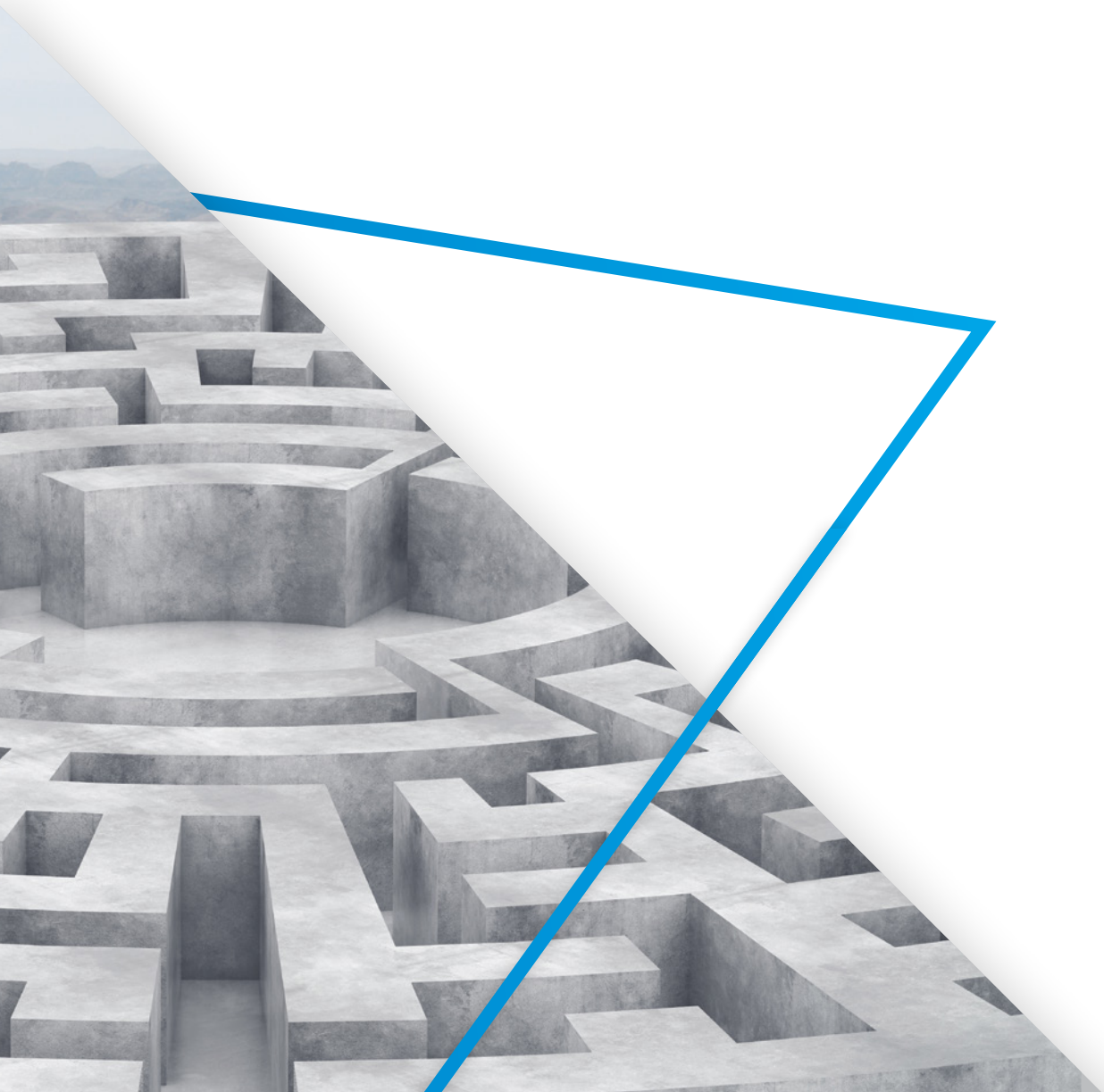
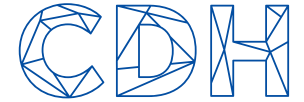


Tax & Exchange Control

ALERT | 12 September 2024



In this issue

KENYA

Lurking in the shadows: Understanding the often-overlooked capital gains tax in real estate transactions



For more insight into our expertise and services

Lurking in the shadows: Understanding the often-overlooked capital gains tax in real estate transactions

Since its reintroduction in 2015, capital gains tax (CGT) has been somewhat overlooked by sellers and buyers in both land and real estate transactions.

