Capital Gains Tax: At what point in time is it triggered?

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Mr. S concludes an agreement to sell fixed property ("Property S") to Mr. P on 20 January 2021, subject to Mr. P concluding an unconditional agreement of sale to sell his own fixed property ("Property P") by 20 February 2021. Mr P concludes an unconditional agreement for the sale of Property P on 2 February 2021. The Deeds Office registers the transfer of Property S on 20 May 2021.

At what point in time does Mr. S trigger capital gains tax? The importance and detailed consideration of this question is at times overlooked – with potentially drastic implications for Mr. S (or any other taxpayer realising a capital gain on the sale of property).

To take a step back - capital gains tax may be triggered in respect of the disposal of assets in the event that the proceeds realised by the seller exceeds the base cost of such asset in the hands of the seller. The Eighth Schedule of the Income Tax Act No. 58 of 1962 contains rules which stipulate the time of a disposal for capital gains tax purposes – which is therefore the time at which capital gains tax is triggered.

In the context of the example above, the time of disposal of an asset is the date upon which an agreement for the sale of such asset is concluded. However, if such agreement is subject to a suspensive condition, the time of disposal will be delayed until such time as the suspensive condition is met. The relevant considerations in determining the time of disposal of the asset (and accordingly the time at which capital gains tax is triggered) include:

1) At what point in time was an agreement concluded for the sale of an asset?
2) Is such agreement subject to a suspensive condition?
3) If (2) above, is answered yes, the time of disposal will be the time upon which the suspensive condition is met. If (2) above is answered no, the time upon which the agreement is concluded will constitute the time of disposal.

Importantly, the time at which the transfer of a property is registered in the Deeds Office is of no relevance to the time of disposal and when capital gains tax should be payable. Should, for example, Mr. S have incorrectly regarded the time of disposal of the sale of Property S as 20 May 2021, he would have determined his capital gains tax liability in respect of such transaction for purposes of his 2022 year of assessment.

As the correct time of disposal in relation to the above example is 2 February 2021 (i.e., the date upon which the agreement for the sale of Property S became unconditional), the capital gains tax liability is triggered in Mr. S's 2021 year of assessment. As a result of Mr. S only disclosing his capital gains tax liability for purposes of his 2022 year of assessment, Mr. S's income for the 2021 year of assessment would be understated – and therefore subject to potentially significant underestimation penalties (for the purposes of provisional tax) and understatement penalties on assessment.

On the basis of the above, it is clear that the time of disposal rules should be carefully considered when an asset giving rise to a capital gain is disposed of. Should there be any uncertainty in this regard it is best to seek professional advice to confirm the time of disposal.

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