that shelf company at the time of the transaction.

#### 2.3.4 Pre-emptive rights

The proviso to the definition of the term “date of acquisition” deals with a situation where a person acquires property by exercising a pre-emptive right. In such a case, the date of acquisition is the date that the right is exercised and not the date that the right was acquired. This is because the acquisition of the right itself does not constitute “property” as defined in section 1(1) and is not a registrable right unless it is intended to bind successors in title. Only when the right is exercised, does a right to acquire property arise.

## 2.4 “Fair value”

“fair value”—

- (a) in relation to property as defined in paragraphs (a) and (c) of the definition of “property”, means the fair market value of that property as at the date of acquisition thereof;
- (b) in relation to a share or member’s interest in a company as contemplated in paragraph (d) or (e) of the definition of “property”, means so much of the fair market value as at the date of acquisition of that share or member’s interest, of any property held by that company which constitutes—
  - (i) residential property;
  - (ii) a share or member’s interest in any company as contemplated in paragraph (d) or (e) of the definition of “property”; or
  - (iii) a contingent right in property of a trust as contemplated in paragraph (f) of the definition of “property”,

(without taking into account any lease agreement or any liability in respect of any loan or any right to or an interest in the use of immovable property conferred on the owner of a share in a share block company as contemplated in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), in relation to that residential property or any residential property of any company or trust contemplated in subparagraph (ii) or (iii)), as is attributable to that share or member's interest; or

- (c) in relation to any contingent right to any property, which constitutes—
- (i) residential property;
  - (ii) a share or member's interest contemplated in paragraph (d) or (e) of the definition of "property"; or
  - (iii) a contingent right in property of a trust as contemplated in paragraph (f) of the definition of "property", held by a discretionary trust, means the fair market value of that property (without taking into account any lease agreement or any liability in respect of any loan in relation to that residential property or any residential property of any company or trust contemplated in subparagraph (ii) or (iii)), as at the date of acquisition of that contingent right:
- (d) in relation to a share in a company as contemplated in paragraph (g) of the definition of "property", means so much of the fair market value, as at the date of acquisition of that share, of any property held by that company which constitutes property as contemplated in paragraphs (a) and (c) of that definition (without taking into account any lease agreement or any liability in respect of any loan in relation to that residential property) as is attributable to that share:

Provided that—

- (a) the fair market value of any property of a company or a trust which constitutes a contingent right in property of a trust, as contemplated in paragraphs (b)(iii) and (c)(iii), shall be equal to the fair value of that contingent right as determined in terms of paragraph (c) of this definition; and
- (b) where property, has been acquired by the exercise of an option to purchase or a right of pre-emption, the fair value in relation to that property shall be the fair market value thereof as at the date upon which the option or right of pre-emption was acquired by the person who exercised the option or right of pre-emption;

#### 2.4.1 General rules – land and fixtures to the land

The definition of the term "fair value" must be read and interpreted within the context of the definition of "property" as well as section 5 which provides for the determination of the value of property on which transfer duty is payable. Paragraph (a) of the definition of the term "fair value" is the general rule which applies to land and any fixtures thereon, which specifically includes reference to the acquisitions mentioned in paragraphs (a) and (c) of the definition of the term "property", namely –

- real rights in land (but excluding rights under mortgage bonds or leases other than those described below);
- rights to minerals or rights to mine for minerals; and
- leases or sub-leases of rights to minerals or to mine for minerals.

In these cases, "fair value" means the fair market value of that property as at the date of acquisition. In an arm's length transaction between two unrelated parties, the consideration payable by the purchaser will generally be representative of the fair market value on which transfer duty is paid. In the case of related parties and transactions where no consideration is payable, transfer duty will be paid on the declared value of the property, provided that the

Commissioner may determine the fair value if the consideration payable or the declared value is less than the fair value of the property concerned. In such cases, the duty payable on the acquisition of that property will be based on the **greater of** –

- the consideration paid or payable for the property; or
- the fair value of the property as determined by the Commissioner.

This will apply, for example, in a case where the property is sold for less than the fair market value because the contracting parties are related, or when it otherwise appears to the Commissioner that the transaction is not concluded at arm's length. In cases where the Commissioner determines the fair value of the property, that determination may be revised not later than two years from the date on which duty was originally paid.

In determining the fair value of a property, the Commissioner **must have regard to** –

- the nature of the real right in land and the period for which it has been acquired (or the period for which the property is likely to be enjoyed in cases where the property is acquired for an indefinite period, or for the natural life of any person);
- the municipal valuation;
- any sworn valuation which has been furnished by, or on behalf of the person liable to pay the duty; and
- any valuation made by the Director-General: Mineral Resources or by any other competent and disinterested person appointed by the Commissioner.<sup>11</sup>

Although the definition of the term “fair value” does not refer specifically to renunciations, it is submitted that the amount (fair value) on which transfer duty is payable is the difference between the value of the property burdened with the interest or restriction, and the value of the property not so burdened. This must be determined objectively according to the fair market values of the property in each circumstance respectively (that is burdened vs not burdened).<sup>12</sup>

#### 2.4.2 Limited real rights in property

Limited real rights in property include *praedial servitudes*<sup>13</sup> such as a *usufruct*, *usus*, *habitatio*, and *fideicommissum*. The fair value for transfer duty purposes in such cases is the fair market value of the rights as at the date of acquisition. Although it is possible for limited real rights to be the subject of a purchase and sale agreement, it is more common for the rights to be acquired by way of a donation, or as a result of an inheritance.

The fair value of limited real rights in property is usually determined through the use of the tables which were promulgated under section 29 of the Estate Duty Act 45 of 1955. In particular, when no consideration is paid for the acquisition of these rights (which is the usual position) the Commissioner must be satisfied that the declared value is a true reflection of the fair value of the property in the circumstances. This is based on the principle that in contemplating the fair value, the Commissioner must consider the factors mentioned in section 5(7) which includes (amongst other factors) –

- the nature of the real right in the property and the period for which that property has been acquired; and

<sup>11</sup> See sections 5(6) and 5(7).

<sup>12</sup> *Handbook on Transfer Duty* (1950), Meyerowitz and Jacobson. Also see 2.4.

<sup>13</sup> Praedial means “relating to land or fixed property”.

- the period for which the property is likely to be enjoyed when the property has been acquired for an indefinite period or for the natural life of any person.

In a case where the usufructuary renounces his or her rights and interests in the property, this will result in a dutiable transaction and the applicable tables<sup>14</sup> will be applied to determine the value by which the property has been enhanced for transfer duty purposes. This amount will then be compared to any consideration paid to the person renouncing the rights and interests, and transfer duty will be payable on the higher value. In a situation where the owner's property is restored to its full content by virtue of the lapsing of the encumbrance, for example, when a usufruct comes to an end as a result of the death of the usufructuary, this is not regarded as a renunciation. Consequently, there is no "acquisition" of property by the bare dominium owner which can be subject to duty.

The tables apply in the following manner:

- In the case where a person has acquired a real right in property for the rest of that person's life, Table A "*The Expectation of Life and the Present Value of R1 per Annum for Life Capitalised at 12 per cent over the Expectation of Life of Males and Females of Various Ages*" is used to calculate the value. **Table A** is commonly referred to as the "**life expectancy tables**";
- Where a person acquires a real right for a fixed period, Table B titled "*Present Value of R1 per Annum Capitalised at 12 per cent over Fixed Periods*" is used to calculate the value. **Table B** is commonly referred to as the "**fixed period tables**"; and
- The life expectancies apply to natural persons who hold limited rights in respect of donations and *estates* on or after 1 April 1977. In the case of a non-natural person, the expectancy is fixed at 50 years.

The tables are used to determine the discounting factors over the various life expectancies or fixed periods involved (as the case may be) which is multiplied by the annual yield in order to arrive at the applicable values (that is by discounting R1 by an annual factor of 12%). The values as determined by these tables are used to calculate valuations of limited rights for purposes of estate duty, donations tax and transfer duty, although in certain cases (not within the scope of this guide), there may be some differences between them. (Also see 7.3.3 for some examples, as well as 2.4.2 and section 5(7) for more information regarding valuation issues in this regard.)

### 2.4.3 Pre-emptive rights

The value of property acquired by exercising a pre-emptive right<sup>15</sup> is taken as at the date when the right was acquired by the person exercising it. This rule applies regardless of whether that right was obtained directly from the owner of the property, or from some intermediate holder of the right. The value of any improvements effected by a prior option holder will normally be reflected in the amount of the consideration paid by the person acquiring the option from the prior holder.

The intention is that a person acquiring property through the exercising of an option to purchase should not be chargeable with duty on any increase in value due to improvements made, or the exploring and proving of mining prospects, or fluctuations in value during the period that the right was held by that person.

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<sup>14</sup> See **Annexure B**.

<sup>15</sup> Also see **2.3.4**.

The acquisition of a pre-emptive right is not, in itself, a transaction which is subject to transfer duty, unless it is intended to bind successors in title and is to be registered in the Deeds Registry as an encumbrance over the property. Any amount paid or payable for that right must be added to the consideration payable for the acquisition of the property if that consideration forms part of, or is applied as credit against, the purchase consideration for the property when the holder exercises the right. (See section 6(1)(b).)

#### 2.4.4 Plot and plan contracts

Sometimes a developer or building contractor may sell a piece of land together with an undertaking to erect a building on the land, or to complete a partially completed building thereon. There are various ways in which this can be done. For example, the land and the building contract may be contained in a single contract or in separate contracts with the same supplier, or there could be separate contracts with the different suppliers.

In most of these cases, the supplier should be registered as a VAT vendor and VAT must be charged at the standard rate on both the property and the building which is to be supplied. Therefore, it is usually only in the case where there are separate transactions involved in acquiring the land and buildings that transfer duty may be payable on the land acquired. For example, if vacant land is acquired from one person (non-vendor) and the building work is carried out by another person (vendor), transfer duty will be payable on the land and VAT will be payable on the construction work for the building.

Developers and builders who attempt to avoid VAT registration or avoid paying VAT on certain transactions could face prosecution and could be liable for administrative non-compliance penalties, as well as interest on the amounts not paid, as well as understatement penalties of up to 200% of the tax payable.

Examples of this include –

- the intentional structuring of transactions in such a manner that it appears that the supply of the land and the supply of the buildings are unconnected or are made by separate (unconnected) persons, when this is in fact not the case; or
- documents submitted to SARS which are intended to be deliberately misleading, or are omitted for the purposes of obtaining a transfer duty exemption or zero-rating, or in an attempt to pay duty on a lower amount, or to pay transfer duty instead of VAT.

#### **Example 1 – Plot and plan: VAT anti-avoidance provisions**

*Facts:*

Mrs M is a property developer and trades as a sole proprietor under the name ABC Properties (ABC). She is also the sole member of XYZ Construction CC (XYZ). ABC sells vacant stands in residential developments to customers and in terms of that contract, the client is required to conclude a separate contract with XYZ to build the residences on the land sold to them by ABC. ABC is not registered for VAT as its supplies of vacant stands is below the R 1 million threshold for compulsory VAT registration. XYZ is registered for VAT. Mrs M deliberately split her activities to avoid having to register ABC for VAT purposes.

What are the VAT and transfer duty implications of this situation?

**Result:**

Section 50A of the VAT Act, is an anti-avoidance provision. It provides that where it appears to the Commissioner that the person is attempting to avoid VAT registration by artificially splitting the activities of a single enterprise between various persons, the Commissioner can deem the separate persons to be one and the same for VAT purposes. Since Mrs M appears to be continuously or regularly supplying stands and/or plot and plan projects and has deliberately split her activities, the Commissioner may, under section 50A of the VAT Act, regard Mrs M and XYZ Construction cc as one and the same person. The consequences of applying this provision is that the Commissioner will aggregate the consideration paid or payable for the land and buildings to determine if the R1 million threshold for compulsory VAT registration under section 23 of the VAT Act has been exceeded.

In the event that the Commissioner invokes section 50A of the VAT Act, there will be a liability to charge VAT on the full consideration received for the land and any improvements to be effected on that land at the standard rate (14%) under section 7(1)(a) of the VAT Act. Alternatively, if section 50A of the VAT Act does not apply in this situation, the buyer would pay transfer duty on the unimproved land acquired from ABC and VAT on the construction services acquired from XYZ. The VAT and transfer duty treatment of the transactions will, therefore, ultimately depend on the structure of the agreement(s) and whether or not the suppliers are connected persons for VAT purposes. It is also important to note the anti-avoidance provisions contained in section 50A of the VAT Act when considering the exemption under section 9(15) (see **8.2.21**).

**2.4.5 Tenant improvements**

Transfer duty on property that is sold to a tenant who effected improvements to the property whilst being the *bona fide* possessor of the land, is calculated on the fair value of the property less the value of any improvements effected by that tenant.

In *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Company Ltd*,<sup>16</sup> the tenant who was also the *bona fide* possessor of land but not the owner thereof, erected houses costing more than £900 000 on the leased property. The tenant later bought the property for £129 555 and the Commissioner claimed that transfer duty should be paid on an amount in excess of £1 million, being the fair market value of the property (including the houses). The Court found that this approach was incorrect as the possessor's right of retention diminished the dominium of the owner who was not able to sell more than such diminished dominium.

**2.4.6 Shares, members' interests and contingent rights relating to residential property**

Paragraphs (b) and (c) of the definition of the term "fair value" see the situations in paragraphs (d), (e) and (f) of the definition of the term "property".<sup>17</sup> This deals with the trading of shares in companies, interests in close corporations and contingent rights in trusts which are associated with the use or ownership of "residential property" through the holding

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<sup>16</sup> 1960 (3) SA 642 (A).

<sup>17</sup> Before the introduction of paragraph (g) of "property" this rule would have also applied to shareblock transactions which constituted the supply of "residential property".

of those shares, interests or rights.<sup>18</sup> These rules were introduced as anti-avoidance measures to deal with transactions which had the effect that the use or enjoyment of “residential property”<sup>19</sup> could be obtained either –

- directly, by purchasing shares in a “residential property company”<sup>20</sup> which owns the residential property; or
- indirectly, by acquiring shares in a holding company which would, together with its subsidiaries, have been regarded as a “residential property company” had they not been separate entities; or
- by substituting a beneficiary or trustee of a discretionary trust which owns residential property through its ownership of shares or interests in a “residential property company”.

The effect of these provisions is that the person acquiring rights to “residential property” in this manner can no longer avoid the payment of transfer duty on the basis that no “property” had been acquired. In these cases the “fair value” is the proportional share of the fair market value of any property held by the company which is attributable to the shares, interests or rights to which they relate. In other words, the value of the company’s residential property is attributed to the various share block owners in proportion to their overall shareholding in the company.

In determining the fair value of shares or similar interests in property, no account must be taken of any lease on the property or liability in respect of any loan or debt related to the property. The fair value of the property or contingent right held must, however, comprise more than 50% of the aggregate fair value of all the company’s assets. (Also see **2.5.10**.)

The taxable value is the greater of the value of the consideration for the “residential property” or the fair value thereof (excluding any loan obligation).

**Example 2 – Determining the fair value of “residential property” involving the purchase of shares, member’s interests etc**

*Facts:*

M purchases the full extent of the member’s interest in a close corporation which has as its sole asset, a beach-front holiday apartment with a fair value of R700 000. The close corporation is not conducting an enterprise for VAT purposes and the apartment is used exclusively for the enjoyment of the member. The apartment originally cost R300 000, which was funded by a member’s contribution of R100 and a member’s loan of R299 900.

What is the fair value of the residential property owned by the close corporation?

<sup>18</sup> A Real Estate Investment Trust (REIT) does not fall within the definition of “residential property company”. The transfer of shares in a REIT will, as a result, not be subject to transfer duty. See **2.7**.

<sup>19</sup> As defined in section 1(1).

<sup>20</sup> Residential property companies are companies (including close corporations) that own “residential property”, whether directly or indirectly or by way of contingent rights to trust property, as their primary assets.

*Result:*

M pays R400 100 for the transfer of the member's interest and R299 900 for the member's loan. The transfer duty payable is based on the fair value ignoring any loan liabilities. The fair value of the member's interest is R700 000, being the fair value of the residential property owned by the close corporation.

**2.4.7 Shares in a share block company**

Share block transactions are subject to transfer duty unless they are subject to VAT (see **2.4.6**, **2.5.10** and **2.5.11**). The taxable value is the greater of the value of the consideration for the share block or the fair value thereof (excluding any loan obligation).

The same rules apply for determining the taxable value in cases where the shares constitute "residential property" as discussed in **2.4.1**, **2.4.6** and **2.6**.

In practice the application of this rule includes an analysis of market conditions, historical sales as well as the type and characteristics of the underlying property (amongst other factors) to which the share block shares or shares in the "residential property" relate in much the same manner as one would expect for similar types of property. In essence, the fair market value in an arm's length transaction will usually be the sum of the price for the shares together with the outstanding loan obligation (if any).<sup>21</sup>

**2.4.8 Special rules**

Besides the definition of the term "fair value", the Transfer Duty Act also contains a number of other provisions which relate to the determination of the value of the property acquired which will be subject to transfer duty. For example, sections 5 to 8 prescribe further rules as to –

- how the dutiable amount or fair value is determined in certain circumstances; and
- whether certain payments are to be included or excluded from the consideration which is regarded as being payable in respect of the acquisition of the property concerned.

For example, contractual rights granting permission to take clay or soil for the making of bricks also constitute registrable rights which may be subject to transfer duty (unless the transaction is subject to VAT). In such cases where the consideration is not paid in cash, but rather by way of rent, royalty, share of profits or by some periodical payment, section 8 prescribes what factors the Commissioner must consider in determining the dutiable amount or fair value in the circumstances.

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<sup>21</sup> In the case of "residential property" the fair value applies only to the extent that the shares relate to the residential property itself and not to assets such as boats, aircraft or other movables which are not intended to fall within the scope of transfer duty.

## 2.5 “Property”

“**property**” means land in the Republic and any fixtures thereon, and includes—

- (a) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (c);
- (b) any right to minerals (including any right to mine for minerals) and a lease or sub-lease of such a right;
- (c) a *share* (other than a share contemplated in paragraph (g)) or member’s interest in a residential property company;
- (d) a share (other than a share contemplated in paragraph (g)) or member’s interest in a company which is a holding company (as defined in the Companies Act, 1973 (Act No. 61 of 1973), or as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984), as the case may be), if that company and all of its subsidiary companies (as defined in the Companies Act, 1973, or Close Corporations Act, 1984), would be a residential property company if all such companies were regarded as a single entity;
- (e) a contingent *right* to any residential property or share or member’s interest, contemplated in paragraph (d) or (e), held by a discretionary trust (other than a special trust as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962)), the acquisition of which is—
  - (i) a consequence of or attendant upon the conclusion of any agreement for consideration with regard to property held by that trust;
  - (ii) accompanied by the substitution or variation of that trust’s loan creditors, or by the substitution or addition of any mortgage bond or mortgage bond creditor; or
  - (iii) accompanied by the change of any trustee of that trust; and
- (f) a share in a share block company as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);

### 2.5.1 Introduction

The acquisition of property is one of the two principal tax events that give rise to the liability to pay transfer duty. The other one is the renunciation of an interest in, or restriction upon, the use or disposal of property. “Property” is defined as including “*land in the Republic and any fixtures thereon*”. The definition further includes certain items and excludes others from the category of land and fixtures.

The most common forms of property and real rights in property are mentioned in paragraphs (a) and (c) of the definition which includes –

- land and any fixtures thereon;
- real rights in land but excluding rights under mortgage bonds or leases (other than the leases mentioned below); and
- rights to minerals or rights to mine for minerals (including any sub-lease of such a right).

These transactions are explained in more detail in **2.5.2 to 2.5.9**. As they involve real rights, such transactions are required to be recorded in a Deeds Registry.

Paragraphs (d) to (g) of the definition of the term “property” are explained in **2.5.10** and **2.5.11**. These transactions involve shares, rights and other interests in entities that own

immovable property. Although these transactions are not recorded in a Deeds Registry, they are nevertheless transactions which will be subject to either VAT or transfer duty.

Fractional ownership and timeshare schemes which, depending on the type of scheme, could fall within paragraph (a), (d), (e), (f) or (g) of the definition of the term “property” are discussed in **2.5.12**.

### 2.5.2 Land and fixtures – General

Land consists primarily of the soil, its geological components such as minerals and everything attached to the soil. The reference to land and fixtures is based on the well-established principle that anything which is permanently attached to the land forms part of the land and therefore acquires the status of immovable property. However, the acquisition of a fixture which must be removed from the land to which it is attached is not a dutiable event for transfer duty purposes, nor is there a dutiable event when a tenant permanently affixes assets to the property which become the owner’s property by operation of law (accession). This aspect is important when determining the fair value and the transfer duty payable on a transaction involving the sale of the land on which the fixture is located, as the value of the land increases due to the value added to the property by the addition of the fixture. Whether or not a fixture forms part of the land will depend on the facts and circumstances of each case.

A sectional title unit also qualifies as “land”,<sup>22</sup> but rights attached to shares in a company that operates a share block scheme are **rights to the use** of immovable property or interests in immovable property<sup>23</sup> and would not have qualified as “property” for transfer duty purposes had it not been specifically included.<sup>24</sup>

### 2.5.3 Real rights in land

The question as to what constitutes a real right in land is a very complex one, but in practice a large measure of consensus exists between conveyancers and the Registrar of Deeds as regards **registrable rights** in land,<sup>25</sup> without too much application of the underlying legal theory. The definition of the term “property” includes any real right in land, but a right under a mortgage bond is expressly excluded. A lease of property is also excluded, but this is subject to certain exceptions (see **2.5.6** and **2.5.8**).

A real right in land is a right which is exercisable by the right holder against the owner of the land to which the right relates or anyone else who unlawfully infringes upon the holder’s ability to exercise that right. The owner of the land would, in turn, be obliged to tolerate the exploitation of the land or access to the land which is permitted by the right. This is why the registration of rights in land is important. It provides, as a matter of public record, information to prospective purchasers of land about the rights that others may have in that land. The granting of a real right in land has been described as a “subtraction” from the ownership of land because an element of the ownership does not vest in the owner of the land until the right held over that land by the other person has been extinguished.

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<sup>22</sup> Sectional Titles Act 95 of 1986, section 2.

<sup>23</sup> Share Blocks Control Act 59 of 1980, section 10.

<sup>24</sup> See **2.5.10** and **2.5.11**.

<sup>25</sup> Deeds Registries Act 47 of 1937, sections 3(1) and 63(1).

In a property transaction, the owner transfers the ownership of the land in its limited form to a person who acquires the land, as no person may transfer more rights than that person has vested in the land. Transfer of ownership of land and limited real rights in land are effected by way of registration in a Deeds Registry, however, this does not mean that the acquisition of a real right in land is not dutiable under the Transfer Duty Act unless it is registered.<sup>26</sup>

The most common examples of real rights in land are leases, mineral rights, mortgages,<sup>27</sup> personal servitudes, *praedial* servitudes and rights of sectional title owners in exclusive use areas that are registerable as such.

Although the Deeds Registries Act does not provide absolute certainty as to the nature of a real right, for the purposes of this guide and paragraphs (a) and (c) of the definition of the term “property”, the term “real right” is considered to include –

- the rights referred to in section 3(1) of the Deeds Registries Act which must be registered by the Registrar; and
- those rights referred to in section 63(1) of that Act which have been registered as a result of the Registrar exercising a discretion, or making a determination in that regard.

#### 2.5.4 Attachment by way of planting and sowing

The attachment of fixtures by mechanical means can be contrasted with the attachment of plantations, crops and other vegetation to the land as the result of planting and sowing, or by natural means as part of the environment. The vegetation becomes part of the land and potentially increases its value as soon as the plants, trees or crops take root.<sup>28</sup> Generally, this would mean that for transfer duty purposes, plants, trees or crops on the land constitute a fixture of the land when acquired, and therefore, its value must be included in the value of the property which will be subjected to transfer duty. However, there are cases in which the intention with which plants have been planted may well be decisive.

Usually, the right to cut timber is treated as a real right in land,<sup>29</sup> but these sorts of transactions are often structured as leases or similar arrangements which may resemble a lease. The cutting of trees attaching to the land which belong to the owner would not be included in the right of use for a lawful purpose (except to the limited extent generally permissible for domestic purposes in the case of a lessee).

The key is to determine whether the right acquired by the purported “lessee” entitles that person to –

- **merely use** and enjoy the leased property in terms of a lease agreement, in which case, no duty would be payable; or
- **something more than mere use**, for example, to consume the property or part thereof which constitutes a real right in property and, in principle, would be subject to

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<sup>26</sup> *Hopper v Cochran* 1934 TPD 324 (7 SATC 90).

<sup>27</sup> Leases, mineral rights and mortgages are dealt with in **2.5.6**, **2.5.8** and **2.5.9**.

<sup>28</sup> *Secretary for Lands v Jerome* 1922 AD 103 at 105.

<sup>29</sup> See *Botha and Another v Soocher* (1941 TPD 245) and *Federal Timber Co v Collins* (1909 TS 909).

transfer duty.<sup>30</sup>

The same principles described above will apply in the case of crops and other plants which are harvested on a regular basis. For example, sugar cane or maize.

Also see 2.5.5 and 2.5.6 below.

### 2.5.5 Limited real rights

As mentioned in 2.4.2, limited real rights include *praedial* and personal servitudes such as *usufruct*, *usus*, *habitatio*, *fideicommissum*, access rights and other limited interests in property. Transfer duty is not only paid on the granting of such rights, but also in respect of the amount by which the value of the property has been enhanced as a result of the renunciation of those rights in favour of the owner. For example, if the holder of a right of way servitude over a property is cancelled in favour of the owner of the servient property, duty would be payable by the owner of the servient property on the enhanced value of that property as a result of the removal of the restriction.

Contracts granting the right to take clay, soil or stone and contracts of a similar nature, including those for the removal of indigenous trees may also constitute real rights within the meaning of “property” as defined in section 1(1). The acquisition of such rights may therefore be subject to transfer duty if they are not subject to VAT and are required to be registered in the Deeds Registry as encumbrances over the property.

### 2.5.6 Leases

The essential characteristics of a lease are that the landlord makes available to the tenant **only the use and enjoyment of land** against payment of a specified or determinable rental in terms of a contract (lease agreement) which sets out the terms and conditions of use, and how the property must be maintained during the lease period. The contractual relationship is not permanent but lasts for an indefinite or agreed term. Since a lease confers the powers of use and enjoyment of the property on a temporary basis only, it does not constitute the acquisition of *dominium* over immovable “property” and is excluded from the transfer duty tax base, except in the case of –

- specific leases involving minerals referred to in paragraph (c) of the definition of the term “property”;<sup>31</sup> and
- those rights under a lease agreement which the Registrar determines to be registrable rights for the purposes of the proviso to section 63(1) of the Deeds Registries Act.

The subject-matter of a lease is not the land itself; but rather, the use and enjoyment of the land.<sup>32</sup> What is contemplated by this exclusion from “property” is an arrangement whereby the landlord and the tenant conclude a contract which allows **only the use and enjoyment of the land** to be placed at the tenant’s disposal. Once the contract contemplates something more than that, for example, to consume or destroy the subject-matter of the transaction, the

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<sup>30</sup> See *Bozzone v SIR* 1975 (4) SA 579 (A) and *SA Pulp and Paper Industries v CIR* 1955 (1) SA 8 (T). The transaction would only be subject to transfer duty if it does not qualify as a taxable supply for VAT purposes.

<sup>31</sup> These exceptions are discussed in 2.5.8.

<sup>32</sup> *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785; *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A) at 576.

contract is not a lease and will be liable for transfer duty (subject to any exemptions) on the consideration payable or fair value relating to that acquisition. The fact that the parties call the document a “lease” and make provision for “rent” payments does not alter the position.

Two important cases which illustrate the differences between registrable real rights in property and leases are *Botha v Soocher*<sup>33</sup> and *Bozzone v Secretary for Inland Revenue*.<sup>34</sup> In neither of these cases were the contractual rights registered in a Deeds Registry and in both cases the court found that a right to consume the property existed, as opposed to a right to merely use the property. As the recipients in each case were allowed to draw from the fruits of the property, the transactions concerned were characterised as being something other than a lease of property. Consequently, these transactions would give rise to a liability for the payment of transfer duty as they are **not excluded** from the definition of the term “property”.

### 2.5.7 Licences, goodwill and production quotas

In most cases involving the acquisition of licences, goodwill or production quotas that are associated with a property, the acquisition of those rights will be subject to VAT. These rights are not fixtures in the strict sense, but they may be linked to an increase in the value of the immovable property to which they relate. In other words, a licence is not immovable property in the technical sense and therefore not within the scope of the meaning of “property” as defined in section 1(1). Also, these assets are typically in the hands of the owner of the property in which the licensed activity is being conducted, rather than in the hands of the licensee. A licence can therefore add value to the property to which it relates, although it is not an integral part of the land itself.

In the case of *Sturrock Sugar Farm*<sup>35</sup> the differences between a liquor licence and a production quota (sugar quota) were highlighted. In this case it was decided that, unlike a liquor licence, the sugar quota operates exclusively as an integral part of the value of the land and is therefore enhanced by its value for transfer duty purposes.

