



Business rescue/Turnaround

PRESENTED BY

Kreston South Africa

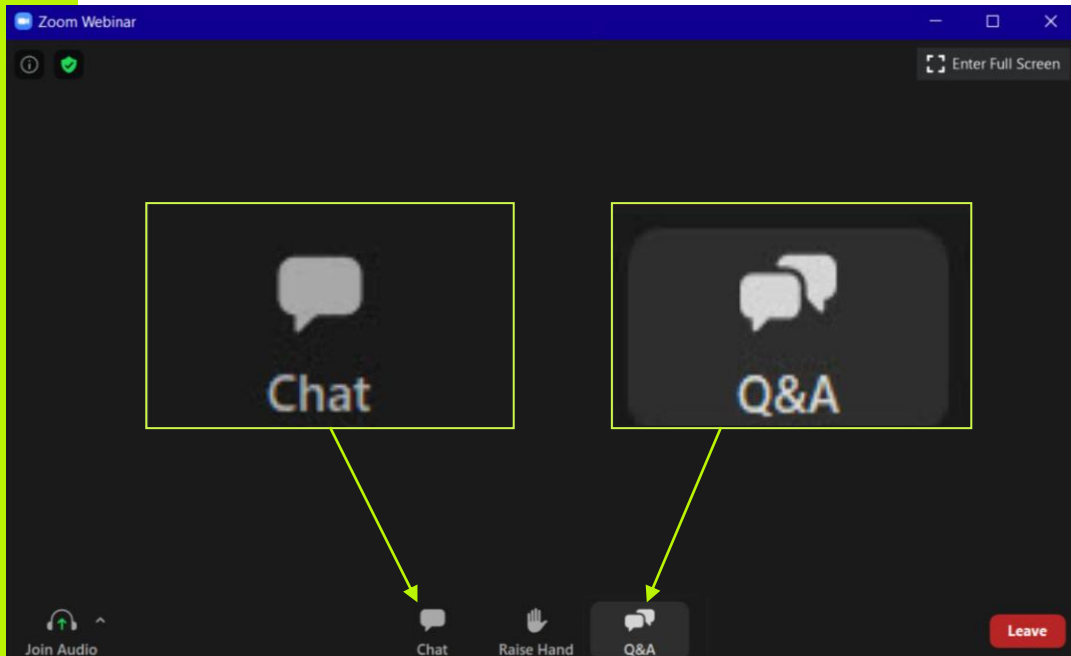
Johan Heydenrych: Director Tax Services

Marina Pretorius: Associate Director Tax Services

23 November 2022



EVENT PROCEDURE



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Assessment on Statements of Tax Standards
(25 Questions)

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Assessment on Statements of Tax Standards
(25 Questions)
Assessment on VAT, Corporate, Individual and Payroll Taxes
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ABOUT THE PRESENTER

Johan Heydenrych Kreston South Africa



Johan is a Chartered Accountant who specialised in taxation since 1991. He holds the following qualifications:

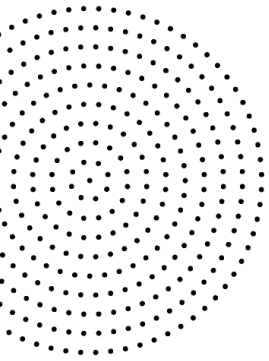
- B. Com (Accounting) (Cum Laude)
- B. Com (Accounting) (Hons) (Cum Laude) (Award: "Best student in Audit 700")
- Certificate in the Theory of Accounting
- M. Com (Taxation) (Cum Laude) (Award: "Best M. Com (Tax) student")
- Chartered Accountant (Specialising in Taxation)
- Member of SAICA
- Registered Tax Practitioner

Johan was a tax partner at KPMG from 1997 to 2020 and is currently a partner in the Kreston SA network specialising in taxation.

He provides a wide range of tax services to various clients across industries. These include but are not limited to the following:

- Advice on Tax Risk Management and Tax Governance.
- Tax compliance services including but not limited to ITR 14 and IT 14SD
- Dealing with tax disputes including representing clients at Alternative Dispute Resolution (ADR) hearings.
- Submission of documentation and revised returns under the Voluntary Disclosure Programme.
- Issuing of tax technical opinions on Income Tax, VAT and PAYE. This include preparing briefs to Senior Counsel and submissions of requests for Binding Opinions from SARS.
- Audit support services that includes Normal Tax and Deferred Tax disclosure and disclosure of uncertain tax positions.
- Assistance with implementation of tax reporting for new accounting standards such as IFRIC 23, IFRS 9, IFRS 15 and IFRS 16.
- Facilitation of tax diagnostic sessions with existing and prospective clients.
- Advice on mergers, acquisitions and reorganizations.
- Tax due diligences
- Advice on tax implications of recapitalization transactions, debt restructures, liquidations and deregistration's





ABOUT THE PRESENTERS

Marina Pretorius

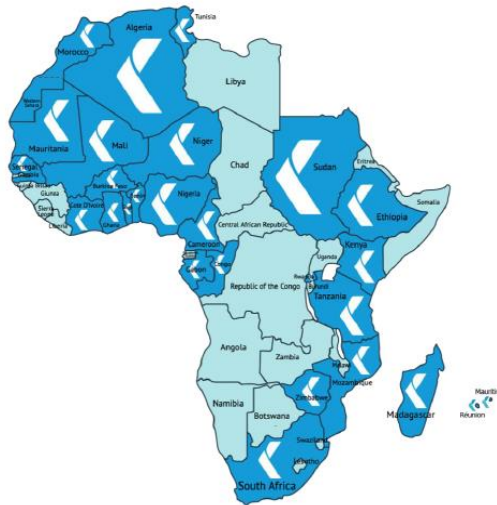
Kreston South Africa

- Marina joined the Kreston Pretoria team on 1 March 2021 after specialising in tax at KPMG for the 13 years. She is an experienced tax advisor who holds an H. Dip(Tax) Degree. She completed her articles at Deloitte where she also passed the CA(SA) qualifying examination.
- She worked in the UK on large listed clients for 2 years and joined KPMG tax department in 2007.
- As Associate Director and head of KPMG's Global Compliance Managed Services business unit, she is very experienced in tax and accounting reporting requirements for large multi-nationals.
- This includes ITR 14 disclosures required for multi-nationals as well as submissions of CbC Reports, Master Files and Local Files.



