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NON-CITIZEN CORPORATES' TRANSFER DUTY RANGES FROM 18%-19.3%: By Jonathan Hore

The much-debated Transfer Duty Amendment Act 2019 was finally enacted on the 28th of August 2019 and it 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.

According to the Transfer Duty Act, a citizen includes, in layman's language, a Motswana and a company in which Batswana hold more than 50% shareholding. For the record, citizens still pay the tax at 5% whenever they acquire immovable property. Whilst the new law is yet to commence, business is already aligning board-room decisions in line with the new law. However, there is a myth that all non-citizens will pay transfer duty at 30% as the effective tax rate can go down to 18% or 19.3%.

The simple fact that the transfer duty rate for non-citizens was increased to 30% has made some businesses and individuals to conclude that they will in all instances pay the tax at 30%. This is not the case as the Transfer Duty Act must be interpreted together with the VAT Act. Coincidentally, both Acts refer to the other's provisions.

The exemptions list in the Transfer Duty Act stipulate 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 must bring some relief to non-citizens who will acquire immovable property after commencement of the law. It is therefore critical for businesses not to conclude that by merely being non-citizen for transfer duty purposes, they will pay the tax at 30%.

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 an 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-citizens to 19.3%, down from the 30%. This therefore entails that 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, start-ups which do not meet the new registration threshold will also need to warm up to paying the tax at a higher rate. The same applies to established corporates which cannot register for VAT because of the businesses that they conduct. Technically, non-citizen VAT-registrants must not always take it that they will suffer the tax at 30% as it may be lower depending on who they buy from.

From a planning perspective, it would be advisable for non-citizens to always seek to buy immovable property from VAT registrants as the effective tax becomes 18%. Where they cannot get the immovable property from VAT-registrants, then they may have to bear the tax at 19.3%. In both cases, the effective tax rates are much lower than what business has come to believe; being that all non-citizens will bear the tax at 30%.