CGT is levied at a rate of 15% (previously 5%) on the net gains made from the sale of land or real estate. There are, however, exemptions to this, including:

- the transfer of property for the purposes of securing a debt or a loan;
- the transfer of property by a personal representative in the course of the administration of the estate of a deceased person;
- the transfer of property by a trustee to a beneficiary;
- the transfer of property between spouses or to immediate family;
- the transfer of property to a family company;
- the transfer of private residences, subject to the fulfilment of certain conditions;
- the transfer of agricultural land by individuals, subject to the prescribed conditions; and
- the transfer of property necessitated by internal restructuring within a group.

Save for the exempt transactions set out above, the question remains, at what point should the seller remit CGT?

Subject to the Finance Act, 2023, the Income Tax Act was amended to the effect that the due date for CGT should be the earlier of the date of receipt of the full purchase price by the seller or registration of the transfer of title. This raised the pertinent issue of when the taxable gain from a real estate transaction accrues.

The debate was taken to the courts, and in its decision in *Law Society of Kenya v Kenya Revenue Authority and Another* [2017] eKLR Petition No 39 of 2017, the High Court was of the view that CGT can only be levied after the registration of the transfer by the responsible land registrar, since a taxable gain only accrues to the seller once the property has been legally disposed. This aligned with the recent decision of the Tax Appeals Tribunal (Tribunal) in the case of *Haria v Commissioner of Domestic Taxes* (Tax Appeal E558 of 2023) [2024] KETAT 845 (KLR). Though the case dealt with a transfer of shares transaction, the Tribunal reiterated the High Court's finding in the *Law Society of Kenya* case, that the tax point for payment of CGT is upon registration of the transfer instrument in favour of the transferee.

Accordingly, sellers of property should ensure that the CGT payable is remitted to the Kenya Revenue Authority (KRA) upon registration of the transfer, failure of which they will be liable to a penalty of 5% of the tax payable, and interest at the rate of 1% per month.