Kreston Africa Region

- \$29.2m revenue
- 29 countries
- 50 offices
- 91 partners
- 1325 staff



Education and Qualifications

- B. Com (Accounting)
- B. Com (Accounting) (Hons)
- Certificate in the Theory of Accounting
- Passed qualifying CA(SA) exam.
- H.Dip (Tax)
- Registered Tax Practitioner

Topics for September, October and November 2022

Businesses met and continue to meet numerous challenges over the past 3 years. Not only did management need to deal with Covid-19, it also needed to address widescale unrests and floodings and the global impact of the Ukraine War. To meet these challenges, many businesses need to restructure, introduce new investors, dispose of non-core businesses, raise capital and streamline businesses. Many businesses are currently under business rescue where debts are restructured or other drastic measures introduced to rescue the entity. In the next three Tax Happy Hours, we will address the tax implications of some of these “out of ordinary” transactions that many businesses are currently considering.

September Happy Hour

In the September Happy Hour, we will consider the tax implications of the following:

- *Asset for share transactions*
- *Amalgamation Transactions*
- *Unbundling Transactions*
- *Intergroup transactions*
- *Liquidation transactions*

Whilst we will focus on the corporate rules as found in sections 41 to 47 of the Income Tax Act, we will also address capital gains tax rules such as Par 43A of the 8th Schedule and specific dividend tax rules.

Topics for September, October and November 2022

October Happy Hour

In the October Happy Hour, we will specifically deal with tax pitfalls and opportunities in so far as the following are concerned:

- *Sale of shares vs sale of business*
- *Raising share capital*
- *Raising loans*

We will not only analyse the impact of the specific transactions, but will also consider the tax treatment of transactional costs incurred.

November Happy Hour

In the November Happy Hour we will discuss tax pitfalls and opportunities arising from typical Business Rescue activities.

This will include VAT and Income Tax implication of inter alia the following:

- *Conversion of loans to shares*
- *Compromise with creditors*
- *Retrenchments*
- *Sale and leaseback arrangements*

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tax happy hour



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1

What is Business Rescue?

tax happy hour

Chapter 6 of the Companies Act

Business rescue proceedings are proceedings aimed at facilitating the rehabilitation of a company/CC that is *financially distressed* by providing for:

- the temporary supervision of the company/CC, and the management of its affairs, business and property, by a *business rescue practitioner*;
- a temporary *moratorium* (stay) on the rights of claimants against the company/CC or in respect of property in its possession – such claimants are, for purposes of business rescue proceedings, examples of **affected persons**; and
- the development and implementation, if approved, of a *business rescue plan* to rescue the company/CC by restructuring its business, assets, debt, liabilities and equity, as well as its affairs in general.

A **business rescue practitioner** is a person appointed, or two or more persons jointly appointed, to oversee a company/CC during business rescue.

Chapter 6 of the Companies Act

Affected persons are important role players in the business rescue process. An affected person includes shareholders, creditors, employees (or their representative) or a registered trade union representing employees of the company/CC concerned.

Financially distressed means that: -

- it appears to be reasonably unlikely that the company/CC in question will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (commercial insolvency); **or**
- it appears to be reasonably likely that such company/CC will become insolvent within the immediately ensuing six months (factual insolvency).

A **business rescue plan** is a plan developed and, if approved, implemented by the business rescue practitioner, which details the manner in which the practitioner envisages that the company/CC will be rescued. The plan is the culmination of the business rescue process.

2

Dealing with SARS as an existing creditor

tax happy hour

2.1 Tax Status Report

Tax status report

- The first task of the BRP is to establish what is the current status regarding SARS obligations.
- Often, when a company is under financial distress, the tax obligations are not complied with
 - Obtain tax clearance status report – follow up on any red flags
 - Reconcile VAT accounts to VAT 201 's
 - Reconcile payroll to EMP 201 's
 - Check status of income tax payments
 - Enquire as to any disputes with SARS including outstanding Requests for Information (RFI), SARS audits etc.
 - Consider contacting SARS and inform them that the company is under Business Rescue and they should inform you of any outstanding tax matters.

Typical issues for the company in financial distress

Topic	Explanation
Creditors have not been paid	If the input VAT has been claimed and the liability has not been paid in 12 months, then an output VAT liability may arise (Section 22(3) of the VAT Act)

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Tax payments	PAYE, VAT, Income Tax etc may be paid late or not declared at all. TERS may have incorrectly been claimed.

2.2 Correcting historic tax returns

Section 223 Understatement Penalty % table

1	2	3	4	5	6
Item	Behaviour	Standard case	If obstructive, or if it is a 'repeat case'	Voluntary disclosure after notification of audit or criminal investigation	Voluntary disclosure before notification of audit or criminal investigation
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

Voluntary Disclosure Programme

- It is important to perform a “tax health check” when a BRP has been appointed.
- Understatement penalties are also payable when assessed losses are overstated
- Whenever an understatement of taxes has been identified, the VDP process must be used to normalise any historic tax liabilities.

