



# DAVEY'S Locker



Davey's Locker

May 2012

## Primary residence unwinding exemption

Not everyone qualifies

by Tony Davey

© 2012 A H Davey (tonyd@harding.co.za www.tonydavey.com)

Special concessions are available when, on or before 31 December 2012, a company (or cc) or a trust transfers an 'interest' in a 'residence' to a natural person in qualifying circumstances, in order that such a person may qualify for the CGT primary-residence exclusion upon a subsequent disposal of the residence.

I was recently compelled to dwell on the tax consequences of the transfer of a residence owned by a cc into an individual's own name. This individual resides on the property and is the sole member of the cc, and thus, *prima facie*, qualifies for the para 51A relief (Eighth Schedule to the Income Tax Act). Significantly, though, the cc was a property developer and is a VAT vendor.

### CGT

In my view, in order for the para 51A exemption to apply, it is implicit that the residence be a capital asset (as distinct from trading stock, being a revenue asset) *vis a vis* the cc.

The rationale for this view is that there is no need to provide for a CGT exemption to the cc unless the transaction is a CGT event in the first place. There is no provision in the Income Tax Act (which includes the CGT legislation) permitting the conversion of a revenue asset to

a capital asset in such circumstances.

This view is reinforced by s 22(8) of the Income Tax Act, as read with the recently published Interpretation Note 65, which requires that trading stock disposed of (for example, by a cc to its member) be included in the cc's income for tax purposes.

### Transfer duty

An exemption from transfer duty is allowed under s 9(20) of the Transfer Duty Act when a natural person acquires a residence in the circumstances envisaged by para 51A.

Yet this concession does not extend to the Value-Added Tax Act which is applicable, given that the cc is a registered VAT vendor. In addition, the VAT zero-rating exemption for a going-concern business is inapplicable, since the transfer of the residence to a natural person is a domestic and not a business transaction.

### Conclusion

The CGT and transfer duty exemptions are inapplicable in the circumstances postulated here, on the basis that the residence is trading stock and the cc is a VAT vendor. Thus normal income tax plus VAT would be imposed on the cc.

