REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2019/21825 [P]

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

11 March 2021

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DATE **RT SUTHERLAND**

ABSA BANK LIMITED **First Applicant**

UNITED TOWERS PROPRIETARY LIMITED **Second Applicant**

and

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE **Respondent**

JUDGMENT

SUTHERLAND ADJP:

Introduction

[1] The applicants, Absa Bank Ltd and its wholly owned subsidiary Absa Towers (Pty) Ltd hereafter referred to, collectively, as Absa, seek to review two decisions of the respondent, the Commissioner, South African Revenue Service (SARS).

[2] The origin of this case lies in a controversy about whether or not an impermissible tax avoidance arrangement was conceived to evade a tax liability. It involves the application of the general anti-avoidance regime (GAAR) provisions (sections 80A – 80-L) of the Income Tax Act 58 of 1962, (ITA). Section 80B empowers SARS to impose tax liability in circumstances where a liability is impermissibly avoided.

[2] An impermissible tax avoidance arrangement is described in section 80A.

> "An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and-
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> *(a)* in the context of business-
>
> (i) it was entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than obtaining a tax benefit; or
>
> (ii) it lacks commercial substance, in whole or in part, taking into account the provisions of section 80C;
>
> *(b)* in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a *bona fide* purpose, other than obtaining a tax benefit; or
>
> *(c)* in any context-
>
> (i) it has created rights or obligations that would not normally be created between persons dealing at arm's length; or
>
> (ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part)."

The terms used in section 80A are further defined in Section 80L:

For purposes of this Part-

'arrangement' means any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property;

'avoidance arrangement' means any arrangement that, but for this Part, results in a tax benefit;

'impermissible avoidance arrangement' means any avoidance arrangement described in section 80A;

'party' means any-

(a) person;

(b) permanent establishment in the Republic of a person who is not a resident;

(c) permanent establishment outside the Republic of a person who is a resident;

(d) partnership; or

(e) joint venture,

who participates or takes part in an arrangement;"

[3] When SARS believes an impermissible tax avoidance arrangement has been implemented, it must issue a section 80J notice to the taxpayers:

"(1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.

(2) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.

(3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2)-

(a) request additional information in order to determine whether or not this Part applies in respect of an arrangement;

(b) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or

(c) determine the liability of that party for tax in terms of this Part.

(4) If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the Commissioner, he or she may revise or modify his or her reasons for applying this Part or, if the notice has been withdrawn, give notice in terms of subsection (1)"

[4] The first decision of SARS sought to be reviewed is a refusal to comply with a request by Absa to withdraw section 80J notices in respect of each applicant about a specific transaction. Section 80J(3)(b) contemplates a withdrawal of the notice upon consideration of a taxpayer's response to the notice. SARS did not comply with the request. Instead, it determined a tax liability for Absa as contemplated in section 80J(3)(c).

[5] Section 9 of the Tax Administration Act 28 of 2011 (TAA) was invoked by Absa to demand the withdrawal. Section 9 provides:

> "(1) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph *(a)*, *(b)*or *(c)* or at the request of the relevant person, be withdrawn or amended by-
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> *(a)* the SARS official;
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> *(b)* a SARS official to whom the SARS official reports; or
>
> *(c)* a senior SARS official.
>
> (2) If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to in subsection (1) may not be withdrawn or amended with retrospective effect, after three years from the later of the-
>
> *(a)* date of the written notice of that decision; or
>
> *(b)* date of assessment or the notice of assessment giving effect to the decision (if applicable).
>
> (3) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary."

[6] The second decision by SARS sought to be reviewed is the issue of letters of assessment to each of the applicants in respect of a tax liability imposed in terms of section 80B on Absa in respect of the alleged arrangement. The letters of assessment were issued while the review on the first decision was pending. The two section 80J notices are identical. The two letters of assessment are identical. The basis for the assessments is identical to the section 80J notices.

[7] The two review applications are inextricably linked. Had the first decision to issue the section 80J notices been withdrawn no letters of assessment could have followed. Because the rationale for the assessments is also the rationale in the section 80J notices, should the notices be set aside the letters of assessment must, logically, be set aside too.

[8] The section 80J notice addressed a specific, alleged, 'arrangement' the details of which addressed hereafter.