Section 227 of TAA – Requirements of a valid voluntary disclosure

Be voluntary;	Involve a default which has not occurred within five years of the disclosure of a similar "default" by the applicant or a person referred to in section 226(3);	Be full and complete in all material respects;	Involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;	Not result in a refund due by SARS; and	Be made in the prescribed form and manner
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Where an applicant has been given notice of the commencement of an audit or criminal investigation

- which has not been concluded and

- is related to the disclosed default,

such an application is regarded as not being voluntary, unless

- a senior SARS official is of the view, having regards to the circumstances and ambit of the audit or investigation, that the default would not otherwise have been detected during the audit or investigation, and

- is also of the view that the application would be in the interest of good management of the tax system and the best use of SARS' resources.

Identify potential personal liabilities

Tax Administration Act No 28 of 2011

180. Liability of financial management for tax debts.—

A person is personally liable for any outstanding tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in the failure to pay the tax debt if—

- (a) the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer; and*
- (b) a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer.*

What is negligence

Negligence

- It is not only those unlawful acts which are committed intentionally which are punishable, for the law also punishes acts which are committed unintentionally.
- Negligence in South African law is a term used to indicate that conduct of a person which falls short of a prescribed standard, normally weighed against the conduct of a reasonable person.
- Negligence can also be seen if the accused failed to exercise the required care and circumspection in acquainting himself with the relevant legal provision, in other words if the reasonable person in same circumstances would have been similarly ignorant.

2.3 Suspension of payment

Suspension of payment

The obligation to pay tax; and the right of SARS to receive and recover tax, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal

A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax

A senior SARS official may suspend payment of the disputed tax or a portion thereof, taking the following into account:

- Whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- The compliance history of the taxpayer with SARS;
- Whether fraud is *prima facie* involved in the origin of the dispute;
- Whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- Whether the taxpayer has tendered adequate security for the payment of the disputed tax

2.4 Deferral arrangement (S167 and S168 of TAA)

Negotiated with senior SARS official

Qualifying for a deferral arrangement:

- Taxpayer suffers from deficiency of assets or liquidity which is reasonably certain to be remedied in the future OR
- Taxpayer anticipates income or other receipts which can be used to satisfy the tax debt OR
- Prospects of immediate collection activity are poor or uneconomical but are likely to improve in the future OR
- Collection activity would be harsh OR
- The taxpayer provides security

Termination / modification if:

- Collection of tax is in jeopardy OR
- Taxpayer has supplied materially incorrect information in applying for a deferral OR
- Financial condition of the taxpayer has changed materially

2.6 Preservation order (S163 of TAA)

In order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable, a **senior SARS official** may apply to the High Court for an order for the preservation of assets of a taxpayer or other person

- Could prohibit any person from dealing in any manner with the assets to which the order relates

SARS may seize the assets pending the outcome of an application for a preservation order

- Application must commence within 24 hours from the time of seizure of the assets
- SARS and the taxpayer or other person can agree on an extended time frame
- Until a preservation order is made, SARS must take reasonable steps to preserve and safeguard the assets including appointing a curator

A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized

A preservation order remains in force:

- Pending the setting aside thereof on appeal
- Until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt

2.7 Compromise of Tax Debt (Chapter 14 of TAA)

What is “compromise” of tax debt (S200 & S204)

Definition: Section 192

Agreement entered into between SARS and a taxpayer with a tax debt

- The person with the tax debt undertakes to pay an amount which is less than the full amount of the tax debt due in full satisfaction of the tax debt; and
- SARS undertakes to permanently 'write off' the remaining portion of the tax debt on the condition that the “debtor” complies with the undertaking referred to in par (a) and any further conditions as may be imposed by SARS.

Considerations for request for compromise of tax debt (S202)

- The extent that the 'compromise' may result in:
 - Savings in the costs of collection;
 - Collection at an earlier date than would otherwise be the case without the 'compromise';
 - Collection of a greater amount than would otherwise have been recovered; or
 - The abandonment by the taxpayer of some claim or right, which has a monetary value, arising under a tax Act, such as carryovers of losses, deductions, credits and rebates

When is compromise of tax debt NOT appropriate (S203)

- The taxpayer was a party to an agreement with SARS to 'compromise' an amount of tax debt within the period of 3 years immediately before the request for the 'compromise';
- The tax affairs of the taxpayer (other than the outstanding tax debt) are not up to date;
- Another creditor has communicated its intention to initiate or has initiated liquidation or sequestration proceedings;
- The 'compromise' will prejudice other creditors (unless the affected creditors consent to the 'compromise') or
- if other creditors will be placed in a position of advantage relative to SARS;
- It may adversely affect broader taxpayer compliance; or
- The taxpayer is a company or a trust and SARS has not first explored action against or recovery from the personal assets of the persons who may be liable for the debt

Procedure for compromise of tax debt (S204)

- 1) To 'compromise' a tax debt, a senior SARS official and the 'debtor' must sign an agreement setting out—
 - (a) the amount payable by the 'debtor' in full satisfaction of the debt;
 - (b) the undertaking by SARS not to pursue recovery of the balance of the tax debt; and
 - (c) the conditions subject to which the tax debt is 'compromised' by SARS.

- (2) The conditions referred to in subsection (1) (c) may include a requirement that the 'debtor' must—
 - (a) comply with subsequent obligations imposed in terms of a tax Act;
 - (b) pay the tax debt in the manner prescribed by SARS; or
 - (c) give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.

Generally the agreement states that it is in full and final settlement of the year's tax liability

Assessed losses are often forfeited

When is SARS not bound to the compromise of tax debt? (S205)

SARS is not bound by a 'compromise' if—

- (a) the 'debtor' fails to disclose a material fact to which the 'compromise' relates;
- (b) the 'debtor' supplies materially incorrect information to which the 'compromise' relates;
- (c) the 'debtor' fails to comply with a provision or condition contained in the agreement referred to in section 204; or
- (d) the 'debtor' is liquidated or the 'debtor's' estate is sequestrated before the 'debtor' has fully complied with the conditions contained in the agreement referred to in section 204.