### 2.5.8 Minerals

Rights relating to the exploitation of minerals are expressly included in paragraph (c) of the definition of the term “property”. Land ownership embraces title to the land itself, to the airspace above the land and to everything below the land surface; which includes the minerals in and below the soil.<sup>36</sup> Mineral rights are therefore also in principle severable from the ownership of land and capable of being held by a person other than the owner. The acquisition of a right which entitles the holder to exploit the land of another is therefore a registrable real right that constitutes “property” for transfer duty purposes which will attract transfer duty.

The term “mineral” has a variety of meanings depending on the context in which it is used,<sup>37</sup> but for the purposes of this guide, it is used to denote any naturally occurring substance found in or on the earth which was formed by, or subject to, a geological process. It is also

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<sup>33</sup> 1941 TPD 245.

<sup>34</sup> 1975 (4) SA 579 (A) (37 SATC 262).

<sup>35</sup> *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897(A); 27 SATC 31.

<sup>36</sup> *Neebe v Registrar of Mining Rights* 1902 TS 65 at 85; *Rocher's case* (above) at 315; *Erasmus and Lategan* (above) at 417; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) at 604; *Trojan Exploration Company (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509 ([1996] 4 All SA 121).

<sup>37</sup> *Finbro Furnishers (Pty) Ltd v Registrar of Deeds* 1983 (3) SA 191 (O) at 195.

submitted that the broad definition of the term “mineral” as defined in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRD Act) has become the prevailing one for all practical purposes.<sup>38</sup>

The importance of the introduction of the MPRD Act for the regulatory regime with regard to mineral rights or for the definition or the registration of those rights should also not be overlooked. For example, sections 5(1) and 5(2) of the MPRD Act provide respectively as follows:

“A prospecting right, mining right, exploration right or production right granted under this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.”

and

“The holder [thereof] is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.”

A prospecting contract, even though it may embody an option to purchase the land or to purchase the right to the minerals and be registered, is not subject to the payment of transfer duty. Strictly speaking, a prospecting contract does not entail a right to “property” as such, as it gives no right to minerals,<sup>39</sup> but merely a right to search for minerals. However, a contract granting the right to win, remove and sell minerals (a mining right), though it may resemble a prospecting contract, confers a real right, and is subject to transfer duty. These contracts should be referred to the Director-General: Mineral Resources for the valuation of the rights acquired.

Almost all of the functions and procedures relating to the registration of those rights have been removed from the Deeds Registries Act and transferred to the Mineral and Petroleum Titles Registration Office (MPTRO). Registrars of Deeds still exercise certain formal powers in this regard, but the registration of rights now takes place within the MPTRO. The MPTRO is also under no obligation to effect the registration of rights before being satisfied that transfer duty and other relevant taxes owing to the State have been paid, as is the case under section 92 of the Deeds Registries Act.

Provision for the conversion of so-called “old-order rights” into those recognised by the MPRD Act has also been made in that Act.<sup>40</sup> In cases like prospecting rights, which were not real rights under the common law, the holder would now acquire “property” as defined in section 1(1), but those acquisitions are exempt from transfer duty.<sup>41</sup>

### 2.5.9 Rights under a mortgage bond

Any right under a mortgage bond is excluded from the definition of the term “property”. A “mortgage bond” is a document which is evidence of different types of rights. It embodies the terms of a loan agreement as well as the real right of mortgage, which is a real right in land that secures the repayment of the loan. A right of mortgage as evidenced in the mortgage bond does not have an independent existence, and in practice, has no economic value apart from the value of the claim that it secures.

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<sup>38</sup> See the preamble to the MPRD Act, as well as, amongst others, section 3 of that Act.

<sup>39</sup> See *Munnik Myburgh Asbestos (Kaapsche Hoop) Ltd v Receiver of Revenue* 1927 WLD 98.

<sup>40</sup> Schedule II to the MPRD Act.

<sup>41</sup> Section 9(18).

### 2.5.10 Shares, members' interests and contingent rights relating to residential property

See **2.4.6** and **2.4.7** regarding paragraphs (d) to (g) of the definition of a “property” (including the valuation rules), as these explanations are not repeated here. Although **2.4.6** and **2.4.7** focus on transactions involving shares and interests in companies and close corporations, paragraph (f) of “property” also brings within the scope of the taxing provisions, the acquisition of any contingent right to a “residential property” or a contingent right to the property described in paragraphs (d) and (e) of the definition of the term “property” held by a discretionary trust.<sup>42</sup>

Transfer duty will, however, only become payable as a result of the application of paragraph (f) in circumstances where the acquisition of the right is either –

- in consequence of an agreement for consideration in relation to property held by the trust; or
- accompanied by a change in the debt or security structure of the trust; or
- accompanied by a change in beneficiaries or the trustees of the trust.

Also see **2.4.7** and **2.5.11** regarding the supply of shares in a share block company.

### 2.5.11 Shares in a share block company

The supply of shares in a share block company is regarded as “goods” and “fixed property” as defined in section 1(1) of the VAT Act and will usually attract VAT. However, if the supply is not taxable under the VAT Act, transfer duty will be payable (subject to any exemptions which may apply).<sup>43</sup>

Before 1 September 2009 share block transactions were treated for transfer duty purposes in the same manner as shares and interests in companies and close corporations or contingent rights to a “residential property” held by a discretionary trust as set out in paragraphs (d) to (f) of the definition of the term “property” as discussed in **2.4.6**, **2.4.7** and **2.5.10**. With effect from 1 September 2009, paragraph (g) of the definition of the term “property” was inserted to specifically include shares in a share block company. As a result, share block transactions are now subject to transfer duty, regardless of whether they relate to residential or non-residential type properties.<sup>44</sup>

### 2.5.12 Fractional ownership and timeshare schemes

Fractional ownership is a term used to market a form of co-ownership of an asset. The asset concerned could be any movable or immovable asset, but typically the underlying asset is immovable property such as a holiday apartment or hotel suite which is usually used by the fractional owners for leisure or investment purposes.

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<sup>42</sup> This excludes a “special trust” as defined in the Income Tax Act.

<sup>43</sup> See **8.2.21** for more information in this regard.

<sup>44</sup> This is provided that the transaction is not subject to VAT. If the transaction is subject to VAT, it will be exempt from transfer duty under section 9(15).

Through the use of an ownership usage roster, fractional owners are each allocated a number of days or weeks during the year in accordance with their respective interests in the entity which owns the asset<sup>45</sup> within which they may enjoy the exclusive use of the property and its amenities.

The issue which normally arises in this regard is whether the supply of a fractional ownership interest constitutes –

- the sale of an equity security (share or similar interest) – which is exempt from VAT and therefore treated the same as the normal purchase of shares in a juristic person;<sup>46</sup> or
- the supply of shares in a share block company or the supply of a time-sharing interest – both of which constitute the supply of “fixed property” and “goods” (as defined) and are subject to VAT at the standard rate of 14% if the supplier is registered for VAT (or required to be registered); or
- a supply which is subject to transfer duty.

From a VAT perspective, the taxable nature or otherwise of the supply of the rights and interests under the fractional ownership scheme rests on whether the supply constitutes the supply of “fixed property” and “goods” as defined in section 1(1) of the VAT Act (regardless of whether the fractional ownership scheme itself complies with the provisions of the Share Blocks Control Act or the Property Time-Sharing Control Act), or if it is a supply of a “financial service”. (Also see **8.2.21**.)

The characteristics of a fractional ownership scheme which relates to the use of fixed property are very similar to share block and time-sharing schemes. This is because included in the supply is a right to, or an interest in, the use of immovable property or a part thereof.

The supply of fractional ownership interests in a scheme of this nature does not merely constitute the supply of equity, but rather, interests in share block or time-sharing schemes which confer a right of use or occupation upon the owners. Since the supply of rights and interests under a fractional ownership scheme will constitute “fixed property” as defined in section 1(1) of the VAT Act, it follows that the supply of fractional ownership interests in that property by any person who is registered as a VAT vendor (or who is liable to be registered as such) will be subject to VAT at the standard rate. Failure to charge VAT will result in the price charged for the supply being deemed to include VAT at the standard rate. It is not correct to merely pay transfer duty as an alternative to VAT.

As mentioned earlier in this chapter and in the Preface, the position is that a supply of “fixed property” under the VAT Act is, for all intents and purposes, the equivalent of the supply of “property” for transfer duty purposes. Therefore, if the transaction constitutes a taxable supply of fixed property by a vendor for VAT purposes, the supply will be exempt from transfer duty under section 9(15).

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<sup>45</sup> This can take a number of different forms, but usually the interests are represented by the allocation and purchase of a 1/13<sup>th</sup> share of the issued share capital of the company that owns the property.

<sup>46</sup> For legal authority on this topic, see the Supreme Court of Appeal judgment in the case of *TCT Leisure v The Commissioner for the South African Revenue Services* (59/09) [2010] ZASCA 10 (12 March 2010).

As the supply of fractional ownership interests usually involves “residential property” which falls within paragraphs (d) to (g) of the definition of the term “property” as defined in section 1(1), such a transaction will normally be subject to transfer duty if it is exempt from VAT because –

- it is a supply of an equity security (shares and other interests constituting a “financial service” under the VAT Act); or
- the supplier is not a vendor; or
- it is otherwise not a taxable supply in the course of an “enterprise” carried on by that vendor.

The supply of fractional ownership interests in immovable property by persons who are not liable to register for VAT is subject to transfer duty. This will usually apply for subsequent sales by the initial investors in the fractional scheme (although each case must be decided upon the relevant facts).

## 2.6 “Residential property”

“residential property” means any dwelling-house, holiday home, apartment or similar abode, improved or unimproved land zoned for residential use in the Republic (including any real right thereto), other than—

- (a) an apartment complex, hotel, guesthouse or similar structure consisting of five or more units held by a person which has been used for renting to five or more persons, who are not connected persons, as defined in the Income Tax Act, 1962 (Act No. 58 of 1962), in relation to that person; or
- (b) any “fixed property” of a “vendor” forming part of an “enterprise” all as defined in section 1 of the Value-Added Tax Act, 1991 (Act No. 89 of 1991);

The following are specifically included in the definition of the term “residential property” for the purposes of paragraphs (d), (e) and (f) of the definition of the terms “property”<sup>47</sup> and “residential property company”:

- A dwelling-house, holiday home, apartment, or similar abode;
- Improved or unimproved land zoned for residential use; and
- Any real right pertaining to any of the above-mentioned types of property.

Properties held by business enterprises that are liable to be registered for VAT are excluded from the definition. This is achieved by excluding –

- an apartment complex, hotel, guesthouse, or similar structure of more than five units as long as they have been rented to five or more persons unconnected to their owner; or
- any fixed property of a vendor forming part of an enterprise for VAT purposes.

<sup>47</sup> See the earlier discussions in 2.4.6, 2.4.7 and 2.5.10.

Although there is some degree of overlap between these two exclusions, the first exclusion is aimed at distinguishing property used purely for residential (dwelling) purposes from property which is used for business purposes in a genuine “commercial accommodation”<sup>48</sup> enterprise. However, the definition provides that if the owner and the person occupying the property are connected persons, the exclusion does not apply.

The second exclusion deals with a situation where the fixed property concerned forms part of the assets which are used in any “enterprise” as defined in section 1(1) of the VAT Act. This exclusion is primarily aimed at developers and speculators in residential property that are liable to register and must therefore charge VAT on the fixed properties that they supply (sell) in the ordinary course of their enterprises.

In summary, the exclusions provide 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 VAT Act, the supply will be subject to VAT and will not be “residential property” for transfer duty purposes.

## 2.7 “Residential property company”

“**residential property company**” means any company, other than a REIT as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962), that holds property that constitutes—

- (a) residential property; or
- (b) a contingent right contemplated in paragraph (f) of the definition of “property”,

and where the fair value of that property or contingent right comprises more than 50 per cent of the aggregate fair market value of all the assets, as defined in paragraph 1 of the Eighth Schedule to the Income Tax Act, 1962, (other than financial instruments as defined in section 1 of that Act or any coin made mainly from gold or platinum), held by that company on the date of acquisition of an interest in that company;

This definition singles out companies (including close corporations) where the only asset or the greater part of the value of assets (that is more than 50%) in that company comprises either “residential property,” an indirect holding in such property, a contingent right to such property, or holding through a trust.

All “financial instruments” as defined in the Eighth Schedule to the Income Tax Act and gold or platinum coins held by the company are disregarded when applying this test. The implication is that the supply of any shares or other interests in an entity falling within the scope of this definition is regarded as the supply of “property” which is subject to transfer duty.

A Real Estate Investment Trust (REIT) has its shares listed on the Johannesburg Stock Exchange (JSE) as securities and is excluded from the definition of “residential property company” from 11 December 2013. The transfer of shares in a REIT will, as a result, not be subject to transfer duty.

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<sup>48</sup> The supply of a “dwelling” for VAT purposes is exempt, whereas the supply of “commercial accommodation” is taxable. See Chapter 5 of the *VAT 411 – Guide for Entertainment Accommodation and Catering* for more details in this regard.

**Example 3 – Determining if an entity is a “residential property company”***Facts:*

W (Pty) Ltd owns the following assets when the shares of the company are sold:

- A house which has a fair value of R1 million (on which there is a mortgage bond of R500 000)
- A boat with a value of R200 000
- A portfolio of shares worth R300 000
- Kruger Rands worth R100 000

Is W (Pty) Ltd a residential property company?

*Result:*

The definition requires that the aggregate fair market value of all the assets must be determined (liabilities such as the mortgage are excluded). The fair market value of the shares and the gold coins are also specifically excluded in the definition. Since the value of the house exceeds 50% of the aggregate fair value of all assets to be considered, W (Pty) Ltd is a “residential property company”.

**2.8 “Transaction”**

“**transaction**” means—

- (a) in relation to paragraphs (a) and (c) of the definition of “property”, an agreement whereby one party thereto agrees to sell, grant, waive, donate, cede, exchange, lease or otherwise dispose of property to another person or any act whereby any person renounces any right in or restriction in his or her favour upon the use or disposal of property; or
- (b) in relation to any shares or member’s interest contemplated in paragraph (d) or (e) of the definition of “property”, an agreement whereby one party thereto agrees to sell, grant, waive, donate, cede, exchange, issue, buy-back, convert, vary, cancel or otherwise dispose of any such shares or member’s interest to another person or any act whereby any person renounces any right in or restriction in his or her favour upon the use or disposal of any such shares or member’s interest; or
- (c) in relation to a discretionary trust, the substitution or addition of one or more beneficiaries with a contingent right to any property of that trust, which constitutes residential property or shares or member’s interest contemplated in paragraph (d) or (e) of the definition of “property” or a contingent right contemplated in paragraph (f) of that definition;

Paragraph (a) of this definition deals with transactions involving the acquisition of ownership of property or real rights in property which are required to be registered in a Deeds Registry as envisaged in paragraphs (a) and (c) of the definition of the term “property”. It provides that a “transaction” includes not only an acquisition by way of purchase, donation, exchange, and any other modes of acquisition, but also any act whereby the value of property is enhanced through the renunciation of any other person’s interest in, or restriction upon, the use or disposal of the property.

Also included in paragraph (a) of the definition are transactions involving the acquisition or renunciation of registrable personal servitudes. A positive personal servitude is where the owner of the land burdened by the servitude must allow the holder of the servitude to exercise some right or benefit over the land in question. Examples include rights of *usufruct*, *habitation*, *usus*, right of way, right to collect fire wood, power line servitudes etc.

A negative personal servitude prohibits the owner of the land from exercising a right which is inherent in the ownership of the property. In other words, these types of servitudes amount to registrable restraints or veto rights which prohibit the owner of the land from doing something which would usually be permissible. Examples include:–

- prohibiting the owner from subdividing without the necessary consent;
- restricting the height of buildings or prohibiting more than one building to be erected on the land; and
- prohibiting the transfer of the land without the consent from the Home Owners' Association etc.

A negative personal servitude can be created in the deed of transfer if it is capable of being enforced by some person who is mentioned in the servitude and that person has accepted the right. This is often applied in the case of the creation of restraints enforceable by Home Owners' Associations. However, no separate creation or registration event is necessary where the restraint is created by statute, for example, by Municipal Ordinance.<sup>49</sup>

Paragraphs (b) and (c) of the definition of a “transaction” must be read with the definitions of “fair value”, “property” and “residential property” as far as shares in a company, member's interest in a close corporation or a contingent right to property held in a discretionary trust is concerned.

These provisions ensure that the acquisition of an interest in a “residential property company” to the extent that it relates to “residential property” is a “transaction” for transfer duty purposes, regardless of whether that property is held directly or indirectly via an entity or a multi-tiered structure, or whether that structure contains companies, close corporations, trusts or combinations thereof. However, not all changes with regard to trusts holding residential property are transactions which give rise to tax events. For example, the birth of a child may create changes in the number and status of trust beneficiaries of a family trust, but that event would not be a taxable event, because of the requirements contained in paragraph (f) of the definition of a “property”.

A further aspect to consider in the context of the definition of a “transaction” is whether a transaction is **divisible or indivisible**. This is important for the purposes of correctly applying the rates of transfer duty when a single contract involves the acquisition of more than one property. In such cases it must be established if there are a number of separate transactions embodied in one agreement, or if all the properties concerned are acquired in terms of one indivisible transaction.

The contract would be regarded as one **indivisible** transaction for the aggregate of the values or prices attributed to the properties concerned if a number of properties held under separate title are purchased under one deed of sale, and the agreement stipulates the terms

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<sup>49</sup> See sections 65(1), 61(2) and 67 of the Deeds Registries Act 47 of 1937 for the general rules which apply in this regard and any exceptions.

of payment of the total consideration payable.<sup>50</sup> This means that legally, the effect of any failure on the part of the purchaser to adhere to the terms of the contract would result in the cancellation of the entire contract as no part thereof could be implemented. The effect is that the graduated rates of transfer duty will apply to the combined full purchase price of all the properties, instead of individually.

On the other hand, when the contract is so worded as to make each unit of property the subject matter of a contract, which stands by itself, even if embodied in a single deed of sale, that contract is **divisible** and transfer duty would be chargeable on the consideration payable in respect of each property. Whether a contract is divisible or indivisible is a matter of construction, a crucial point being whether there is an appropriation of separate considerations to the separate parts of the contract.<sup>51</sup>

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<sup>50</sup> See *CIR v Freddie's Consolidated Mines Ltd* 1957 (1) SA 306 (A) or 21 SATC 132.

<sup>51</sup> See *Modder East Orchards Ltd v Receiver of Revenue*, 1924 TPD 14; *Receiver of Revenue v Troye*, 1923 TPD 14; and *Wright v Registrar of Deeds*, 1911 CPD 611. (Also see 6.7.2.)

## Chapter 3

### Tax base

#### 3.1 General

In this chapter, various aspects regarding the tax base of the Transfer Duty Act as set out in section 2(1) will be discussed. However, as a number of these concepts have been dealt with in **Chapter 2**, this chapter will not unnecessarily repeat the explanations already provided. Instead, the contents of this chapter should be read as additional explanations which put into perspective, or support, the explanations already provided in that chapter.

The transfer duty tax base consists of –

- the acquisition of property by any person (by way of a transaction or in any other manner); and
- the amount by which the value of property is enhanced by the renunciation of a right in, or restriction upon, the use or disposal of that property.

“Acquisition of property” contributes most to the transfer duty tax base. However, the need for the second event, namely, the renunciation of rights is suitably described by Van Wyk AJ in *Kock v CIR* 1954 (3) SA 631 (C) at 635A-B:

“A renunciation of a right in the property of another does not transfer the rights renounced to the owner of such property. Such owner, therefore, does not ‘acquire’ the rights held by the person who renounces; they simply cease to exist. The benefit which accrues to the owner of the property in respect of which a right is renounced arises not because it is acquired by him but because his property has been released from the burden of the right.”

#### 3.2 Acquisition

##### 3.2.1 General

As discussed in **2.2**, the “acquisition of property” refers to the acquisition of a personal right that entitles the person who acquires the property, to claim transfer. An innominate (unnamed) contract in terms of which a person acquires property will also result in a transfer duty liability.<sup>52</sup> There is also a possible application of the common law principle that the law will give effect to the true intention of parties, irrespective or despite their simulated actions.<sup>53</sup>

With regard to an option or a right of pre-emption to acquire property, see the definitions of “date of acquisition” and “fair value” in section 1(1) and the discussion in **2.3.4** as well as section 6(1)(b). Liability for transfer duty can only arise in this regard when the option is exercised, for example, by the conclusion of a contract of sale.

As discussed in **2.8**, the definition of a “transaction” includes not only the traditional purchase and sale of property, but also all other modes of acquisition of property. This could include, for example, a donation, waiver, cession or exchange of immovable property (or real rights in that property) which are required to be registered in a Deeds Registry.

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<sup>52</sup> Refer, for example, to *Browning v Registrar of Deeds* 1951 (2) SA 429 (C).

<sup>53</sup> Refer, for example, to *SA Pulp and Paper Industries v CIR* 1955 (1) SA 8 (T), *Du Plessis v Joubert* 1968 (1) SA 585 (A) and *Roodt v SBI* 1974 (1) SA 525 (A).

When it concerns any shares or member's interest in a "residential property company," which are not registered in a Deeds Registry, the mode of acquisition could also include a buy-back, conversion, variation or cancellation. Similarly, in the case of a discretionary trust, "property" can be acquired by substituting or adding beneficiaries with a contingent right to any property of that trust which constitutes "residential property."

### 3.2.2 "Property" must be acquired

"Property" is defined in section 1(1), and discussed in detail in 2.5. However, a few additional comments on some of the main points mentioned in that paragraph are provided in the brief summary below to put this term into perspective when considering the tax base.

"Land" includes any undeveloped or developed land (for example separately surveyed plots or farms registered under separate title deeds in the Deeds Registry). "Property" also includes "sectional title units" (as defined in the Sectional Titles Act 95 of 1986) as well as mineral and mining rights, but specifically excludes a lease of property and mortgage rights over property. It is important to be familiar with the common law principles regarding the nature of fixtures and when they become part of the immovable property. The term "property", therefore, clearly refers to ownership (that is full *dominium*) of land, but also expressly includes limited real rights in land (paragraphs (a) and (c) of the definition of the term "property").

There is no *numerus clausus* (closed number) of limited real rights, but the following list should suffice:

- Personal servitudes such as *usufruct*, *fideicommissum*, *habitatio* and *usus*;
- Mineral rights, mining rights and mining leases;
- Quitrent and leasehold (to the extent that these may still exist in the light of land reforms introduced since 1987 and accelerated since 1994);
- Real rights under the Sectional Titles Act 95 of 1986;
- Right of way and other *praedial* servitudes;
- Unregistered (statutory) real rights.

### 3.2.3 Acquisition by way of a transaction

Sale, donation and exchange are the more traditional ways of acquiring property by way of transaction. A contract for the alienation or acquisition of "land" as defined in section 1 of the Alienation of Land Act 68 of 1981 must be in writing and be signed by both contracting parties. In the case of contracts of sale, donation and exchange, there can only be a legitimate contract once the parties have complied with these legal requirements. Liability for transfer duty can only occur once there is a contract giving rise to a personal right in terms of which transfer of "property" can be claimed.

The following are some examples of the ways in which property can be acquired by transaction:

- Antenuptial and postnuptial contracts
- *Donatio mortis causa* (a gift made in contemplation of death)
- Partition agreements
- Redistribution agreements (in the process of winding up a deceased estate)
- Nomination agreements (see **3.2.6**)
- Novation (takes place as the result of an agreement between parties substituting a new obligation for an existing one, thus cancelling the existing one)
- Cession or assignment
- Cancellation agreements (see **3.3**)

In practice it sometimes happens that property is donated to a future partner in terms of an antenuptial contract, but the property is not formally transferred into that person's name. Such transactions receive no favourable treatment and are also subject to transfer duty.<sup>54</sup> The effect is that if there is a dissolution of the marriage, transfer to a third party cannot take place until the transfer duty (plus interest and any penalties which may be applicable) in respect of the earlier acquisition in terms of the antenuptial contract is paid.<sup>55</sup>

Although a property transfer effected pursuant to the will of a deceased person is not regarded as a "transaction", any transfer of property as a result of a redistribution agreement in the course of winding up that estate is a transaction. Both types of acquisitions are, however, exempt from duty under section 9(1)(e). Any agreement to transfer property between the beneficiaries after the estate has been wound up will be a transaction which is subject to duty. Similarly, a *donatio mortis causa* is a transaction (despite its testamentary character) which will result in a transfer duty liability.<sup>56</sup>

As regards partition agreements and the dissolution of other joint ownership holdings in property, see sections 9(1)(g), (h), (i) and (j). If a person acquires extra property through a partition agreement than what was held before the partition agreement was entered into, transfer duty will be payable.<sup>57</sup> For example, if a person had a 50% interest or share in a property valued at R3 million before the partition agreement and afterwards holds a 70% interest or share, that person will be liable for transfer duty on the difference in the extent of property acquired in terms of that transaction. (See **7.3.2.**)

### 3.2.4 Acquisition other than by way of a transaction

The charging provision, section 2(1) imposes transfer duty on the acquisition of property by way of a transaction or "in any other manner". The function of this phrase is to ensure that all acquisitions of immovable property are dutiable in principle, subject to any exemption which may apply. The following are some examples of these different modes of acquisition:

- Decree of divorce

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<sup>54</sup> This is confirmed by section 92(2) of the Registration of Deeds Act 47 of 1937. See, in contrast, section 56(1)(a) of the Income Tax Act 58 of 1962 in respect of donations tax and section 3(3)(a) of the Estate Duty Act No. 45 of 1955 in respect of estate duty.

<sup>55</sup> See *Conrad v Registrar of Deeds* 1930 CPD 323.

<sup>56</sup> See *In re Everard Estate* 1938 TPD 190.

<sup>57</sup> Refer, for example, to *Roodt v SBI* 1975(1) SA 525 (A).

- Prescription<sup>58</sup>
- Expropriation
- Inheritance
- Massing of estates
- Marriage within community of property
- Conversion of close corporations into private companies, or *vice versa*
- By way of statute in a *sui generis* (that is unique) manner

The courts have indicated that for a transfer duty liability to arise, some common denominator for all types of acquisitions is required. Bristowe J states the principle as follows in *Colonial Treasurer v Rand Water Board*<sup>59</sup>:

“There is one circumstance which is common to all these (transactions), and that is the circumstance of voluntariness – not necessarily voluntariness on the part of both parties to the transaction, but at all events voluntariness upon the part of the person who is called upon to pay the tax.”

Voluntary acquisition on the part of the individual who acquires the property is required because this is the person who ultimately pays the tax. The act of acquisition need not be mutual and a one-sided act such as expropriation or prescription will be sufficient.<sup>60</sup> Although expropriation could, in principle, trigger a transfer duty liability, it will rarely result in a liability for transfer duty since the person acquiring the property in such a case is usually a national or provincial government department or a municipality which is exempt from transfer duty.<sup>61</sup>

In a number of other cases, acquisitions other than by way of transaction will also be exempt. For example, section 9(1)(k) provides for an exemption in the case of a spouse acquiring property by entering into a marriage within community of property and section 9(1)(e) provides for an exemption in the case of inheritance of property of a deceased person. Although such an acquisition is generally exempt from transfer duty, there are situations where transfer duty may indeed be payable.<sup>62</sup>

In *Victoria Falls Power Co Ltd v Colonial Treasurer*<sup>63</sup> it was decided that transfer duty was rightly payable on the acquisition of a right to transmit electric current over the area and along the route in question as there was no exemption. This is because the acquisition was of a limited interest in land in terms of which a unique real right was created and acquired through the statute.

Although a liability for transfer duty mostly arises as a result of an acquisition of property, section 2(1) also states that transfer duty is payable on the “*amount by which the value of property is enhanced by the renunciation... of an interest in or restriction upon the use or disposal of that property...*”. The definition of a “transaction” includes “*any act whereby any person renounces any limited interest in or restriction in his favour upon the use or disposal of property*”.

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<sup>58</sup> Prescription Act 68 of 1969.

<sup>59</sup> 1907 TS 479.

<sup>60</sup> See *Ex parte Van Oudtshoorn* 1952 (2) SA 310 (T) in this regard.

<sup>61</sup> Sections 9(1)(a) and 9(1)(b). Also see **Chapter 8**.

<sup>62</sup> Refer, for example, to *SIR v Estate Roadknight* 1974 (1) SA 253 (A) with regard to the requirement that the will of the deceased must be the originating cause of the acquisition.

<sup>63</sup> 1909 TS 140.

In their *Handbook on Transfer Duty* (1950), Meyerowitz and Jacobson explain the meaning of “renounce” and “renunciation” as follows:

“‘Renounced’ and ‘renunciation’ are words connoting a voluntary giving up, that is, the holder of the interest or restriction must do some act whereby he gives up such interest or restriction. Consequently, if the interest or restriction lapses or ends, for any reason other than an act of renunciation, no liability for transfer duty is incurred... ‘Renunciation’ will include an agreement to give up the interest or restriction for a consideration.”

This interpretation is confirmed by Van Wyk AJ in *Kock v CIR*<sup>64</sup>:

“In my opinion the word ‘renunciation’ in sec. 9(1)(e)(ii) must be given its ordinary meaning which is ‘giving up’. This word is frequently used in legal documents not only when rights are given away gratuitously, but also when they are given up for valuable consideration...”

Although Van Wyk AJ’s remarks speak about the word “renunciation” as referred to in section 9(1)(e)(ii), the court specifically confirms that it carries a similar gist for purposes of section 2 and the definition of a “transaction” in section 1(1). An example of the application of a renunciation with transfer duty implications is where the holder of a *usufruct* renounces gratuitously, or for consideration, the limited real rights held in favour of the owner of the *bare dominium*. However, no duty is payable if a *usufruct* comes to an end as a result of the death of the usufructuary, or the rights cease to apply by effluxion of time.