[9] The critical questions before the court that arise for decision are these:

9.1 Is a refusal to withdraw a section 80J notice reviewable, at all, and if so, on what jurisprudential basis?

9.2 Is Absa a "party" to an impermissible "arrangement" as contemplated by GAAR?

9.3 Did Absa procure a "tax benefit" as contemplated by GAAR?

The transactions alleged to be an "arrangement"

[10] Absa bought, on four occasions, tranches of preference shares in a South African company, PSIC 3. This entitled Absa to dividends when declared. The various tranches of shares were held for various periods during tax years 2014 to 2018.

[11] PSIC 3 thereupon bought preference shares in another South African company, PSIC4. Axiomatically, when it declared a dividend PSIC 3 would receive revenue and in turn

be able itself to declare a dividend to its shareholders. It is unknown whether there were any other shareholders than those mentioned herein.

[12] PSIC4 invested in an offshore trust, DI Trust. This investment was a capital outlay. The DI Trust then lent money to MSSA, a South African Company, by means of subscribing for floating rate notes. This company was a subsidiary of the Macquarie Group of companies, domiciled in Australia.

[13] The DI Trust made investments by way of the purchase of Brazilian Government bonds. It then derived interest thereon. In turn, PSIC4 received from DI Trust interest on its capital investment in DI Trust.

[14] Axiomatically, PSIC 4 was able, in turn, to declare a dividend payable to PSIC3 and, in turn, PSIC 3 declared a dividend payable to Absa.

[15] The dividends received by Absa from PSIC 3 were free of tax.

The contending perspectives of these transactions

[16] The critical aspect of this series of transactions that provoked the belief by SARS that a tax avoidance arrangement had been constructed was the Brazilian investment by DI Trust. Unravelling the series of transactions led to the view that Absa was a party, as defined in section 80L, to an arrangement comprising all these transactions and that ABSA had received an impermissible tax benefit in the form of a tax-free dividend. The proper result, so it was determined, ought to have been that interest was received by Absa which would attract tax. Hence the section 80J notice and the consequent letter of assessment premised on that view.

[17] Absa however states that it bought the preference shares in PSIC 3 on the understanding that PSIC 3 and MSSA had a back-to-back relationship and that the funds would flow directly to MSSA to repay debt to its parent the Macquarie Group. Absa was unaware of the intermediation of PSIC 4 and the DI Trust, and of the DI Trust's Brazilian transaction. Thus, ran the argument, Absa could not, in a state of ignorance, have participated in an impermissible tax avoidance arrangement, nor did it have a tax avoidance motive in mind, and nor did it procure a tax benefit to which it was not entitled.

The Controversy about the reviewability of the decisions

[18] The rival contentions proceed from opposite points of departure. At the level of generality, they are thus:

18.1 SARS's view is that it is anathema to the dispute resolution scheme crafted by the tax legislation to be able to opt out of the internal remedies and evade a progression through a process of objections, appeals and eventually, a trial in the special tax court, by approaching, directly, a court of law at the inception of a dispute about tax liability. The section 80J notice is manifestly an integral step in a multi-step process, the integrity of which process is violated by a parallel process. In any event, so it is argued, Section 9 of TAA, properly interpreted, is not a valid nor legitimate hook upon which to hang a review of a decision in an anti-tax-avoidance dispute.

18.2 Absa's standpoint to refute this stance is founded on two bases. First, the scope of the dispute is a pure point of law, an attribute which lends itself to broader considerations that those that dominate the stance taken by SARS. Second, allied to the first point, the

guarantee in section 34 of the Constitution of access by a person to a court resolve a dispute has not been compromised by the provision of a system of internal remedies leading to the Special Tax Court.[1] This is demonstrated by the abundant precedent for the courts' dealing with tax disputes on points of law. Insofar as a court has a discretion to deal with a tax dispute or insist that internal remedies be exhausted, it is argued that a court would regard a pure point-of-law-dispute as an appropriate rationale to hear and dispose of the controversy, in preference to condemning the parties to a protracted slog through all the internal steps towards the Special Tax Court and then, if necessary, to a court of law to which the parties could have approached directly at the outset. In my view this general proposition as advanced on behalf of Absa is correct.

[19] Getting to grips with the jurisprudential bristles involves dealing with several further aspects to which I now turn.

Section 9 of the TAA – what is it used for?

[20] Can you invoke section 9 of TAA in a review of a section 80J process? SARS' view is that section 9 of TAA addresses concerns completely unrelated to section 80J matters. The argument runs that section 9 contemplates a single official, who, vested with a discretion, may entertain a request to withdraw a notice. Whatever category of decisions or notices section 9 might apply to, it is expressly provided that it does not apply to:

> " ...a decision given effect to in an assessment or notice of assessment that is subject to objection and appeal..."