**TAX & EXCHANGE CONTROL
ALERT**

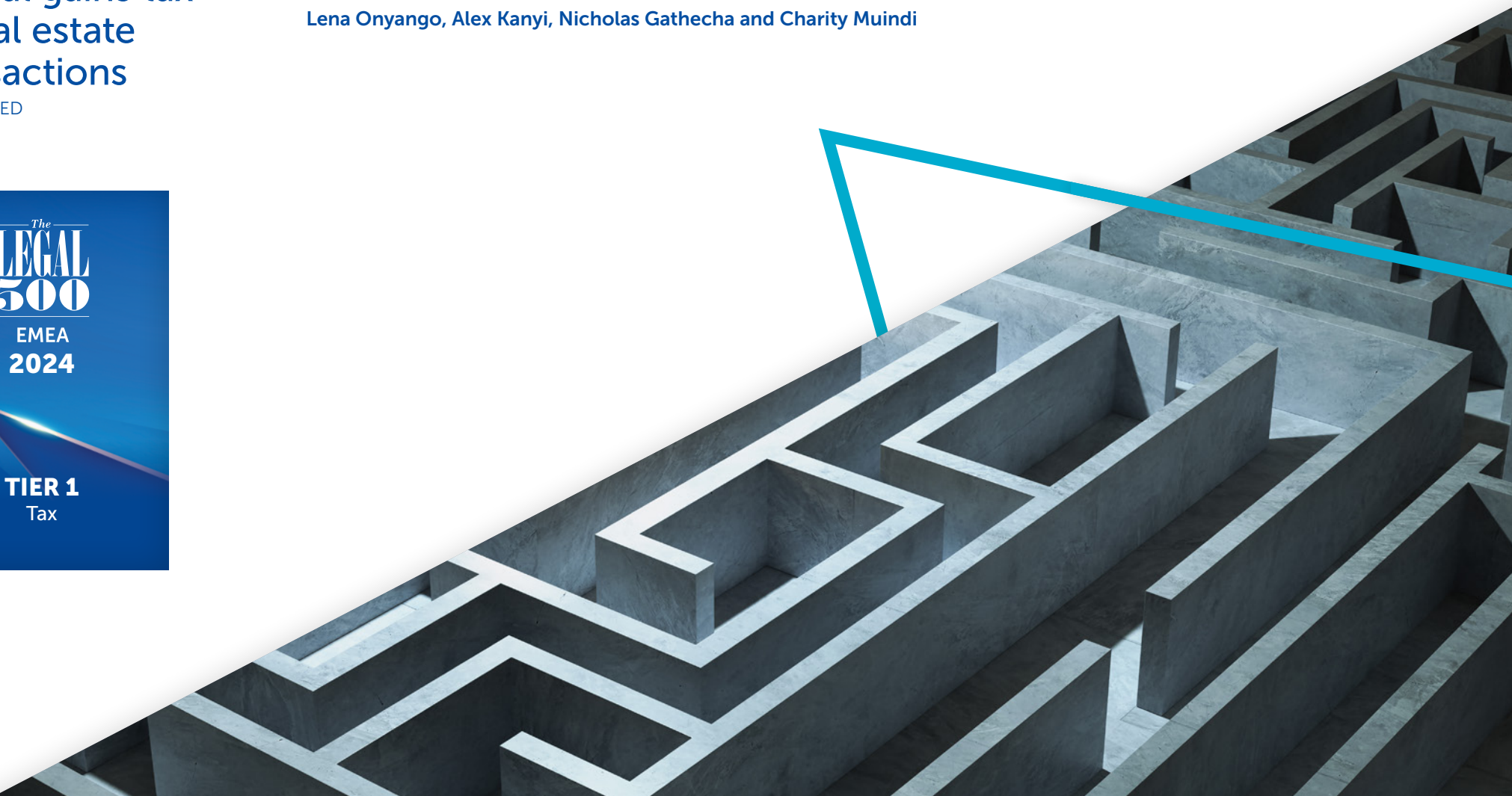
Lurking in the shadows: Understanding the often-overlooked capital gains tax in real estate transactions

CONTINUED

Comment

Recently, we have noted a renewed focus by the KRA on enforcing CGT compliance for real estate transactions, for both individuals and companies, largely driven by the need to collect more revenue. These potential risks buttress the need for sellers to seek legal advice from trusted counsel to avoid non-compliance issues, as well as enjoy the available exemptions, whenever applicable.

Lena Onyango, Alex Kanyi, Nicholas Gathecha and Charity Muindi



OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa and Kenya, please contact:



Emil Brincker

Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Gerhard Badenhorst

Director:
Tax & Exchange Control
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Jerome Brink

Director:
Tax & Exchange Control
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Petr Erasmus

Director:
Tax & Exchange Control
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Dries Hoek

Director:
Tax & Exchange Control
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Alex Kanyi

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E alex.kanyi@cdhlegal.com



Heinrich Louw

Director:
Tax & Exchange Control
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Lena Onyango

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lena.onyango@cdhlegal.com



Howmera Parak

Director:
Tax & Exchange Control
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com



Stephan Spamer

Director:
Tax & Exchange Control
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



Tersia van Schalkwyk

Tax Consultant:
Tax & Exchange Control
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com



Varusha Moodaley

Senior Associate:
Tax & Exchange Control
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



Abednego Mutie

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E abednego.mutie@cdhlegal.com



Nicholas Carroll

Associate:
Tax & Exchange Control
T +27 (0)21 481 6433
E nicholas.carroll@cdhlegal.com



Nicholas Gathecha

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E nicholas.gathecha@cdhlegal.com



Puleng Mothabeng

Associate:
Tax & Exchange Control
T +27 (0)11 562 1355
E puleng.mothabeng@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2024 13911/SEP