### 3.2.5 Property acquired on behalf of others

A person who acts as the agent of another person in acquiring property, must disclose the name and certain other details of the principal to the seller (or the seller’s agent) immediately upon acquisition.

Section 16 which deals with these matters states as follows:

**16. “Persons who acquired property on behalf of others shall disclose names of their principals—**(1) Where property is sold to a person who is acting as an agent for some other person, the person so acting as agent shall disclose to the seller or his or her agent the name and address of the principal for whom he or she acts, and furnish the seller or his or her agent with a copy of the documents appointing him or her as agent—

- (i) if the sale is by auction, on the day of acceptance by the auctioneer of his or her offer; or
- (ii) if the sale is otherwise than by auction, on the day of conclusion of the agreement of sale.

(2) Any person who has been appointed as an agent and has in his or her possession the documents referred to in subsection (1), but fails to furnish them and the name of the person on whose behalf he or she is acting to the seller or his or her agent on the date specified in subsection (1) shall, for the purpose of the payment of the duty payable in respect of the acquisition of the property in question, be presumed, unless the contrary is proved, to have acquired the property for himself or herself.

Section 16 refers to a situation where there is an agreement whereby one person (usually referred to as the agent) will enter into a contract for the purchase of property on behalf of another person (the principal). In such a case the “agent” must be in possession of a special power of attorney and furnish it to the seller or the seller’s agent, on the date that the

<sup>64</sup> 1954 (3) SA 631 (C) at 634E-G.

agreement for the acquisition of fixed property is entered into. The name and address of the principal must be disclosed on the same day that the offer is accepted in the case of a sale by auction, or on the same day as the agreement of sale is concluded in any other case of an ordinary purchase and sale.

When the original transaction, whether by auction or otherwise, allows for another person to be nominated as purchaser (the nominee), and the requirements of section 16 have not been met, the first-mentioned person will be presumed (unless the contrary is proved) to have acquired the property.<sup>65</sup> The ultimate transferee and the person who contracted with the seller will be deemed not to be alternative, but successive purchasers if the nominee does not validly accept the nomination as purchaser on the date of the original transaction.

As mentioned earlier, South African case law is clear that the liability for transfer duty arises on the acquisition of the right to acquire ownership of property and not on transfer of ownership as such. This applies equally to sales by auction, including sales in execution by the Sheriff. Accordingly, the date of acquisition and the date of imposition of the duty is the date on which this personal right is acquired and duty must be paid within six months from that date.

It is accepted that there is only one transaction when contracts are concluded on behalf of, or for the benefit of companies, close corporations and other juristic persons when the signatory is acting in an official capacity as the representative of that entity.

Similarly, when that person signs as the promoter, “agent” or “trustee” in a pre-incorporation contract for the purchase of property for the benefit of a company or close corporation which has not yet been formed,<sup>66</sup> there is also only one transaction if –

- that entity is intended to be the ultimate transferee;
- the contract has been (or will be) ratified by the entity concerned before transfer; and
- the provisions of section 16 as described above have been met.

In the case of a trust, a similar principle can be applied, but is limited to cases where the trust was in existence on the date of transaction. This fact must be supported with reference to the date of the Letters of Authority from the Master of the High Court (the Master). This is because the statutory power of a newly incorporated legal entity under the Companies Act to ratify contracts concluded on its behalf by agents or trustees (the promoters) before they come into existence is not available to trusts.

A trustee may only act as such if authorised to do so by the Master<sup>67</sup> and a trust only comes into existence once the “Letters of Authority” are issued by the Master. Therefore, any transaction entered into by a person purporting to act on behalf of that trust, without the requisite authority, is invalid. A “trust to be formed” may accordingly not be nominated as a purchaser for transfer duty purposes, not even when using the wording “*stipulatio alteri*”, as the trustees will not be in a position to ratify the purported act on behalf of the trust with retroactive effect. In such a case there will be no transaction as the contract is void *ab initio*. The trustee (once appointed as such) will therefore be required to enter into a new contract with the seller if the ultimate intention is for the trust concerned to take transfer of the property.

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<sup>65</sup> Section 16(2).

<sup>66</sup> See the earlier discussion in 2.3.3 with regard to these transactions.

<sup>67</sup> Trust Property Control Act 57 of 1988, section 6(1).

Whether a so-called “nomination clause” in a contract for the acquisition of property is intended as a form of *stipulatio alteri* or not, the rules are the same in either case. This is because section 16 requires the name and address of the ultimate transferee to be disclosed to the seller and to provide the seller with a copy of the documents appointing that person as the representative on the date of the transaction. There is no reason why these documents cannot be presented to the seller on the date of the transaction, and subsequently, submitted to SARS (if requested) when making payment of the transfer duty, if the company or trust exists at the time. Failure to furnish the documents and other details to the seller (and later to SARS – if requested) as evidence of that fact as required under section 16, means that the property in question is presumed to have been acquired by the person who entered into the contract.

The implication of this presumption is that if the ultimate intention is to transfer the property to a company, trust or other entity, there would be **two transactions** for transfer duty purposes.<sup>68</sup> However, as this is a rebuttable presumption, it means that the transferee bears the burden of proving to the Commissioner that the requirements in section 16 have actually been met, and that consequently, the presumption is incorrect.

For example, in the case of a pre-incorporation contract, the purported promoter of a company needs to prove that the contract was entered into for the benefit of a specific company which could, in hindsight, be identified as being the same entity contemplated on the date of the transaction. In other words, evidence must show that in the circumstances, it would be more reasonable to accept that the seller was informed of the actual identity of the purchaser at the date of the transaction and provided with the relevant documentation (insofar as it is possible to do so in respect of a company which has not yet been formed), than it would be to conclude that the nominated person was never contemplated to be the ultimate transferee at that time.

To avoid the payment of double transfer duty in these cases, proof of the ratification of the contract by the company concerned as contemplated in section 21 of the (new) Companies Act<sup>69</sup> would be required. Alternatively, there must be a deemed ratification under section 21 of that Act which satisfies the Commissioner that the agreement is enforceable against the company and not the promoter.

### 3.2.6 Suspensive and resolutive conditions

The date of the transaction is the effective date, regardless of whether or not the transaction is subject to any suspensive or resolutive conditions. A **suspensive condition** delays either the coming into operation, or the enforceability of the obligation which arises in terms of the transaction – depending on whether an uncertain future event happens or not. It has been held<sup>70</sup> that when a suspensive condition has not been fulfilled and the transaction fails to materialise, the intended purchaser has not acquired the right to claim transfer of the property. The position, in that case, is that no property was acquired, and hence, there is no liability to pay transfer duty.

In order to avoid interest being levied in the event of the suspensive condition being fulfilled, a “deposit payment” of transfer duty can be made under section 3 which may be refunded in the event of the agreement falling away.

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<sup>68</sup> Unless there is **no transaction** as explained in the previous paragraph.

<sup>69</sup> Alternatively, section 35 of the Companies Act 61 of 1973 – if this Act applies in the circumstances.

<sup>70</sup> *Commissioner for Inland Revenue v Viljoen* 1995 (4) SA 476 (E) (57 SATC 335).

Typical suspensive conditions include the following:

- A clause stipulating that the purchase of a new residential property by the purchaser is subject to the sale of the purchaser's current residence. This type of clause is intended to make it clear that the contract will only become unconditional between the parties if and when the buyer sells the other property.
- A clause which makes the sale subject to the purchaser being able to obtain finance – usually in the form of a mortgage bond.

A **resolutive condition** has no bearing on the obligations of the parties but its fulfilment results in the termination or variation of those obligations. The effect of this is that if a resolutive condition is not fulfilled, and it fails to take effect, the position is as if the contract had been unconditional, so the benefit and the risk are the buyer's from the time the contract had been "perfected". In the case of a contract with a resolutive condition, property is acquired upon entering into the agreement and there will be a liability to pay transfer duty at the date of acquisition. However, the fulfilment of a resolutive condition which results in the cancellation or termination of the contractual obligation to transfer the property before registration in the Deeds Registry will result in transfer duty only being payable on that part of the consideration which is retained by the seller. Also see **3.3**.

In summary, a contract with a **suspensive condition** does not give rise to a right to acquire the property which is the subject of the transaction if the suspensive condition is not fulfilled and no dutiable transaction arises for transfer duty purposes. On the other hand, if a contract only has a **resolutive condition**, a right to acquire the property arises regardless of whether or not the resolutive condition is fulfilled.

### 3.3 Cancellations

#### 5. Value of property on which duty payable—(1)...

- (2) (a) If a transaction whereby property has been acquired, is, before registration of the acquisition in a deeds registry, cancelled, or dissolved by the operation of a resolutive condition, duty shall be payable only on that part of the consideration which has been or is paid to and retained by the seller and on any consideration payable by the buyer for or in respect of the cancellation thereof, provided that on cancellation or dissolution of that transaction, such property completely reverts to the seller and the original buyer has relinquished all rights and has not received nor will receive any consideration arising from such cancellation or dissolution.

The intention of section 5(2)(a) is to grant relief to a purchaser who is unable to proceed with a property transaction. The purchaser abandons the rights to the property and sometimes also forfeits a "deposit" or part of the consideration which may have already been paid, or which is still to be paid, or which becomes payable as a result of the cancellation.

Section 5(2)(a) stipulates a requirement that the cancellation must result in a complete reversion of the property and that all rights thereto must be relinquished, together with the requirement that any consideration retained is dutiable, is further supported by section 5(1)(b) which states:

"[U]pon the subsequent disposal of property referred to in paragraph (a), the person so disposing of it shall, in the declaration to be made by him under section fourteen, set forth the circumstances of such previous transaction and of the cancellation thereof and shall furnish particulars relating to the payment of duty in connection therewith, and any duty payable in connection with such previous transaction but still unpaid shall be paid by the person so

disposing of the property, who may thereupon recover the duty so paid from the person liable for the payment thereof under section three.”

Section 5(1)(b) is a monitoring mechanism to avoid the alteration of documents so as to create the impression of the cancellation of a transaction when, in fact, the relationship between the parties to the transaction continues essentially unaltered.

“Cancellation” as contemplated by section 5(2)(a) therefore requires the complete extinction of all the existing obligations between all parties concerned. Obligations on the original purchaser to pay, for example, interest until a new purchaser is found, must fall away. In the event that interest remains payable, the obligations have not been completely extinguished and there is no cancellation as contemplated by the provisions of section 5(2)(a). Similarly, if any obligations between the parties in respect of rentals, levies etc. provided for in the agreements purported to have been cancelled, are not extinguished such agreements cannot be regarded as having been effectively cancelled, and the liability for the full transfer duty on the original purchase price remains.

The leading case in this regard which demonstrates the law very clearly is *Secretary for Inland Revenue v Hartzenberg*.<sup>71</sup>

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<sup>71</sup> 1966 (1) SA 405 (A) (28 SATC 94).

## Chapter 4

### Date of liability

#### 4.1 Introduction

The date of liability for transfer duty on the acquisition of property is the “date of acquisition” as defined in section 1(1). Duty is payable within six months from the date of acquisition. If the transfer duty is not paid within the period allowed, interest, currently calculated at 10% per annum will be payable in addition to the unpaid transfer duty. Interest on any unpaid duty is calculated in respect of each completed month from the last day of the six-month period<sup>72</sup> to the date of payment. Transactions entered into before 1 March 2005 where transfer duty is paid after the six-month period allowed are subject to “penalty” under section 4(1). After 1 March 2005, late payments of transfer duty are subject to “interest” levied under section 4(1A). The effect is merely that the word “penalty” has been substituted by the word “interest”, but the method of calculating the interest or penalty (as the case may be) is the same.

Remember that in the case of conditional sales the period of six months commences from the date on which the transaction was entered into, and not the date when the contract becomes binding upon the parties. See **Chapter 7** for examples of how to calculate transfer duty.

#### Example 4 – Suspensive conditions

*Facts:*

On 19 January 2014, Mr X concluded a sale agreement in terms of which a property was sold to Company Y.

Does the contract contain a suspensive condition?

*Result:*

The contract contains a suspensive condition that Mr X must remove all the trees on the property by 30 January 2014. Mr X has the trees removed on 27 January 2014. The date of acquisition remains 19 January 2014 and not 27 January 2014 or 30 January 2014.

A specific rule applies with regard to options. If property is acquired by exercising an option to purchase, the date of acquisition is the date upon which the option is exercised. In *Galway v van Aardt*<sup>73</sup> an option to purchase a dairy farm was embedded in the lease agreement. The option clause provided that the lessee shall exercise its pre-emptive right to purchase the farm by delivering a signed agreement of sale to the lessor. The court concluded that the date the lessee exercised his pre-emptive right, was the date that the property was acquired.

<sup>72</sup> This date is known as the “effective date” under the TA Act.

<sup>73</sup> 2012(2) SA 315 (SCA); [2012] 2 All SA 78 (SCA).

**Example 5 – Exercising of an option***Facts:*

On 12 December 2014, Mr A grants an option to Mrs B to purchase a piece of vacant land. Mrs B exercises the option on 11 March 2015.

What is the date of acquisition?

*Result:*

The date of acquisition will be 11 March 2015 and not 12 December 2014.

In the case of a sale in execution, the agreement of sale is usually signed on the day of the auction by the contracting parties or by agents contracting on behalf of their principals. It follows that the date of acquisition will be the day the auction took place, provided that this is the date the last contracting party signed the agreement as discussed in **2.3.1**.

See **3.2.5** for more details on property acquired on behalf of others.

**4.2 Acquisition by way of transaction**

As discussed in **2.3.1** the date of acquisition **by way of transaction** in terms of an agreement of purchase and sale, will be the date on which the transaction was entered into, being the date that the last contracting party has signed the agreement. Regarding a “transaction” (for example a sale, donation etc.), the date that the liability arises is *“the date the transaction was entered into, irrespective of whether the transaction was conditional or not or was entered into on behalf of a company already registered or still to be registered...”* The date of fulfilment of a suspensive condition is consequently irrelevant. As suspensive conditions are generally used in the context of acquiring immovable property, it is imperative to take note of what is stated in **3.2.6**.

**4.3 Acquisition other than by way of a transaction**

The definition of the term “date of acquisition” states that in the case of the acquisition of property otherwise than by way of transaction, the date of acquisition means *“the date upon which the person who so acquired the property became entitled thereto”*.

**4.3.1 Prescription**

In respect of an acquisition by way of prescription, transfer duty is payable where “property” is acquired. In this regard, the date of acquisition will be the date the court gives judgment and confirms the acquisition by way of prescription. Once the judgment has been given, the registration of the property in the Deeds Office can be exercised.

**4.3.2 Divorce**

The date of acquisition of property as a result of a divorce is the date of the order of the court and not the date of the agreement between the parties in regard to the division of the joint estate or separate estates as incorporated in the order of court. It is also possible to amend the divorce order or settlement agreement by executing an addendum to such agreement. The courts have previously ruled<sup>74</sup> that the consent of the court is not a prerequisite to amend the stipulations of the divorce order with regard to the redistribution of assets

<sup>74</sup> *Ex parte Boshi and Other* 1979 (1) SA 249 (R) and *Ex parte Herman* 1954(2) SA 636 (O).

between spouses. In a case where settlement in relation to a property is only reached after the formal court proceedings are finalised, the date of acquisition will be the date that the subsequent settlement is reached. The exemption under section 9(1)(j) will still apply in this case even though the agreement is made after the court order.

See **8.2.7** for more details as well as example 6 below.

### **Example 6 – Divorce**

*Facts:*

Mr B and Mrs B were divorced and the court order was made in this regard on 13 January 2010, but the property was not dealt with in the court order. On 4 July 2015 the parties decide that the full property must revert to Mr B.

What is the date of acquisition?

*Result:*

The acquisition of the property will normally be dealt with in a court order. The date of the court order will therefore be regarded as the date of acquisition. When the property is not dealt with in a court order, the date that the parties agree on how the property is to be dealt with, will be the date of acquisition. As a result the date of acquisition is 4 July 2015 and not 13 January 2010.

### **4.3.3 Antenuptial contract**

In the case of property donated by antenuptial contract which provides that the property be bequeathed after the death of the donor to the donee, the date of acquisition is the date of the execution of the antenuptial contract. Despite the similarity to a testamentary disposition, it does not deprive the antenuptial contract of its character.

The date of acquisition would be the date the antenuptial contract was entered into. In their Handbook on Transfer Duty (1950), Meyerowitz and Jacobson state the following regarding antenuptial contracts:

“... an antenuptial contract which provides for the devolution of the estate of one spouse on his death is not a “transaction”, and although on his death the beneficiary may acquire property, because at the time of execution of the ante nuptial contract it cannot be said that property is being disposed of. In such cases, however, there will be an acquisition of property in another manner and the date of acquisition will be the date on which the person acquiring the property becomes entitled thereto.”

### **4.3.4 Inheritance**

Adiation is a term adopted from the Roman law signifying the acceptance of an inheritance by an heir. The heir is not bound to accept an inheritance, but must make a decision as to whether it will be accepted or not.

Over the years there has been much debate regarding the correct date to be used as the date of acquisition in these cases. This is because, in practice, when an inheritance is accepted there is usually no physical evidence of a separate adiation event, unless the heir repudiates the inheritance and it is subsequently accepted by another person in writing. The date of death is therefore usually used as the date of acquisition for all practical

purposes,<sup>75</sup> except in the case of a massed estate where adiation is mandatory.

### **Example 7 – Inheritance**

*Facts:*

Mrs D dies on 4 July 2013 and her estate is dealt with in accordance with her Last Will and Testament dated 2 February 2000. Mrs D leaves her house to her son Mr A and the contents of the house to her daughter Ms B. Mr A is not in the country at the time, but when the executor of the estate manages to contact him, he advises that he does not want the house, but that he would prefer for his sister Ms B to take transfer. Mr A will instead benefit from the proceeds of the sale of the contents of the house which are of almost equal value to the property. Mr A therefore repudiates the inheritance on 7 March 2014 and Ms B accepts the house in a swop with her brother on the following day. A redistribution agreement is therefore concluded on 10 June 2014, and the estate is eventually wound up on the same day.

What is the date of acquisition?

*Result:*

Although it could be argued that Ms B only acquires the right to receive transfer of the property when she adiates on 8 March 2014 or when the redistribution agreement is recorded in writing (10 June 2014), for practical purposes the Registrar of Deeds accepts that the date of death (4 July 2013) will be the date of acquisition. This is despite the fact that the inheritance was initially repudiated by Mr A.

The backdated effect of the date of acquisition will not give rise to the payment of any interest by Ms B as the acquisition is exempt from transfer duty.

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<sup>75</sup> The Registrar of Deeds has also confirmed that the date of death of the “testator” should be used as the date of acquisition, irrespective of testate or intestate succession and irrespective of repudiation or adiation.

## Chapter 5

### Person liable to pay duty

#### 5.1 General rules

The acquisition of property by, or the enhancement of value of property in the case of a renunciation in favour of “any person”, gives rise to a liability for transfer duty. The person who acquires the property or the person whose property is enhanced in value by a renunciation of rights will therefore be liable for payment of transfer duty. Normally it is the person who acquires the property (the transferee) who is liable to pay the duty, but there are exceptions where other persons could become liable in the context of the extended meaning given to the term “property” and “transaction” in the Transfer Duty Act. These exceptions will be discussed in 5.2.

#### 5.2 Liability of persons other than the transferee

As mentioned in 5.1, it is usually the person acquiring transfer of the property or the person who will benefit from a renunciation of rights in property who is liable to pay the transfer duty. This person is usually referred to as the “transferee”. However, with regard to transactions which involve the trading of certain shares and other interests in a “residential property company”, sections 3(1A) and 3(1B) may also be applied to extend the liability for transfer duty to persons other than the transferee.

The types of “property” referred to in sections 3(1A) and 3(1B) do not constitute the acquisition of real rights in property which are required to be registered in a Deeds Registry as envisaged in section 16 of the Deeds Registries Act. The registration of transfer in such cases is merely reflected by the recording of changes to the share register, membership of a close corporation or changes in a trust deed, but no submission will be made to a Deeds Registry.

This means that section 12 of the Transfer Duty Act which deals with the prohibition of registration of transfer of property in cases where the transfer duty has not been paid, cannot be applied as a way of ensuring the collection of the tax. Section 3(1A) provides, therefore, that in cases where the person who acquires shares or a member’s interest as contemplated in paragraph (d), (e) or (g) of the definition of the term “property” fails to pay transfer duty, the public officer (who is usually the “representative taxpayer”)<sup>76</sup> of the company or close corporation and the seller of the shares or member’s interest are jointly and severally liable for the duty.

The public officer is, however, entitled under section 160 of the TA Act to –

- (a) recover the amount paid from the person on whose behalf it is paid; or
- (b) retain an amount equal to the amount paid out of money or assets in that person’s possession or which may come to be held by that person in a representative capacity.

Section 3(1B) likewise provides that where a person acquires property as contemplated in paragraph (f) of the definition of the term “property” and that person fails to pay transfer duty, the trust and the trustee who is the representative taxpayer will be jointly and severally liable

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<sup>76</sup> As defined in section 1 of the TA Act.

for the duty. The trustee in that case will also have a right of recourse under section 160 of the TA Act against the person who is liable for the duty as explained above.

Section 160(2) of the TA Act provides, however, that if the amount of tax has been deducted or withheld and paid to SARS by a withholding agent on behalf of a taxpayer, that person is not entitled to recover that amount from the withholding agent unless otherwise provided for in a tax Act. The Transfer Duty Act does not provide for an exception to this rule.

## Chapter 6

### Dutiable value

#### 6.1 Introduction

Transfer duty is payable on the higher of the following values in respect of the acquisition of “property”:<sup>77</sup>

- The amount of the consideration payable (where consideration is payable);
- The “declared value” (where no consideration is payable);<sup>78</sup> or
- The “fair value” (also known as the fair market value).<sup>79</sup>

In *Union Government (Minister of Finance) v Tahan*,<sup>80</sup> Botha J states the following (at 90):

“In the ordinary case of sale and purchase of fixed property the price paid is deemed to be the value of the property for transfer duty purposes. But transfer duty is always payable on the value of the property not the price.”

In *Brink v Wiid*,<sup>81</sup> Van Blerk JA states (at 543H) that “*op skrif gestelde koopprys... hoogstens as leidraad dien vir die bepaling van die waarde waarop hereregte betaalbaar is*”. This means that the purchase price in a deed of sale serves, at most, as a guideline to determine the value on which transfer duty is payable.

#### 6.2 Determination of fair value

##### 6.2.1 General

The Transfer Duty Act specifically uses the concept of “fair value” as opposed to “market value” or “fair market value”. However, in most cases “fair value” and “fair market value” will have the same meaning. To accommodate the extended definitions of “property” and “transaction”, the definition of the term “fair value” also deals specifically with share block transactions and situations where entities such as companies, close corporations and trusts hold, and then transfer shares or other interests in that property to other persons (as contemplated in paragraphs (d), (e) and (f) of the definition of the term “property”).

The basis of the liability for any transfer duty payable is the value of the property acquired. In the case of property acquired by *bona fide* purchase, the main criterion used to determine the value is the price for which it is purchased.<sup>82</sup> The price paid at a *bona fide* sale by public auction is accepted as conclusive within the terms of section 5(9).

The price includes the amount paid and also the amount of any additional consideration where the purchaser agrees to pay certain other expenses of the seller as part of the conditions of sale. Examples include payments for arrear rates and municipal service charges, bond payments, collection and legal charges etc.

The amount by which the value of the property is enhanced in the case of the renunciation of a *usufruct*, should be calculated from the tables as prescribed by the Estate Duty Act 45 of

<sup>77</sup> Section 1(1), read with section 5(6).

<sup>78</sup> Section 1(1) definition of the term “declared value” read with section 14.

<sup>79</sup> Section 1(1) definition of the term “fair value”.

<sup>80</sup> 1931 OPD 87.

<sup>81</sup> 1968 (1) SA 536 (A).

<sup>82</sup> See section 5(1)(a).

1955 (see **Annexure B**) by capitalising the annual value of the *usufruct* over the life expectancy or other period for which the usufructuary was entitled to its enjoyment. If the interest renounced was less than a full *usufruct*, for example *usus* or *habitatio*, an estimate should be obtained of its annual value for purposes of calculating its capitalised value according to the above-mentioned tables.

A reasonable estimate of the enhancement in value should be furnished by the person benefiting from that renunciation, having regard to all the known and probable circumstances, in the case of a transaction being a renunciation of a restriction such as that under a *fideicommissum* or other restraint upon the disposal or use of the property.

In a case where the renunciation in any of the above-mentioned cases is made upon payment of consideration, it may be necessary to determine whether the consideration can be accepted as the fair and reasonable value for the purposes of calculating the duty.

The so-called Land Bank values cannot be used for the purposes of determining the fair value of agricultural land (used for *bona fide* farming purposes) for transfer duty purposes. The Transfer Duty Act does not provide for the use of these values. (Also see **6.2.4.**)

As regards the fair value of an “interest” in a company or close corporation, it is in essence the market value of the types of “property” as contemplated in the definition of that term which is owned by that entity, but disregarding the loan liabilities and leases attributable to that interest. Similarly, the fair value of a contingent right to property should also disregard loan liabilities and leases. The extension of the definition of the term “fair value” is aimed at countering the use of loan liabilities and leases as mechanisms to shift or artificially depress values of rights pertaining to immovable property.

In short, the definitions of “fair value”, “property” and “transaction” ensure that any indirect transfer of immovable residential property (primarily to avoid transfer duty) becomes taxable in the same manner as any direct transfer of the property. In other words, the transfer of shares or a member’s interest in a company or close corporation or the transfer of a contingent right to property of a discretionary trust (where the only or primary asset in each case is a “residential property”) should be taxed in the same way and based on the same “fair value” as if the property itself was the subject of the sale in any of those cases.

**Example 8 – Determining the fair value for purposes of paragraphs (d) to (g) of “property”**

*Facts:*

A acquires the shares in a company that owns a residential property with a market value of R900 000 as its only asset. The original cost of this property was R300 000, which was funded by B, the previous sole shareholder of the company, by a shareholder’s interest of R100 and a loan of R299 900. The balance of the loan account at the date of acquisition was R200 100. A will accordingly pay an amount of R200 100 for the transfer of the loan and R699 900 for the member’s interest.

What is the “fair value” of the “property” that A acquires?

*Result:*

For transfer duty purposes the “fair value” of the “property” that A acquires, will be R900 000. In other words, the loan liability is disregarded, as the market value of the shares in reality is the market value of the underlying asset owned by the company, despite the loan.

### 6.2.2 Declared value and valuation factors

The declared value is simply the value placed upon the property by the parties which must be stated in a return or declaration as required in section 14 where there is no consideration in money to be paid. Examples include the acquisition of rights in “property” by way of donation, exchange, prescription or renunciation.

In these cases, the transfer duty payable is based on the declared value.<sup>83</sup> The declared value is taken to mean the “fair market value” of the property as at the date of acquisition. The terms “declared value” and “fair value” are both defined in the Transfer Duty Act, but neither of these terms indicates how the value should be determined, as this is dealt with in section 5. However, paragraph (a) of the definition of the term “fair value” in section 1(1) refers to the “fair market value” of property, which is defined in section 1 of the TA Act as being *“the price which could be obtained upon a sale of an asset between a willing buyer and a willing seller dealing at arm’s length in an open market.”*

Note that the interpretation rules mentioned in **Chapter 10** should be kept in mind in this regard as the valuation rules which remain in the Transfer Duty Act will take precedence.

The Commissioner may determine the fair value under sections 5(6) and 5(7), if the total consideration, or the declared value, in the opinion of the Commissioner is less than the “fair value” as defined in section 1(1), in which case, duty will be payable on the **greater of** –

- the fair value;
- the consideration; or
- the declared value.

The Commissioner must consider the following factors as set out in section 5(7) in determining the fair value:

- The nature of the real right in land and the period for which it has been acquired (or the period for which the property is likely to be enjoyed in cases where the property is acquired for an indefinite period or for the natural life of any person);
- The municipal valuation;
- Any sworn valuation which has been furnished by, or on behalf of the person liable to pay the duty;
- Any valuation made by the Director-General: Mineral Resources or by any other competent and disinterested person appointed by the Commissioner.

The fair value as determined by the Commissioner may be revised not later than two years from the date on which duty was originally paid. In cases of disagreement as to the value as determined by SARS, the matter must be submitted for review to the Commissioner, whose decision will be subject to objection and appeal as provided in Chapter 9 of the TA Act. In such cases the person liable for duty or that person’s authorised representative must be advised, in writing, that –

- the determination of the value is provisional;
- any contemplated application to court should be held in abeyance;

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<sup>83</sup> Section 5(1)(b). In the case of an exchange of properties where no additional consideration is payable by either party to the transaction, section 5(4)(a) applies.

- the matter will be referred to the Commissioner for review; and
- the period of 30 days to lodge the objection or appeal is reckoned from the date on which the Commissioner's decision is made known to that person.

Except in the case of properties with mineral rights, the Commissioner will also be guided by the general principle that the agreed purchase price of the property in *bona fide* transactions of sale and purchase is generally regarded as the true value. This is generally referred to as an "arm's length" transaction and the purchase price in these circumstances will, in most cases, be equal to the fair value for transfer duty purposes. It is also the value intended by the law to be taken as the basis for payment of duty.