[1] Section 34 of the Constitution: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

It follows therefore, it is argued, that by extracting from the purview of section 9 such issues, which enjoy a dispute resolution route through objections, appeals and the special tax court, to a final resolution, it would be anomalous to suppose that an alternative "section 9 route" has been created for an aggrieved taxpayer. Moreover, the discretion conferred on the official implies that a degree of expertise peculiar to a SARS official is a component of the decision-making which should enjoy due deference in making a section 9-type decision.

[21] The rebuttal to this thesis is that the passages addressing exclusions of types of disputes in the text refers to assessments *already given effect to* not to assessments *not yet given effect* to. Thus, it addresses cases where - eg, tax is paid and the objections and appeals process is pending. That is not the case in this matter. Further, so it is argued, the right question to ask is not whether the tax regime offers two routes but whether the court's jurisdiction is plainly excluded. In the face of clear precedents, the court has dealt with tax disputes on points of law and have not compelled aggrieved taxpayers to exhaust internal remedies. (See: *Metcash Trading Ltd v C, SARS* 2001 (1) SA 1109 (CC) at [43] and [46] [2]).

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[2] [43] Once the Commissioner has disallowed an objection an aggrieved vendor can appeal such decision. What s 36 clearly does not do is place any impediment in the way of such an appeal, either to the Special Court or from its decision to an ordinary court of law. The crucial point, however, is that the section expressly does not preclude a disgruntled vendor against whom an assessment has been made from resorting to a court of law for whatever other relief that may be appropriate in the circumstances. Although the Act vests jurisdiction to vary or set aside assessments - and other decisions by the Commissioner - in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), there is nothing in s 36 to suggest that the inherent jurisdiction of a High Court to grant appropriate other or ancillary relief is excluded. The section does not say so expressly nor is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication.

...

[46] It is therefore clear that any decision of the Commissioner to make a VAT assessment under s 31 and/or to levy additional tax under s 60, and not only a refusal by the Commissioner to grant relief under the power to do so vested in the office by s 36(1) of the Act ('unless the Commissioner so directs'), is subject to judicial intervention in certain circumstances. The implacable interpretation of s 36(1) contended for in argument on behalf of Metcash and accepted by the learned Judge in the High Court is not warranted. Neither the injunction to pay first, regardless of a resort to the Special Court, nor the non-suspension provision is intended or has the effect of prohibiting judicial intervention. Nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in s 36 as it stands. That section, therefore, cannot be said to bar the access to the courts protected by s 34 of the Constitution.

[22] As regards the implication of the officials' discretion taking the matter out of the hands of a court, the argument is advanced that when the dispute is about a point of law there is no room to debate a range of options in making a decision: only a correct view of the law is rational and lawful, hence there is no room for deference: the decision is right or wrong.

[23] I agree with these contentions advanced by Absa.

The effect of Section 105 of TAA

[23] Section 105 of TAA provides:

> "A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, *unless a High Court otherwise directs*."

[24] Section 104(1), referred to therein provides:

> (1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may *object to the assessment.*
>
> (2) The following decisions may be objected to and appealed against in the same manner as an assessment:
>
> *(a)* ...
> *(b)* ...
> *(c) any other decision that may be objected to or appealed against under a tax Act.*
>
> (3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.
>
> (Emphasis supplied)

[25] It was contended that the provisions of section 105 indicate a confined arena in which to conduct any disputations over a tax liability. However, plainly, if a court may '...otherwise direct...' that results in an environment for dispute resolution in which there is more than one process. A court plainly has a discretion to approve a deviation from what might fairly be called the default route. In as much as the section is couched in terms which imply

permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking a review, where an appropriate case is made out. It was common cause that such appropriate circumstances should be labelled "exceptional circumstances". The court would require a justification to depart from the usual procedure and, this, by definition, would be "exceptional". However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a point of law, that attribute. in my view, would satisfy exceptionably.

[26] Accordingly, Sections 104 and 105 do not impinge adversely on the course of action launched by Absa.

PAJA[3] *or the Principle of Legality?*

[27] The next debate in relation to the non-reviewability of the refusal to withdraw a section 80J notice led to an examination of the decision in order to determine to what species it belonged. Was it "administrative action" or was it merely an exercise of public power and reviewable under the principle of legality? The decision to *issue* the section 80J notice was of course not final – or perhaps, to belabour the nuance - not fully-final because the notice per se placed no immediate adverse burden on Absa and thus had no "external or legal effect" and was therefore plainly not administrative action as contemplated by PAJA.[4]

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[3] Promotion of Administrative Justice Act 3 of 2000.

