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Tax Cases and SARS interpretation

Critical Tax Changes and SARS Legislative Updates

15 May 2025

YOUR KEY TO THE TAX COMMUNITY

Agenda

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2 The 2024 amendments to the foreign tax rebate

3 The absence of a land-rich share clause in tax treaties

4 Proposed amendments to section 25B and section 7

Keitumetse Sesana MTP (SA)

LLM (Tax Law), registered SARS Tax Practitioner and
Master Tax Practitioner

Keitumetse Sesana is Strategic Lead for Stakeholder Engagement Legislation at SAIT.

Keitumetse currently specialises in tax legislative policy engagement and leads strategic initiatives aimed at shaping and refining the tax legislative framework. She plays a key role in managing key stakeholder relations, including facilitating collaboration with key government departments such as Parliament, National Treasury, SARS, and other key entities. Her strategic oversight extends to leading the SAIT Tax Technical workgroups, ensuring that tax specialists within the group collaborate effectively to draft and submit policy proposals that influence legislative reform.

In addition to her policy and stakeholder engagement responsibilities, Keitumetse leads webinars and curates content aimed at supporting tax practitioners' Continuous Professional Development (CPD). She is dedicated to helping tax professionals stay ahead in an ever-evolving tax landscape through insightful webinars and contributions to various SAIT publications.

Keitumetse holds a Master of Laws (LLM) specialising in Tax Law, a Bachelor of Laws (LLB), and a Bachelor of Commerce (BCom) Law degree.

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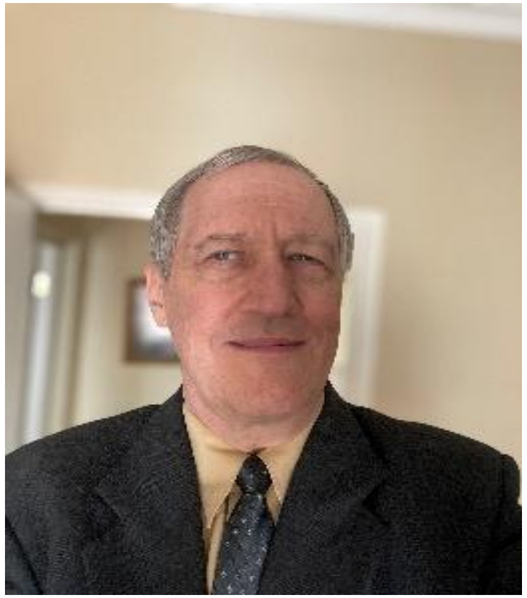

Duncan McAllister

CA (SA), SAIT Consultant

Duncan is a Chartered Accountant and specialises in income tax with particular expertise in capital gains tax and corporate tax. He has 36 years' experience in the tax field, having spent 35 of those years with SARS on a variety of sections in the Durban office: Company Audit, assessing of companies in liquidation, head of individual business, partnership, trust and estates assessing, head of the company assessing section, acting head of the law administration section dealing with all objections and appeals, manager of the tax board, and responsible for all JSC and RSC levy rulings.

From July 2000 he worked for head office on: drafting CGT legislation, presenting seminars on CGT throughout the country, writing numerous guides and interpretation notes and reviewing most of the guides and interpretation notes produced by the Corporate Income Tax Section, participating as an external committee member of the Advance Tax Rulings Section, providing input on selected objection and appeal matters, member of the GAAR committee, and drafting income tax and CGT legislation and reviewing draft tax legislation.

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The 2024 amendments to section 6quat (tax credit for foreign taxes)

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The 2024 amendments to the foreign tax rebate

- **Introduction**
  - The Taxation Laws Amendment Act 42 of 2024 was promulgated on 24 December 2024.
    - It included three amendments to section 6quat , which governs the rebate for foreign taxes:
    - Two amendments affected limitations on the rebate for foreign capital gains .
    - One amendment changed the rule for translating foreign taxes of a controlled foreign company (CFC) to rand.

- **Amendments Affecting Capital Gains**
  - Three-step limitation process applies when determining the section 6quat rebate on capital gains:
    - Comparative inclusion limitation (section 6quat(1) and (1A)).
    - Foreign tax limitation on foreign taxable capital gains.
    - Overall normal tax limitation (section 6quat(1B)(a)).