Impact of compromise of tax debt on income tax

- Effect of compromise is as follows
 - Normal, Capital Gains Tax, WTH tax on dividends
 - No impact on normal tax since never claimed a tax deduction
 - Output VAT
 - Output VAT never became payable but taxpayer received money in ordinary course of business and did not pay income tax thereon.
 - PAYE
 - The full salary cost was deducted but only the PAYE exclusive part was paid to the employee. The rest was never paid.
 - Interest WTH tax
 - The full interest was claimed but only the part excluding the WTH tax was paid to the non-resident.
- Section 19 excludes a “tax debt” as defined in the TAA
- Can one read it in Section 8(4)(a)? Is the expense “recovered” or “recouped”.
- Arguably, there is no income tax consequences if a tax debt is compromised since it is excluded from S 19 of the ITA.

Powerful tool

Especially in poor
economic
conditions

Full disclosure and
compliance
required

2.8 Permanent write-off of tax debt (Chap 14 of TAA)

To the extent SARS is satisfied that the tax debt is irrecoverable in law

- It cannot be recovered by action and judgment of a court; or
- It is owed by a taxpayer that is in liquidation or sequestration and it represents the balance outstanding after notice is given by the liquidator or trustee that no further dividend is to be paid or a final dividend has been paid to the creditors of the estate; or
- It is owed by a taxpayer that is subject to a business rescue plan

If the debt is 'compromised' (per Section 200)

SARS must notify the taxpayer owing the tax debt in writing of the amount of tax debt 'written off'

How is tax debt written off? (S199)

- Before a decision is made on the write-off of tax debt, SARS must:
 - Determine whether there are any other tax debts owing to SARS by the taxpayer;
 - Reconcile amounts owed by and to the taxpayer, including penalties, interest and costs;
 - Obtain a breakdown of the tax debt and the periods to which the outstanding amounts relate;
 - Document the history of the recovery process and the reasons for deciding to 'write off' the tax debt

2.9 Taxpayer's right to a refund (S190 and S191)

When is a taxpayer entitled to a refund?

- When the refund is correctly stated in an assessment; and
- If a taxpayer made a mistake and paid an amount greater than what is contained in an assessment

When can SARS withhold paying a refund?

- If verification, inspection or audit is necessary to confirm the accuracy of the refund – until this has been finalised (S190(2))

If a taxpayer provides acceptable security SARS must release a refund before verification, inspection or audit is finalised. (S190(3))

A decision not to authorise a refund is subject to objection and appeal (S190(6))

General

- Set-off of refunds (S 191)
 - A refund and interest on the refund must be set off against a taxpayer's tax debt and a debt outstanding under the Customs and Excise Act
 - Unless the tax debt is disputed and suspended by SARS
 - A refund cannot be set off against a tax debt if there is a deferred payment arrangement
- When should a refund be claimed?
 - E-filing within 5 years after date of assessment
 - Other within 3 years after date of assessment

3

Dealing with tax consequences of the actual
Business Rescue Plan

tax happy hour



Tax and business rescue

- The Tax Acts does not contain any specific section dealing with “business rescue”
- However, each act of the business rescue practitioner (BRP) under the business rescue plan will hold a multi-disciplinary tax implication. (Income Tax, VAT, PAYE, Dividend Tax, Interest WTH Tax)
- The tax implications of the business rescue plan is often underestimated since the BRP only considers income tax (where there is generally a significant assessed loss). However, numerous direct and indirect tax pitfalls should be addressed.
- The aim of this course is for the BRP to become more aware of the numerous tax pitfalls and opportunities arising from the Business Rescue Plan

3.1 Examples of immediate steps to improve solvency and liquidity of company

Improve solvency and liquidity simultaneously

Action	High level comments
Raise more equity and cash through issue of ordinary shares	Normally best way to improve solvency. However, one needs a shareholder with sufficient resources. In many instances, this is not possible since it may water down the B-BBEE rating of the company. (Especially if major shareholder is non-resident). No STT on issue of new shares.

Improve solvency and liquidity simultaneously

Action	High level comments
Raise more equity and cash through issue of ordinary shares	Normally best way to improve solvency. However, one needs a shareholder with sufficient resources. In many instances, this is not possible since it may water down the B-BBEE rating of the company. (Especially if major shareholder is non-resident). No STT on issue of new shares.
Raise more equity and cash through preference shares issued	Also advisable option, but care should be taken that the preference share does not fall foul of Section 8E if redeemable within 3 years, Dividend then taxable as normal income but still not deductible for the taxpayer. PS: Check accounting – IFRS may require disclosure as “liability”

Improve solvency and liquidity simultaneously

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Raise finance with 3 rd party backed share	<i>Avoid S8EA – Deem income in hands of holder but still not tax deductible</i> <i>“third-party backed share”</i> means any preference share or equity instrument in respect of which an enforcement right is exercisable by the holder of that preference share or equity instrument as a result of any amount of any specified dividend, foreign dividend, return of capital or foreign return of capital attributable to that share or equity instrument not being received by or accruing to any person entitled thereto. PS: Check accounting – IFRS may require disclosure as “liability”

Improve solvency only

Action	High level comments
Convert debt into equity (i.e. ordinary shares) (Directly or indirectly by using proceeds on issue of shares to settle debt)	Consider section 19 of the ITA and par 12A of the 8 th Schedule to the Act. There are numerous exclusions, but may apply only of group of companies as envisaged in S41 of ITA There is a saving in interest charges.

