

CAN TRUSTS REDUCE 30% TRANSFER DUTY TO 5%? By Jonathan Hore

Most of us may know that the Transfer Duty Act ('Act') was amended with effect from 1 March 2020 to levy transfer duty at 30% when immovable property is acquired by non-citizens. On the other hand, citizens and any other entity other than a company or a natural person pay the tax at 5%. There is a very hot debate in the legal and tax fraternities on whether non-citizens can form private trusts and pay transfer duty at 5% and not 30%, as the Act prescribes. In this article, words importing the masculine shall be deemed to include the feminine.

The crux of the matter

The big deal here is that 30% transfer duty is such a high rate as compared to 5% and this has led to non-citizens looking for ways of acquiring immovable property and paying the least possible amount as permitted by the law. As stated above, citizens do not have an issue with the Act as it favours them. The big issue is with non-citizens, who intend to acquire immovable property legally but are faced with an onerous tax bill. As expected, they ask so many questions, with one of them being whether they can form a trust and pay the tax at 5%, as trusts are not natural persons or companies, which puts their tax rate at 5%.

The divergent views

A non-citizen intending to own an immovable property as an individual may not be able to bear the 30% tax. For example, if one purchases a house at P1m, they must prepare P300 000 in taxes, which is quite a mountain to climb. Therefore, since the Act states that any other entity not being an individual or company pays tax at 5%, the big idea is whether non-citizens can form private trusts in whom their kids or themselves are beneficiaries. They would then use those vehicles to acquire immovable property. Since trusts are not individuals or companies, such entities should legally be able to acquire immovable property and pay tax at 5%, whether or not the beneficiaries are non-citizens. This is a provision in the law, which is in black and white. But now, we are all aware that the legislature wanted all non-citizens to pay transfer duty at 30% and that puts in question the possibility of non-citizens using trusts to acquire immovable properties and paying tax at 5%. That's a hot potato buddy; don't catch it if you if you are not prepared for fire.

Interpretation of the law

The courts of law have stated that where a provision in an Act makes it sound improper or absurd, reference should be given to the intention of the legislature. If that is followed, then non-citizens can't use trusts to acquire property and pay tax at 5% since the intention of the legislature is for them to pay tax at 30%.

Without derogation to the above-mentioned ruling, another court held that, *'If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'* Following this ruling, it simply means that non-citizens can still form private trusts and use them to transfer immovable property, paying tax at 5%.

Now, how does one balance these two interpretational views? How do you proceed when the law seems to give a window for non-citizens to escape the 30% which they are supposed to pay?

Conclusion

Legally, non-citizens can form trusts and use them to acquire immovable property at 5%. However, this may be practically impossible as the tax authorities may question the arrangement. But again, the 5% is provided in law. The only way out of this is to seek professional guidance before one concludes transactions or agreements, seeing that there is some ambiguity around the matter. Such advice will help avoid the unwanted. You know the cell number of the firm you should call; right?

Well folks, I hope that was insightful. As Yours Truly says goodbye, remember to pay to Caesar what belongs to him. If you want to join our Tax Whatsapp group, send me a text on the cell number below.