



Current issues for Corporate Tax

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Outline for today's session

- Administrative issues
 - Covid relief and provisional taxes
 - IT14 changes
 - Efiling issues
 - EMP501's
- A reminder for representative taxpayers
- Budget 2020 promises
 - Proposed interest limitation
 - Assessed loss limitation
 - Restructuring changes
 - Exchange Control
- Budget 2021?

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ADMINISTRATIVE ISSUES

Provisional tax

We are now entering the time where a large number of second provisional tax returns are going to be due. Please keep a look out when submitting these for some of the known problems that have already been encountered:

The tax compliance status of the individual is queried because the due date of an income tax return is incorrectly reflected on the eFiling system.

The SARS official reviewing the case has not consistently/correctly calculated the amount due, resulting in a professed underpayment.

If there is an ongoing dispute about the first provisional payment, the second will not be granted.

Random unpaid amounts that crop up on the SOA.

Turnover line not consistently allowing for the relief

Please let me know if you have any more

Provisional tax

“qualifying taxpayer” is a company, trust, partnership or individual—

- (a) that is a taxpayer as defined in section 151 of the Tax Administration Act;
- (b) that conducts a trade during the year of assessment ending on or after 1 April 2020 but before 1 April 2021 and has a gross income of R100 million or less during that year of assessment;
- (c) whose gross income for that year of assessment does not include more than 20 per cent in aggregate of interest, dividends, foreign dividends, royalties, rental from letting fixed property, annuities and any remuneration received from an employer; and
- (d) that is tax compliant as referred to in section 256(3) of the Tax Administration Act when making a reduced payment under this Act:

Provided that—

- (i) the gross income of a partnership for purposes of this definition is the aggregate of the partners' gross income from the partnership;
- (ii) the requirement in paragraph (b) will be deemed to have been met if the Commissioner is satisfied that the taxpayer's estimate of the gross income for that year of assessment, when making a reduced payment under this Act, was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated; and
- (iii) paragraph (c) must be read without the reference to rental from letting fixed property, if the primary trading activity of the company, trust, partnership or individual is the letting of fixed properties and substantially the whole of the gross income is rental from fixed property

IT14 changes

SARS issued a letter regarding changes to be made to the return, available here:
<https://www.sars.gov.za/AllDocs/Documents/CIT/CIT%20Filing%20Season%20letter%2026112020.pdf>

The main changes are:

Section 24O - Incurral of interest in respect of certain debts deemed to be in the production of income. The amendment aims to make it clearer to taxpayers what is required, which would lead to more accurate declarations and protect the fiscus;

Additional questions in Section 12R – Special Economic Zones (SEZ) to deter incorrect claims against the fiscus;

Section 12L- Extension to the “energy efficiency” deduction in favour of taxpayers as the incentive has been extended for three years;

Definition of “Domestic Treasury Management Company” changed to make the incentive more accessible and attractive;

Ultimate Holding Company container to accept Trust numbers - This requirement will enable the ITR14 return to accept Trust registration numbers in cases where the ultimate holding entity of this structure is a trust;

Enhanced Estimated Assessment process - The objective of this requirement is to define the business rules and system processes relating to the submission of an original ITR14 return by the taxpayer subsequent to an estimated assessment being raised and issued by SARS. Furthermore the change will ensure alignment with the requirements of the Tax Administration Act (TAA) No. 28 of 2011.

Efiling issues



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Efiling issues

- <https://www.sars.gov.za/ClientSegments/Individuals/How-Register-Tax/Pages/eFiling-Compatibility-Guidelines.aspx>
- <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/GEN-ELEC-21-G01%20-%20How%20to%20download%20the%20new%20SARS%20eFiling%20Browser%20-%20External%20Guide.pdf>
- This is an ongoing area and changes daily. Please highlight problems as soon as you discover them that they can be fixed.

EMP501's

- We're in "last chance saloon" territory to get the payrolls corrected.
- So far no indication that extensions will be granted.
- TERS has been causing issues with the August reconciliations, more than likely this will continue.

Representative Taxpayers

Do you know what you've signed
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Definitions

“Outstanding tax debt” means tax debt not paid by the day referred to in s162. s162 allows the Commissioner to set the payment date either by public notice or as specified by a Act. (Think PAYE being 7 days after the end of the month)

“Tax debt” is any amount referred to in s169(1). This is any amount of tax due or payable in terms of a tax Act.