Improve solvency only

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Waiver of debt	Consider section 19 of the ITA and par 12A of the 8 th Schedule to the Act. There are numerous exclusions, but may apply only of group of companies as envisaged in S41 of ITA

Improve liquidity only

Action	High level comments
Raise finance with subordinated hybrid debt instrument	Section 8F may be applicable. This may be an advisable instrument since the interest is deemed to be a dividend for both the recipient and payer of the interest. Note – Section 8F is not an anti-avoidance legislation – it is substance over form legislation.

Improve liquidity only

Action	High level comments
Raise finance with subordinated hybrid debt instrument	<p>Section 8F may be applicable. This may be an advisable instrument since the interest is deemed to be a dividend for both the recipient and payer of the interest.</p> <p>Note – Section 8F is not an anti-avoidance legislation – it is substance over form legislation.</p>
Raise finance from group companies	<p>If non-resident connected party:</p> <ul style="list-style-type: none">• Consider impact on thin capitalisation• If interest free – then a transfer pricing problem in foreign jurisdiction may apply• Consider section 23M if interest is not due and payable and not subject to WTH tax on interest <p>If resident connected party:</p> <ul style="list-style-type: none">• If interest free – consider impact of unproductive interest for lender <p>Consider future legislation designed to limit interest deductibility.</p>

Improve liquidity only

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Raise finance with subordinated hybrid debt instrument	<p>Section 8F may be applicable. This may be an advisable instrument since the interest is deemed to be a dividend for both the recipient and payer of the interest.</p> <p>Note – Section 8F is not an anti-avoidance legislation – it is substance over form legislation.</p>
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Sell non-core assets	<p>Generally advisable since it improves liquidity but maintains operations</p> <ul style="list-style-type: none">• CGT and recoupments on sale• VAT and other indirect taxes on sale

3.2 How to return company to profitability?

Improve long term viability of company

Action	High level comments
Exit onerous contracts	<p>The following are examples of “onerous contracts”</p> <ul style="list-style-type: none">• Lease contracts for buildings• Agreements with suppliers for unsustainable quantities and/or prices• Agreements with customers that are uneconomical• Agreements with employees:<ul style="list-style-type: none">• Post retirement medical aid• Unsustainable guaranteed bonuses <p>The income tax and VAT implications of payments made to exit onerous contracts are very complex. It may or may not be tax deductible for payor and may or may not be taxable for recipient. The payment may or may not attract VAT and in the case of employees, the PAYE implications must also be considered.</p>

Improve long term viability of company

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Retrench excess employees	<p>Normally retrenchment costs will ne deductible for income tax purposes if part of a whole business is closed. If however an entire company is closed, there is a risk that it is not tax deductible. Preferential tax treatment for employees is available on lump sum payments.</p>

Improve long term viability of company

Action	High level comments
Sell businesses as going concern that are either loss making or that are deemed to be non-core	<p>Tax risks</p> <ul style="list-style-type: none">• Without careful planning, neither the seller nor the buyer will enjoy an income tax deduction for contingent liabilities transferred – e.g. bonus, leave pay, warranties• Automatic application of section 45 etc may apply.• Be careful to ensure VAT efficiencies• Time of supply for CGT in case where agreement is not subject to a suspensive condition is when the agreement is signed. May be different from effective date.• Recoupments, CGT etc.• Consider IFRS 3 Business combinations – may be different than tax

Improve long term viability of company

Action	High level comments
Improve operational efficiency	<ul style="list-style-type: none">• Reduce stockholding• Limit discretionary spend• Renegotiate payment terms with creditors and debtors• Invest in new technology• Streamline products and services on areas with highest margins – focus on what the companies does well and cut out non-core products and services.• Focus on efficiencies in processes <p>All of the above will hold tax consequences – some positive and some negative</p>

4

Income Tax and CGT: Tax treatment of debt benefit – S19 and Par 12A of 8th Schedule

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Section 19 Income Tax and Par 12A - CGT

Legislation extremely complex.

Legislation directed towards anti-avoidance.

Try to use the exemptions....

“concession or compromise” means any arrangement in terms of which—

(a) a debt is—

(i) cancelled or waived; or

(ii) extinguished by—

(aa) redemption of the claim in respect of that debt by the person owing that debt or by any person that is a connected person in relation to that person; or

(bb) merger by reason of the acquisition by the person owing that debt of the claim in respect of that debt,

otherwise than as the result or by reason of the implementation of an arrangement described in [paragraph \(b\)](#);

(b) a debt owed by a company is settled, directly or indirectly—

(i) by being converted to or exchanged for shares in that company; or

(ii) by applying the proceeds from shares issued by that company;