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The 2024 amendments to the foreign tax rebate

- **CGT Inclusion Rate Amendment**
  - The CGT inclusion rate was modified to 100% for rebate calculations .
  - This change removes limitations caused by South Africa's lower inclusion rates compared to foreign countries.
  - Effective from 1 January 2025 for tax years starting on or after that date.
- **Foreign Tax Limitation Amendment**
  - Prior to the amendment , foreign capital gains not linked to a permanent establishment faced strict limitations , with excess foreign taxes permanently forfeited .
  - New rule: Now all foreign-source capital gains are subject to the same limitation formula .
  - Also removes the asset-by-asset limitation —foreign capital gains are now aggregated instead of being assessed per asset.
  - This may require SARS to adjust its interpretation of capital gains calculations.

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The 2024 amendments to the foreign tax rebate

- **Changes to CFC Foreign Tax Translation**
  - Before amendment: Foreign taxes were converted to rand using the average exchange rate for the resident's tax year .
  - New rule: For CFCs , foreign taxes must now be translated at the average exchange rate for the CFC's foreign tax year .
  - Effective 31 December 2024 , applying to foreign tax years of CFCs ending on or after that date .

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The sale of land-rich shares by a non-resident when there is no share clause in a tax treaty (article 13(4) of OECD Model Treaty

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The absence of a land-rich share clause in tax treaties

Introduction

- Non-residents disposing of shares in a land-rich company may be subject to South African capital gains tax.
- Many tax treaties include a land-rich share clause granting South Africa taxing rights, but some do not.
- SARS asserts taxing rights even when such a clause is absent.

Capital Gains Tax Provisions

- Under paragraph 2(1)(b)(i) and 2(2) of the Eighth Schedule :
- A non-resident must account for capital gains if 80% or more of share value comes from South African immovable property.
- The non-resident must hold at least 20% of the company’s equity shares .
- Immovable property includes:
  - Land, rights to land, and mineral rights in South Africa.
  - Buyers must withhold tax under section 35A if the purchase price exceeds R2 million .

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The absence of a land-rich share clause in tax treaties

Role of Tax Treaties

- OECD Model Tax Convention Article 13(4) allows South Africa to tax gains on shares if 50% or more of their value is derived from South African immovable property.
- Not all tax treaties have Article 13(4) —for example, the Luxembourg treaty excludes land-rich share taxation .
- Shares are legally classified as movable property in South African law, complicating SARS's position.

SARS's Interpretation

- SARS previously accepted that treaties without Article 13(4) prevent taxing land-rich shares.
- Later, SARS obtained a senior counsel opinion supporting taxation even without the clause .
- SARS argues that:
    - "Immovable property" in Article 6(2) of the OECD treaty includes interests in land-rich companies.
- Section 35A(15) defines "immovable property" in a way that supports SARS's stance.

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The absence of a land-rich share clause in tax treaties

Counterarguments

- Legal principles suggest Article 13(4) serves a clear purpose —it defines taxing rights.
- The OECD commentary historically stated that taxing land-rich shares requires explicit treaty provisions .
- South African laws generally define immovable property as things that cannot be moved .
- SARS's reliance on section 35A(15) is questionable since its definition applies only within section 35A .
- SARS's interpretation conflicts with exit charge exemptions in section 9H .

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What are the proposed amendments to section 25B and s 7(5), as outlined in Budget 2.0, likely to be about?

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The absence of a land-rich share clause in tax treaties

- In 2023, amendments were made to the rules relating to the taxation of trusts and their beneficiaries by limiting the flow- through principle to resident beneficiaries. It has come to government's attention that the interaction between sections 7 and 25B of the Income Tax Act and the tax treatment of income and assets vested in beneficiaries of trusts could have unintended consequences where non- residents are involved.

- It is proposed that these aspects be reviewed.

What does this relate to?

- We can only speculate but the Eighth Schedule offers some clues.
  - Paragraph 80(2) used to deal with both resident and non-resident trusts that vested capital gains in resident beneficiaries in the same year of assessment.
  - It was then amended to deal with resident trusts, while non-resident trusts were addressed in paragraph 80(2A).

- This separation served two purposes, namely,
  - simplification; and
  - to open up the conduit pipe through multiple offshore trusts.

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The absence of a land-rich share clause in tax treaties

- Section 25B(1) does not have this separation, with the result that the conduit principle was turned off between offshore trusts. This means that when income flows through multiple offshore trusts, it would represent capital in the hands of a resident beneficiary.