Definition of taxpayer (S151)

A person chargeable to tax or with a tax offence

A person upon whom the liability for tax due under a tax Act is imposed & is personally liable

A representative taxpayer

A person who is responsible for paying the tax liability of another person as an agent

A withholding agent

A person who under the tax Act must withhold an amount of tax and pay it to SARS

NB: Taxpayers are not absolved of any liability because the representative didn't do it/is liable for the tax

Definition of taxpayer (S151) - cont

A responsible 3rd party

A person who becomes otherwise liable for the tax liability of another person other than as a representative or withholding agent

A person who is subject to the request to provide assistance under an international tax agreement

Who is liable?

Taxpayer – first port of call

Representative taxpayer

With respect to:

- Income they're entitled to

- Money over which they have management or control

- Transactions they have concluded

Becomes liable for the amount of taxes specified in the Act

- But can claim allowances, set off etc of the taxpayer

SARS can issue an assessment for such taxes against the representative taxpayer

Who is liable?

(S159) A responsible 3rd party – while the tax remains unpaid, the 3rd party is personally responsible

Withholding agent (s 156)

Agent is liable for:

- Taxes withheld and not paid to SARS

- Amounts which should have been withheld but haven't been

- Any payment by the withholding agents counts as a payment towards the taxpayers debt

Who is liable?

(S160) Any other taxpayer that is not the primary person who pays the tax

- Is entitled to recover the amount paid

- From the person on whose behalf the tax was paid/withheld out of that persons assets in their possession

The taxpayer cannot recover taxes paid from the withholding agent or responsible third party. Must approach SARS.

Payment of tax (S161)

A SSO may require security from a taxpayer to secure the collection of tax by SARS from the following taxpayers

- Rep taxpayer, withholding agent or responsible 3rd party who was previously held liable in the taxpayers personal capacity

- Has been convicted of an tax offence

- Has frequently failed to pay amounts due

- Has frequently failed to carry out other obligations = non compliance under the tax Acts

- Is under the management or control of any of the above persons

If security required, SARS must give written notice with all the details.

Any cash security required and not paid by due date is treated as a tax debt.

Something else to consider

- These sections create a criminal offence for non-disclosure/incorrect disclosure:
 - Paragraph 30 of the Fourth Schedule to the Income Tax Act 58 of 1962;
 - Section 58 of the Value Added Tax Act 89 of 1991; and
 - Section 234 of the Tax Administration Act 28 of 2011 (TAA).
- Previously, this needed to be wilful (ie: intentional and negligent) – post Jan 2021, no more. Now it can simply be negligent.

Criminal offence for non compliance

S234 of the TAA

- (a) fails or neglects to register or notify SARS of a change in registered particulars as required in Chapter 3;
- (b) fails or neglects to appoint a representative taxpayer or notify SARS of the appointment or change of a representative taxpayer as required under section 153 or 249;
- (c) fails or neglects to register as a tax practitioner as required under section 240;
- (d) fails or neglects to submit a return or document to SARS or issue a document to a person as required under a tax Act;
- (e) fails or neglects to retain records as required under this Act;
- (f) submits a false certificate or statement under Chapter 4;
- (g) issues an erroneous, incomplete or false document required to be issued under a tax Act to another person;
- (h) refuses or neglects to—
 - (i) furnish, produce or make available any information, document or thing, excluding information requested under section 46 (8);
 - (ii) reply to or answer truly and fully any questions put to the person by a SARS official;
 - (iii) take an oath or make a solemn declaration; or
 - (iv) attend and give evidence,
- as and when required in terms of this Act;
- (i) fails to comply with a directive or instruction issued by SARS to the person under a tax Act;