Direct monetary compromise

Share issues and conversions of debt into shares

“debt” means any amount that is owed by a person in respect of—

(a) expenditure incurred by that person; or

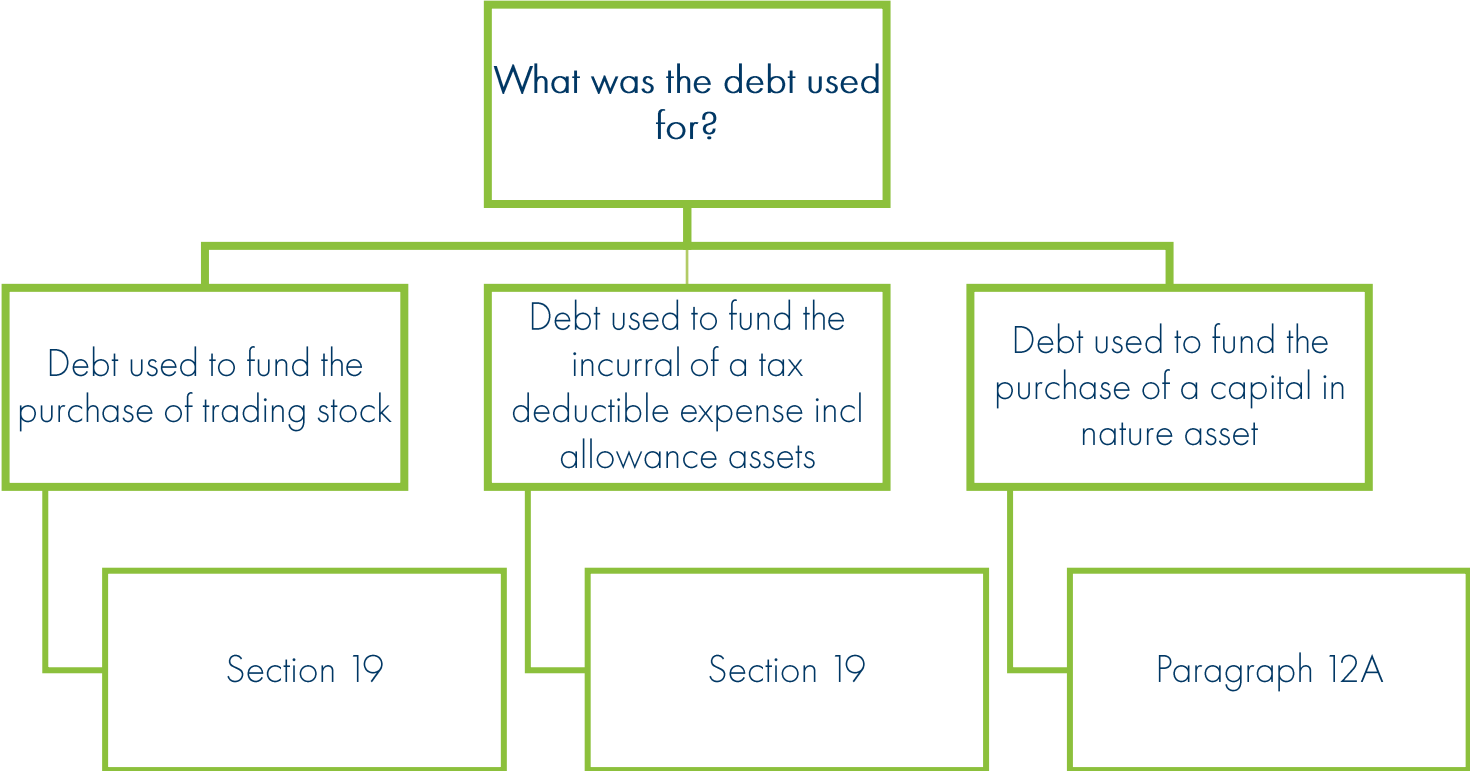
(b) a loan, advance or credit that was used, directly or indirectly, to fund any expenditure incurred by that person,

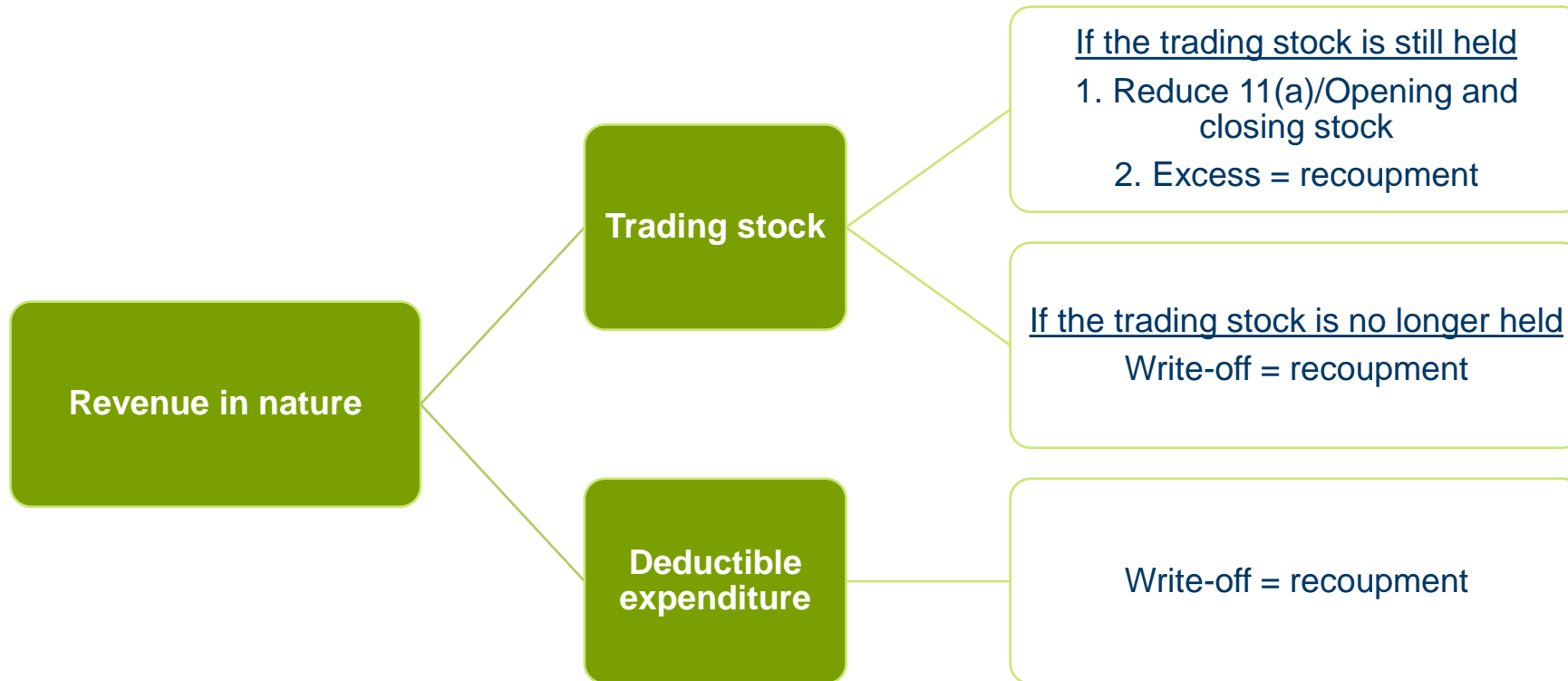
but does not include a tax debt as defined in section 1 of the Tax Administration Act;