A *bona fide* sale and purchase is taken to mean a transaction of sale and purchase between independent unconnected parties on the basis that they act as willing buyer and willing seller and where there is no element of favour, collusion or compulsion in regard to the consideration payable for the property.

The Commissioner is justified in resorting to appraisal or valuation in those cases which do not appear to be at "arm's length",<sup>84</sup> for example –

- where the parties are relatives and the price appears to be a favoured price or where any other element of favour is involved;
- where an agreement purporting to be a purchase and sale of property which in substance is a disguise of some other transaction such as a donation, family distribution or transfer in anticipation of inheritance, where the agreed "price" is considerably under the true selling value;
- forced sales where property passes at "knock-down" value; and
- where a bonded property is sold at the instance, and bought in by, or on behalf of, the bondholder.

In cases where the value is determined by the Commissioner under section 5(6), the transfer duty receipt must be clearly endorsed. In all other cases, the value on which transfer duty is payable, should be described as being the "purchase price", "declared value", "municipal value", or "appraised value" – as the case may be.

### 6.2.3 Municipal valuations

SARS may require the endorsement of the value by the municipality where available. In cases other than sales by public auction, these valuations will serve as a guide in the acceptance of duty tendered on sale price or declared value; while in respect of sales by public auction the price realised will provide an indication whether the municipal valuations may be accepted as reflecting current market values. There is no provision in the Transfer Duty Act under which transfer duty may be assessed or based exclusively on the municipal value, as it is merely one of the factors considered as a guideline by the Commissioner in determining the fair value of the property.

### 6.2.4 Sworn valuers or appraisers

The Commissioner is required to give consideration to valuations by sworn appraisers even though they may not have been appointed by the Commissioner for that purpose. Valuations made for purposes of the Land and Agricultural Development Bank Act 15 of 2002, are

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<sup>84</sup> Also see section 5(9) in this regard.

however, not acceptable for purposes of transfer duty as these values are normally made on an “agricultural basis” (that is the value for *bona fide* agricultural purposes) at an amount sufficient as security for a Land Bank loan and do not reflect the true or fair value of the property.

In the case of non-mineral properties, the Commissioner may appoint a particular sworn appraiser, or any other competent and disinterested person if the services of a sworn appraiser are not available or the expense not justified by the amount at stake or for other reasons. In this regard, the provisions of section 5(8)(b) must not be overlooked, as cost of the valuation could be for the State where there is no significant difference between the consideration or declared value and the sworn valuation.

### 6.2.5 Mineral lease valuations

When a transaction involves mineral rights, the consideration payable or the declared value must be verified by an independent valuation by the Department of Mineral Resources (Director-General: Mineral Resources) under section 5(7)(d). Only once the valuation has been confirmed as acceptable by the Department may the duty tendered by the applicant be viewed as the final amount payable. The selection of the cases to be submitted for purposes of such valuation will be primarily at the discretion of the Commissioner. The Commissioner is not expected to submit the case for valuation when mineral rights are of minor importance, or when there is no reason to believe that a valuation by the Department is likely to be substantially higher than the consideration or declared value on which payment of duty is tendered.

All of the following cases must be referred to the Director-General: Mineral Resources, Department of Mineral Resources, Private Bag X59, Pretoria, 0001, for the valuation of the mineral rights or confirmation that the amount of the consideration or declared value is sufficient:

- Transfers of property acquired by the exercise of mineral options or rights under prospecting contracts.
- Cases in which minerals or mineral rights are specified as the subject of the contract or transaction.
- Cases where the Commissioner has reason to believe that, although not specifically mentioned in a contract, the real objective of the purchasers or transferees is the acquisition of minerals or mineral rights.
- Transfers of land *cum* minerals where it seems to the Commissioner that the minerals form an important part of the transaction.
- If the consideration is such as to raise a presumption that the property has a mineral value.
- If the property appears on any list of mineral farms or areas which may have been supplied to the district by the Department.
- Mineral leases.

In all such submissions to the Department, the following particulars are required to be furnished:

- Name and number of the plot or farm, district in which it is situated and location of the farm with reference to the nearest town (for example, Hercules No. 134, District of Hay, 30 miles north-west of Barkly West).

- A sketch plan, drawn to scale, showing the position of such portion or block in relation to the farm boundaries if a portion of a farm or a block of claims is involved. If the mineral assets over an entire farm pass, the sketch plan is not necessary.
- A copy of the applicable contract (for example agreement of cession, lease, sale etc.) and a declaration of the value as furnished under the Transfer Duty Act by the parties to the transaction.
- If mineral assets form only a portion of the total assets being transferred, in particular where surface rights are also being transferred:
  - The value assigned to the mineral assets by the party acquiring the assets.
  - The appraisalment which the Commissioner proposes to accept in respect of the assets other than the mineral assets.
  - A schedule of the value assigned to each item of building, machinery, plant and equipment should be furnished if a portion of a farm or a block of claims is involved. The values reflected should, where possible, be insurance values.

## 6.3 Consideration

### 6.3.1 Consideration ascertainable in money

As mentioned in 6.2.1 and 6.2.2, the consideration payable will in most cases represent the fair value of the property and will therefore be the dutiable value for transfer duty purposes.<sup>85</sup> Generally, transfer duty “shall be calculated in accordance with the fair value (as determined) or the consideration payable, or the declared value, whichever is the greater”. The application of this principle means that when an unrealistically high price is paid for the property, that price will be the dutiable value. The onus is on the Commissioner to determine the fair value of the property if the price is too low, in which case duty will be payable on the declared value or the fair value (whichever is greater).<sup>86</sup>

Sections 6 and 7 state respectively what must be included and excluded from the meaning of the term “consideration”. The value of consideration by way of rent, royalty, share of profits or any other periodical payment, or otherwise than in cash, must be determined under section 8.

The following payments must be added to the consideration payable under section 6(1):

- **Commission or fees [section 6(1)(a)]:** The total amount of commission or fees paid or payable by the person who acquired the property in respect of that acquisition must be included for purposes of calculating transfer duty. Typically, this is where the agreement provides for the purchaser to pay a part, or all of the commission or fees payable by the seller in relation to the costs of selling the property. However, in the case of a sale in execution, only the commission or fees paid in excess of 5% of the consideration for the property should be included.
- **Option money [section 6(1)(b)]:** Any payment made for the option or right of pre-emption by the person acquiring the property is to be added to the consideration for purposes of determining the duty, if it is regarded as part of the purchase consideration of the property. There is no acquisition of property and no transfer duty

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<sup>85</sup> Section 5(1)(a) read with sections 5(5), 5(6), 6, 7 and 8.

<sup>86</sup> Section 5(8) indicates who shall bear the costs of any valuation required to determine the fair value.

payable if the amount paid is consideration for the option itself, or is an amount forfeited in the event of a failure to exercise the option.

- **Other consideration [section 6(1)(c)]:** Any consideration which the transferee has paid, or agreed to pay, to any person whatsoever concerning the acquisition of the property, over and above the agreed purchase price payable to the seller (excluding any rent payable under a lease or sub-lease by the cessionary).<sup>87</sup> This provision is similar to section 6(1)(a) but is much wider. The purpose of this provision is to add to the value for transfer duty purposes any other payment by the purchaser which will be for the benefit of the seller. In other words, whether the consideration is split into various components or not, the total consideration which is paid or payable by the purchaser in respect of, or in connection with, the acquisition of the property will be subject to transfer duty.

Examples include the following:

- *Agreeing to settle past, current or future debts for the benefit of the seller.* This includes any amount by which the seller benefits by the settlement of any debts, loans, accounts, fines, penalties, taxes, or any other amount owed by the seller to any other person. For example, this could include the payment of arrear rates and services charges which are owed on the property to the municipality by the seller;
- *Land Bank advances for fencing:* Under section 29 of the Land and Agricultural Development Bank Act 15 of 2002, liability in respect of instalments and interest for any advances made by the Land Bank in respect of dipping tanks, silos, fencing, windmills, or any other assets attaching to the property is upon each successive owner as the amounts fall due, and as if the advance had been made to that person. As this obligation falls upon the purchaser it constitutes further consideration paid or payable to another person as envisaged under section 6(1)(c) and must be declared as such by the purchaser and included in the value of the property for transfer duty purposes;
- *Quitrent:* Where the property acquired is subject to the payment of quitrent, which the transferee has agreed to pay, the value is to be included in the amount on which duty is to be paid.

Section 8 provides that where the whole or a part of the consideration is payable by way of periodic payments in the form of rent, royalty, share of profits, or otherwise than by way of cash, the total amount of all such payments (whether paid or to be paid) must be added and transfer duty levied on the total. In cases where the amounts are not fixed, the transfer duty should be levied on a value which the Commissioner would consider fair, for example:

- The valuation of rent, royalty or profit shares which are immediately determinable will generally apply to an acquisition of rights in respect of minerals and falls within the ambit of section 8(a)(i). The value of amounts not immediately determinable will be based on estimates furnished and declared by the parties to the transaction [see section 8(a)(ii)].
- In cases involving shares or securities, the value will usually be based on an estimate. Shares or securities which are quoted on a recognised stock exchange are to be valued at their middle market price on the date of the transactions.

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<sup>87</sup> Refer, for example, to *SIR v Wispeco Housing (Pty) Ltd* 1973 (1) SA 783 (A).

This average is the value which will be used to establish the “fair value” for transfer duty purposes. The value of unlisted shares is determined by the Commissioner based on factors which are considered to be fair in the circumstances.

In those cases where there is difficulty in establishing the amount on which transfer duty should be paid, full particulars (including contracts, valuations, rental amounts etc.) should be submitted to the Commissioner for a decision as to the amount to be determined as the fair value for purposes of determining the duty. Any decision made as to the fair value under this section may be subject to objection and appeal as provided for in Chapter 9 of the TA Act.

### 6.3.2 Consideration other than in money

In many cases the transaction of acquisition or disposal of property does not involve the passing of consideration for example donations, granting or ceding of property rights etc. In such instances the value on which transfer duty should be paid is determined as set out in 6.2.

### 6.3.3 Exchanges

The following permutations can arise where properties are exchanged:

- *Properties of equal value without additional consideration* – If properties of equal value are exchanged without additional consideration, each party pays duty on the declared value of the property acquired – section 5(4)(a).
- *Properties of unequal value without additional consideration* – If properties of unequal value are exchanged without additional consideration, each party pays duty on an amount equal to the value of the property with the greater value – section 5(4)(a).
- *Properties of equal or unequal value with additional consideration* – If payment of additional consideration is made in the exchange of properties of equal or unequal value, duty is payable according to the rules contained in sub-paragraph (i) or (ii) of section 5(4)(b) as illustrated in the examples below.

The position with regard to the transfer duty treatment of exchanges can be reduced to the following formula:

**Section 5(4)(b)(i):** In respect of the acquisition of the property for which the additional consideration is payable:

|  |       |
|--|-------|
| Declared value of the property                               | = (A) |
| Declared value of the property given in exchange             | = (B) |
| The additional consideration                                 | = (C) |
| (B) <i>plus</i> (C)  | = (D) |
| Duty is payable on the greater of <b>(A)</b> or <b>(D)</b> . |       |

**Section 5(4)(b)(ii):** In respect of the acquisition of the other property:

|  |       |
|--|-------|
| Declared value thereof                                       | = (B) |
| Declared value of the property given in exchange             | = (A) |
| The additional consideration                                 | = (C) |
| (A) <i>minus</i> (C)   | = (E) |
| Duty is payable on the greater of <b>(B)</b> or <b>(E)</b> . |       |

See the examples below for the practical application of these principles.

### Example 9 – Exchanges – application of section 5(4)(b)

#### Facts 1:

Property X valued at R3 000 000 and owned by A, is exchanged for Property Y owned by B valued at R2 400 000: B pays R600 000 to A as additional consideration.

What is the amount of duty A and B have to pay?

#### Result 1:

Under 5(4)(b)(i), B acquires Property X and pays additional consideration of R600 000. He therefore pays duty on the declared value of Property X = R3 000 000. This is because the “*value of the property given*” (Property Y) is R2 400 000 plus the “*additional consideration given*” of R600 000 = R3 000 000, being the same value as Property X.

Under section 5(4)(b)(ii), A would pay on the declared value of R2 400 000 in respect of the “*acquisition of the other property*” (Property Y). The declared “*value of the property given*” (Property X) being R3 000 000 “*less the additional consideration payable*” of R600 000 (R2 400 000) being no greater than the value of Property Y (R2 400 000).

#### Facts 2:

Assume the same details as in Facts 1, except that the additional consideration is reduced to R400 000.

What is the amount of duty A and B have to pay?

#### Result 2:

In this case (as in Facts1), B pays duty on the same amount of R3 000 000 as this does not exceed the sum of R2 400 000 plus R400 000 (that is R2 800 000). In Facts 1, A was liable for duty on R2 400 000, but now pays on R2 600 000. This is because the value of Property X (R3 000 000) less the additional consideration of R400 000 = R2 600 000 (being the greater of R2 400 000 and R2 600 000).

#### Facts 3:

Assume the same details as in Facts 1, except that the additional consideration is increased to R800 000.

What is the amount of duty A and B have to pay?

#### Result 3:

In Facts 1 and 2, B was liable to pay duty on an amount of R3 000 000, based on the value of the property “*for which the additional consideration is payable*”. In this case, B is liable for duty on an amount of R3 200 000, as this is the greater amount under section 5(4)(b)(i) (being the “*declared value of the property given*” (Property Y) of R2 400 000 plus the additional consideration of R800 000 payable = R3 200 000).

As in Facts 1, A will be liable for duty on R2 400 000 under section 5(4)(b)(ii), as the value of Property X which was given (R3 000 000) less the additional consideration payable by B of R800 000 (that is, R2 200 000), does not exceed R2 400 000.

## 6.4 Cancelled or dissolved transactions

A cancellation will not be recognised as a true cancellation for transfer duty purposes if a property has been acquired and the transaction is subsequently cancelled so that the same parties can enter into a new transaction in respect of the same property to obtain the benefit of the rebate on transfer duty, or to avoid payment of interest on transfer duty not paid within six months from the date of acquisition of the property.

Section 5(2) does not provide any particular timeframe within which the cancellation must take place.

In such cases, the original date of the transaction is taken as the effective date for purposes of calculating the transfer duty rates which are applied, as well as any penalty or interest which may be payable. This also applies in the case of any transaction entered into which is subject to a suspensive or resolutive condition, where the sale is cancelled and a new transaction is entered into as a result of the condition not being met.

See 3.3 and the *Hartzenberg* case which was mentioned in that paragraph for more details in this regard.

## 6.5 Liquor-licensed premises

In the case of a sale of property for a price that includes both the immovable and movable property, any portion of the price relating to a licence, goodwill, stock-in-trade, furniture or other movables must be excluded from the value on which transfer duty is payable – as these assets do not constitute “property” as defined in section 1(1). However, the fact that premises are licensed to sell liquor is a circumstance which must be taken into account in estimating the true value.<sup>88</sup> In such cases, the facts and the relevant documentation constituting or ancillary to the contract should be carefully examined to determine whether the portion of the consideration allocated to any of the movables has been overstated with a view to reducing the consideration attributable to the dutiable part of the transaction.

The Commissioner may call for a valuation by a person to be appointed under section 5(7)(d), with due regard to the liability for the costs of valuation under section 5(8) if the Commissioner is of the opinion that the portion of the consideration which has been attributed to the immovable property is insufficient. In calling for such a valuation, it should be made clear to the valuer that the valuation must be done on the basis that the premises are licensed. (Also see 2.4.8.)

## 6.6 Costs of valuation

Section 5(8) establishes the rule that the costs of an appraisal are to be borne by the –

- person liable for the duty if the “fair value as determined by the Commissioner” exceeds the amount of the consideration or the declared value by one-third or more; and
- State if it does not exceed the consideration or the declared value by one-third or more.

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<sup>88</sup> *Receiver of Revenue (Cape) v Cavanagh* 1912 AD 459. Also see 2.5.7.

## 6.7 Other factors

### 6.7.1 Accession

Since fixtures accede to the fixed property to which it is permanently attached, the value attributable to those fixtures must be included in the definition of the term “property”. It is therefore important to know if anything has been permanently attached to land or buildings which are the subject of a transaction. Examples of assets or fixtures which may be the subject of accession to fixed property include machinery, irrigation equipment, storage tanks, air conditioning etc.<sup>89</sup> (See 2.5.2.)

### 6.7.2 Separate properties acquired for a single price

The sale of a number of properties held under separate title by one person to another under one deed of sale will result in only one transaction for the aggregate of the values of prices attributed to the properties concerned. A factor which must be taken into consideration in deciding whether or not a single transaction has been entered into is the indivisibility of the transaction. Therefore, where a number of plots are purchased under one deed of sale and the agreement stipulates the terms of payment of the total consideration payable, the contract would be regarded as indivisible. The reason is that the failure on the part of the purchaser to adhere to the terms of the contract would result in the cancellation of the entire contract as no part thereof could be implemented separately.

A contract which is worded in such a way that each separate property is the subject matter of a contract which stands by itself is regarded as a divisible transaction (even if embodied in a single deed of sale) and will attract transfer duty on each property separately. In other words, in a divisible contract, the aggregate price for all the properties is not used to calculate the duty, but rather, the duty is calculated separately in respect of each property based on the price (or fair value) which is attributable to that particular property. On the other hand, where a number of properties are sold under one indivisible deed of sale and separate returns are submitted by the seller and purchaser in respect of each property, transfer duty must be collected on the aggregate purchase consideration stipulated in the contract.<sup>90</sup>

This point was highlighted in *Dawson v Yates NO 1958 (3) SA 820 (SR)* where the following was stated by Murray CJ (at 822B-C):

“The essential fact (in casu) is that there was a single contract, even though it related to the disposal of four separate items of property. It may be pointed out that these four stands were not held by the vendor under separate titles, one relating to each stand... But even if they were held by the vendor under separate titles registered in the Deeds Office, the position as I see it would be precisely the same.”

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<sup>89</sup> Refer, for example, to *Caltex (Africa) Ltd v Director of Valuations* 1961 (1) SA 525 (C), *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) and *Pettersen and Others v Sorvaag* 1955 (3) SA 624 (A).

<sup>90</sup> Also see 2.8 and *CIR v Freddie's Consolidated Mines Ltd* 1957 (1) SA 306 (A) in this regard.

### 6.7.3 Object of sale consists of more than “property”

Transfer duty is only payable on the value of “property” as defined in section 1(1). A purchaser who buys a property together with movable assets under a “lock, stock and barrel” or “going concern” arrangement which is not a taxable supply for VAT purposes, must exclude the value of movables such as furniture and equipment from the amount on which transfer duty is calculated.<sup>91</sup>

### 6.7.4 Land Bank values

The so-called Land Bank values cannot be used for the purposes of determining the fair value of agricultural land (used for *bona fide* farming purposes) for transfer duty purposes. Also see 6.2.4.

### 6.7.5 Quitrents

Land can be held on a permanent basis by virtue of one of three forms of land tenure, namely –

- real rights of ownership (freehold);
- perpetual quitrent (erfpag); and
- leasehold (huurpag).

Land tenure by virtue of perpetual quitrent was created by proclamation. In terms of the proclamation, land was granted to private individuals by the State which allowed the grantee all the normal incidents of ownership or freehold tenure, subject to certain reservations of rights in favour of the State. In return the grantee was required to pay an annual quitrent. The rights reserved by the State concerned mainly rights to precious minerals and stones, as well as the right to make and repair public roads, and to raise materials to do so on the land.

In certain cases, quitrent tenure was redeemed by the payment of a fixed sum, which meant that quitrent was no longer payable, but the land was still subject to the reservations applicable to it. Where such quitrents are redeemable, their value for duty purposes may be taken as the amount for which they can be so redeemed. The value of quitrents that are payable for a fixed number of years and which are not redeemable, may be determined according to Table A as prescribed by the Estate Duty Act 45 of 1955 (see **Annexure B**).

These payments, if payable in perpetuity and not redeemable, are regarded as being in respect of a 99-year lease (which is required to be registered in the Deeds Registry) and the value of the property is determined as being equal to R16.61 for each R1 payable annually in respect of the quitrent.

The capitalised value of such quitrent on which duty is paid must be shown in the transfer duty receipt.

Any periodic payments, by way of quitrent not repealed by Act 54 of 1934, which is agreed to be paid by the persons acquiring the property, constitute additional consideration to be added under section 6(1)(c).

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<sup>91</sup> Refer, for example, to *Receiver of Revenue (Cape) v Cavanagh* 1912 AD 459 and *SIR v Sturrock Sugar Farms (Pty) Ltd* 1965 (1) SA 897 (A) and 2.5.7.

**Example 10 – Quitrents***Facts:*

In the event that a quitrent of R100 per annum is payable in perpetuity on a property and the amount is not redeemable, calculate the value upon which transfer duty would be payable.

*Result:*

Value:  $R16.61 \times R100 \times 99 = R164\,439$

## Chapter 7

### Tax rates and calculations

#### 7.1 Introduction

The potential tax bases for VAT and transfer duty overlap to some extent. To ensure that the sale of fixed property is not subject to both taxes, an exemption from transfer duty applies if the supply is subject to VAT. The Deeds Registry in the region concerned will not allow a property transfer to take place unless a transfer duty receipt is issued indicating that the transfer duty has been paid or the relevant receipt must be endorsed to indicate that the zero rate applies where the transaction value does not exceed R750 000 under section 2(1)(b)(i). If the transaction is exempt from transfer duty, an exemption receipt must be issued by SARS before the registration of the transfer may take place. (See **Chapter 8: Exemptions.**)

It should, however, be kept in mind that not all acquisitions of “property” as defined in section 1(1) will constitute real rights in immovable property which are required to be registered in a Deeds Registry. For example, any transaction relating to the sale or disposal of shares, rights and interests in companies and other entities as contemplated in paragraphs (d) to (g) of the definition of “property” will merely be noted in the share registers or other records of the entities concerned. For example, in the case of changes to the membership of a close corporation or changes to beneficiaries in a trust deed, the Companies and Intellectual Property Commission (CIPC)<sup>92</sup> or the Master’s Office (as the case may be) must be advised, but no submission will be made to a Deeds Registry in this regard.

From 23 February 2011 the graduated rates of transfer duty became applicable to **all persons**. Before this date, the graduated rates were only applicable to acquisitions of property by natural persons. Non-natural persons (legal or juristic persons) such as companies, close corporations and trusts were taxed at a flat rate of 8%. There is, therefore, no longer any distinction in the rates of transfer duty applicable to natural persons and legal or juristic persons as was the case before 23 February 2011.

The rates are subject to change from time to time as determined by the Minister of Finance. In this regard, it should be noted that the most recent rates were announced in the Budget Speech in February 2017 and became effective from 1 March 2017.

#### 7.2 Rates of duty

As property transactions are sometimes presented to SARS for payment of duty years after the date of acquisition, the rates of duty from 1 March 2005 to date are set out below.<sup>93</sup>

##### From 1 March 2006 to 22 February 2011

|   |  |    |
|---|--|----|
| <i>Natural persons</i>  | On the first R500 000 of value           | 0% |
|   | On the value from R500 000 to R1 million | 5% |
|   | On the value exceeding R1 million        | 8% |
| <i>Non-natural persons</i> for example a company, CC or trust |  | 8% |

<sup>92</sup> Previously known as the Companies and Intellectual Property Registration Office (CIPRO).

<sup>93</sup> See the **SARS website** for the rates of duty from 1 January 1950 to 28 February 2005.

**From 23 February 2011 to 28 February 2015**

|                    |  |    |
|--------------------|--|----|
| <i>All persons</i> | On the first R600 000 of value               | 0% |
|                    | On the value from R600 000 to R1 million     | 3% |
|                    | On the value from R1 million to R1,5 million | 5% |
|                    | On the value exceeding R1,5 million          | 8% |

**From 1 March 2015 to 29 February 2016**

|                    |  |     |
|--------------------|--|-----|
| <i>All persons</i> | On the first R750 000 of value                   | 0%  |
|                    | On the value from R750 000 to R1,25 million      | 3%  |
|                    | On the value from R1,25 million to R1,75 million | 6%  |
|                    | On the value from R1,75 million to R2,25 million | 8%  |
|                    | On the value exceeding R2,25 million             | 11% |

**From 1 March 2016 to 28 February 2017**

|                    |  |     |
|--------------------|--|-----|
| <i>All persons</i> | On the first R750 000 of value                   | 0%  |
|                    | On the value from R750 000 to R1,25 million      | 3%  |
|                    | On the value from R1,25 million to R1,75 million | 6%  |
|                    | On the value from R1,75 million to R2,25 million | 8%  |
|                    | On the value from R2,25 million to R10 million   | 11% |
|                    | On the value exceeding R10 million               | 13% |

**From 1 March 2017**

|                    |  |     |
|--------------------|--|-----|
| <i>All persons</i> | On the first R900 000 of value                   | 0%  |
|                    | On the value from R900 000 to R1,25 million      | 3%  |
|                    | On the value from R1,25 million to R1,75 million | 6%  |
|                    | On the value from R1,75 million to R2,25 million | 8%  |
|                    | On the value from R2,25 million to R10 million   | 11% |
|                    | On the value exceeding R10 million               | 13% |

**7.3 Application of the graduated rates of duty****7.3.1 General rule**

The general rule when applying the graduated or progressive rates to calculate the duty requires a three-step approach which is based on the rates which were applicable as at the date of acquisition as follows:

|                |   |
|----------------|---|
| <b>Step 1:</b> | The total consideration must be split between the applicable value ranges.  |
| <b>Step 2:</b> | The duty for each range of values is calculated by multiplying the consideration in that range by the rate which applies for that range on the date of acquisition. |
| <b>Step 3:</b> | The duty calculated in each value range is aggregated to determine the total duty payable.  |

Generally, this approach applies for all forms of “property” as defined in section 1(1), but where the transaction constitutes the acquisition of an “*undivided share in any property*”, the formula as set out in section 2(5) and explained in **7.3.2** will apply.

Remember that the graduated rates in section 2(1)(b)(i) and the rules in section 2(5) did not apply to legal or juristic persons before 23 February 2011.

The calculation of transfer duty in terms of the general rule is shown below in **Examples 11** to **17**.

### Example 11 – Calculating the transfer duty payable from 1 March 2016 – 28 February 2017

*Facts:*

Assume the date of acquisition was 12 March 2016 and the purchase price of the property (the consideration) was R11 000 000. Calculate the transfer duty payable.

*Result:*

| <b>Step 1</b>  | <b>Step 2</b>           |               |
|--|-------------------------|---------------|
|  | R                       |               |
| Duty @ 0% on the first R750 000                      | nil                     |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)        | 15 000                  |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)      | 30 000                  |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)      | 40 000                  |               |
| Duty @ 11% on R7 750 000 (R10 000 000 – R2 250 000)  | 852 500                 |               |
| Duty @ 13% on R1 000 000 (R11 000 000 – R10 000 000) | <u>130 000</u>          |               |
| <b>Total transfer duty</b>                           | <b><u>1 067 500</u></b> | <b>Step 3</b> |

### Example 12 – Calculating the transfer duty payable from 1 March 2017

*Facts:*

Assume the same facts as in **Example 11**, but where the date of acquisition was 12 March 2017. Calculate the transfer duty payable.

*Result:*

| <b>Step 1</b>  | <b>Step 2</b>           |               |
|--|-------------------------|---------------|
|  | R                       |               |
| Duty @ 0% on the first R900 000                      | nil                     |               |
| Duty @ 3% on R350 000 (R1 250 000 – R900 000)        | 10 500                  |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)      | 30 000                  |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)      | 40 000                  |               |
| Duty @ 11% on R7 750 000 (10 000 000 – R2 250 000)   | 852 500                 |               |
| Duty @ 13% on R1 000 000 (R11 000 000 – R10 000 000) | <u>130 000</u>          |               |
| <b>Total transfer duty</b>                           | <b><u>1 063 000</u></b> | <b>Step 3</b> |

The difference in rates and the overall reduction in the amount of transfer duty payable with effect from 1 March 2017 will be noted when comparing **Examples 11** and **12**.

**Example 13 – Zero-rated transaction***Facts:*

B bought a house in Mamelodi for R850 000 on 1 March 2017. Calculate the transfer duty payable (if any).

What would the position have been if he bought the property on 20 February 2017?

*Result:*

As the purchase price is within the R900 000 zero-rated threshold which came into effect on 1 March 2017 there is no transfer duty payable. If he had purchased the property on 20 February 2017, he would have been liable for transfer duty on R100 000 @ 3% = R3 000. (That is, R850 000 - R750 000 which was the value subject to the zero-rating at that time).

**Example 14 – Transactions attracting different taxes ,***Facts:*

Mr P is a registered VAT vendor who lives and works in Johannesburg. As he wants to go into semi-retirement and move to Cape Town, he sells the property from where he conducts his business in Johannesburg as well as his residence in Pretoria. Mr P sells the business property for R3 million and his private residence for R1,4 million. The business was not sold together with the business property, and therefore it did not qualify as the supply of a going concern. Both properties were sold on 1 March 2017. The property prices exclude VAT or any other taxes which may be payable.

Which taxes apply on the sale of the properties?