Criminal offence for non compliance

S234 of the TAA

- (j) fails or neglects to disclose to SARS any material facts which should have been disclosed under this Act or to notify SARS of anything which the person is required to so notify SARS under a tax Act;
- (k) obstructs or hinders a SARS official in the discharge of the official's duties;
- (l) refuses to give assistance required under section 49 (1);
- (m) holds himself or herself out as a SARS official engaged in carrying out the provisions of this Act;
- (n) fails or neglects to comply with the provisions of sections 179 to 182, if that person was given notice by SARS to transfer the assets or pay the amounts to SARS as referred to in those sections; or
- (o) dissipates that person's assets or assists another person to dissipate that other person's assets in order to impede the collection of any taxes, penalties or interest;
- (p) fails or neglects to withhold and pay to SARS an amount of tax as and when required under a tax Act;

is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

Budget 2020

- Promises vs reality

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Limitation of interest



The OECD recommendation is that the types of expenses that should be caught by this provision include, but are not restricted to:

- payments under profit participating loans
- imputed interest on instruments such as convertible bonds and zero-coupon bonds
- amounts under alternative financing arrangements, such as Islamic finance
- the finance cost element of finance lease payments
- capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest
- amounts measured by reference to a funding return under transfer pricing rules, where applicable
- notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings
- certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance
- guarantee fees with respect to financing arrangements
- arrangement fees and similar costs related to the borrowing of funds

Gist of proposal



- The main points of this proposal are:
 - Deductions to be limited to 30% of EBITDA on/after 1 January 2022.
 - Applies to any groups that produce consolidated AFS.
 - Roll forward limited to 5 years
- There have been a number of consultations on this already.
- Still going ahead, but not now.
- Budget 2021 should provide further clarity of thinking.

Assessed loss limitation



- Proposal was for assessed losses to be limited to 80% of the total.
- Was not part of final Amendment Acts.
- Change not made.
- It may still come back in future, but feedback to Treasury seems to have scuppered this idea.

Exchange Control – laws as they were



Exchange Control consideration for export/imports

Exchange Control for loop structures?

How are you going to manage your foreign currency risk?

Have you applied for a foreign bank account?

Will you need cross border funding?

Loop structure



Private individuals may not utilise funds in terms of the aforementioned dispensation or any other authorised foreign assets to enter into a transaction or a series of transactions to, directly or indirectly through any structure or scheme of arrangement, acquire shares or some other interests in a CMA company or a CMA asset ('loop structures'). Similarly, such funds may not be re-introduced as a loan to a CMA resident.

Loop structure



For companies:

Same rules apply – can't use your allowance to give to a non-resident that then invests in RSA

Exception: If RSA companies own less than 40% of a foreign company, then the foreign company may reinvest into CMA up to 40%.



South African companies are now permitted to acquire up to 40 per cent equity and/or voting rights, whichever is the higher, in a foreign target entity, which may hold investments and/or make loans into any CMA country. This dispensation does not apply to foreign direct investments and foreign portfolio investments where the South African company on its own or where several South African companies collectively hold an equity interest and/or voting rights in the foreign target entity that exceed 40 per cent in total.

Quote from Budget 2020



Government will increase the cap on the exemption of foreign remuneration earned by South African tax residents to R1.25 million per year from 1 March 2020. Some advisors have recommended emigration, as recognised by the Reserve Bank, as a way to break tax residency.

However, this is only one factor considered by SARS. Government wants to encourage all South Africans working abroad to maintain their ties to the country. Consequently, this concept of emigration will be phased out by 1 March 2021.

Changes proposed in Budget



Instead of needing approval for every transaction, now will have automatic approval unless the transaction is on the list.

The practical difference between emigrants and residents to be abolished.

Confirmation that changes in SARS residency are not a definitive change in tax residency.

Restrictions that stay



To ensure financial stability, some macroprudential and capital management measures will remain. These include:

South African corporates will not be allowed to shift their primary domicile, except under exceptional circumstances approved by the Minister of Finance.

Approval conditions granted by the Minister of Finance for corporates with a primary listing offshore, including dual-listed structures, will be aligned to the current foreign direct investment criteria and/or conditions to level the playing field.

Cross-border foreign-exchange activities will continue to be conducted through dealers authorised and regulated by the Reserve Bank.

Prudential limits on South African banks and institutional investors will remain, but the limits will be reviewed regularly.

Banks' unhedged foreign-currency exposures will remain limited to 10 per cent of liabilities (known as the net open foreign exchange position) and will remain regulated by the Prudential Authority of the Reserve Bank.

The domestic treasury management company policy, which allows South African companies to establish one subsidiary as a holding company for African and offshore operations without being subject to exchange control restrictions, will remain in place, as will the international headquarter company regime.