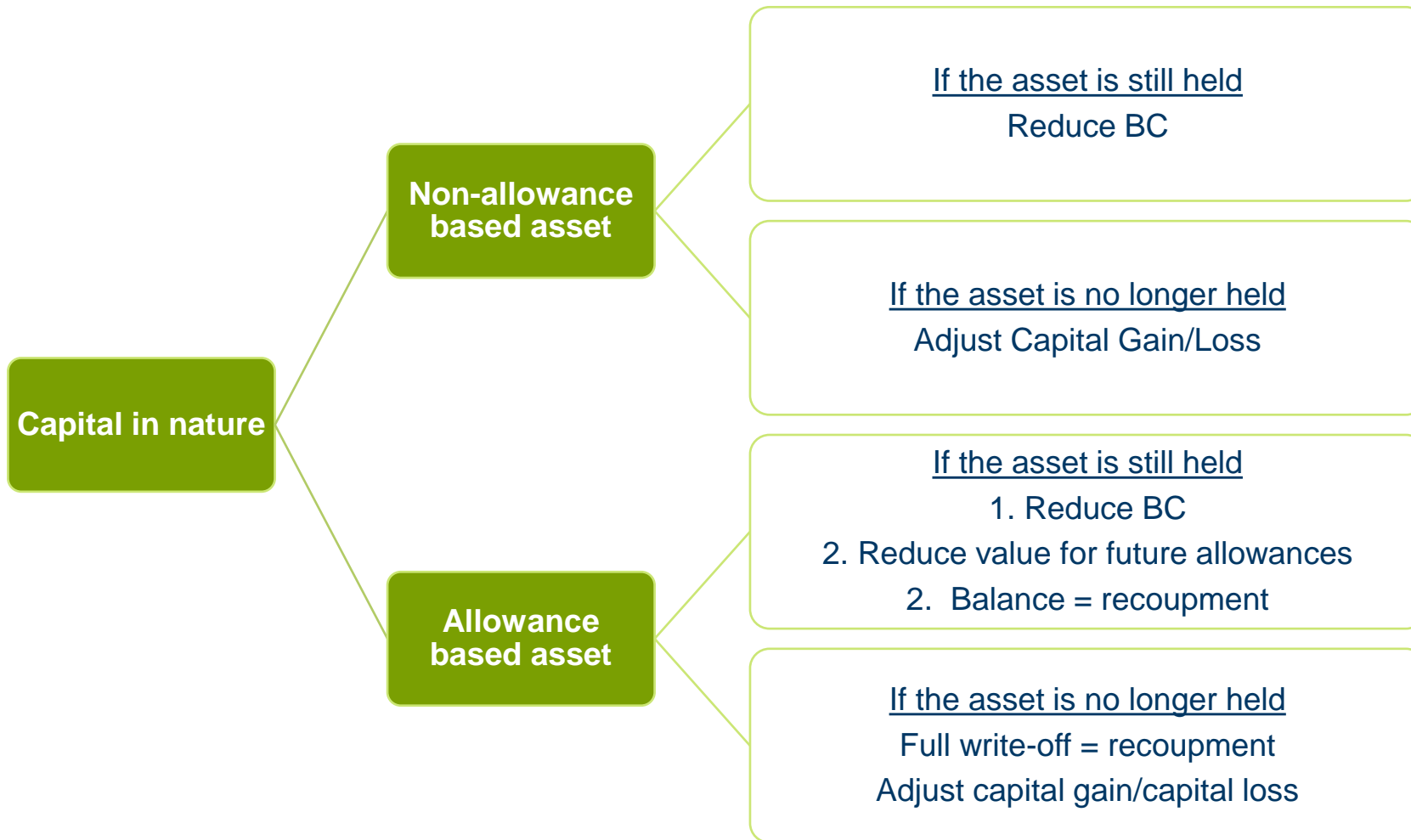
“debt benefit”, in respect of a debt owed by a person to another person, means—

- (a) in the case of an arrangement described in paragraph (a) (i) of the definition of [“concession or compromise”](#), the amount cancelled or waived;
- (b) in the case of the extinction of that debt by means of an arrangement described in paragraph (a) (ii) of the definition of [“concession or compromise”](#), the amount by which the face value of the claim in respect of that debt held by the person to whom the debt is owed prior to the entering into of that arrangement exceeds the expenditure incurred in respect of—
 - (i) the redemption of that debt; or
 - (ii) the acquisition of the claim in respect of that debt;
- (c) in the case of the settling of that debt by means of an arrangement described in [paragraph \(b\)](#) of the definition of [“concession or compromise”](#), where the person who acquired shares in a company in terms of that arrangement did not hold an effective interest in the shares of that company prior to the entering into of that arrangement, the amount by which the face value of the claim held in respect of that debt prior to the entering into of that arrangement exceeds the market value of the shares acquired by reason or as a result of the implementation of that arrangement; or
- (d) in the case of the settling of that debt by means of an arrangement described in [paragraph \(b\)](#) of the definition of [“concession or compromise”](#), where the person who acquired shares in a company in terms of that arrangement held an effective interest in the shares of that company prior to the entering into of that arrangement, the amount by which the face value of the claim held in respect of that debt prior to the entering into of that arrangement exceeds the amount by which the market value of any effective interest held by that person in the shares of that company immediately after the implementation of that arrangement exceeds, solely as a result of the implementation of that arrangement, the market value of the effective interest held by that person in the shares of that company immediately prior to the entering into of that arrangement;

There will generally only be a “debt benefit” if the company is technically insolvent – i.e. liabilities exceed assets.