- Under paragraph 70, a capital gain can be attributed only to a donor who is a resident.
  - But section 7(5) allows attribution to any person, which includes a non-resident donor.
  - Paragraph 80(2A) is not subject to paragraph 72. Thus, if a non-resident trust is funded by a donation and a capital gain arising from that donation is vested in a resident beneficiary, paragraph 72 will not apply.
  - But section 7(8) deems income back to a donor even if the income is vested in a resident beneficiary. (see IN 114).

These inconsistencies need to be addressed.

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Questions and Answers

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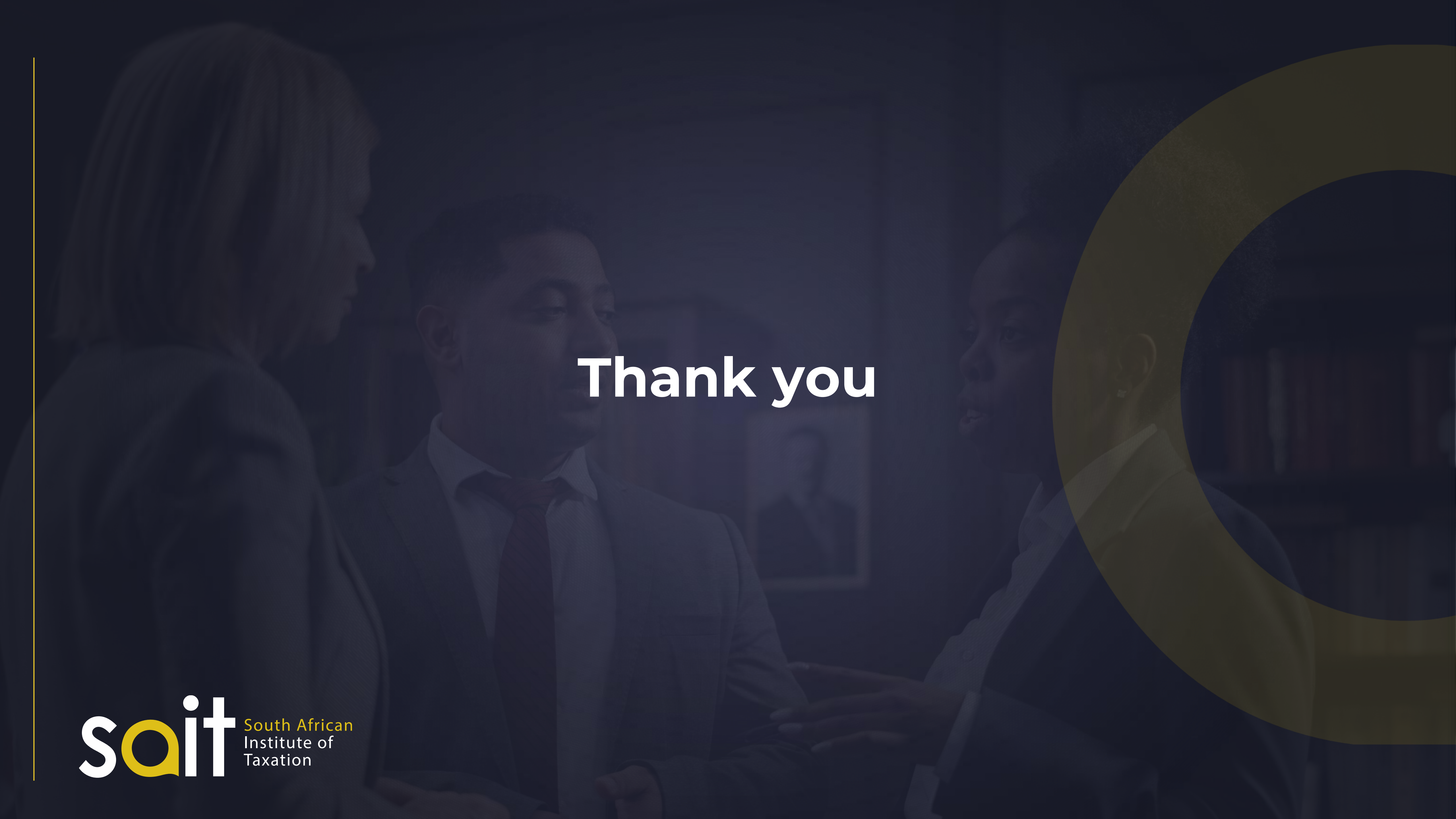
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