The export of intellectual property for fair value to non-related parties will not be subject to approval.

The current policy of certain loop structures, which relates to the acquisition by private individuals of equity and/or voting rights in a foreign company, will remain until tax amendments are implemented to address the risks.

EXPLANATORY NOTE ON FINANCIAL SECTOR MTBPS ANNOUNCEMENTS



1. PROMOTING INVESTMENT: CAPITAL FLOW MANAGEMENT In order to support South Africa's growth as an investment and financial hub for Africa, the Minister of Finance (Minister) announced in the February 2020 Budget far-reaching reforms to modernise the capital flow management framework. These reforms will result in the phasing out of current Exchange Control Regulations to be replaced with new regulations under the Currency and Exchanges Act, 1933. In the meantime, Government will be accelerating the following measures to make it easier to invest in South Africa:



1. Inward Listing instruments: All debt, derivatives and exchange traded instruments referencing foreign assets, that are inward listed, traded and settled in Rand on South African exchanges, will be classified as domestic. The classification of all inward listed shares denominated in Rand remains domestic.



2. Loop Structures for FDI purposes: The full 'loop structure' restriction has been lifted to encourage inward investments into South Africa, subject to reporting to Financial Surveillance Department of the South African Reserve Bank (FinSurv) as and when the transaction is finalized. This reform will be effective from 1 January 2021 for companies, including private equity funds, provided that the entity is a tax resident in South Africa.



3. Corporate foreign borrowings: All bond and note issuances by South African corporates offshore (excluding SOCs) with recourse to South Africa, will be subject to framework and reporting conditions determined by the South African Reserve Bank, which will replace the current prior-approval process.

Laws as we stand now

- Circular 1/2021: Loop structure restrictions lifted, reporting requirement remains.
- For individuals: Resident/non resident becomes irrelevant 1 March 2021 – final regulations not yet promulgated though
- New rules for retirement funds 1 March 2021
- NT has made it clear that the “penalties” for loop structures will be brought into the tax legislation.



What does that tell us?



- The Excon rework is going full steam ahead.
- That the tax laws regarding offshore structures are still going to see significant rework.
- All of our previous structures may need to be reconsidered.
- SARS is going to have to pay much more attention to offshore ownership.

Corporate structures with offshore branches

What's the problem?

Core Problem Statement for NT

They want SA to be easy to use for international structures

At the same time they don't want to be abused (transfer pricing/wealth stripping)

Managing internal taxing needs with appeasing international investors

Core Problem Statement for us

There is no one size fits all solution

Factors that will influence decisions one way or another are:

- Quantum of offshore transactions

- Duration of offshore operations

- Long term Estate Planning/Succession Planning

- Key objective with the offshore operation:

 - International expansion only?

 - Get away from scary expropriation?

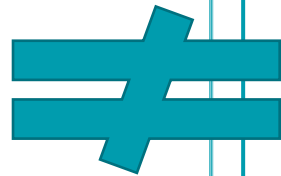
 - Genuine trading or passive investments?

 - Local or offshore investors?

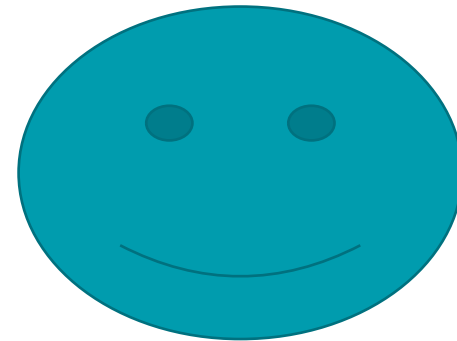
Back in the day....