Exclusions (S19)

- (8) This section must not apply to a debt benefit in respect of any debt owed by a person—
 - (a) that is an heir or legatee of a deceased estate, to the extent that—
 - (i) the debt is owed to that deceased estate;
 - (ii) the debt is reduced by the deceased estate; and
 - (iii) the amount by which the debt is reduced by the deceased estate forms part of the property of the deceased estate for the purposes of the Estate Duty Act;
 - (b) to the extent that the debt is reduced by way of—
 - (i) a donation as defined in section 55 (1); or
 - (ii) any transaction to which section 58 applies, in respect of which donations tax is payable; or
 - (c) to an employer of that person, to the extent that the debt is reduced in the circumstances contemplated in paragraph 2 (h) of the Seventh Schedule;

Exclusions (S19)

- (8) This section must not apply to a debt benefit in respect of any debt owed by a person—
- (d) to another person where the person that owes that debt is a company if—
- (i) that company owes that debt to a company that forms part of the same group of companies as that company; and
 - (ii) that company has not carried on any trade, during the year of assessment in which that debt benefit arises as well as during the immediately preceding year of assessment: Provided that this paragraph must not apply in respect of any debt—
 - (aa) incurred, directly or indirectly by that company to fund expenditure incurred in respect of any asset that was subsequently disposed of by that company by way of an asset-for-share, intra-group or amalgamation transaction or a liquidation distribution in respect of which the provisions of section 42, 44, 45 or 47, as the case may be, applied; or
 - (bb) incurred or assumed by that company in order to settle, take over, refinance or renew, directly or indirectly, any debt incurred by—
 - (A) any other company that forms part of the same group of companies; or
 - (B) any company that is a controlled foreign company in relation to any company that forms part of the same group of companies;

Group of companies as defined in S41 - i.e. excludes non-residents, PBO's, NPC

Company ceased trading

Applies to all compromises – whether by equity of not

Exclusions (S19)

- (8) This section must not apply to a debt benefit in respect of any debt owed by a person—
- (e) to another person where the person that owes that debt is a company that—
- (i) owes that debt to a company that forms part of the same group of companies as that company; and
 - (ii) reduces or settles that debt, directly or indirectly, by means of shares issued by that company:
- Provided that this paragraph must not apply in respect of any debt that was incurred or assumed by that company in order to settle, take over, refinance or renew, directly or indirectly, any debt incurred by another company which—
- (aa) did not form part of that same group of companies at the time that that other company incurred that debt; or
 - (bb) does not form part of that same group of companies at the time that that company reduces or settles that debt, directly or indirectly, by means of shares issued by that company; or

Group of companies as defined in S41 - i.e. excludes non-residents, PBO's, NPC

Only if settle debt by issue of shares

Exclusions (S19)

- (8) This section must not apply to a debt benefit in respect of any debt owed by a person—
- (f) to the extent that the debt so owed—
- (i) is settled by means of an arrangement described in [paragraph \(b\)](#) of the definition of “[concession or compromise](#)”, and
 - (ii) does not consist of or represent an amount owed by that person in respect of any interest incurred by that person during any year of assessment.

- Important exemption if company needs to be made solvent
- This exemption also applies to non-residents.
- Only applies where shares are issued to settle debt – directly or indirectly
- Capitalised interest is recouped – but not rest.

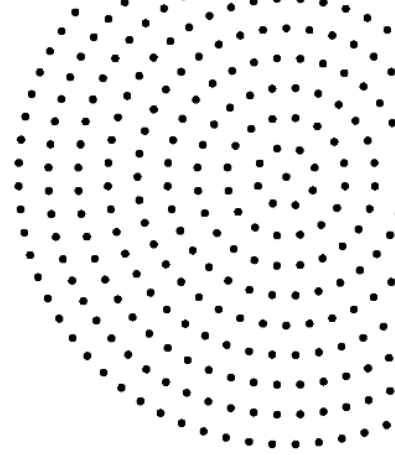
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Business Rescue Plan: Perspective of creditor

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Perspective of the creditor

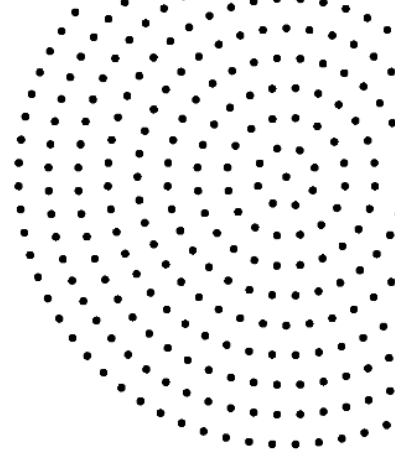
- The likelihood that the plan will be accepted improves if the plan makes sense from the perspective of the creditor and the investor – this applies from a commercial and a tax perspective
- Following are examples of questions that the BRP should ask:
 - Will the creditor obtain an income tax deduction or not?
 - Will the creditor realise a capital loss or not?
 - Will an input tax deduction be available on the amount written off (VAT)?
- If a commercial debt is converted to a loan account, then there is a risk that the creditor will not be entitled to an input VAT deduction when the loan becomes bad since “payment” may have been triggered. The wording of the contract is critical.



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SEE YOU AGAIN

25 January 2023
Wednesday

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