*Result:*

The sale of the business property is subject to VAT at the standard rate as it is supplied in the course or furtherance of Mr P's enterprise. However, as Mr P's private residence was not part of the enterprise, the purchaser will pay transfer duty calculated as follows:

| <b>Step 1</b>                                   | <b>Step 2</b> |                      |
|---|---------------|----------------------|
|   | R             |                      |
| Duty @ 0% on the first R900 000                 |               | nil                  |
| Duty @ 3% on R350 000 (R1 250 000 – R900 000)   |               | 10 500               |
| Duty @ 6% on R150 000 (R1 400 000 – R1 250 000) |               | <u>9 000</u>         |
| <b>Total transfer duty</b>                      |               | <b><u>19 500</u></b> |
|   |               | <b>Step 3</b>        |

Mr P is liable to account for VAT of R420 000 (R3 000 000 × 14%) which must be declared as output tax on his VAT 201 return, whereas the purchaser is liable to pay the transfer duty of R19 500 directly to SARS.

**Example 15 – Interest in “residential property” acquired***Facts:*

In March 2017, M purchases the member's interest in a close corporation which has as its sole asset, a beach-front holiday apartment with a fair value of R7 000 000. The close corporation is not conducting an enterprise for VAT purposes and the apartment is used exclusively for the enjoyment of the member. The apartment originally cost R3 000 000, which was funded by a member's contribution of R1 000 and a member's loan of R2 999 000. M pays R4 001 000 for the transfer of the member's interest and R2 999 000 for the member's loan obligation.

*Result:*

The transfer duty payable is based on the fair value ignoring any loan obligation. The fair value of the member's interest is R7 000 000, being the fair value of the residential property owned by the close corporation. M must pay transfer duty on R7 000 000, being the fair value of the residential property owned by the close corporation (ignoring any loan liabilities). Calculated as follows:

| <b>Step 1</b>                                      | <b>Step 2</b>         |               |
|--|-----------------------|---------------|
|  | R                     |               |
| Duty @ 0% on the first R900 000                    | nil                   |               |
| Duty @ 3% on R350 000 (R1 250 000 – R900 000)      | 10 500                |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)    | 30 000                |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)    | 40 000                |               |
| Duty @ 11% on R4 750 000 (R7 000 000 – R2 250 000) | <u>522 500</u>        |               |
| <b>Transfer duty payable</b>                       | <b><u>603 000</u></b> | <b>Step 3</b> |

In the event that the transfer duty documents and payment were lodged after the six-month period allowed for payment of the duty, interest at 10% per annum (calculated pro-rata per completed month) will be charged on the outstanding balance.

**Example 16 – Contingent rights in a discretionary trust relating to a “residential property”***Facts:*

Mr and Mrs S are the trustees of a discretionary trust known as S Trust which owns a residential property. On 1 May 2015, Mr and Mrs S enter into a contract with Mr and Mrs T in terms of which –

- Mr and Mrs S will resign as trustees of S Trust and will be replaced by Mr and Mrs T;
- Mr and Mrs T will acquire the loan account of the trust, being R5 000 000; and
- Mr and Mrs T will pay R4 000 000 for the appointment of their three children as beneficiaries of the trust.

Calculate the transfer duty payable.

**Result:**

The fair market value of the residential property of the trust is R9 000 000. As the consideration for the contingent rights in the trust is less than the fair value of the contingent right, the transfer duty payable is based on the “fair value” as defined, ignoring any loan liabilities. The amount of transfer duty each beneficiary will have to pay is calculated as follows:

| <b>Step 1</b>                                      | <b>Step 2</b>         |               |
|--|-----------------------|---------------|
|  | R                     |               |
| Duty @ 0% on the first R750 000                    | nil                   |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)      | 15 000                |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)    | 30 000                |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)    | 40 000                |               |
| Duty @ 11% on R6 750 000 (R9 000 000 – R2 250 000) | <u>742 500</u>        |               |
| <b>Transfer duty payable</b>                       | <b><u>827 500</u></b> | <b>Step 3</b> |

Each beneficiary pays **R275 833.33** (R827 500 / 3).

### 7.3.2 Undivided shares in property

As illustrated above, the transfer duty is calculated by following a three-step approach. However, where the underlying property acquired consists of an “undivided share in any property”, a more detailed calculation which has two extra steps is required in terms of the calculation in section 2(5). In these cases, the value of the whole property must first be determined before the graduated rates can be applied. Once the graduated rates have been applied to calculate the transfer duty on the whole property, the actual transfer duty payable is calculated in proportion to the size of the undivided share of the property which has been acquired.

Section 2(5) provides that where a person acquires any property consisting of an undivided share in any property (referred to as the “joint property”), the duty payable must be calculated in accordance with the following formula –<sup>94</sup>

$$y = \frac{a}{b} \times \frac{c}{1}$$

where –

“**y**”= the duty payable on the transaction;

“**a**”= the value of the undivided share on which the duty is leviable under section 2(1);

“**b**”= the sum of –

(i) “**a**”; and

(ii) the value of the remainder of the joint property.

“**b**” is therefore equal to the fair value of the entire property concerned;

“**c**”= the duty which would have been payable on the whole of the joint property, calculated on the value of the joint property.

<sup>94</sup> For the purposes of the guide, the meaning of items “b” and “c” in the formula have been significantly simplified so that they are more easily understood. See section 2(5) for the actual wording relating to these items.

The formula in section 2(5) applies in any co-ownership situation where instead of the full title to the property, something less than that is acquired in the form of an undivided share in the whole property. For example, the formula will apply where two people each buy a 50% undivided share in a property which they intend to use as their residence in two separate transactions instead of buying the entire property jointly in one undivided transaction. The formula does not apply in respect of the acquisition of an undivided share in common property under the Sectional Titles Act 95 of 1986 which is apportioned to a “section” as defined in section 1 of that Act which forms an integral part of that unit. However, the formula will apply in respect of the acquisition of an undivided share in such a unit.<sup>95</sup> In essence, the formula determines that the transfer duty payable will be in proportion to the part of the property which has been acquired. Therefore, if A purchases a 25% undivided share in a “property” and B purchases the other 75% of the property, A and B will each be liable to pay 25% and 75% respectively of the transfer duty which would have been payable on the whole property.

The formula will also apply where the transaction involves the acquisition of shares or other interests in a “residential property”, or contingent rights in a trust which holds such interests as contemplated in paragraphs (d) to (f), or is in respect of shares in a share block company as contemplated in paragraph (g) of the definition of the term “property”, if such rights or interests do not represent the full value of the underlying immovable property to which the shares or other interests held by that entity relate.

In each of these situations, each person would be liable to pay transfer duty in proportion to their respective acquisitions. The parties will not be entitled to the benefit of the application of the zero rate of transfer duty under section 2(1)(b)(i) on each transaction if the value of the respective portions of the property acquired fall under the threshold for zero-rating (currently 750 000). This is because the rates of duty in section 2(1)(b)(i) apply only in respect of the value of the **whole property**. The parties to such an agreement would therefore only benefit from the zero rate in proportion to the extent that the undivided share represents that part of the fair market value of the whole property which falls under the said threshold.

This is illustrated in **Examples 17** and **18**.

**Example 17 – Application of section 2(5) when acquiring an undivided share in property**

*Facts:*

J and M live together in rented accommodation. As they want to own their own residence, but are not married, they decide that the best arrangement would be for each of them to finance the purchase of a 50% undivided share in a residence. S agrees to sell his house to J and M for R8 000 000 on 1 March 2017, but instead of one transaction, he agrees to structure the deal so that that J and M would each purchase a 50% undivided share in the property for R4 000 000 in terms of two separate transactions. S is not a VAT vendor.

Discuss the tax consequences of these transactions and calculate the tax payable (if any) by each party.

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<sup>95</sup> Section 2(6).

*Result:*

Since S is not a VAT vendor, no VAT will be charged on the property sales. However, J and M will each be liable to pay transfer duty on the R4 000 000 paid for their respective undivided shares in the property. Since undivided shares in the property are purchased, the transfer duty rates under section 2(1)(b) cannot be applied directly to the consideration for each individual transaction. The fair value of the entire property must first be established and only then are the rates applied **to that value**. In this case, the fair value of the whole property would be equal to the sum of the two purchase prices which is R8 000 000, as there is no reason to believe that the transactions are not at arm's length. J and M are therefore liable to each pay their respective share of the transfer duty which is payable on R8 000 000 calculated as follows:

$$y = \frac{a \times c}{b}$$

where –

**y** = the duty payable;

**a** = R4 000 000,

**b** = R8 000 000; and

**c** = the duty on R8 000 000.

(Therefore, **y = 0,5 × c**)

Calculated as follows:

| <b>Step 1</b>                                      | <b>Step 2</b>         |               |
|--|-----------------------|---------------|
|  | R                     |               |
| Duty @ 0% on the first R900 000                    | nil                   |               |
| Duty @ 3% on R350 000 (R1 250 000 – R900 000)      | 10 500                |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)    | 30 000                |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)    | 40 000                |               |
| Duty @ 11% on R5 750 000 (R8 000 000 – R2 250 000) | <u>632 500</u>        |               |
| <b>Transfer duty payable</b>                       | <b><u>713 000</u></b> | <b>Step 3</b> |

Therefore, **y = R356 500** (that is,  $y = 0,5 \times R713 000$ )

Since the transfer duty on the whole property is R713 000, J and M will each have to pay R356 500 in transfer duty relating to their respective 50% undivided shares in the property.

### **Example 18 – Application of section 2(5) when acquiring shares in a “residential property company”**

*Facts:*

Assume the same facts as in **Example 17** above, except that the house is the sole asset of XYZ (Pty) Ltd. S owns all the shares in XYZ (Pty) Ltd and he sells 50% of the shares in the company to J and M respectively for R4 000 000 each on 1 March 2017.

Discuss the tax consequences of these transactions and calculate the tax payable (if any) by each party.

*Result:*

The transfer duty payable is the same as in **Example 17** above. This is because it makes no difference if the residential property is acquired in an indirect manner by acquiring 50% of the shares in the “residential property company” which owns the residential property, or by directly purchasing a 50% undivided share in the actual property itself. In each case, the method of calculating the transfer duty is the same.

### 7.3.3 Limited real rights in property

The transfer duty is calculated on the acquisition of limited real rights in much the same way as the three-step approach described in **7.3.1**. However, before applying the transfer duty calculation, there are a number of preliminary steps which have to be followed to determine the taxable value of the limited real rights acquired in terms of the prescribed tables.

This is illustrated in **Examples 19** and **20** below.

#### Example 19 – Determining the value of lifetime limited real rights

*Facts:*

For purposes of Facts 1, 2 and 3 below, the following values are used:

|  |            |
|--|------------|
|  | R          |
| Fair value of the property                               | 5 600 000  |
| Value of the land  | 1 200 000  |
| Value of improvements                                    | 4 400 000  |
| Rental value of the property per month                   | 14 000     |
| Date of transaction                                      | 25/02/2016 |
| Date of birth of Mrs C who receives a limited real right | 01/03/1969 |
| Age at the next birthday after date of acquisition       | 47         |

*Facts 1:*

Calculate the value of the *usufruct* and the *bare dominium* and the transfer duty payable (if any) on the granting of a lifetime *usufruct* over the property in favour of Mrs C.

*Result 1:*

The first step is to calculate the age as at the next birthday of the limited right holder. This is calculated in relation to the date of transaction, and not the date that the documents are submitted to SARS. The age as at the next birthday is calculated by subtracting the year of birth from the year in which the transaction took place. In this case it is  $2016 - 1969 = 47$ . As the limited right holder will be 47 **after** the date of the transaction, 47 is the age as at her next birthday. If the date of the birthday was before the date of the transaction, +1 year should be added to the answer to get to the age as at the **next** birthday.

The next step is to take the calculated age as at the next birthday (47) to Table A: “Life Expectancy Tables” because the rights are for the rest of Mrs C’s lifetime. Since she is a female, the right hand column under the heading “Present value of R1 per annum for life” should be selected. The age factor of 8,03119 must therefore be used to calculate the value of the rights for transfer duty purposes.

|                            |  |
|----------------------------|--|
| <b>Usufruct value</b>      | = Fair value of property × 12% × age factor              |
|                            | = R5 600 000.00 × 12% × 8,03119                          |
|                            | = <b><u>R5 396 959.70</u></b>                            |
| <b>Bare dominium value</b> | = R5 600 000 – R5 396 959.70 = <b><u>R203 040.30</u></b> |

Transfer duty on the *usufruct*, based on the rates, would be calculated as follows:

| <b>Step 1</b>  | <b>Step 2</b>            |               |
|--|--------------------------|---------------|
|  | R                        |               |
| Duty @ 0% on the first R750 000                          | nil                      |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)            | 15 000.00                |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)          | 30 000.00                |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)          | 40 000.00                |               |
| Duty @ 11% on R3 146 959.70 (R5 396 959.70 – R2 250 000) | <u>346 165.57</u>        |               |
| <b>Total transfer duty</b>                               | <b><u>431 165.57</u></b> | <b>Step 3</b> |

The 12% in the aforementioned formula represents the yield prescribed by the Estate Duty Act 45 of 1955 and is used in all cases where the true yield (for example rental) is unknown. The usufructuary pays transfer duty on R5 396 959.70 which represents the value of the *usufruct* registered in her name. The *bare dominium* holder (owner of the property) retains ownership of the property and will therefore not be liable for any transfer. This will also be the case in *Facts 2 and 3* below. Where the transferor (donor or seller) retains the *usufruct* but disposes of the *bare dominium*, transfer duty is levied only on the value of the *bare dominium* acquired by the purchaser.

*Facts 2:*

Calculate the value of the limited real rights and the transfer duty payable (if any) on the granting of a right to Mrs C to inhabit the dwelling on the property for the remainder of her life.

*Result 2:*

A “*usus*” or right of “*habitatio*” comprises lesser rights than a *usufruct*, therefore the value of these rights are calculated only on the value of the improvements on the fixed property to which those rights relate. If the value of the improvements is not stipulated separately, the value of the property must be used for the calculation of the *habitatio* or *usus*. In this example, the value is known.

|                                |  |
|--------------------------------|--|
| <b>Usus or habitatio value</b> | = Fair value of improvements (the dwelling) × 12% × age factor |
|                                | = R4 400 000.00 × 12% × 8,03119                                |
|                                | = <b><u>R4 240 468.32</u></b>                                  |

| <b>Step 1</b>  | <b>Step 2</b>            |               |
|--|--------------------------|---------------|
|  | R                        |               |
| Duty @ 0% on the first R750 000                          | nil                      |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)            | 15 000.00                |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)          | 30 000.00                |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)          | 40 000.00                |               |
| Duty @ 11% on R1 990 468.32 (R4 240 468.32 – R2 250 000) | <u>218 951.51</u>        |               |
| <b>Total transfer duty</b>                               | <b><u>303 951.51</u></b> | <b>Step 3</b> |

**Facts 3:**

Calculate the value of the limited real rights and the transfer duty payable (if any) if Mrs C is granted a right to inhabit the dwelling on the property on the basis that a monthly rental value of R14 000 applies for the property.

**Result 3:**

If the rental value of the property is submitted for the calculation, the fair value of the property and the 12% yield is substituted with the rental per annum. The monthly rental must therefore be multiplied by 12 in order to determine an annual rental value (that is R14 000 × 12 = R168 000 annual rental).

**Usus or habitatio value** = Rental per annum × age factor  
= R168 000 × 8,03119  
= **R1 349 239.92**

Transfer duty on the rental value, based on the rates, is calculated as follows:

| <b>Step 1</b>                                  | <b>Step 2</b>           |               |
|--|-------------------------|---------------|
|  | R                       |               |
| Duty @ 0% on the first R750 000                | nil                     |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)  | 15 000.00               |               |
| Duty @ 6% on R99 239 (R1 349 239 – R1 250 000) | <u>5 954.40</u>         |               |
| <b>Total transfer duty</b>                     | <b><u>20 954.34</u></b> | <b>Step 3</b> |

**Example 20 – Determining the value of fixed period limited real rights****Facts:**

L emigrated to Australia on 29 November 2015, but decided that he would probably return to South Africa after about 10 years when he reached retirement age. He therefore decided not to sell the family home which is situated in Johannesburg, but rather, to grant his brother M a *usufruct* over the property for a period of 10 years commencing from 29 November 2015. The fair value of the home was R3 950 000 on the date of the transaction.

Calculate the value of the *usufruct* and the transfer duty payable (if any) on the granting of the 10 year *usufruct* over the property in favour of M.

**Result:**

According to Table B in **Annexure B**, the factor to be used for a fixed period acquisition of limited real rights for a period of 10 years is 5,6502.

**Usufruct value** Fair value of property × 12% × fixed period factor for 10 years as per Table B  
 = R3 950 000 × 12% × 5,6502  
 = **R2 678 194.80**

Transfer duty on the *usufruct*, based on the rates at that time (29 November 2015), is calculated as follows:

| <b>Step 1</b>  | <b>Step 2</b>             |               |
|--|---------------------------|---------------|
|  | R                         |               |
| Duty @ 0% on the first R750 000                        | nil                       |               |
| Duty @ 3% on R500 000 (R1 250 000 – R750 000)          | 15 000.00                 |               |
| Duty @ 6% on R500 000 (R1 750 000 – R1 250 000)        | 30 000.00                 |               |
| Duty @ 8% on R500 000 (R2 250 000 – R1 750 000)        | 40 000.00                 |               |
| Duty @ 11% on R428 194.80 (R2 678 194.80 – R2 250 000) | <u>47 101.43</u>          |               |
| <b>Transfer duty payable</b>                           | <b><u>132 1013.43</u></b> | <b>Step 3</b> |

#### 7.4 Date of application of amended rates of duty

Sometimes during the annual Budget Speech in Parliament (as was the case in 2016), the Minister of Finance announces that the rate of transfer duty will change, or that the acquisition of certain types of property will no longer be subject to transfer duty from a certain date. This creates a difficulty if the effective date of application of the new rate or exemption is before the date on which the legislation introducing that amendment is promulgated.

The Transfer Duty Act provides that where the Minister announces that different transfer duty rates apply, or that more favourable conditions for exemption or zero-rating will apply, those changes in the law will apply from the date stated or determined by the Minister in that announcement. The effective date of the change in the law could therefore be from the date of the announcement itself (immediate), or it could apply from a date specified in that announcement (as the case may be). The legislation giving effect to those changes must be passed within a period of 12 months from the date that the change in the law was intended to come into effect.

## Chapter 8

### Exemptions

#### 8.1 Introduction

As a general rule, all exemptions under the Transfer Duty Act are grouped together in section 9. The exemptions apply equally to all forms of property as set out in the definition of the term “property”. For example, if property is acquired by way of a divorce settlement and that acquisition is exempt from transfer duty as provided in section 9(1)(i), it does not matter whether that property constitutes a real right in immovable property as contemplated in paragraph (a) or (c) of the definition of the term “property”, or if it constitutes shares, rights or other interests in entities as contemplated in paragraphs (d) to (g) of that definition. It therefore does not matter whether the transfer of ownership or rights in the property is required to be registered in a Deeds Registry or not for the exemption to apply. All that is required is for the conditions of the exemption as set out in section 9 to be met. The transferee must apply to SARS for an exemption receipt when a transaction is exempt, regardless of whether or not the transfer of property must be recorded in a Deeds Registry.

A distinction must also be made between an “exemption” from transfer duty as contemplated in section 9 and the application of the zero rate of transfer duty under section 2(1)(b)(i), as they are not the same. Whilst this distinction may seem to be academic because a similar result is achieved in some cases, there is a fundamental difference between a transaction that is subject to transfer duty in principle and one that is exempt. For example, if the consideration for a property is R750 000 where the date of acquisition was after 1 March 2015, no transfer duty is payable, whether the transaction is exempt under section 9 or because of the application of the zero-rate in section 2(1)(b)(i). However, if it turns out later that the fair value should have been R950 000 and not R750 000, the distinction becomes important because if the transaction is not exempt in terms of the conditions set out in the applicable provision in section 9, transfer duty will be payable on the balance of R200 000.

It should be noted that the governments of certain foreign countries may enjoy exemption when acquiring property in South Africa. Cases involving such acquisitions should be referred to the Department of International Relations and Cooperation (DIRCO) for written confirmation of whether an exemption applies in respect of the specific country. An exemption, if applicable, is granted under the Diplomatic Immunities and Privileges Act 37 of 2001. In certain other cases, no exemption receipt will be required, and the details of the transactions will be dealt with directly by the Deeds Registry concerned.

Examples of this include the following:

- Restitution of Land Rights Act 22 of 1994
- Land Reform (Labour Tenants) Act 3 of 1996
- Extension of Security of Tenure Act 62 of 1997
- Provisions of Land and Assistance Act 126 1993

## 8.2 Current exemptions

### 8.2.1 Government [section 9(1)(a)]

This exemption is specifically for the Government of the Republic of South Africa and a provincial administration. Although the Transfer Duty Act does not define the term “government” or “provincial administration”, these terms are taken to mean any entity forming part of the national or provincial government structures.<sup>96</sup> This will include, for example, the government departments and their sub-components listed in the schedules to the Public Service Act 103 of 1994, but it does not include the public entities listed in the schedules to the Public Finance Management Act 1 of 1999 (the PFMA), although some of these entities may qualify for an exemption under other provisions.

### 8.2.2 Municipalities and water service providers [sections 9(1)(b) and 9(1)(bB)]

A “municipality” is an organ of state within the local sphere of government and is defined in section 1(1) of the Income Tax Act, which in turn, refers to a municipality as contemplated in section 155(1) of the Constitution of the Republic of South Africa 108 of 1996. Municipalities are further established under section 12(1) of the Local Government: Municipal Structures Act 117 of 1998 and exercise legislative and executive authority within a certain geographical area determined under the Local Government: Municipal Demarcation Act 27 of 1998.

A “municipality” does not include a “municipal entity” as defined in section 1 of the Local Government: Municipal Systems Act 32 of 2000. A municipal entity will therefore not be exempt from transfer duty unless it qualifies as a “water services provider” as defined in section 1(1) of the Income Tax Act, or under one of the other exemptions.

Section 9(1)(bB) provides an exemption for any “water services provider”, being a person that provides water and sanitation services, which is –

- a public entity regulated under the PFMA,<sup>97</sup> or a wholly-owned subsidiary or entity of that public entity if the operations of that subsidiary or entity are ancillary or complementary to the operations of the public entity;
- a company or other entity which is wholly owned by one or more municipalities; or
- a board or institution that has powers similar to a water board established under the Water Services Act 108 of 1997, and would have fallen within the ambit of the now-deleted definition of the term “local authority”.

### 8.2.3 Public benefit organisations and other statutory bodies [sections 9(1)(c), 9(1)(d) and 9(1A)]

A public benefit organisation (PBO) which has been approved by the Commissioner under section 30(3) of the Income Tax Act will qualify for exemption from transfer duty on property which is acquired for purposes of carrying on one or more approved public benefit activities (PBA), provided that the whole or substantially the whole of the property acquired is used for carrying on one or more PBAs. The exemption from transfer duty will also be considered in respect of a statutory body which has been established by or under any law and which is exempt from income tax under section 10(1)(cA)(i) of the Income Tax Act and which has as its sole or principal object, the carrying on of an approved PBA. (This would include public

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<sup>96</sup> The term “government” in the context of section 9(1)(a) does not include local government, as section 9(1)(b) provides a separate exemption for municipalities.

<sup>97</sup> See Schedule 3B to the PFMA.

schools, universities, universities of technology, museums, libraries etc.)

The exemption in section 9(1A) applies where the entity that qualifies for the exemption under section 9(1)(c) transfers a property to another entity that it controls.

It should be noted that if at any time subsequent to the acquisition of the property, the whole or substantially the whole of the property is used for a purpose other than the carrying on of any PBA, the exemption does not apply and transfer duty will become payable. In this regard, the date on which the property was first used for a purpose other than for carrying on PBAs, will be deemed to be the date of acquisition for the purposes of section 3(1) and section 4. The value on which transfer duty will be calculated is the original value of the property on the actual date of acquisition that is when the property was initially acquired.

For further information relating to these exemptions see Interpretation Note 22 (Issue 3) “Exemption: Public Benefit Organisations and Statutory Bodies”.

The Transfer Duty Act also contains an exemption for the acquisition of property by any institution or body for purposes of a public hospital under section 9(1)(d). The conditions of the exemption are the same as those which apply to PBOs as explained above.

#### 8.2.4 Inheritance by heirs or legatees [section 9(1)(e)]

Sub-paragraph (i) of section 9(1)(e) provides a total exemption from payment of duty in respect of property of the deceased acquired by *ab intestato* or testamentary succession, or as a result of a redistribution of the assets of a deceased estate in the process of liquidation.<sup>98</sup> This means that whether or not a last will and testament existed at the time of death of the deceased, the heirs or legatees of the deceased still qualify for the exemption. This exemption applies regardless of whether assets “outside the estate” are introduced in order to equalise the redistribution.<sup>99</sup> The exemption only applies to heirs or legatees acquiring property in the manner specified and will not apply to any property purchased by descendants or others from the estate of the deceased.

Sub-paragraph (ii) of section 9(1)(e) provides for an exemption from duty to which heirs or legatees might otherwise become liable in respect of the renunciation or extinction of any interest which may have been imposed upon the succession of the property referred to in sub-paragraph (i). Any benefit accruing as a result of the natural expiration of a limited interest would not be liable for duty under section 2. In cases where consideration is paid to the usufructuary by the heir of the property in respect of the renunciation of the *usufruct* in favour of such heir, the exemption will still apply.<sup>100</sup>

The acquisition of property by testamentary succession subject to the payment of a bequest price will fall within the terms of the exemption under section 9(1)(e)(i). In the case of *Hart v Commissioner for Inland Revenue*,<sup>101</sup> in terms of the joint will of the applicant’s parents, who were married in community of property, the applicant was given the right to purchase a farm registered in his father’s name at a stated price after the death of the survivor of the testators. On the death of the survivor, the applicant exercised his right of purchase.

<sup>98</sup> The phrase “...in the process of liquidation” does not mean that the deceased estate is insolvent. Rather, it refers to a situation where the assets of the estate are in the process of being realised (liquidated) in the ordinary course of administering the estate.

<sup>99</sup> See *Lubbe v CIR* (24 SATC 528).

<sup>100</sup> See *Kock v CIR* 1954 (3) SA 631 (C) (or 19 SATC 263).

<sup>101</sup> 1953 (2) SA 271 (C) (or 18 SATC 375).

The court held that the applicant had not acquired the property by testamentary succession and that the exemption from transfer duty was, therefore, not applicable. In *SIR v Estate Roadknight and Another*,<sup>102</sup> however, the court found that the exemption applied where an heir exercised an option to buy a farm from the estate which was granted in the deceased's last will. The court stated that the will must be seen as the real *fons et origo* (that is origin or reason) for the acquisition rather than the contract of sale resulting from the exercise of the option.

### 8.2.5 Partition between joint owners [section 9(1)(g)]

This exemption applies to all partitions of property, provided no consideration is paid or promised for the purpose of equalising the partition or for any other reason. Duty will be payable only on the value of any consideration that passes between the parties – whether by way of cash, movables or by virtue of any of the parties accepting increased liability under any bonds over the properties – regardless of the value or extent of the property taken on partition. Also, if a person, acquires extra property through a partition agreement which is greater than the extent that was held before the partition agreement was entered into, transfer duty will be payable thereon.<sup>103</sup>

#### Example 21 – Partition of joint interests in property

In the following examples, total exemption from payment of duty will be allowable:

- Property owned by A, B, C and D in undivided shares. On partition, A takes portion 1 and B, C and D continue to hold the remainder in undivided shares.
- Property owned by A, B, C and D in undivided shares. On partition, A and B together take portion 1 and C and D take the remainder.
- Properties X and Y owned by A, B, C, D and E in undivided shares. On partition, A, B and C take property X and D and E take property Y.
- Properties X and Y owned by A and B in undivided shares. On partition, A takes property X and B takes property Y.
- Property owned by A, B and C in undivided shares. On partition, A takes portion 1 but continues to jointly own the remainder together with B and C.

### 8.2.6 Acquisition by joint owner [section 9(1)(h)]

This provision allows an exemption in a case where one of the joint owners of property acquires the sole ownership in the whole or a portion of jointly owned property. The exemption applies in respect of so much of the value of the property as represents the transferee's original part of the jointly owned property. In other words, transfer duty is only payable in respect of the portion of the property now acquired by the transferee.

<sup>102</sup> 1974 (1) SA 253 (A).

<sup>103</sup> See *Roodt v SBI* 1974 (1) SA 525 (A).

**Example 22 – Own portion of a joint share in property**

A and B jointly own a property worth R4 000 000 in equal proportions. If B acquires A's half share of the property, B will pay duty on half of the property now being acquired from A. The transaction will be subject to transfer duty calculated under section 2(5). The exemption therefore applies only in respect of the amount of R2 000 000 which represents half of the value of the joint property already held B.