Here be dragon (aka offshore)

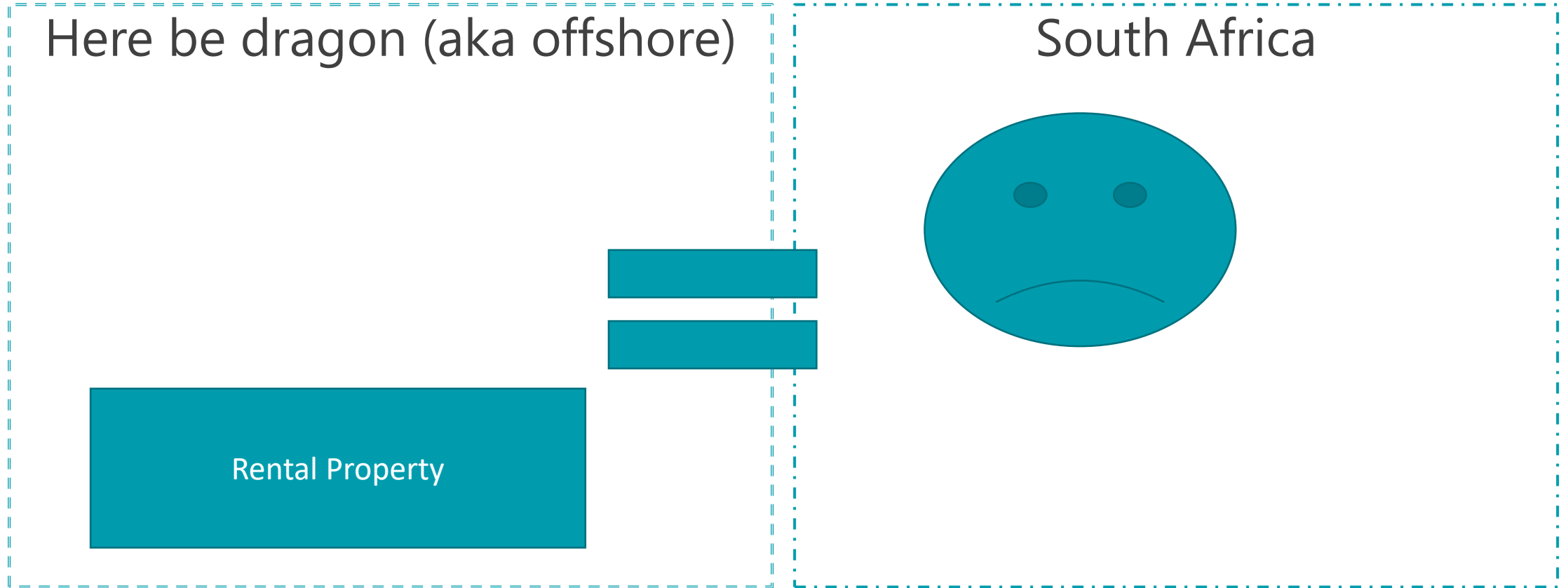
Rental Property



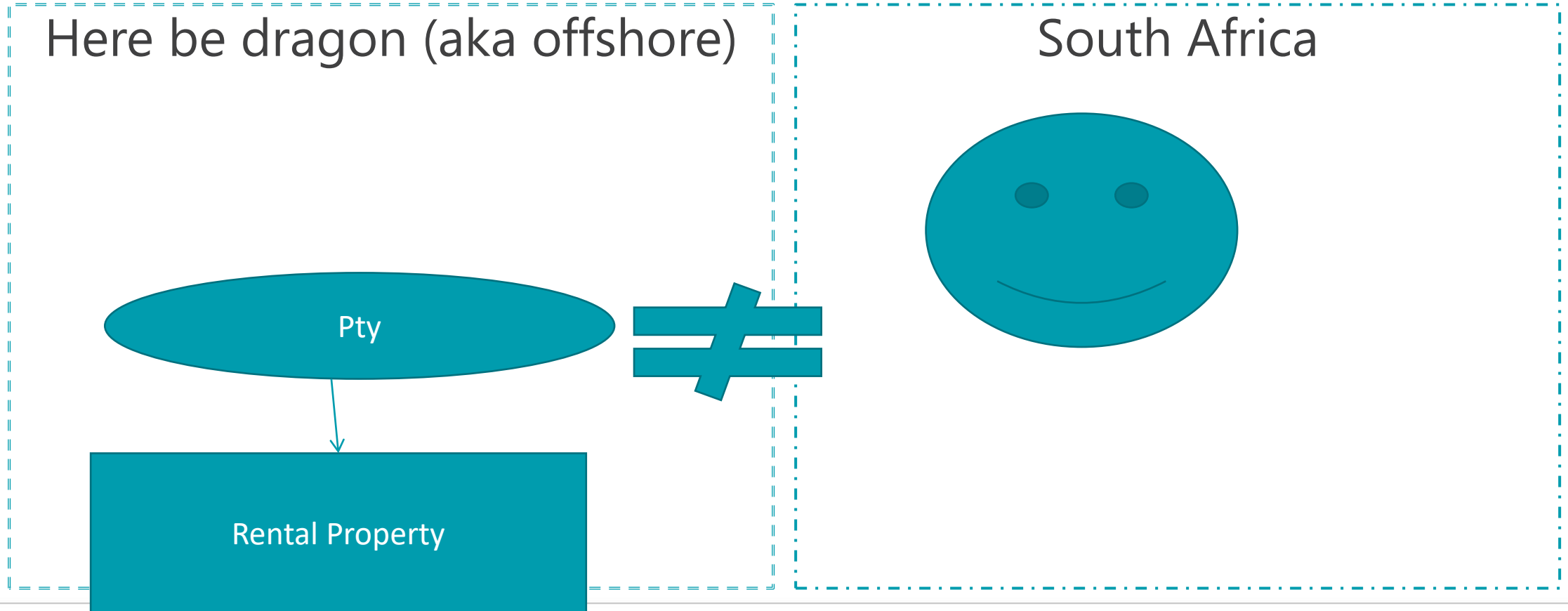
South Africa