[4] The definition of "administrative action" is in section 1. The relevant portion reads:

"administrative action" means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) ...

[28] Such a decision can be contrasted with the effect of a letter of assessment, which it was common cause was administrative action. The decision to refuse to withdraw, an option open to the decision-maker stands in a different light. Arguably the refusal to withdraw the notice it could be construed as administrative action too.

[29] Absa however invoked the principle of legality to review the decision. Does it really matter that it might have relied on PAJA? It is unnecessary, in my view, to decide this question because it seems to me that it can fairly be said that the attributes of the decision to refuse lies in the borderlands of which review-regime should prevail, ie, PAJA or Legality. The refusal undoubtedly had an effect even if it can plausibly be argued that it was not final in effect. More important, in my view, is that the decision to refuse was plainly a decision by an organ of state exercising a statutory power and its notional non-final attribute is not a bar, precisely because it nevertheless had an impact. Similar non-final decisions have been held be susceptible to review. (See: *C,SARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) at [4]; *C,SARS v Langholm Farms (Pty) Ltd* [2019] ZASCA 163 at [7] – [10]. *Earthlife Africa (CT) v DG, Dept of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at [35] to [37]).

(ii) exercising a public power or performing a public function in terms of any legislation; or

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include ...."

[30] In the result it was appropriate to proceed by way of a legality review in preference to PAJA. (See: *Minister of Home Affairs v Public Protector of RSA* 2018 (3) SA 380 (SCA) at [38]).

Is the controversy a pure point of law?

[31] The foundation of Absa's case is that SARS accepts that Absa was ignorant of the labyrinthine mechanics of the series of transactions and in turn therefore accepts that Absa had no knowledge of PSIC 4 and D1Trust and the Brazilian transaction. It relies on several passages in the section 80J notices, and in the letters of assessment, in which latter documents SARS relied on the identical premise evinced in the section 80J notices.

[32] In the section 80J notices (and in identical terms in the subsequent letters of assessment) the core facts relating to Absa's role in these transactions was expressed thus:

> "17. The ABSA Group has provided SARS with internal documentation relating to the four ABSA arrangements, including credit applications and related documentation. In all four cases, ABSA's understanding of the arrangement appears to be that the arrangement consists of a back-to-back preference share investment into MSSA (via PSIC 3), which investment would be used to fund mssa's broker operations. None of the Absa documentation makes any reference to psic 4, the d1 Trust or any of the transactions undertaken by the latter. SARS has been advised by ABSA and United that they were unaware of the unreferenced entities or transactions.
>
> 18. ABSA, United and other parties to the arrangements entered into various security/ancillary arrangements related to the preference share investments, including:
>
> 18.1 In each case, a default put option agreement with MSSA in terms of which ABSA could put the PSIC 3 reference shares to the MSSA upon the occurrence of certain specified events/circumstances.
>
> 18.2 A guarantee and undertaking provided by MGL[Macquarie Group] to ABSA/United (in all cases, PSIC 3 and MSSA were also party to such agreement) whereby MGL guaranteed the preference share return and made certain undertakings regarding the tax treatment of the amounts involved (including "gross up" provisions to maintain the level of preference share return should the amounts become taxable). The guarantee and undertaking agreements also contain provisions detailing how disputes with SARS will be conducted by the parties.

18.3 The preference share investments in the A1 and A3 arrangements were also secured via the cession of certain "collateral instruments" held by MSSA. The cession was achieved via the conclusion of security cession and pledge agreements between MSSA and United (the investor in each of the arrangements). The instruments in question were:

18.3.1 In the case of the A1 arrangement, certain negotiable certificates of deposit (NCDs) issued by SBSA with an aggregate value of R800 million. The NCDs were issued by SBSA on 10 December 2013, ie shortly after inception of the A1 arrangement.

18.3.2 In the case of the A3 arrangement, certain NCDs issued by FBL with an aggregate value of R300 million.

18.4 In the cases were collateral instruments were ceded as security, the ABSA Group records that it measured credit risk against the issuer of the NCDs (ie SBSA or FBL, as the case may be) and not against MSSA (a so-called "risk transfer"). This was in part due to MSSA's ability to settle the put option price (should United exercise its put option) via the transfer of the collateral instruments."

