LEGAL DIGEST: FEBRUARY 2017

Highlights of the month………..

- Conservatory orders put on pre-transfer payment of capital gains tax;

- KRA simba system to be replaced.

Payment of Capital Gains Tax

The High Court has issued an order stopping the Kenya Revenue Authority (KRA) from implementing Paragraph 11A of the Eighth Schedule to the Income Tax Act. This Paragraph requires that Capital Gains Tax (CGT) be paid before the transfer of the property from the seller to the purchaser.

The Law Society of Kenya petitioned the court on this matter in an attempt to resolve the challenges that have come up in the real property sector as stakeholders seek to implement Paragraph 11A.

KRA had put in administrative mechanisms through its iTAX portal for the assessment and collection of the CGT before payment of stamp duty and the transfer of the property.

Effectively, this meant that the seller of the property would pay CGT before the transaction for the sale of the property is completed.

The seller would have to account for the CGT before he has received the entire sum of the purchase price. This is because in most cases, the full purchase price of the property will not be paid or released to the seller until the transfer process is completed. This also applies in cases where the sale is being financed by a lender as the lender will only release the balance once the transfer and security documents have been registered.

To counter the challenges above, the seller would have to pay the CGT out of their pocket or ask the purchaser to fund this cost or release the purchase price to seller.

As the rigmarole continues and as we await the outcome of the petition, it is important that taxpayers do not forget their obligation to account for CGT.

Re-introduced from January 2015 by the Finance Act 2014, CGT is payable at 5% on the net gain made from transfer of property. This is a final tax, meaning that the same gain should not be subjected to further taxation. Property is defined in the Income Tax Act as including buildings, land and marketable securities.

Exemptions from payment of CGT include income that is taxed elsewhere, for example, for property dealers who pay income tax on the gains; transfer of machinery like motor vehicles; securities traded at the Nairobi Securities Exchange and transfer of individual residence occupied for at least 3 years immediately prior to the transfer.

The net gain is calculated as follows

(Transfer value – incidental costs) **less** *adjusted cost of acquisition*

KRA to replace simba system

KRA will bring into operation a new integrated Customs Management Systems (iCMS) to replace the long used simba system.

The new system is meant to improve the movement of cargo from the port of Mombasa. It also incorporates automatic benchmarking of cargo value to control cargo under-valuation.

The customs systems upgrade is also a level of compliance as required by the World Trade Organization Trade Facilitation Agreement that Kenya ratified in December 2015. The agreement aims at reducing the cost of international trade by among other things expediting the release and clearance of goods.

Let's talk

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