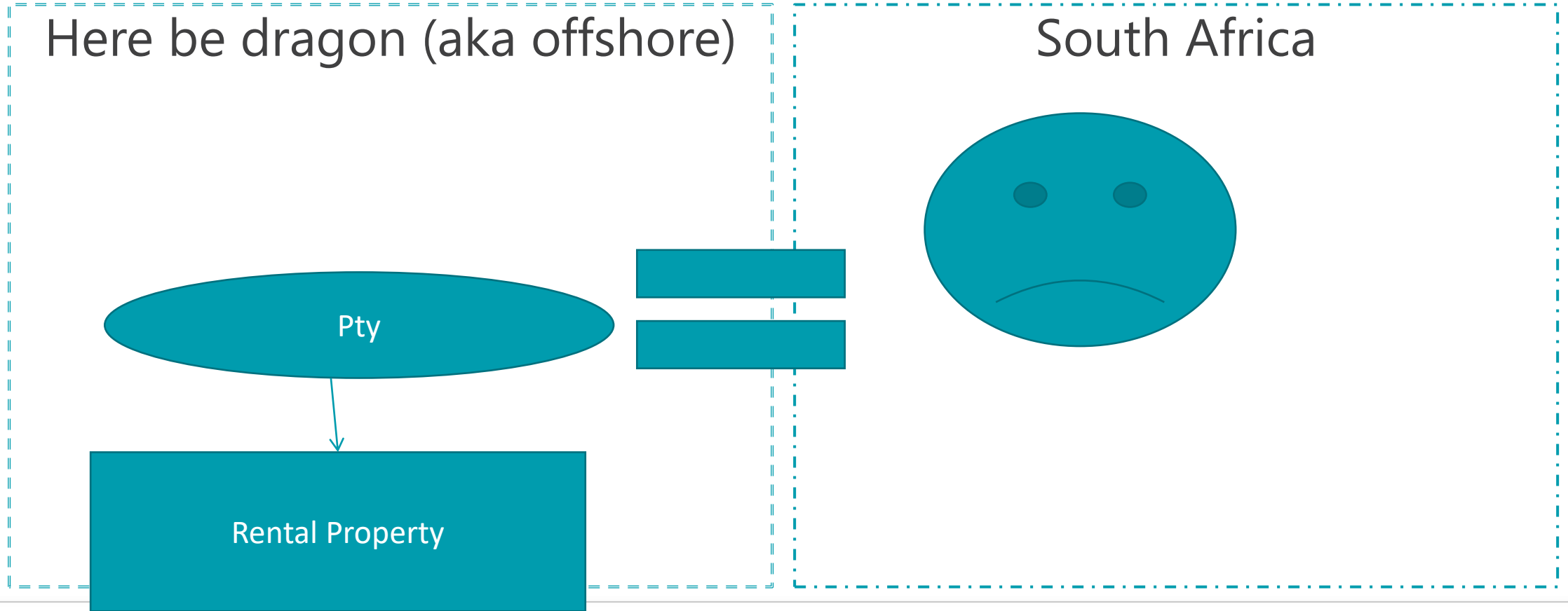
Then in 2001 – GASP! Residency based tax hits us



Then in 2001 – Solution? Insert a PTY



Then in 2001 – Solution? CFC legislation!



