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CORPORATES TRANSFER DUTY BETWEEN 18%-19.3% : By Jonathan Hore

The much-awaited commencement notice for the Transfer Duty Amendment Act (Amendment Act) 2019 was finally published by the Minister of Finance & Economic Development on 3 February 2020 and it states that the revamped transfer duty regime commences 1 March 2020. The Amendment Act which was enacted on 28 August 2019 ushered in a number of very positive changes, especially the enhancement of property ownership by citizens. The new law also brought about an increase in the transfer duty rate for non-citizens from 5% to 30%, which still remains the subject of so many business discussions. I want to analyse the effective transfer duty rate for non-citizen corporates. In this article, words importing the masculine shall be deemed to include the feminine.

DEFINITION OF CITIZEN

Per the Transfer Duty Act (Act), a citizen includes a Motswana and a company in which Batswana hold more than 50% shareholding. Citizens still pay the tax at 5% whenever they acquire immovable property or shares in a company owning such property. On the other hand, a company which is controlled by non-citizens is regarded as non-citizen and it therefore pays transfer duty on paper at 30%. Further, companies which are equally owned by citizens and non-citizens are also regarded as non-citizen and they will also pay the tax at 30%. As the new law is set to commence next month, businesses are already aligning board-room decisions in line with the new law. However, there is a myth that all non-citizen corporates will pay transfer duty at 30% as the effective tax rate can go down to 18% or 19.3%, for those registered for VAT.

18% EFFECTIVE DUTY RATE

The simple fact that the transfer duty rate for non-citizens was increased to 30% has made some businesses to conclude that they will in all instances pay the tax at 30%. The fact that the 30% will be a bit onerous on non-citizen corporates is not in question. However, non-citizen corporates who are also VAT-registrants can only suffer the tax to the extent to which they cannot claim part of it in terms of the VAT Act.

The exemptions list in the Transfer Duty Act stipulates that when VAT is charged at 12% and the acquirer of an immovable property is also subject to transfer duty at 30%, then the 12% is waived. That waiver reduces the effective transfer duty rate for corporates to 18% since most of them are VAT-registered. The corporates will effectively pay the transfer duty at 18% and claim the VAT charged at 12% as input tax, especially if the immovable property is used for Vatable activities. Whilst it is acknowledged that 18% may still be a bit high, the 12% waiver arising from VAT brings some relief to non-citizens who will acquire immovable property after commencement of the law.

19.3% TAX RATE

Further, corporates which purchase immovable property to advance their Vatable activities may still claim part of the transfer duty even when they acquire immovable property from non-VAT registrants. This is so as the VAT Act has a provision which stipulates that a VAT-registrant can claim what is called notional input tax, i.e. imputed VAT even when such VAT would not have been charged. What this means is that a non-citizen VAT-registrant may acquire immovable property from a non-VAT-registrant and in the process pay transfer duty at 30%. However, the VAT registrant is allowed to claim part of the transfer duty using what is known as the tax fraction.

The lesser of the application of the tax fraction on the market value and the transfer duty actually paid becomes claimable input VAT. The transfer duty is claimed back through the VAT-registrant’s VAT return as VAT on second-hand goods, which is also known as notional input tax. The use of the notional input tax effectively reduces the transfer duty for such non-citizen corporates to 19.3%, down from the 30%. In summary, the non-citizen corporates’ effective transfer duty rate will range from 18% to 19.3%, depending on whether they buy from a VAT registrant or not.

It is however very clear that individual non-citizens will undoubtedly bear the transfer duty at 30%, except if they are VAT registered. Further, businesses which do not meet the VAT registration threshold will also need to warm up to paying the tax at a higher rate.

PLANNING MATTERS

From a planning perspective, it would be advisable for non-citizen corporates to always seek to buy immovable property from VAT registrants as the effective tax becomes 18%. Where they cannot buy the immovable property from VAT-registrants, then they may have to bear the tax at 19.3%. Such corporates may also opt to buy land and develop it, rather than purchasing built property which come with heavy tax costs. Another alternative for such businesses is to rent property rather than outright purchases, which will save them cashflow-wise.