**8.2.7 Surviving or divorced spouse [section 9(1)(i)]**

An exemption is provided to the surviving or divorced spouse when property is acquired from the spouse as a result of the death of the spouse or upon dissolution of the marriage. This is one of the most common exemptions requested and has been the subject of much debate over the years. It is, therefore, useful to examine some of the contentious aspects, which include the following:

- (i) Whether or not in the case of a divorce the exemption should apply regardless of the marriage regime.
- (ii) Whether the relationship between two persons could be regarded as a "marriage" or a marriage which is akin to the "in community of property" regime which would be recognised as such in terms of the law in South Africa.
- (iii) The meaning of the words "*sole ownership*" and "*...acquires the sole ownership in the whole or any portion of property..*" when it concerns an undivided share in property, the whole of which, or part of which, is subsequently transferred to the surviving or former spouse.
- (iv) Whether the phrase "*...registered in the name of his deceased or divorced spouse ...*" means that the exemption only applies to property transactions contemplated in paragraphs (a) and (c) of the definition of the term "property" which require registration in a Deeds Registry, or if it also includes "property" as contemplated in paragraphs (d) to (g) of the definition.
- (v) There are overlaps between section 9(1)(i) and sections 9(1)(e) [inheritance], 9(1)(h) [joint ownership] and the now-deleted 9(1)(f) [acquisition by the surviving spouse from a deceased spouse]. The effect being that certain transactions would be exempt under more than one provision. Also, certain transactions considered worthy of exemption because of similar circumstances, did not qualify in terms of any of these provisions.

Regarding points (i) and (ii) above, the practical application of this provision meant that in the case of a marriage out of community of property,<sup>104</sup> the former spouse acquiring property which was registered in the name of the other spouse could not be exempted from transfer duty where that property (or portion thereof) was acquired as a result of the dissolution of the marriage. The Transfer Duty Act was therefore amended with effect from 25 July 2006 to provide that transfer duty will not be payable on the acquisition of property in the case of divorce, regardless of the marriage regime (including civil unions or same-sex partnerships which have been solemnised and registered as marriages).

<sup>104</sup> The same would apply to any relationship between two people which is not akin to a marriage in community of property.

Initially, section 9(1)(i) read as follows:

“[A] surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his deceased or divorced spouse to whom he was **married in community of property**, in respect of so much of the value of the property in which sole ownership is acquired as represents his share in that property **by virtue of the marriage in community of property**,”

(Emphasis added.)

The provision now reads as follows:

“[A] surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his or her deceased or divorced spouse where that property or portion is transferred to that surviving or divorced spouse as a result of the **death of his or her spouse or dissolution of their marriage or union**,”

(Emphasis added.)

The exemption is also applicable to spouses acquiring property from the estates of their deceased spouses and as a result, transfers from the estate of the deceased spouse as well as transfers to spouses as a result of divorce are now dealt with in one provision. Also to be considered is that, in the case of a severance of the relationship between two “married” persons, or for other reasons where the property is split between the parties, the exemptions under section 9(1)(g) or (h) could apply, depending on the circumstances.

### Example 23 – Divorce settlement

#### *Facts:*

J and P were married out of community of property, but are now getting divorced. They are the only members of a CC that owns “residential property” in the form of a beachfront holiday apartment which they use exclusively for private purposes. The CC is therefore regarded as a “residential property company” as defined in section 1(1). The membership of the CC is on a 50/50 basis and they share equally all costs and profits associated with the operation of the CC.

P also owns a flat in Johannesburg and J owns an undivided half share in a farm property in Welkom together with his business partner S.

In terms of the divorce settlement, dated 15 March 2015, J has to transfer his membership portion in the CC to P as well as his undivided half share in the farm property. P, in turn, must transfer ownership of the flat in Johannesburg to J.

Explain the application of the exemption in section 9(1)(i).

#### *Result:*

The transaction will be exempt from transfer duty on the properties acquired by J and P, as section 9(1)(i) accommodates transfers of property made in terms of a divorce settlement where the parties were married out of community of property. The exemption applies whether or not whole properties or any undivided share therein (“portion”) is transferred to the former spouse in terms of the divorce settlement. Section 2(5) would apply in regard to each of P’s acquisitions because she acquires an undivided share in property in both cases.

The term “sole ownership” does not mean that it is a condition of the exemption that after the transfer, P must enjoy full ownership of the entire property to which the “portion” acquired from J relates. Rather, what it means is that whatever J owned – be it a portion of the property or the whole property – as long as the entire extent of that ownership in property is transferred to P in terms of the settlement, the exemption will apply. For example, P will co-own the farm with S after the divorce and she will not be the sole owner of the entire property to which J’s portion relates. However, the exemption will still apply as she is acquiring “sole ownership” of the “portion” that he owns, and which he is able to transfer. Similarly, the 50% interest in the CC (being a “residential property company”) is a “*portion of the property*”, as contemplated in the exemption. Therefore, when “...*that property or portion...*” is transferred to P, she will qualify for the exemption because she is acquiring the full extent of J’s ownership of the “property” as contemplated in paragraph (d) of the definition of a “property”.

The exemption will also apply in a case where the property is “transferred” to the spouse for a consideration, as long as that is the arrangement in terms of the settlement. But if the transferee is anyone other than the former spouse in terms of the settlement, or if J retains a portion of that property, the exemption will not apply, even if the transfer is made for no consideration.

#### **Example 24 – Purchase and sale in terms of a divorce settlement**

##### *Facts:*

Assume the same facts as in **Example 24** above, except that J, P and S each have a one third share of the member’s interest in the CC that owns the beachfront apartment. Assume also, that J must sell his one third interest in the CC to P for R100 000 in terms of the divorce settlement so that after the transfer, P and S will be the members of the CC that owns the apartment. The fair value of the apartment is R1 700 000.

##### *Result:*

P qualifies for the exemption as the transfer is made in terms of the divorce settlement. The exemption is not affected by the fact that J pays a consideration of R100 000 to P, nor by the fact that the type of “property” involved is not a real right in property which is required to be registered in a Deeds Registry.

### **8.2.8 Acquisition from a spouse by virtue of marriage in community of property [section 9(1)(k)]**

If one spouse owns property before the date of becoming married in community of property, the other spouse will, by operation of law, become the owner of an undivided half share of the property concerned. This exemption allows the Registrar of Deeds to note the effect in law of this acquisition in the Deeds Registry without the payment of any duty.

### **8.2.9 Amalgamation transactions [section 9(1)(l)]**

A transfer duty exemption applies to any acquisition of property in terms of a transaction that constitutes an asset-for-share, a substitutive share-for-share transaction, amalgamation or intra-group transaction or liquidation distribution as contemplated in sections 42,43,44, 45 or 47 of the Income Tax Act, regardless of whether the property was acquired as a capital asset or as trading stock. The application for exemption must be supported by an affidavit or sworn declaration from the public officer of the company that the transaction complies with the relevant conditions stated in those provisions.

### 8.2.10 Superannuation funds of former TBVC<sup>105</sup> self-governing territories [section 9(1)(m)]

Section 9(1)(m) provides an exemption relating to the transfer of properties owned by Government superannuation funds of the former TBVC territories or other similar funds to the Government Employees' Pension Fund (GEPF). This is where the properties are still registered in the names of the former TBVC territories, and are now transferred to the GEPF. The exemption applies in respect of any property acquired, or interest in, or restriction upon any property renounced on or after 1 February 2006.

### 8.2.11 Land reform and land restitution transactions [sections 9(1)(n) and (o)]

The government's current Land Reform Programme is made up of the following principal focus areas:

- *Land Redistribution* – to provide the landless indigent, labour tenants, farm workers, women and emerging farmers with access to purchase land for residential and productive uses.
- *Land Restitution* – to restore land and provide other restitution remedies to people dispossessed of land rights by racially discriminatory legislation passed since 19 June 1913.
- *Land Tenure Reform* – to provide for secure forms of land tenure, to help resolve tenure disputes and to make awards to provide people with secure tenure.

Within these focus areas, government, via the Department of Rural Development and Land Reform (the DRD) has established the following programmes through which financial assistance is provided to qualifying beneficiaries, or where immovable property is acquired by the DRD for use by qualifying beneficiaries:

- *Commonage* – land is set aside for communal agricultural usage but owned by a municipality, and as the demand is from the municipality, the municipality is viewed as the beneficiary.<sup>106</sup>
- *Land Redistribution for Agricultural Development (LRAD)* – the DRD provides financial assistance (referred to as an LRAD grant).
- *Proactive Land Acquisition Strategy (PLAS)* – the DRD will acquire agricultural land within an Integrated Development Plan and will hold the land for a period (normally between one year and three years), after which it will sell the land to the beneficiaries. Qualifying beneficiaries will be entitled to LRAD grants in respect of the acquisition of the land.
- *General (Land Claims and Restitution)* – the DRD provides a grant to assist successful beneficiaries of a negotiated land restitution settlement to manage or secure their restored or compensatory land.

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<sup>105</sup> Transkei, Bophuthatswana, Venda, and Ciskei.

<sup>106</sup> Acquisitions by municipalities in this regard are already covered by the exemption in section 9(1)(b).

Key transactions that occur within the land reform programme can be summarised as follows:

- (i) Government purchases land from the seller and pays for the purchase wholly from designated funds. The land is then transferred to beneficiaries after a period of time, normally ranging from one to three years; or
- (ii) The beneficiary purchases the land from a seller and pays for a portion of the purchase price. Government pays the purchase price of the other portion of the land from designated funds. Alternatively, the Government pays the full purchase price from designated funds.

The main issue is that sellers and beneficiaries may, or may not, be VAT vendors carrying on an enterprise. This means that different permutations arise with regard to the taxable nature or otherwise of the supply, and the ability or inability of the beneficiary to deduct input tax, which affects government's cost of acquiring the property.

All land supplied as part of the land reform regime and paid for by government is subject to VAT at the zero rate if the seller is a VAT vendor and the land is supplied in the course or furtherance of an enterprise. This is, however, limited to the extent of the grant funding provided to the beneficiary, and does not include payment for any movables which are part of the purchase arrangement. Therefore, if any part of the purchase price relates to movables, the appropriate part of the price allocated to those movables will be subject to VAT at the standard rate if the supplier is a vendor. Similarly, if the payment by government grant in this regard is insufficient to cover the full purchase price of the property, VAT must be charged by the supplier (if that person is a VAT vendor) on that part of the consideration which is payable by the beneficiary. Exemption from transfer duty will apply if the supplier is not a vendor, or the transfer of land is made by the government to land reform beneficiaries.

#### **8.2.12 Rectification of registration errors [section 9(2)(i)]**

No duty is payable when the applicant seeks to rectify an error identified in the registration of the property. This exemption relates only to an act of registration which is required to rectify a previous error in registering an acquisition of property and is granted only when the duty payable in respect of the actual acquisition has been paid. This applies, for example –

- where the property was registered in the name of the wrong person in error; or
- where the transfer of a farm has been passed by mistake in attempting to register the transfer of a part of that property when it has no separate existence of its own; or
- where two parties purchase a property jointly, but by mistake, the property transfer is recorded in only one of the parties' names.

Although no duty is payable to rectify the registration if the duty has already been paid on the acquisition, if the intended effect is to create a change in proprietorship by deviating from the substance of the original acquisition, the exemption does not apply.

#### **8.2.13 Transfer from a partnership into the individual partner's names [section 9(3)]**

An exemption is granted for transfers to meet the requirements of section 14(1)(a) of the Deeds Registries Act as an intermediate stage in the transfer of property from the partnership to the individual partners in separate portions. Its application will rest entirely with the Registrar of Deeds.

### 8.2.14 Transfers to trustees, administrators, beneficiaries and insolvent persons [section 9(4)]

- *Termination of appointment of trustee or administrator [section 9(4)(a)]* – This exemption applies where there is a change in the registration of the property required because of a termination of the appointment of an administrator of a trust or insolvent estate. There is in fact no transaction in this case, merely a change of name of the trustee or administrator.
- *Transfer from administrator to beneficiary [section 9(4)(b)]* – Trust property transferred by the administrator of a trust to persons entitled thereto under the will or other written instrument (which implies to be the Trust Deed) is exempt from transfer duty. This subsection is intended to restrict the exemption only to testamentary trusts and *inter vivos* trusts, where the beneficiaries are related to the founder of the trust.
- *Restoration of property to insolvent person [section 9(4)(c)]* – Following the vesting of an insolvent's assets in his trustee, the [Transfer Duty Act](#) provides for exemption from duty upon transfer of property from that trustee back into the name of the previously insolvent person.
- *Registration of property in name of a trustee [section 9(4)(d)]* – The Trust Property Control Act 57 of 1988 requires trust property to be registered in such a manner as to make it clear from the registration that it is trust property. With regard to trust property being administered at the date of commencement of the said Act, the trustee is granted a period of 12 months in which to bring the registration of such property into conformity with the said requirement. Transfer duty is primarily an impost on the acquisition of property and as the requirement of the Trust Property Control Act 57 of 1988 is not purported to bring about, or have as a consequence, a change in ownership – this section is to make it clear that transfer duty is not payable in these circumstances.

### 8.2.15 Transfer to surety [section 9(6)]

In the event that a purchaser fails to pay the consideration in respect of a property transaction and instead, the consideration is paid under a surety by another person, the transfer of property into the surety's name is exempt from transfer duty. This is provided that duty in respect of the transaction has been paid and that no further consideration is payable by the surety.

### 8.2.16 Transactions declared void by a competent court [section 9(7)(a)]

No transfer duty will be payable if a transaction is declared void by a competent court, and the property is transferred back to the original owner. A competent court is defined as “a court with competent jurisdiction.”

### 8.2.17 Transactions becoming void by insolvency [sections 9(7)(b) and 9(7)(c)]

The application of these exemptions rests with the Registrar of Deeds and is provided where transactions become void as a result of –

- the insolvency of the seller; or
- the transaction is abandoned by the trustee on the insolvency of the purchaser.

### 8.2.18 Exchange of adjoining portions of mining properties [section 9(7)(d)]

Duty will be chargeable only if consideration is paid.

### 8.2.19 Acquisition of property by a subsidiary company [section 9(8)]

The effect of this subsection is to exempt from duty any acquisition, of property by a subsidiary company which is registered, managed and controlled in the Republic, from a foreign company which is registered, managed and controlled outside the Republic.

The Commissioner must be satisfied that the subsidiary company has acquired all the assets from the foreign company, including the property relating to any industrial or commercial or other business undertaking of the foreign company in the Republic and that the foreign company from which the property is acquired is controlled by or controls another foreign company which holds all the issued shares of the South African company.

### 8.2.20 Expropriation [section 9(9)]

The effect of this provision is to exempt from duty the re-acquisition of property by the original owner upon the cancellation or variation of an expropriation order by the State, a municipality or a board, body or institution of a public character established by law (that is a PBO).

### 8.2.21 Taxable supply of goods to the person acquiring property [section 9(15)]

The purpose of this exemption is to prevent the possible double taxation of a transaction. In order to ensure that the supply of “goods” constituting “fixed property”<sup>107</sup> is not subject to both VAT and transfer duty, the Transfer Duty Act provides an exemption so that no transfer duty is payable on the acquisition of “property”<sup>108</sup> in these circumstances.

The payment of VAT will therefore take precedence over the payment of transfer duty where the supplier is a vendor. However, sometimes the supply of fixed property may be subject to transfer duty even if the seller is a vendor. For example, the sale of a vendor’s private residence will usually not be in the course or furtherance of that vendor’s enterprise, and therefore, the transaction will be subject to transfer duty.

The following must, amongst others, be taken into account in determining if a supply is a taxable supply of “**goods**” and “**fixed property**” under the VAT Act:

- A taxable supply is a supply on which VAT must be charged at the standard rate (currently 14%) or at the zero rate. To be a taxable supply, the supplier (seller or transferor) must be a “vendor”<sup>109</sup> and the supply of the property must be in the course or furtherance of an “enterprise carried on by that vendor.”<sup>110</sup>
- The supply of an entire enterprise with all its assets (including any fixed property) as a “going concern” may qualify as a zero-rated taxable supply if all the conditions in section 11(1)(e) of the VAT Act are met. See Interpretation Note 57 “Sale of an Enterprise or Part thereof as a Going Concern” for more details in this regard.
- An exempt supply or a supply which is out of scope for VAT purposes is not a taxable supply. It follows that transfer duty would be payable in such cases, unless an exemption applies in the circumstances – see **8.2.23** which discusses the exemption in section 9(15B).
- The term “goods” as defined in section 1(1) of the VAT Act includes “fixed property”.

<sup>107</sup> See the definitions of “goods” and “fixed property” in section 1(1) of the VAT Act.

<sup>108</sup> As contemplated in section 1(1).

<sup>109</sup> This is a person who is registered for VAT, or is required to register for VAT.

<sup>110</sup> See the definition of an “enterprise” in section 1(1) of the VAT Act.

“Fixed property”, in turn, includes –

- land and improvements affixed to the fixed property;
- sectional title units;
- shares in a share block company which confers a right to or interest in the use of immovable property;
- time-sharing interests; and
- any real right in such land, unit, share or time-sharing interest.

The supply of shares in a share block company [paragraph (g) of the definition of the term “property” in section 1(1)] is a supply of “goods” and “fixed property” for VAT purposes. Such a supply may constitute a taxable supply, and if so, it will be exempt from transfer duty. However, the supply of other types of shares or members interests and certain interests in a discretionary trust constitute the supply of “services” for VAT purposes.

In addition to the points mentioned above regarding the supply of goods, the following should be noted when determining if a supply is a taxable supply of “**services**”<sup>111</sup> under the VAT Act:

- Services are anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of “goods”. The type of “services” with which we are concerned are financial services constituting the sale, transfer or acquisition of shares in a company or a member’s interest in a close corporation and certain interests in a discretionary trust contemplated in paragraphs (d), (e) and (f) of the definition of the term “property” in section 1(1). Also see **2.4.6** and **2.5.10** to **2.5.12**.
- The transfer of ownership of an “equity security”, being an interest in or right to a share in the capital of a juristic person or member’s interest in a close corporation is a “financial service” for VAT purposes and is exempt from VAT under section 12(a) of the VAT Act.<sup>112</sup> However, as mentioned above, the supply of shares in a share block company constitutes “fixed property” and “goods” for VAT purposes and is not the supply of a “service” or a “financial service”.
- The term “*equity security*” does not include the following:<sup>113</sup>
  - Ownership or an interest in land (for instance a sectional title unit, excluding an interest as mortgagee).
  - A share in the share capital of a share block company.

A member’s interest in a close corporation of which the association agreement confers on the member a time-sharing interest. In summary, the supply of shares or other interests in a “residential property company” as defined in the Transfer Duty Act will, in most cases, be a “financial service” which is exempt from VAT. In such cases, the exemption in section 9(15) is not applicable and transfer duty is payable. However, the sale of shares in a share block company constitutes a supply of “goods” being “fixed property”, and may constitute a taxable supply. For example, if the seller of the share block is a developer or speculator in property, the supply will be subject to VAT, but the sale of that person’s private dwelling will usually

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<sup>111</sup> See the definition of the term “services” in section 1(1) and “financial services” in section 2 of the VAT Act respectively.

<sup>112</sup> Also see sections 2(1) and 2(2)(iv) of the VAT Act.

<sup>113</sup> Section 2(3)(b), (c) and (d) of the VAT Act.

not be a taxable supply even if that person is a vendor.

On submission of the TDC01 return to SARS in this regard, the exemption receipt is issued once SARS is satisfied that the VAT payable on the transaction has been paid, or will be paid. In some cases, the seller may be required to provide security if the VAT has not yet been paid. For example, if the seller of the property has a history of non-compliance, security for the unpaid VAT may be required. In terms of the process, where security is required, the seller will be informed of certain options which may be available to resolve the outstanding issues before SARS will be in a position to issue the transfer duty exemption receipt.

These options are –

- resolve all outstanding tax obligations; or
- provide security for the VAT payment in respect of the property transaction concerned; or
- instruct the seller's transferring attorney (conveyancer) to provide an undertaking to pay the VAT out of the proceeds of the property sale directly to SARS. Where the vendor has elected for this option, the conveyancer will be required to complete a *SARS TD-VAT form*.

See the *VAT 404 – Guide for Vendors* and the *VAT 409 – Guide for Fixed Property and Construction* for more information regarding VAT.

### **8.2.22 Asset-for-share transactions under section 42 of the Income Tax Act [section 9(15A)]**

The exemption applies where fixed property is acquired as a result of an asset-for-share transaction as contemplated in section 42 of the Income Tax Act. The exemption is limited to immovable property where the supplier and the recipient of that property are deemed to be one and the same person under section 8(25) of the VAT Act. The public officer of the company is required to submit a sworn affidavit or solemn declaration that the provisions of section 8(25) of the VAT Act and section 42 of the Income Tax Act apply in the circumstances.

### **8.2.23 VAT registered rental pool schemes [section 9(15B)]**

Section 9(15B) provides an exemption from transfer duty in situations where the property is used in a VAT registered rental pool scheme and the property is supplied to a new owner who elects (as part of the transaction), to continue applying the property within the rental pool. The transaction is therefore not recognised as a taxable supply for VAT purposes provided that the property remains within the rental pool.

The exemption provides that no duty shall be payable in respect of the acquisition where –

- the property is operated and managed by a person on behalf of a rental pool scheme as contemplated in section 52(2) of the VAT Act; and
- the person acquiring that property elects in writing that that property must continue to be operated and managed by that person on behalf of a rental pool scheme.

This exemption is limited to instances where the purchaser elects in writing that the property remains in the rental pool. In other words, it only applies in situations where the ownership of the property will change, but for VAT purposes, the rental pool will continue to use the property for purposes of making taxable supplies in the course or furtherance of that rental pool's enterprise.

See Chapter 10 of the *VAT 409 – Guide for Fixed Property and Construction* for more details on rental pool schemes and the application of the VAT law under section 52(2) of the VAT Act.

#### 8.2.24 Mineral and prospecting rights [section 9(18)]

No duty is payable where –

- any “old order right” or “OP26 right”<sup>114</sup> wholly or partially continues in force or is wholly or partially converted into a new right pursuant to Schedule II of the MPRD; or
- any prospecting right, mining right, exploration right, production right, mining permit, retention permit or reconnaissance permit, or any reconnaissance permission<sup>115</sup> contemplated in section 14 of the MPRD Act, is granted or is wholly or partially renewed under that Act.

The purpose of this exemption is to exempt the acquisition, renewal or conversion of mineral rights as a result of the disposal or acquisition under of the MPRD Act as contemplated in Schedule II to that Act.

#### 8.2.25 Conversion from share block to sectional title [section 9(19)]

A share block company may, by special resolution, decide to convert its immovable property to sectional title units.<sup>116</sup> As such a transaction involves the acquisition of “fixed property” as defined in the VAT Act and “property” as defined in section 1(1), by the former shareholder, the transaction should (in principle) be subject to tax. Section 8(19) of the VAT Act however, provides that the waiving of the right of use of shares by the shareholder and the supply of the immovable property to the shareholder by the share block company in the course of converting to sectional title is deemed to be made in the course or furtherance of an enterprise. The value is deemed to be nil under section 10(27) of the VAT Act.<sup>117</sup>

Conversions to sectional title will generally be subject to VAT on a nil value if the supply by the shareholder or the shareblock company is made in the course of furtherance of an enterprise. It should be noted that this will only apply if the party concerned is already a VAT vendor (or is required to be registered). In the event that the parties concerned are not vendors, the acquisition of the sectional title unit by the former shareholder will fall within the ambit of transfer duty but the acquisition will be exempt from transfer duty under section 9(19). The date of acquisition is the date on which the shareholder advised the company in writing of the election to convert to sectional title.

#### 8.2.26 Transfer of a residence from a company or trust [section 9(20)]

The transfer of a residence from a company or trust was exempt under section 9(20) provided that all the requirements of **paragraphs 51 and 51A of the Eighth Schedule to the Income Tax Act** were met. This exemption only applied if the property was transferred under paragraph 51 on or after 11 February 2009 and before 1 October 2010 and disposed of under paragraph 51A on or after 11 February 2009 and before 1 January 2013.

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<sup>114</sup> As defined in Schedule II of the MPRD Act.

<sup>115</sup> These terms are all defined in section 1 of the MPRD Act.

<sup>116</sup> As envisaged in Item 8 of Schedule 1 to the Share Blocks Control Act 59 of 1980.

<sup>117</sup> This rule applies with effect from 1 April 2014. Before this date section 8(19) of the VAT Act provided that a conversion to sectional title was not a supply made in the course or furtherance of an enterprise. Consequently, if any tax was payable, it would be subject to transfer duty and not to VAT.

For further information see the *Guide to the Disposal of a Residence from a Company or Trust* (Issue 3) (November 2012).

### 8.3 Repealed exemptions

Repealed exemptions are of interest and remain important because they may still be claimed if they applied at the date of acquisition. Old transactions are sometimes submitted to SARS years after the date of acquisition as a result of a failure to register the transfer at the time. There could be many reasons for this, for example, where the property transaction was the subject of lengthy litigation proceedings extending over many years, or because the transferee did not think it was necessary to register the acquisition of certain rights in the Deeds Registry at the time, but later came to realise that it was required in order to properly enforce the right of ownership.

The more recent repeals are therefore listed here for ease of reference:

- Companies, society or other association of persons [section 9(1)(j)] – Deleted by Act 30 of 2000. [section 9(2)(ii)] – Deleted by Act 32 of 2004.
- Government grants of mining or mineral rights [section 9(5)] – Deleted by Act 136 of 1992.
- Rehoboth area [section 9(10)] – Deleted by Act 98 of 1988.
- Acquisition of habitable dwellings and vacant land for the purpose of erecting habitable dwellings under certain amounts (for example “low cost housing”) [sections 9(11), 9(12), 9(12A), 9(12B) and 9(12C)] – Deleted by Act 30 of 2002.
- Acquisition by a housing utility company from another housing utility company [section 9(13)] – Deleted by Act 30 of 2000.
- Acquisition by an insurer registered under the Insurance Act 27 of 1943 [section 9(14)] – Deleted by Act 30 of 2000.
- CGT: Company [section 9(16)] – Deleted by Act 31 of 2005.
- CGT: Trust [section 9(17)] – Deleted by Act 31 of 2005.
- Surviving spouse [section 9(1)(f)] – Deleted by Act 9 of 2006.
- Conversion of right of occupancy of part of building into ownership (section 9A) – Deleted by Act 17 of 2009.

## Chapter 9

### Payment and recovery of transfer duty

#### 9.1 Liability and period for payment

It is important to differentiate between the date of liability for transfer duty which is the same as the “date of acquisition” of the property as discussed in **Chapter 2** and the due date for payment of transfer duty.<sup>118</sup>

Section 3(1) provides the general rule which states that transfer duty is payable **within six months of the “date of acquisition”** (as defined in section 1(1)). In the case of an **acquisition of property**, the person who is liable to pay the duty is the person who acquires the property. In the case of a **renunciation of property**, the person who is liable to pay the duty is the person in whose favour, or for whose benefit, any interest in, or restriction upon the use or disposal of property has been renounced.

A suspensive condition concerning the acquisition of property does not delay the liability for transfer duty. Liability for transfer duty arises on the date that the contract for the acquisition of property has been entered into – irrespective of any suspensive condition. Conditional transactions which are dissolved by the operation of a resolutive condition are handled the same as cancelled transactions under section 5(2)(a).

#### Example 25 – Suspensive conditions

A and B conclude a contract of sale of property on 10 February 2015, on condition that B, the purchaser, acquires a loan within 3 calendar months from the date of the conclusion of the contract. Regardless of when B’s loan is approved (that is the condition is fulfilled), transfer duty will be payable within six months of 10 February 2015 – that is on or before 9 August 2015. However, if the contract is extinguished because B could not obtain the loan, there is no acquisition of property on which transfer duty is payable.

Sections 3(1A) and 3(1B) provide that persons other than those who acquire property can in certain circumstances be liable for transfer duty and the parties may be held liable jointly or severally. This refers to acquisitions as contemplated in paragraphs (d), (e), (f) and (g) of the definition of the term “property”.

#### 9.2 Deposit on account of duty

A deposit or advance payment can be made in exceptional circumstances in a case where the determination of the amount on which duty is payable is pending.<sup>119</sup> In such a case, with the permission of the Commissioner, the transfer duty on the declared value or the consideration may be accepted in the interim. The details of the transaction must, however, be submitted by way of a return on eFiling and will not be released as final while the fair value is being determined by the Commissioner. This will prevent the accrual of interest after the date of payment on the amount.<sup>120</sup>

<sup>118</sup> For purposes of the TA Act the date by which the tax must be paid is known as the “effective date”.

<sup>119</sup> Section 3(2).

<sup>120</sup> Section 4(2).

Interest will, however, be payable in the normal way on any additional duty or understatement penalty which may be payable (as the case may be), subject to any extension of time which may have been granted.<sup>121</sup> Once the fair value and the final dutiable amount is known, the “REQUEST FOR CORRECTION” function on the eFiling system can be used to make the necessary adjustments and the balance of the transfer duty (if any), can be paid, plus any interest which may be applicable on the balance.

### 9.3 Payment of duty and issuing of receipts

All payments of transfer duty as well as any TDC01 returns which may be required for the processing of transactions must be submitted to SARS *via* eFiling. Generally, no supporting documentation will be required. This, however, depends on the level of risk associated with the transaction. If further documentation or information is required, this will be requested by way of a letter issued *via* eFiling. Alternatively, if no further information is required, the system will automatically release the receipt once payment has been made. Similarly, an exemption receipt will be issued *via* eFiling if the transaction is exempt from transfer duty and a zero-rated receipt will be issued when the consideration, fair value or declared value which is accepted by the Commissioner in relation to the transaction falls under the threshold for the zero rate of transfer duty (currently R750 000).

Receipts may not be altered after issue and a new transaction must be submitted *via* eFiling with the correct information. If it appears that a return is incorrect, or that the properties to be transferred were not correctly described or fully itemised, a refund request should be submitted (if applicable). There are, however, certain minor errors and corrections that do not require a new transaction to be lodged. These can be corrected under cover of a Certificate by a Conveyancer which should state the correct position.