Other anti avoidance provisions?

Section 31 – Transfer pricing and BEPS

Place of effective management

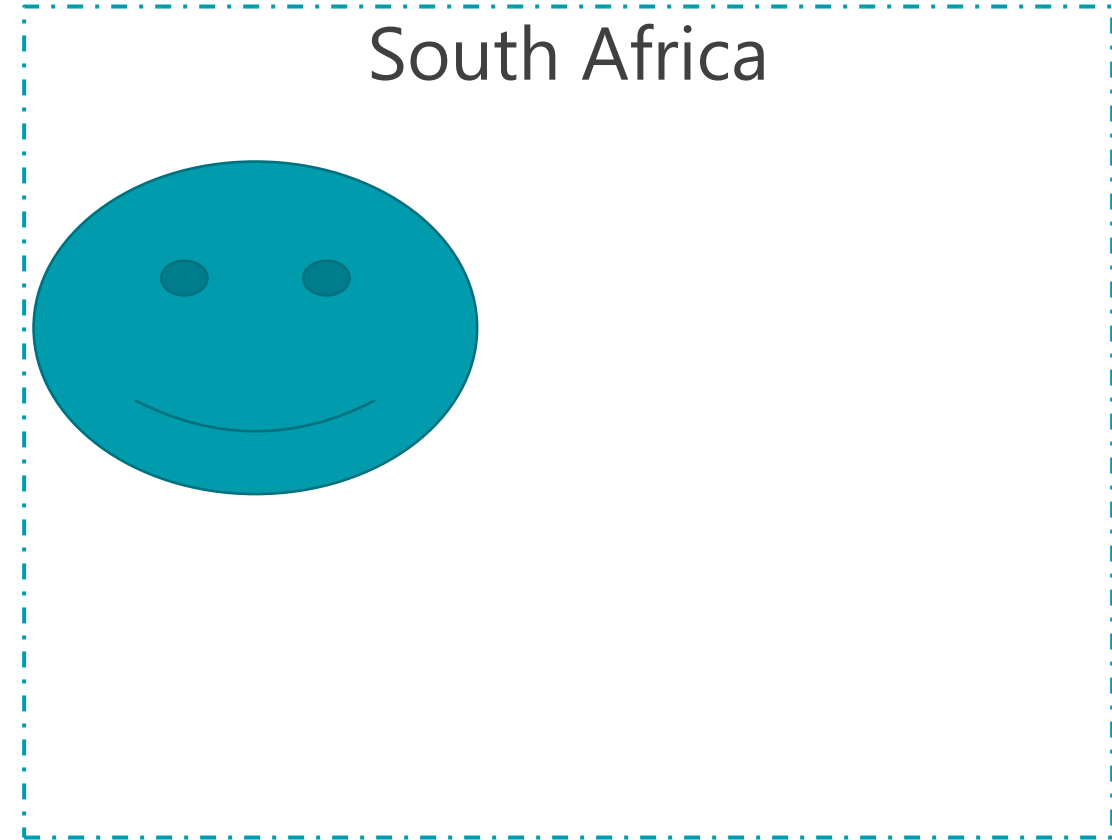
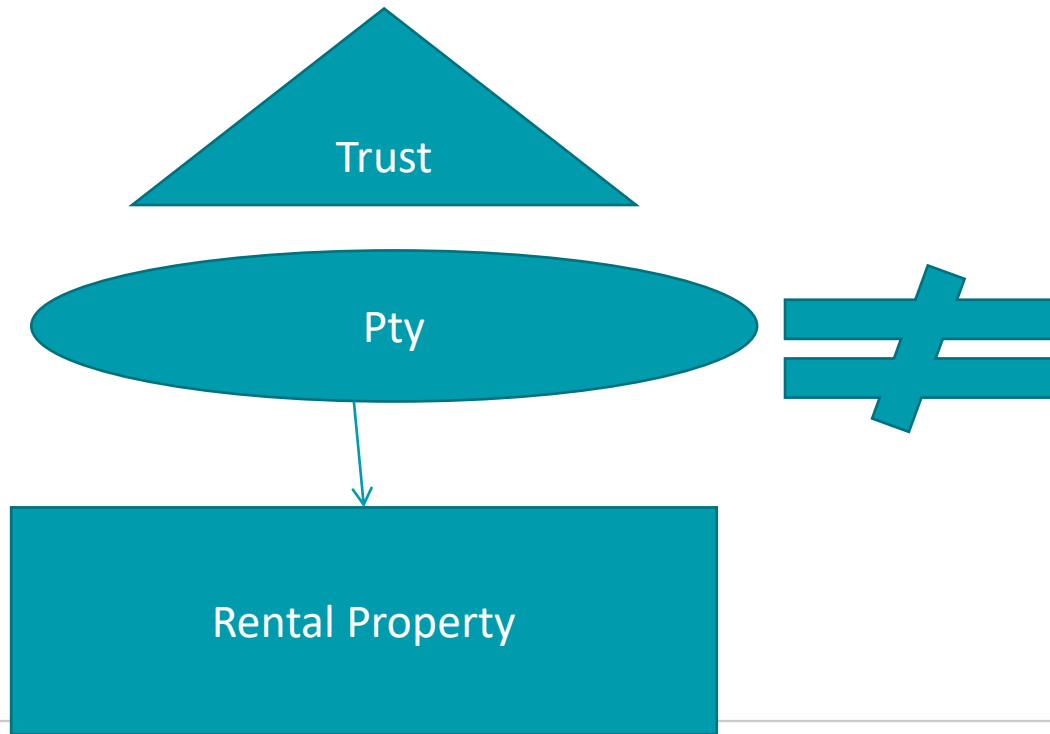
Permanent establishment