[33] No rebuttal of the facts described herein appears in the section 80J notice, nor subsequently in the answering affidavits. No clear allegation of mendacity appears anywhere.

[34] The proposition advanced by SARS is that, properly and fairly read, the passages cited above do not support any acceptance of Absa's say so. SARS says in its answering affidavit that is not convinced of Absa's ignorance. It asserts that a process via objections, appeals and the Special Tax Court, where employees of Absa can be subjected to cross examination and discovery can be demanded is appropriate in order to test the veracity of Absa's claim of ignorance. In this process the onus is on the taxpayer to satisfy SARS that tax is not due.

[35] This might have been a cogent argument had SARS not put its eggs in one basket by issuing the letters of assessment on the factual premise in the section 80J notice. The significance of the letters of assessment to this specific analysis is limited to the effect it has on understanding and interpreting the stance adopted by SARS in the section 80J notice. Put bluntly: If you seek to assess and collect tax on the basis that it is due despite Absa being

ignorant, then it is not open to claim that you deserve a chance to go behind the premise of the assessment levied, so you can afterwards attempt to prove Absa did have knowledge. In my view, it would be untenable, having regard to SARS' conduct, appraised holistically, to endorse a reading of the section 80J notice that would allow it to wriggle out of the premise it chose to rely on to levy an assessment.

[36] Accordingly, there is no room for a plausible dispute of fact. Absa was served a section 80J notice and subsequently served with letters of assessment on the facts reported by Absa about its role in the series of transactions. A semantic gyration cannot turn a Naartjie into an orange.

The substantive grounds of review

[37] The relevant passages in the section 80J notices setting out SARS' rationale are these:

> "37. In substance, the D1 Trust utilises the interest from the South African loans (which is treated as tax-exempt in the hands of the D1 Trust but would not be in the hands of the South African beneficiaries should section 25B of the IT Act apply upon distribution), to "purchase" an income stream (the Brazilian bond interest) via short-term Bond purchases and re-sales, which income stream is treated as tax-exempt when distributed. There is no apparent commercial reason for these transactions, (ie the return of the Brazilian bonds is not superior compared to the South African interest), other than the favourable tax interest for the parties.
>
> 58. In our view, there is no question that at least one of the main purposes of the "assignments" between the D1 Trust and MBL (the purchases and re-sales of the Bonds), is to take advantage of the tax exemption afforded by sub-article 11(4)(d). There is, on the face of it, no other reason for these transactions. As previously noted, all such transactions lead to commercial/economic losses in the hands of the D1 Trust, and by extension its beneficiaries.
>
> 59. We thus conclude that the exception provided for in Article 11(9) of the Brazilian DTA applies in the present case to the Bond coupons, and accordingly South Africa did not (and does not) sacrifice its taxing rights in respect thereof.
>
> 66. Every party to each of the above arrangements is accordingly a "party" as defined in section 18L of the IT Act in relation to a given arrangement. For the avoidance of doubt, this

> would include ABSA and United. This is because, for the purposes of Part 11A of the IT Act, "party" includes *inter alia* any person who shares in or partakes of an arrangement (based on the ordinary meaning of the term "participates in"). This would clearly include any person that benefited financially/economically from the arrangement in question.
>
> 67. Section 1 of the IT Act defines "tax benefit" *inter alia* for the purposes of section 18L as the *"...avoidance, postponement or reduction of any liability for tax"*, where "tax" is *"...any tax, levy, duty or other liability imposed by* [the] *Act or any other Act administered by the Commissioner"....*
>
> 70. It is, in our view, abundantly clear that mechanism employed by the D1 Trust, as described above attempted to "swap" a taxable income stream (the interest from the collateral instruments and/or from MSSA, which interest was paid to the D1 Trust as interest on the loans made by the latter to MSSA) for an income stream that was exempt from South African income tax by the virtue of the application of the Brazilian DTA. In this manner, the liability for income tax that would have arisen had the taxable income stream not been swapped was (according to the parties) completely avoided.
>
> 76. It is important to note that the "purpose" consideration relates to the purpose of the arrangement, and not one or more participants therein. In other words, the purpose test is an objective test of the effect of an arrangement, rather than a subjective test of the reason for any participant's involvement therein (although the latter is one of the factors that must be considered when evaluating the former)."

[38] Absa contends that two substantive errors of law were made in this analysis. First, it was an error to suppose that Absa could be a "party" as defined in section 80L. Second, the transaction to which Absa was a party did not result in it escaping from any tax liability.