See the Chief Registrar’s Circular No. 9 of 2009 (RC 9/2009) for a list of these errors.

### 9.4 Interest on late payment

Interest is levied under section 4(1A) at a rate of 10% per annum on the amount of duty which remains unpaid for **each completed month** calculated from the effective date until the date of payment. The effective date is determined as the day immediately after the six-month period allowed for payment to be made, which is determined from the “date of acquisition”.

#### Example 26 – Calculation of interest

ABC (Pty) Ltd purchased a property on 7 November 2014. The transfer duty which worked out to be of R105 000 was only paid on 10 August 2015 which was after the six-month interest-free period had lapsed. Interest was therefore payable for three completed months at 10% per annum on the date of payment of the tax.

Calculate interest up to 10 August 2015.

|               |                       |                                |
|---------------|-----------------------|--------------------------------|
|               | R                     |                                |
| Transfer duty | 105 000               |                                |
| Interest      | <u>2 625</u>          | (R105 000 × 10% × 3 / 12)      |
| Total payable | <b><u>107 625</u></b> | on or before 6 September 2015. |

<sup>121</sup> Section 4(3).

## 9.5 Registration of acquisition

Section 12(1) provides an effective measure to ensure that transfer duty is indeed paid. This only applies to acquisitions under paragraph (a) or (c) of the definition of the term “property” in section 1(1) which qualify as real rights in property and which are required to be registered under the Deeds Registries Act. (The Deeds Registries Act does not deal with the other forms of property in paragraphs (d) to (g) of the said definition.) Under this provision, the registration of an acquisition of property in a Deeds Registry is barred until evidence is produced that the transfer duty payable has been paid, or that the Commissioner has issued a certificate (exemption receipt) under section 9(15)(c) that no duty is payable. This requirement is also confirmed in section 92(1) of the Deeds Registries Act. Any dispute as to the application of an exemption or the amount of duty payable must be referred to the Commissioner by the Registrar.

The Commissioner may, however, accept a “deposit” or advance payment based on the consideration or the declared value if the transaction is subject to a determination by the Commissioner of the fair value of the property, provided that security for the payment of any balance of transfer duty which may still be payable is received. If the registration of transfer is required before the final settlement of the duty, the Commissioner has a discretion<sup>122</sup> to issue a certificate to the person liable to pay the duty so that the property transfer can be registered as provided in section 12(2).

Section 14(3) also provides that estate agents who are entitled to any remuneration or other payment in respect of services rendered in connection with “residential property” transactions contemplated in paragraph (d), (e) or (f) of the definition of the term “property”, must within six months of the date of acquisition of that property submit details of that transaction to the Commissioner in a form and in such manner as the Commissioner may prescribe.

## 9.6 Recovery of underpaid duty and understatement penalty

Section 13 provides that the Commissioner may recover any amount of underpaid transfer duty, notwithstanding that the acquisition of property has already been registered in a Deeds Registry. In such a case, the Commissioner is entitled, even at a later stage, to recover the additional transfer duty payable in respect of the acquisition of the property in accordance with Chapter 11 of the TA Act.

An assessment can be raised by SARS on which a receipt for additional duty recovered can be acknowledged. This section provides SARS with the right to conduct audits on transactions where receipts have already been issued. This is not limited to instances where duty was paid on less than the fair value of the property, but also to collect duty on transactions which were incorrectly submitted as being exempt, when, in fact, they should have been treated as dutiable transactions. However, the Commissioner may not recover the duty or shortfall in duty after the expiration of a period of five years from the date on which the amount became payable under this Act, if it is shown that the person liable to pay the duty (or any person acting on that person’s behalf) –

- (a) had no intention not to make payment of the duty; and
- (b) acted in good faith, on an assumption based on reasonable grounds that the transaction was not subject to duty, and was not due to negligence.

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<sup>122</sup> This is provided for in section 11(3)(a).

In the event that it is found that insufficient duty has been paid, or that no duty was paid on a dutiable transaction, an understatement penalty may be levied under Chapter 16 of the TA Act, depending on the circumstances of the case. An understatement penalty will be included in an assessment issued by SARS and must be paid by the date specified in the notice of assessment.

An understatement penalty may only be imposed if the fiscus is prejudiced by the taxpayer's conduct in reporting. For example, there will be prejudice if there is a shortfall between the correct amount of tax payable and the amount declared on the return by the taxpayer. The prejudice, must have been caused because a taxpayer –

- defaulted in rendering a return;
- filed a return but omitted important information from that return; or
- filed a return in which an incorrect statement was made.

The applicable percentage on which the understatement penalty is calculated is determined with reference to certain behaviours in the understatement penalty table in section 223 of the TA Act. The understatement penalty is calculated by applying the highest applicable understatement penalty percentage relating to the taxpayer's behaviours to the shortfall amount.

Since the Deeds Registries Act does not deal with the forms of property in paragraphs (d) to (g) of the definition of the term "property" in section 1(1), compliance with regard to these transactions is handled through the normal audit processes.

## Chapter 10

### Administrative provisions

#### 10.1 The Tax Administration Act and the administration of the Transfer Duty Act

The Commissioner is responsible for the administration of the Transfer Duty Act under section 10(1) and the powers conferred upon the Commissioner are set out in section 11. Section 10(2) states that the powers conferred and the duties imposed upon the Commissioner may be performed or exercised by the Commissioner, or by any SARS official<sup>123</sup> under the control, direction or supervision of the Commissioner. SARS officials are responsible for decisions in ascertaining the value of the relevant property for transfer duty purposes within the provisions of the Transfer Duty Act and for the correct assessment and collection of duty. Only cases involving complexity, doubt or dispute require submission to the Commissioner's office for further attention. Care must therefore be taken to ensure that all the relevant information is submitted so that it will not require any subsequent revision. In order to facilitate the checking of the calculation of interest at a later date, the effective date by the seller and purchaser should be stated correctly on the eFiling system.

With effect from 1 October 2012, the general administration of most taxes administered by SARS is governed primarily by the TA Act. Section 10(3) was therefore inserted to provide that any administrative requirements and procedures for purposes of the performance of any duty, power or obligation or the exercise of any right is regulated by the TA Act if the Transfer Duty Act does not provide specifically for the regulation of that matter.<sup>124</sup>

The TA Act only deals with tax administration, and incorporates into one piece of legislation certain administrative provisions that are generic to all tax Acts. It also seeks to align the various administrative provisions which were previously duplicated in the different tax Acts, and to simplify and harmonise the provisions as far as possible. However, some administrative provisions that only apply to the administration of a specific tax type remain in the tax Act that imposes the tax type. For example, certain administrative requirements regarding the valuation of property will remain in the Transfer Duty Act, notwithstanding the definition of the term "fair market value" in section 1 of the TA Act and its application to similar valuation matters dealt with in that Act.

This means that in some cases, both the TA Act and the individual tax Acts such as the VAT Act and the Transfer Duty Act will prescribe certain administrative requirements with which a taxpayer must comply. In addition, certain provisions relating to interest in sections 187 to 189 of the TA Act did not come into effect from 1 October 2012, but will be promulgated later by way of a Proclamation in the *Government Gazette*. Only once these provisions come into effect will interest be charged at the "prescribed rate". Therefore, until such time as the Proclamation is issued, the current rate of 10% per annum in section 4(1A) will continue to apply, however only in respect of transactions entered into after 1 March 2005.

The administrative provisions mentioned in this guide must therefore be understood within the context of the TA Act as well as any public notice issued under the TA Act and the Proclamation mentioned above. See the *Short Guide to the Tax Administration Act, 2011* for more information in regard to the administration of the tax Acts. The TA Act and various other related sources of information are also available on the SARS website under the *Legal*

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<sup>123</sup> A "SARS official" is defined in section 1 of the TA Act.

<sup>124</sup> See Chapter 2 of the TA Act which sets out the prescribed powers and duties of SARS, SARS officials, the Commissioner, the Minister and the Tax Ombud.

*Counsel* page.

## 10.2 Returns

As mentioned earlier, all returns must be submitted to SARS via eFiling. Failure to furnish a return when called upon, or the furnishing of a return which fails to disclose material facts, may be subject to penalties. Section 14 provides for various administrative and compliance issues relating to the submission of returns and payments in electronic format, including rules and regulations relating to electronic or digital signatures. Section 14 also provides that estate agents who are entitled to any remuneration or other payment in respect of services rendered in connection with a transaction in terms of which a person acquired property through the supply of shares and other interests as contemplated in paragraph (d), (e) or (f) of the definition of “property”, must within six months of the date of acquisition of that property submit details of that transaction to the Commissioner in a form and in such manner as prescribed by the Commissioner.

A few points to note regarding the electronic submission of returns and payments:

- SARS will verify the duty calculations and authorise the issue of a transfer duty receipt.
- A copy of the deed of sale or other supporting documents must be electronically scanned and submitted when requested. The deed of sale and original transfer duty returns, with all the requisite signatures must be retained by conveyancers for a period of five years from the date of submission thereof to SARS.
- Once the returns have been completed on the website, the duty and interest, (if any) will be indicated on the website and payment must be made electronically once the transaction has been assessed and authorised. In case of a payment, the transfer duty receipt will be available to conveyancers on the website after the bank reconciliation has been done. A zero-rated, exempt or VAT transaction receipt will be available once assessed. The electronic receipts or exemptions must be presented together with the transfer documents to the Registrar of Deeds where registration of the property is required to be effected in the Deeds Registry.
- Conveyancers wishing to submit transfer duty transactions will have to register on eFiling and can get assistance from the national call centre at 0800 00 7277.

Before a transfer duty receipt is issued, the relevant returns lodged should be carefully checked to ensure that no important particulars are omitted, and that particulars such as the names of the parties, the purchase consideration, and the date of transaction correspond.

The eFiling system keeps records for five years. Conveyancers must also keep the signed returns, manual and eFiling receipts and exemptions, as well as all supporting documents in respect of each transaction for a period of five years for audit purposes. The same applies to auctioneers, brokers and other agents who are required to maintain the records of all sales made by them on behalf of other persons.

Please see the Transfer Duty eFiling Guide as well as various other documents which you will find on the transfer duty webpage on the SARS website with regard to the general administration around the submission and processing of returns and payments on eFiling.

## 10.3 Compliance

### 10.3.1 Outstanding taxes and tax returns

SARS will use property transfers in an effort to ensure that, where applicable, the parties concerned are on register for the various taxes and that their tax returns and tax payments are up to date. The transacting taxpayers will therefore be informed, through this process, of any non-compliance regarding their own tax affairs, and will be given the opportunity to rectify matters.

For example –

- the payment of any taxes due (or acceptable payment arrangements made with SARS); or
- the submission of any outstanding tax returns before proceeding with any recovery steps which may ultimately affect the transfer of the property concerned, or any payment of the consideration in respect thereof.

As part of the recovery process, a conveyancer or other person may be appointed as a withholding agent to pay SARS from the proceeds of the sale – usually within five days of the receipt of funds relating to the transaction.

### 10.3.2 Value-Added Tax

#### *Going concern*

Before completing the TDC01 return indicating that the supply is a taxable supply for VAT purposes, and hence, exempt from transfer duty, please check that the transaction concerned indeed complies with the requirements of the VAT Act. This is important so that the correct documentation can be submitted and payment made on the correct facts, which will avoid any refund application at a later stage as a result of the incorrect tax having been paid. For example, sometimes the parties view a property transaction as a zero-rated going concern for VAT purposes when it does not meet the requirements of section 11(1)(e) of the VAT Act. Alternatively, it might be assumed by the parties that the transaction is subject to transfer duty because the supplier is not registered for VAT at the time, incorrectly believing that there is no liability to register and to charge VAT in respect of the supplies made.

The submission of a return indicating that a supply is zero-rated for VAT purposes and therefore exempt from transfer duty is a risk. This is because the transaction is sometimes the mere sale of property and not a zero-rated supply of an enterprise as a going concern as contemplated in section 11(1)(e) of the VAT Act. An incorrect filing of this nature can expose both the seller and purchaser to severe penalties.

Vendors and conveyancers are therefore encouraged to make every effort to check that the requirements of the VAT Act which substantiate the decision to zero rate the transaction have actually been met. Alternatively to confirm that the transaction is indeed a taxable supply for VAT purposes before completing the return on eFiling and making payment of transfer duty. It should also be kept in mind that the rendering of incorrect returns may be seen as a serious tax offence under the TA Act, particularly if it is a false return made in an attempt to evade tax or to obtain an undue refund of taxes.

For more information in this regard, see Interpretation Note 57 “Sale of an Enterprise or Part thereof as a Going Concern”, the *VAT 409 – Guide for Fixed Property and Construction* and the *VAT 404 – Guide for Vendors*.

*Prices, charged, advertised or quoted to include VAT*

Section 65(1) of the VAT Act provides that it is a requirement that any price charged, advertised or quoted by a vendor must include VAT if the supply is taxable under the VAT Act. A vendor may also not state or imply that any form of trade, cash or any other form of discount or refund is made in lieu of the VAT that is chargeable on a supply. Despite these requirements, some property developers and speculators advertise VAT-exclusive prices on their websites, billboards, newspaper adverts and marketing brochures, which mislead the public into believing that it is possible not to pay the VAT which is due on a transaction. In addition to it being illegal and misleading, a vendor will be exposed to commercial risks if advertised or quoted prices do not include VAT. For example, if you contract with your customer to buy a property based on the advertised price, and no reference is made to VAT in the sale agreement, you may be challenged on the final price. This is because section 64 of the VAT Act deems any price charged by a vendor to include VAT whether it has been included in the price or not.

It is also important to make sure that the contract refers to VAT and not transfer duty if the supply is a taxable supply for VAT purposes. This will help to avoid any dispute arising at a later stage. Vendors such as property developers or speculators should also not advertise that “no transfer costs” are payable on fixed property purchases, especially where the advert does not contain a specific statement indicating that VAT is included in the price. One of the inferences of making such a statement is that no transfer taxes such as VAT or transfer duty are payable. Furthermore, such a statement does not have the effect of shifting the liability from the person who is liable to pay the tax. Regardless of any contractual arrangements, it is always the seller (supplier) who is liable to pay the VAT if the supply is taxable for VAT purposes and in the case of a non-taxable supply under the VAT Act, the purchaser is the person who is liable to pay the transfer duty. In the event that the contractual arrangement is for the seller to pay certain costs such as the legal expenses associated with transferring the property into the purchaser’s name, it is better to advertise the price as including any legal or conveyancing costs rather than stating that “no transfer costs” apply.

## 10.4 Refunds

Refunds are dealt with in Chapter 13 of the TA Act. A refund of transfer duty may be possible only in very exceptional circumstances. For example, where it is proved to the satisfaction of the Commissioner that transfer duty has been paid in respect of an acquisition of property by a person who is, or has become, entitled to an exemption (as at the date of the acquisition), or where the amount paid is in excess of the amount of duty which is properly payable. However, any refundable amount may be set-off against any amount of tax, duty, levy, charge, interest or penalty due by the person entitled to the refund under any Act administered by the Commissioner.

The following information is required by SARS in order to process a refund application:

- Rev 16 form (Claim for Refund out of Revenue) with Part A correctly completed and signed. The form is available on the **SARS website**.
- Motivation on a letterhead as to why a refund is requested. If the reason is due to an error, please provide the new transfer duty number that will replace the refund transaction.
- Copy of a cancelled cheque (to confirm banking details).
- Official letterhead with bank account details.

- eFiling proof of payment indicating that the payment was successful. Follow these steps to obtain the eFiling proof of payment:
  - ⇒ Log on to the eFiling system;
  - ⇒ Click on “Payments” (left hand side of screen);
  - ⇒ Click on “History”;
  - ⇒ Search for the payment;
  - ⇒ Click on “open” (right hand side of payment);
  - ⇒ Click on “open” again;
  - ⇒ Print the proof.
- Transfer duty receipt signed by the conveyancer (printed receipt from eFiling).
- Signed declaration on the firms’ letterhead in which it is stated that the printed receipts will not be used for any other purposes than requesting the refund as well as confirming that an application for a new transaction will be submitted to SARS.
- Deed of sale.
- The Cancellation Agreement in the case of a cancelled transaction.
- If it is a sequestration, liquidation or estate case, please forward the necessary proof.
- Notification from Deeds Office of rejection (if applicable).
- Copy of a current Deeds search.

Should any of the above documents be omitted, the application will be returned for further attention by the applicant.

In the case of a cancelled transaction where no formal cancellation agreement was entered into as a result of a dispute between the parties, the applicant will be required to submit other forms of proof of the cancellation of the sale. For example, a letter from the transferring attorney confirming the cancellation of the transaction to the parties. With the new eFiling process, the number of refund applications should be reduced as a “REQUEST FOR CORRECTION” function is now available on the eFiling system. This means that conveyancers will be able to make changes to a transaction which has already been submitted.

## **10.5 Dispute resolution**

### **10.5.1 General**

The resolution of all tax disputes is provided for in Chapter 9 of the TA Act. Chapter 9 of the TA Act must be read in conjunction with the “rules” governing –

- the procedures to lodge an objection and appeal against an assessment or decision;
- alternative dispute resolution (ADR) procedures under which SARS and the person aggrieved by an assessment or decision may resolve a dispute; and
- the conduct and hearing of an appeal before a tax board or tax court.

For more information on this topic, see Chapter 9 of the TA Act or the *Short Guide to the Tax Administration Act, 2011*. Also see the ADR webpage where the following documents are available:

- *Tax Guide on Dispute Resolution*
- *What do you do if you dispute your tax assessment?*
- *Alternative Dispute Resolution Quick Guide*

### **10.5.2 The “pay now, argue later” principle**

This principle is now embedded in the provisions of the TA Act as a general rule which applies to the administration of all tax Acts. The application of this rule in the context of transfer duty means that if there is a liability to pay transfer duty and such amount has not been paid by the effective date (within six months of the date of acquisition), the duty must be paid pending the resolution of any objection or appeal, unless there is an agreement to the contrary with SARS when considering the circumstances of the transaction concerned.

## Annexure A – Court cases

### Acquisition of property

- *Ex parte Sellars* 22 SATC 139

### Agent

- *Peak Lode Gold Mining Co Ltd v Union Government* 5 SATC 321, 1932 TPD 48
- *Transvaal Consolidated Land and Exploration Co Ltd v RF McCall* 2 SATC 85, 1926 TPD

### Assessments

- *DJ Visser (Pty) Ltd v Cir* 25 SATC 403, 1963 CPD (3) SA 281
- *SBI v Florisfontein Boerdery (Edms) Bpk en 'n Ander* 31 SATC 1, 1969 (1) SA 260 (A)
- *Brink v Wiid* 30 SATC 53, 1968 AD

### Avoidance of duty

- *Transvaal Consolidated Land and Exploration Co Ltd v RF McCall* 2 SATC 85, 1926 TPD

### Cancellation agreement

- *Le Grange v Pretorius* 12 SATC 208, 1943 TPD 223

### Cession

- *Munnik Myburgh Asbestos (Kaapscje Hoop) Ltd v Receiver of Revenue, Johannesburg* 3 SATC 9, 1926 LDW
- *Ex parte Van Schoor* 7 SATC 280, 1935 TPD 316
- *Ex parte Brucken* 18 SATC 176, 1952 (3) SA 227 (W)

### Change of owners

- *Receiver of Revenue, Pietermaritzburg v H Linder* 1 SATC 94, 1925 NLR 9

### Company reconstitution

- *Ex parte Haslam NO : In re Shell Co of SA Ltd* 24 SATC 422, 1961 (3) SA 904 (C)

### Consideration

- *Tudor Estates Ltd v Receiver of Revenue, Pretoria* 1 SATC 202, 1925 TPD 661

### Corruption

- *Steckel v R* 13 SATC 264, 1942 SWA

### Deceased estate

- *Lubbe v KBI* 24 SATC 528, 1962 (2) SA 503 (O)

**Divisibility of contract**

- *Receiver of Revenue v GA Troye* 1 SATC 38, 1923 TPD 14
- *Modder East Orchards Ltd v Receiver of Revenue* 1 SATC 40, 1924 TPD 14

**Divorce**

- *Ex parte Boshi and Another* 1979 (1) SA 249 (R)
- *Ex parte Herman* 1954 (2) SA 636 (O)

**Donations**

- *CIR v De Valence* 5 SATC 211, 1931 NLR 87
- *Trustee Insolvent Estate HG Conrad v Registrar of Deeds* 5 SATC 12, 1930 CPD 323
- *Ex parte Nourse* 12 SATC 101, 1942 CPD 5

**Dutiable transactions**

- *Botha and another v Soocher* 12 SATC 37, 1941 TPD
- *Pretoria Town Council v Receiver of Revenue, Pretoria* 5 SATC 130, 1931 AD

**Evasion of duty**

- *Thornton v R* 5 SATC 215, 1931 EDL 271

**Evidence**

- *Van Wyk v Rottchers Sawmills (Pty) Ltd* 14 SATC 333, 1947 (2) SA 852 (T)
- *Van Wyk v Rottcher's Sawmills (Pty) Ltd* 15 SATC 32, 1948 (1) SA 983 (A)

**Exchange of properties**

- *Roodt en 'n Ander v SBI* 36 SATC 1, 1974 (1) SA 525 (A)

**Exemption**

- *Colonial Treasurer v Rand Water Baord* 1907 TS 479
- *Estate JJ Van Der Merwe (Deceased) v Registrar of Deeds* 6 SATC 15, 1930 CPD
- *Steyn v Registrar of Deeds* 6 SATC 25, 1933 CPD 109
- *Nhlapo v Nhlapo* 14 SATC 235, 1946 NPD 492
- *CIR v Ropes and Mattings (SA) Ltd* 13 SATC 267, 1945 AD 724
- *Estate Birkenstock v Receiver of Revenue, Pietermaritzburg* 3 SATC 264, 1928 NLR 225
- *Ex parte Estate ME Dreyer(Deceased)* 2 SATC 86, 1926 CPD
- *Ex parte Azar* 6 SATC 19, 1932 OPD 107
- *In re Estate Comrie* 3 SATC 263, 1928 NLR
- *Browning v Registrar of Deeds* 17 SATC 282, 1951 (2) SA 429 (C)
- *Bozzone & others v SIR* 37 SATC 262, 1975 (4) SA 579 (A)

- *SIR v Bozzone & others* 36 SATC 133, 1974 (3) SA 826 (N)
- *Prospecton Sugar Estates Ltd v CIR* 5 SATC 326, 1932 NLR 68
- *Hart v CIR* 18 SATC 375, 1953 (2) SA 271 (C)
- *Fakroodien & another v Registrar of Deeds, Natal* 8 SATC 116, 1936 NPD 39
- *Ex parte Estate Sai Molife, Deceased* 8 SATC 120, 1936 NPD
- *Brook's Executors & another v Minister of Finance* 10 SATC 36, 1938 NPD 89
- *Banoo & another v CIR* 14 SATC 442, 1947 (4) SA 417 (T)
- *Ex parte Strydom and another* NO 11 SATC 302, 1940 OPD 278
- *Steenkamp v Registrar of Deeds* 12 SATC 42, 1942 CPD 136
- *Kock v CIR* 19 SATC 263, 1954 (3) SA 631 (C)
- *Moodie & others v Registrar of Deeds* 11 SATC 305, 1941 CPD 171
- *Coetsee & others v Registrar of Deeds* 6 SATC 22, 1932 CPD 392
- *Pretorius v CIR* 46 SATC 34, 1984 (2) SA 619 (T)
- *Stobart v Codd* NO 27 SATC 51, 1965 (2) SA 255 (SR)
- *Greene v Registrar of Deeds, Pietermaritzburg* 3 SATC 14, 1927 NPD
- *CIR v Pretorius* 47 SATC 285, 1986 (1) SA 238 (A)
- *Estate Roadknight & another v SIR* 35 SATC 54, 1973 (D)
- *SIR v Estate Roadknight & another* 35 SATC 250, 1973 (A)
- *Van Rooyen v SBI* 41 SATC 143, 1979 (3) SA 1223 (O)

### Expropriation

- *The Municipality of Cape Town v Government of the Union of South Africa* 11 SATC 39, 1939 CPD

### Fideicommissum

- *Ex parte Estate ME Dreyer (Deceased)* 2 SATC 86, 1926 CPD 225

### Husband and wife

- *Ex parte Executors Estate Everard* 1938 TPD 190
- *Issels v Codd NO & Fitt NO* 18 SATC 163, 1952 (2) SA 615 (SR)

### Improvements

- *KBI v Anglo American (OFS) Housing Co Ltd* 23 SATC 446, 1960 (3) SA 642 (A)
- *Anglo-American (OFS) Housing Co Ltd v CIR* 23 SATC 51, 1959 (4) SA 279 (W)
- *Caltex (Africa) Ltd and others v Director of Valuations* 1961 (1) SA 525 (C)

### Lease

- *Botha & another v Soocher* 12 SATC 37, 1941 TPD 245
- *SA Pulp and Paper Industries Ltd v CIR* 19 SATC 357, 1955 (1) SA 8 (T)
- *CIR v De Beers Consolidated Mines Ltd* 12 SATC 212, 1943 GWL 21

**Liability for duty**

- *De Leef Family Trust NNO v CIR* 55 SATC 207, 1993 (A)

**Limited interest**

- *Hopper v Cochran* 7 SATC 90, 1934 TPD 324
- *Reid v Rocher* 14 SATC 82, 1946 WLD 294
- *Steenkamp v Registrar of Deeds* 12 SATC 42, 1942 CPD 136

**Nominee**

- *Milne v Sexton* 9 SATC 225, 1937 TPD
- *CIR v Collins* 54 SATC 371, 1992 (3) SA 698 (A)
- *Banoo & another v CIR* 14 SATC 442, 1947 (4) SA 417 (T)
- *Wildrice Investments (Pty) Ltd v CIR* 48 SATC 145, 1986 (T)

**Options**

- *Van Niekerk v Smit & others* 18 SATC 167, 1952 (3) SA 17 (T)
- *Van Aardt v Galway* 2012(2) SA 315 (SCA) SA 79 (SCA))
- *Hart v CIR* 18 SATC 375, 1953 (2) SA 271 (C)
- *Union Government v Johannesburg Gold Mining Corporation Ltd* 8 SATC 34, 1936 TPD 1

**Partition**

- *Roodt en Ander v SBI* 36 SATC 1, 1974 AD
- *Fakroodien & another v Registrar of Deeds, Natal* 8 SATC 116, 1936 NPD 39
- *Ex Parte Estate Sai Molife, Deceased* 8 SATC 120, 1936 NPD
- *Du Toit & another v Registrar of Deeds* 11 SATC 146, 1940 CPD 532
- *Brook's Executors & another v Minister of Finance* 10 SATC 36, 1938 NPD 89

**Partnership**

- *Estate Whiteaway & others v CIR* 10 SATC 166, 1938 TPD 482
- *Smith v Weston* 24 SATC 416, 1961 (1) SA 275 (W)

**Prescription**

- *Ex parte Van Oudtshoorn* 18 SATC 158, 1952 (2) SA 310 (T)

**Procedure**

- *DJ Visser (Pty) Ltd v CIR* 25 SATC 403, 1963 (3) SA 281 (C)
- *Connan v SBI* 35 SATC 202, 1973(4) SA 197 (NC)

**Prospecting contract**

- *Munnik Myburgh Asbestos (Kaapsche Hoop) Ltd v Receiver of Revenue, Johannesburg* 3 SATC 9, 1927 WLD 98

**Rates of duty**

- *Hartzenberg v SIR* 27 SATC 128, 1965 (4) SA 282 (W)
- *SIR v Hartzenberg* 28 SATC 94, 1966 (1) SA 405 (A)

**Rectification**

- *Nhlapo v Nhlapo* 14 SATC 235, 1946 NPD 492

**Sale of immovable property**

- *CIR v Viljoen and Others* 57 SATC 335, 1995 (4) SA 476 (EC)
- *Collins v CIR* 53 SATC 30, 1990 (4) SA 619 (D)
- *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A)

**Sales**

- *Posselt & Coull (Pvt) Ltd v Marson* NO 22 SATC 258, 1959 (1) SA 748 (SR)
- *South African Land and Exploration Co Ltd v Union Government* 8 SATC 109, 1936 TPD 174
- *Van Wyk v Rottchers Sawmills (Pty) Ltd* 14 SATC 333, 1947 (2) SA 852 (T)
- *Minister of Finance v Gin Bros and Goldblatt* 19 SATC 248, 1954 (3) SA 881 (A)
- *Mathope v Magano* 8 SATC 217, 1935 TPD
- *Milne v Sexton* 9 SATC 225, 1937 TPD 277
- *Van Wyk v Rottcher's Sawmills (Pty) Ltd* 15 SATC 32, 1948 (1) SA 983 (A)
- *Morrison v Hanson* 9 SATC 396, 1937 TPD 144
- *Griessel v Du Toit* 15 SATC 175, 1948 (2) SA 562 (T)
- *Blundell v Blom* 16 SATC 413, 1950 (2) SA 627 (W)
- *Glover v Bothma* 15 SATC 158, 1948 (1) SA 611 (W)
- *King v Potgieter* 17 SATC 262, 1950 (3) SA 7 (T)
- *Van der Merwe v Cloete & another* 17 SATC 274, 1950 (3) SA 228 (T)
- *Berry v Mann* 9 SATC 218, 1937 NPD 53
- *Reid v Rocher* 14 SATC 82, 1946 WLD 294
- *Ex parte Brucken* 18 SATC 176, 1952 (3) SA 227 (W)
- *Aird & another v Hockly* 9 SATC 10, 1936 EDL 117
- *Ex parte Poonyane* 24 SATC 763, 1962 (2) SA 599 (T)
- *Dawson v Yates* NO 22 SATC 136, 1958 (3) SA 820 (SR)
- *CIR v Freddie's Consolidated Mines Ltd* 21 SATC 132, 1957 (1) SA 306 (A)
- *Van Niekerk v Smit & others* 18 SATC 167, 1952 (3) SA 17 (T)

**Servitude**

- *Nel v Du Plessis* 17 SATC 289, 1951 (3) SA 67 (T)

**Trusts**

- *Ex parte Sellars* 22 SATC 139, 1958 (4) SA 54 (C)
- *Ex parte Strydom and another* NO 11 SATC 302, 1940 OPD 278
- *Stobart v Codd* NO 27 SATC 51, 1965 (2) SA 255
- *Simplex (Pty) Ltd v Van Der Merwe and others* 1996 (1) SA 111 (W)

**Valuation**

- *Cavanagh v Receiver of Revenue, Cape Town* 1912 CPD 462
- *Estate Wright v Registrar of Deeds* 1911 CPD 611
- *SBI v Roodt en Ander* 35 SATC 197, 1973 (4) SA 19 (O)
- *Tudor Estates Ltd v Receiver of Revenue, Pretoria* 1 SATC 202, 1925 TPD
- *SBI v Connan* 36 SATC 87, 1974 (3) SA 111 (A)
- *SBI v Florisfontein Boerdery (Edms) Bpk en 'n Ander* 30 SATC 181, 1968 (4) SA 350 (GW)
- *SIR v Wispeco Housing (Pty) Ltd* 35 SATC 14, 1973 (1) SA 783
- *Van Thiel's Wire Industries (Pty) Ltd v CIR* 19 SATC 269, 1954 (4) SA 69 (D)
- *Minister of Finance v Tahan* 5 SATC 141, 1931 OPD 87
- *Connan v SBI* 35 SATC 202, 1973 (4) SA 197 (NC)
- *Anglo-American (OFS) Housing Co Ltd v CIR* 23 SATC 51, 1959 (4) SA 279 (W)
- *Brink v Wiid* 30 SATC 53, 1968 (1) SA 536 (A)
- *SIR v Sturrock Sugar Farm (Pty) Ltd* 27 SATC 31, 1965 (1) SA 897 (A)
- *Sturrock Sugar Farms (Pty) Ltd v SIR* 26 SATC 241, 1964 (4) SA 85 (N)
- *De Jager v SIR* 35 SATC 79, 1973 (2) SA 710 (T)

## Annexure B – Life expectancy tables

### Life expectancy tables: Section 29 of the Estate Duty Act 45 of 1955 (Government Notice R1942 of 23 September 1977)

GNR 1942 of 23 September 1977: Valuation of annuities or of fiduciary, usufructuary or other limited interests in property in the estates of deceased persons (R)

NOTE:—These regulations were published in Government Notice No. R1942 contained in Regulation Gazette No. 2533 of 23 September, 1977.