Scoping foreign companies out of group concessions

Additional reporting requirements

How do I get around CFC Rules?

Here be dragon (aka offshore)



These have been around for years, now what? 2020 amendments

Where the foreign trust owns more than 50% of the shares, then the 10% participation exemptions available in s10B(2)(a); and para 64B of the Eighth Schedule will no longer apply to distributions or amounts attributed to RSA residents.

Section 7(8) specifically amended to exclude the s 10B(2)(a) exemption

Para 73 of the Eighth Schedule also amended to exclude s10B(2)(a)

Section 25B amended to add a new (2B) which requires you to ignore the s 10B exemption when determining whether an amount “would have constituted income”.

Practically – what does this mean?

Some loss of tax benefits for beneficiaries of offshore trusts (100% exemption vs 55% under new dispensation)

2021 change

Long story short – people were using a combination of s10B and para 64B to strip wealth out of RSA. Method:

- Take RSA company and change it's tax residency.

- No tax consequences for shareholders as no disposal.

- Once transferred, either declare large dividends or sell the shares.

- Claim 10% participation exemption – score!

Change:

S9H – company changing residence now has a deemed CGT on all its assets

S10B – All exemptions on foreign dividends are reduced/cancelled where the recipient has deductible expenditure linked to the receipt of the foreign dividend.

S31 – Transfer pricing rules to be amended. Tax benefit now looks not only at the two transacting parties, but resident shareholders as well.

What does this tell us?

This is going to be an evolving space. I cannot see this being the last set of changes.

International structuring is going to have to adapt.

OECD and Digitisation

Current tax model very much rooted in the idea of physical presence, ie: where I am dictates where I trade.

Place of effective management

Permanent establishment



OECD and Digitisation

Principle One:

Move away from the “nexus” ie, source, idea and give more weight to the market.

Fundamental change to current principles

Market activity will be weighed more heavily than physical presence.

2 possible new concepts:

Significant economic presence

Significant digital presence

OECD and Digitisation

Principle Two: Relook at taxing rights where you have two competing jurisdictions and the one is a low/no tax jurisdiction.

Take away: BEPS is a HUGE concern

Policy Note available here: <http://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf>

BUDGET 2021



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A few things that are certain

Allowances are still under review

Wealth Taxes are still under review

The international space is undergoing significant changes.

- In terms of local government attitudes and laws

- In terms of international norms and laws

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“ Education is the passport to the future, for tomorrow belongs to those who prepare for it today ”
-Malcom X -

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