Was Absa a "Party"

[39] The fundamental issue is whether Absa's conduct demonstrated that it was a party to an "impermissible arrangement". The section requires a taxpayer to 'participate or take part'. Such conduct requires volition. A taxpayer has to be, not merely present, but *participating* in the arrangement. The fact that it might be the unwitting recipient of a benefit from a share of the revenue derived from an impermissible arrangement cannot constitute "taking part" in such an arrangement. SARS elides the notion of *sharing* with participation in paragraph 66 of the section 80J notice, cited above. This is incorrect.

[40] The "arrangement" contended for must encompass all the transactions described. An arrangement which is alleged to comprise several distinct transactions must therefore be a scheme. It is plain that the scheme requires a unity to tie the several transactions into a deliberate chain. (*CIR v Louw* 1983 (3) SA 551 (A) at pp 572ff) A mere series of subsequential events does not constitute a chain. Without a factual basis to allege Absa was anything more than an investor in preference shares, no scheme is established that reaches Absa, even if it extends to some or all of the other entities.

[41] Moreover, there is no basis to construe the factual basis as supporting an inference that the Absa investment was, in the least, motivated by an intention to obtain relief from an anticipated tax liability, a necessary attribute of an arrangement. The expectation of receiving dividend income which is free of tax is so banal a transaction that it cannot support a suspicion of pursing an ulterior motive and thus cannot serve to broaden the compass of the participants in a scheme.

Did Absa receive a tax benefit as required by section 80A?

[42] Whether a tax liability was evaded is determined by the "but for" test applied to a future anticipated tax liability. (*ITC 1625 59 SATC 383*; *Hicklin v CIR* 1980 (1) SA 481 (A) at 492fff).

[43] SARS' rationale was articulated in the passages cited above. In my view, there is no plausible link demonstrated between Absa and the supposedly nefarious transactions. On the but for test the question must be posed: but for the purchase of preference shares in PSIC 3,

how might an anticipated tax liability be evaded? No foundation is set out that demonstrates such a result. Thus, the conclusion is irrational.

Summary of conclusions

[44] The decisions by SARS refusing to withdraw the section 80J notice are appropriately decisions reviewable under the principle of legality.

[45] A taxpayer is not obliged to pursue a remedy in respect of a dispute over a tax liability in terms of the procedures set out in tax legislation only and may apply directly to a court of law for relief in exceptional circumstances. Absa, insofar as judicial authorisation is required, it is authorised to do so.

[46] Exceptional circumstances include a dispute that turns wholly on a point of law.

[47] The premise of the section 80J notice was that Absa was liable to be taxed in respect of an impermissible arrangement despite its ignorance of the arrangement.

[48] That premise was incorrect in law because the factual premise did not establish that Absa was a party to such arrangement nor that it had an intention to escape an anticipated tax liability nor that it received relief from a tax liability as result of acquiring preference shares in PSIC 3.

[49] The letters of assessment were issued on the factual premise of the section 80J notice and their fate is indistinguishable from that of the section 80J notices.

[50] The decision to refuse to withdraw the section 80J notices and the issue of the letters of assessment is reviewed and set aside.

[51] It is appropriate that an order be made withdrawing the section 80J notices.

Costs

[52] It is appropriate that SARS bears Absa's costs, including the costs of two counsel.

The Order

1. The review applications brought by the two applicants have been appropriately brought before the court without subjecting the substance of the grievances to a process of remedies internal to the procedures applied by the respondent in terms of tax legislation.

2. The decisions by the respondent to refuse to withdraw the section 80J notices issued to the two applicants are reviewed and set aside.

3. The notices referred to in paragraph 2 of this order are withdrawn.

4. The decisions of the respondent to issue letters of assessment to the two applicants are reviewed and set aside.

5. The letters of assessment referred to in paragraph 4 of this order are withdrawn.

6. The respondent shall bear the costs, including the costs of two counsel.

Roland, Sutherland

ROLAND SUTHERLAND
Acting Deputy Judge-President, Johannesburg,
Gauteng Division of the High Court of South Africa.

Date of hearing: 25 February 2021
Date of judgment: 11 March 2021

For the Applicants:
Adv Peter Solomon SC,
with him, Adv Steven Budlender SC and Adv Loyiso Mnqandi
Instructed by Allan and Ovary.

For the Respondent:
Adv Eduard Fagan SC,
with him, Adv Thembalihle Sidaki.
Instructed by the State Attorney.