Calculations for the purposes of the valuation of annuities or of fiduciary, usufructuary or other limited interests in property in the estate of any person who died or dies on or after 1 April 1977 shall be made in accordance with the Tables subjoined hereto:

(The regulations promulgated under **Government Notice 641 of 13 April 1956** shall continue to apply in relation to the estate of any person who died before 1 April 1977.)

**Table A**

The Expectation of Life and the Present Value of R1 per Annum for Life Capitalised at 12 per cent over the Expectation of Life of Males and Females of Various Ages.

| Age next birthday | Expectation of life |        | Present value of R1 per annum for life |         | Age |
|-------------------|---------------------|--------|--|---------|-----|
|                   | Male                | Female | Male                                   | Female  |     |
| 0                 | 64,74               | 72,36  | 8,32791                                | 8,33105 | 0*  |
| 1                 | 65,37               | 72,74  | 8,32828                                | 8,33114 | 1*  |
| 2                 | 64,50               | 71,87  | 8,32776                                | 8,33091 | 2*  |
| 3                 | 63,57               | 70,93  | 8,32714                                | 8,33064 | 3*  |
| 4                 | 62,63               | 69,97  | 8,32644                                | 8,33033 | 4*  |
| 5                 | 61,69               | 69,02  | 8,32567                                | 8,32999 | 5*  |
| 6                 | 60,74               | 68,06  | 8,32480                                | 8,32961 | 6*  |
| 7                 | 59,78               | 67,09  | 8,32381                                | 8,32918 | 7*  |
| 8                 | 58,81               | 66,11  | 8,32271                                | 8,32869 | 8*  |
| 9                 | 57,83               | 65,14  | 8,32146                                | 8,32815 | 9*  |
| 10                | 56,85               | 64,15  | 8,32007                                | 8,32753 | 10* |
| 11                | 55,86               | 63,16  | 8,31849                                | 8,32684 | 11* |
| 12                | 54,87               | 62,18  | 8,31673                                | 8,32608 | 12* |
| 13                | 53,90               | 61,19  | 8,31480                                | 8,32522 | 13* |
| 14                | 52,93               | 60,21  | 8,31265                                | 8,32427 | 14* |
| 15                | 51,98               | 59,23  | 8,31029                                | 8,32320 | 15* |
| 16                | 51,04               | 58,26  | 8,30770                                | 8,32203 | 16* |
| 17                | 50,12               | 57,29  | 8,30489                                | 8,32071 | 17* |
| 18                | 49,21               | 56,33  | 8,30180                                | 8,31926 | 18* |

| Age next birthday | Expectation of life |       | Present value of R1 per annum for life |         | Age |
|-------------------|---------------------|-------|--|---------|-----|
|                   |                     |       |  |         |     |
| 19                | 48,31               | 55,37 | 8,29841                                | 8,31764 | 19* |
| 20                | 47,42               | 54,41 | 8,29471                                | 8,31584 | 20* |
| 21                | 46,53               | 53,45 | 8,29061                                | 8,31383 | 21* |
| 22                | 45,65               | 52,50 | 8,28613                                | 8,31161 | 22* |
| 23                | 44,77               | 51,54 | 8,28117                                | 8,30912 | 23* |
| 24                | 43,88               | 50,58 | 8,27564                                | 8,30633 | 24* |
| 25                | 43,00               | 49,63 | 8,26959                                | 8,30326 | 25* |
| 26                | 42,10               | 48,67 | 8,26274                                | 8,29981 | 26* |
| 27                | 41,20               | 47,71 | 8,25516                                | 8,29595 | 27* |
| 28                | 40,30               | 46,76 | 8,24677                                | 8,29171 | 28* |
| 29                | 39,39               | 45,81 | 8,23737                                | 8,28697 | 29* |
| 30                | 38,48               | 44,86 | 8,22694                                | 8,28170 | 30* |
| 31                | 37,57               | 43,91 | 8,21538                                | 8,27583 | 31* |
| 32                | 36,66               | 42,96 | 8,20257                                | 8,26930 | 32* |
| 33                | 35,75               | 42,02 | 8,18836                                | 8,26210 | 33* |
| 34                | 34,84               | 41,07 | 8,17262                                | 8,25400 | 34* |
| 35                | 33,94               | 40,13 | 8,15536                                | 8,24509 | 35* |
| 36                | 33,05               | 39,19 | 8,13647                                | 8,23517 | 36* |
| 37                | 32,16               | 38,26 | 8,11558                                | 8,22426 | 37* |
| 38                | 31,28               | 37,32 | 8,09274                                | 8,21199 | 38* |
| 39                | 30,41               | 36,40 | 8,06781                                | 8,19866 | 39* |
| 40                | 29,54               | 35,48 | 8,04030                                | 8,18386 | 40* |
| 41                | 28,69               | 34,57 | 8,01067                                | 8,16762 | 41* |
| 42                | 27,85               | 33,67 | 7,97844                                | 8,14983 | 42* |
| 43                | 27,02               | 32,77 | 7,94344                                | 8,13012 | 43* |
| 44                | 26,20               | 31,89 | 7,90547                                | 8,10881 | 44* |
| 45                | 25,38               | 31,01 | 7,86380                                | 8,08527 | 45* |
| 46                | 24,58               | 30,14 | 7,81924                                | 8,05956 | 46* |
| 47                | 23,79               | 29,27 | 7,77109                                | 8,03119 | 47* |
| 48                | 23,00               | 28,41 | 7,71843                                | 8,00026 | 48* |
| 49                | 22,23               | 27,55 | 7,66236                                | 7,96617 | 49* |
| 50                | 21,47               | 26,71 | 7,60201                                | 7,92950 | 50* |
| 51                | 20,72               | 25,88 | 7,53713                                | 7,88967 | 51* |
| 52                | 19,98               | 25,06 | 7,46748                                | 7,84646 | 52* |
| 53                | 19,26               | 24,25 | 7,39387                                | 7,79965 | 53* |
| 54                | 18,56               | 23,44 | 7,31631                                | 7,74834 | 54* |
| 55                | 17,86               | 22,65 | 7,23234                                | 7,69355 | 55* |
| 56                | 17,18               | 21,86 | 7,14414                                | 7,63363 | 56* |
| 57                | 16,52               | 21,08 | 7,05178                                | 7,56896 | 57* |
| 58                | 15,86               | 20,31 | 6,95225                                | 7,49927 | 58* |

| Age next birthday | Expectation of life |       | Present value of R1 per annum for life |         | Age |
|-------------------|---------------------|-------|--|---------|-----|
|                   |                     |       |  |         |     |
| 59                | 15,23               | 19,54 | 6,85004                                | 7,42321 | 59* |
| 60                | 14,61               | 18,78 | 6,74206                                | 7,34135 | 60* |
| 61                | 14,01               | 18,04 | 6,63010                                | 7,25457 | 61* |
| 62                | 13,42               | 17,30 | 6,51232                                | 7,16020 | 62* |
| 63                | 12,86               | 16,58 | 6,39301                                | 7,06046 | 63* |
| 64                | 12,31               | 15,88 | 6,26822                                | 6,95537 | 64* |
| 65                | 11,77               | 15,18 | 6,13789                                | 6,84161 | 65* |
| 66                | 11,26               | 14,51 | 6,00726                                | 6,72393 | 66* |
| 67                | 10,76               | 13,85 | 5,87165                                | 6,59893 | 67* |
| 68                | 10,28               | 13,20 | 5,73403                                | 6,46635 | 68* |
| 69                | 9,81                | 12,57 | 5,59182                                | 6,32818 | 69* |
| 70                | 9,37                | 11,96 | 5,45165                                | 6,18466 | 70* |
| 71                | 8,94                | 11,37 | 5,30775                                | 6,03607 | 71* |
| 72                | 8,54                | 10,80 | 5,16744                                | 5,88278 | 72* |
| 73                | 8,15                | 10,24 | 5,02437                                | 5,72222 | 73* |
| 74                | 7,77                | 9,70  | 4,87876                                | 5,55743 | 74* |
| 75                | 7,41                | 9,18  | 4,73490                                | 5,38893 | 75* |
| 76                | 7,07                | 8,68  | 4,59354                                | 5,21727 | 76* |
| 77                | 6,73                | 8,21  | 4,44663                                | 5,04679 | 77* |
| 78                | 6,41                | 7,75  | 4,30309                                | 3,87092 | 78* |
| 79                | 6,10                | 7,31  | 4,15898                                | 4,69389 | 79* |
| 80                | 5,82                | 6,89  | 4,02440                                | 4,51647 | 80* |
| 81                | 5,55                | 6,50  | 3,89051                                | 4,34399 | 81* |
| 82                | 5,31                | 6,13  | 3,76802                                | 4,17315 | 82* |
| 83                | 5,09                | 5,78  | 3,65276                                | 4,00482 | 83* |
| 84                | 4,89                | 5,45  | 3,54546                                | 3,83988 | 84* |
| 85                | 4,72                | 5,14  | 3,45232                                | 3,67921 | 85* |
| 86                | 4,57                | 4,85  | 3,36864                                | 3,52371 | 86* |
| 87                | 4,45                | 4,58  | 3,30066                                | 3,37426 | 87* |
| 88                | 4,36                | 4,33  | 3,24907                                | 3,23175 | 88* |
| 89                | 4,32                | 4,11  | 3,22597                                | 3,10296 | 89* |
| 90                | 4,30                | 3,92  | 3,21438                                | 2,98912 | 90* |

*N.B.*—The age is to be taken as at the next birthday after the date when the right was acquired.

*Example.*— Find the present value of an annuity or *usufruct* of R100 per annum for life of: (A) a female who becomes entitled thereto at the age of 42 years 3 months, or (B) a male who becomes entitled thereto at the age of 65 years 9 months.

|   |                   |                   |
|---|-------------------|-------------------|
|   | (A)               | (B)               |
| Age when acquired   | 42 years 3 months | 65 years 9 months |
| Age next birthday   | 43 years          | 66 years          |
| Present value of R1 per annum for life                    | R8,130 12         | R6,007 26         |
| Therefore present value of R100 per annum for life equals | R813,01           | R600,73           |

Table B

Present Value of R1 per Annum Capitalised at 12 per cent over Fixed Periods.

| Years | Amount<br>R | Years | Amount<br>R | Years | Amount<br>R | Years | Amount<br>R |
|-------|-------------|-------|-------------|-------|-------------|-------|-------------|
| 1     | 0,8929      | 26    | 7,8957      | 51    | 8,3076      | 76    | 8,3318      |
| 2     | 1,6900      | 27    | 7,9426      | 52    | 8,3104      | 77    | 8,3320      |
| 3     | 2,4018      | 28    | 7,9844      | 53    | 8,3128      | 78    | 8,3321      |
| 4     | 3,0374      | 29    | 8,0218      | 54    | 8,3150      | 79    | 8,3323      |
| 5     | 3,6048      | 30    | 8,0552      | 55    | 8,3170      | 80    | 8,3324      |
| 6     | 4,1114      | 31    | 8,0850      | 56    | 8,3187      | 81    | 8,3325      |
| 7     | 4,5638      | 32    | 8,1116      | 57    | 8,3203      | 82    | 8,3326      |
| 8     | 4,9676      | 33    | 8,1354      | 58    | 8,3217      | 83    | 8,3326      |
| 9     | 5,3282      | 34    | 8,1566      | 59    | 8,3229      | 84    | 8,3327      |
| 10    | 5,6502      | 35    | 8,1755      | 60    | 8,3240      | 85    | 8,3328      |
| 11    | 5,9377      | 36    | 8,1924      | 61    | 8,3250      | 86    | 8,3328      |
| 12    | 6,1944      | 37    | 8,2075      | 62    | 8,3259      | 87    | 8,3329      |
| 13    | 6,4236      | 38    | 8,2210      | 63    | 8,3267      | 88    | 8,3330      |
| 14    | 6,6282      | 39    | 8,2330      | 64    | 8,3274      | 89    | 8,3330      |
| 15    | 6,8109      | 40    | 8,2438      | 65    | 8,3281      | 90    | 8,3330      |
| 16    | 6,9740      | 41    | 8,2534      | 66    | 8,3286      | 91    | 8,3331      |
| 17    | 7,1196      | 42    | 8,2619      | 67    | 8,3291      | 92    | 8,3331      |
| 18    | 7,2497      | 43    | 8,2696      | 68    | 8,3296      | 93    | 8,3331      |
| 19    | 7,3658      | 44    | 8,2764      | 69    | 8,3300      | 94    | 8,3331      |
| 20    | 7,4694      | 45    | 8,2825      | 70    | 8,3303      | 95    | 8,3332      |
| 21    | 7,5620      | 46    | 8,2880      | 71    | 8,3307      | 96    | 8,3332      |
| 22    | 7,6446      | 47    | 8,2928      | 72    | 8,3310      | 97    | 8,3332      |
| 23    | 7,7184      | 48    | 8,2972      | 73    | 8,3312      | 98    | 8,3332      |
| 24    | 7,7843      | 49    | 8,3010      | 74    | 8,3314      | 99    | 8,3332      |
| 25    | 7,8431      | 50    | 8,3045      | 75    | 8,3316      | 100   | 8,3332      |

*N.B.*—Fractions of a year are to be disregarded when using this table.

*Example.*—Testator, who died on 1 April 1977 left to (A) an annuity or usufruct value R100 per annum, to terminate when (A) attains majority, which will occur, say, at 30 September 1987. This period is found to be 10 years 6 months, but is taken as 10 years.

Present value of R1 per annum for 10 years R5,650 2

Therefore present value of R100 per annum for 10 years R565,02

## References

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2. Meyerowitz, D. & Jacobson, A. 1950. *A handbook on transfer duty*. Cape Town: Juta
3. "Practice Notes: CIR circular minute no 11 of 1984 - Transfer duty - tripartite agreements" 1984 *De Rebus* 282.
4. UNISA Estate Duty, Donations Tax and Transfer Duty (MESDLW-G) Tutorial Letter 102/2004
5. Butterworths Products: The Law of South Africa Vol 22(2); Silberberg and Schoeman: The Law of Property: 5th Edition;

## Glossary

- Bare dominium** In relation to the rights over immovable property, means that the owner of the immovable property does not have the use of the property at their disposal and that the right of use, or *usufruct*, vests with the usufructuary as a personal servitude.
- Body corporate** Means a group of persons, being owners of sectional title units in a sectional title scheme comprising buildings and the land on which such building  
s are situated, that are responsible for the management and administration of the sectional title scheme.
- Commercial accommodation (VAT Act)** Means lodging, or board and lodging supplied –
- together with domestic goods and services, in any house, flat, apartment, room, hotel, motel, inn, guesthouse, boarding house, residential establishment, holiday accommodation unit, chalet, tent, caravan, camping site, houseboat, or similar establishment;
  - in a home for the aged, children, physically, or mentally handicapped persons; or
  - in a hospice.
- The accommodation must be regularly or systematically supplied and the total annual receipts in respect thereof must exceed or must reasonably be expected to exceed R120 000 per annum in order for it to be qualify as an “enterprise” supplying commercial accommodation. (Before 1 April 2016, the threshold was R60 000 in order for it to be regarded as the supply of commercial accommodation.)
- A dwelling supplied in terms of an agreement for letting and hiring thereof is not regarded as commercial accommodation.
- Connected person (VAT Act)** Describes and identifies the relationships between different persons. If persons are connected in terms of the definition, it may be necessary to apply special time and value of supply rules whereby the supplier may be required to charge VAT on the open market value of the supply, rather than on the amount of consideration received.
- Examples include the following (amongst others):
- Natural persons who are related;
  - A company and subsidiaries of that company;
  - Any close corporation and it’s members; and
  - A natural person and a company where that natural person owns more than 10% of the shares or voting rights in that company.

**Consideration (VAT Act)** The total amount of money (incl. VAT) received for a supply. For barter transactions where the consideration is not in money, the consideration is the open market value of goods or services (incl. VAT) received for making the taxable supply. Section 10 determines the value of supply or consideration for VAT purposes for different types of supplies.

Any act or forbearance, whether voluntary or not for the inducement of a supply of goods or services will constitute consideration, but it excludes any donation made to an association not for gain. Also excluded is a “deposit” which is lodged to secure a future supply of goods and held in trust until the time of the supply.

**Deeds Registry** This is a reference to the Office of the Chief Registrar of Deeds and any of the local deeds registries which are situated in the various areas of South Africa as provided for in the Deeds Registries Act 47 of 1937. It also includes reference to the Mineral and Petroleum Titles Registration Office (MPTRO) established by section 2 of the Mining Titles Registration Act 16 of 1967. The term “Registrar” as used in this guide refers to the person responsible for carrying out the duties and responsibilities of the relevant Deeds Registry.

**Dwelling (VAT Act)** Means, except where used in the supply of commercial accommodation, any building, premises, structure or any other place, or any part thereof, used or intended for use predominantly as a place of residence for any natural person, including all fixtures and fittings.

**Enterprise (VAT Act)** Any business activity in the broadest sense. It includes any activity carried on –

- continuously or regularly;
- by any person;
- in or partly in the Republic;
- in the course of which goods or services are supplied for a consideration, that is some form of payment;
- whether or not for profit.

Examples

- Ordinary businesses – manufacturers, traders, auctioneers, landlords, contractors etc.
- Trades and professions – builders, electricians, plumbers, doctors, lawyers, accountants etc.

**Enterprise  
(continued)**

The following activities are not enterprise activities and will therefore not attract VAT:

**(VAT Act)**

(This list is not exhaustive)

- Services rendered by an employee to his or her employer, for example, salary/wage/remuneration earners. This must, however, be distinguished from a private independent contractor who is not excluded.
- Private occasional transactions, for example, occasional sale of domestic or household goods, personal effects or private motor vehicle.
- Supplies by persons who are not vendors.

**Exempt supply  
(VAT Act)**

Means, a supply on which no VAT may be charged (even if the supplier is registered for VAT). Persons making only exempt supplies may not register for VAT and may not recover input tax on purchases to make exempt supplies.

Section 12 contains a list of exempt supplies.

Examples

- Rental of accommodation in any “dwelling” including employee housing.
- Certain services to members of a sectional title, share block or old age scheme funded out of levies (not applicable to timeshare schemes).

**Fixed property  
(VAT Act)**

Fixed property”, means –

- land (together with improvements affixed thereto);
- any unit as defined in section 1 of the Sectional Titles Act 95 of 1986;
- any share in a share block company which confers a right to or interest in the use of immovable property Share Blocks Control Act 59 of 1980;
- in relation to a property time-sharing scheme, any time-sharing interest as defined in section 1 of the Property Time-sharing Control Act 75 of 1983; and
- any real right in any such land, unit, share or time-sharing interest.

It will therefore be found that most transactions which have some connection with the acquisition of rights to fixed property (excluding rights under a mortgage bond or pledge of fixed property) will fall within the ambit of the definition and will be subject to VAT if the supplier is a vendor.

**Fixed property  
(continued)  
(VAT Act)**

Other examples of rights falling within the definition include –

- certain rights of use such as usufructs, usus or habitatio.
- bare dominium rights of ownership.
- servitudes, encroachments and other encumbrances.
- exclusive use areas in sectional title developments.
- rights to minerals or rights to mine for minerals.

leases or sub-leases of rights to minerals, or to mine for minerals.

**Goods  
(VAT Act)**

Includes the following:

- Corporeal (tangible) movable things, goods in the ordinary sense (including any real right in those things);
- Fixed property, land and buildings (including any real right in the property for example, servitudes, mineral rights, notarial leases etc as explained above);
- Sectional title units (including timeshare);
- Shares in a share block company;
- Electricity;
- Postage stamps; and
- Second-hand goods.

Excludes the following:

- Money, that is, notes, coins, cheques, bills of exchange etc (except when sold as a collector's item);
- Value cards, revenue stamps etc. which are used to pay taxes (except when sold as a collector's item); and
- Any right under a mortgage bond.

**Input tax  
(VAT Act)**

This includes, amongst others, the tax paid by the recipient to the supplier of goods or services, the VAT paid on the importation of goods and includes notional input tax on second-hand goods. Input tax may only be deducted by the recipient vendor if the goods or services are acquired for making taxable supplies and if the vendor is in possession of the relevant documentary proof under section 16(2)(a) to (e). Under section 16(2)(g) a vendor may in certain circumstances deduct input tax based on alternative documentary evidence.

An apportionment of input tax must be made if goods or services are acquired only partly for making taxable supplies.

**Input tax  
(continued)  
(VAT Act)**

In the case of an importation, where the bill of entry or other documentation prescribed by the Customs and Excise Act reflect the vendor as the importer, the vendor must be in possession of such document together with the receipt for the payment of the VAT in relation to the importation of the goods and the EDI Customs Status 1 Release Message. Under the amendment to section 54(3)(b) where the bill of entry or other documentation prescribed by the Customs Act reflect the agent as the importer, that agent must issue a statement to the principal to satisfy the requirement of section 16(2)(dA). The vendor must be in possession of this statement when deducting input tax under section 16(3)(a)(iii) or(b)(ii).

In the case of second-hand goods acquired by the vendor, the vendor must retain a proper record of the details of the transaction on form VAT 264. Should the second-hand goods acquired constitute fixed property, the transfer of which requires registration in a Deeds Registry, input tax may only be deducted once the property has been registered in the name of the vendor claiming a deduction and is limited to the extent that the consideration for the property has been paid.

As a general rule, input tax may not be deducted on supplies of “entertainment”, motor cars and club subscriptions. Input tax may also not be deducted where goods or services are acquired for the purpose of making exempt supplies, for private use or for other non-taxable activities.

**SARS**

South African Revenue Service.

**Sectional title**

This term is not defined in the Sectional Titles Act, but it refers to a type of ownership in fixed property. An owner has full title to a particular demarcated section of a building which is known as a “unit” and is registered as such in the Deeds Registry concerned.

**Services  
(VAT Act)**

Broadly defined and includes the following:

- The granting, assignment, cession, surrender of any right;
- The making available of any facility or advantage; and
- Certain acts which are deemed to be services under section 8;

but excludes:

- A supply of “goods”;
- A supply of “money”; and
- Any stamp, form or card which falls into the definition of the term “goods”.

Examples

- Commercial services – electricians, plumbers, builders.
- Professional services – lawyers.
- Advertising agencies.

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|                                 |   |
|---------------------------------|---|
| <b>Share block scheme</b>       | Means any scheme in terms of which a share, in any manner whatsoever confers a right to or an interest in the use of immovable property.  |
| <b>Supply (VAT Act)</b>         | This definition is very wide and includes all forms of supply (including the expropriation of fixed property), irrespective of where the supply is effected, and any derivative of supply is construed accordingly.   |
| <b>Taxable supply (VAT Act)</b> | <p>These are supplies (including zero-rated supplies) which are chargeable with tax under the VAT Act. There are two types of taxable supplies, namely:</p> <ul style="list-style-type: none"><li>• Those which attract the zero rate (listed in section 11); and</li><li>• Those on which the standard rate of 14% must be charged.</li></ul> <p>A taxable supply does not include any exempt supply listed in section 12, of the VAT Act even if supplied by a registered vendor.</p> |
| <b>VAT</b>                      | Value-Added Tax.  |
| <b>Vendor (VAT Act)</b>         | This is any person that is registered, or is required to be registered for VAT. Therefore any person making taxable supplies in excess of the R1 million threshold amount (prescribed in section 23) is a vendor, whether that person has actually registered with SARS or not.   |

## CONTACT DETAILS

The **SARS website** contains contact details of all SARS branch offices and border posts.

Contact details appearing on the website under "Contact Us" (other than branch offices and border posts) are reproduced below for your convenience.

### SARS Head Office

**Physical Address**

South African Revenue Service  
Lehae La SARS  
299 Bronkhorst Street  
Nieuw Muckleneuk  
0181  
Pretoria

**Postal Address**

Private Bag X923  
Pretoria  
0001  
South Africa

**SARS website**

[www.sars.gov.za](http://www.sars.gov.za)

**Telephone**

(012) 422 4000

**SARS Fraud and Anti-Corruption hotline**

0800 00 28 70

### Complaints Management Services

**Telephone**

0860 12 12 16

**Website (via eFiling)**

[www.sars.gov.za](http://www.sars.gov.za)

**Office**

Any SARS Branch

**eFiling****Call Centre**

0800 00 72 77

**WebsiteFax**

[www.efiling.gov.za](http://www.efiling.gov.za)

### National Call Centre / SARS Contact Centres

- You may contact SARS by phone, email, fax or visiting a SARS Branch:
- Call our SARS Contact Centre on 0800 00 7277
- International Callers may contact our Contact Centre on +27 11 602 2093
- General queries relating to transfer duty matters and transactions lodged on eFiling contact the call centre on 0800 00 7277
- Email or fax one of our dedicated five contact centres:

| Area   | Telephone    | Fax            | email                              |
|--|--------------|----------------|------------------------------------|
| <b>Northern South Africa</b>   |              |                |                                    |
| Vendors residing in Gauteng north (including Centurion and Pretoria), North West, Mpumalanga and Limpopo.  | 0800 00 7277 | (012) 670 6880 | <b>Contact.north@sars.gov.za</b>   |
| <b>Central South Africa</b>  |              |                |                                    |
| Vendors residing in Gauteng south (including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs), the Free State and Northern Cape. | 0800 00 7277 | (010) 208 5005 | <b>Contact.central@sars.gov.za</b> |
| <b>Eastern South Africa</b>  |              |                |                                    |
| Vendors residing in KZN and northern parts of the Eastern Cape (up to and including East London).  | 0800 00 7277 | (031) 328 6018 | <b>Contact.east@sars.gov.za</b>    |
| <b>Southern South Africa</b>   |              |                |                                    |
| Vendors residing in the Eastern Cape, south of East London and the Western Cape.   | 0800 00 7277 | (021) 413 8905 | <b>Contact.south@sars.gov.za</b>   |

### Practitioners Unit

**Telephone / Call Centre**

0800 00 72 77

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Weekdays 8:00 – 16:00 (except Wednesdays)

Wednesdays 9:00 – 16:00

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 226 Bronkhorst Street  
 Nieuw Muckleneuk  
 Pretoria

This facility is for Tax Practitioners already registered with SARS (Pretoria area only). Appointments can be made online by visiting: [www.sars.gov.za](http://www.sars.gov.za) then go to the Tax Practitioners' web page.