REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT WESTERN CAPE HIGH COURT, CAPE TOWN)

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

.....	.....
Date	**NDITA J**

CASE NO: IT 24502

In the matter between:

MR X APPLICANT/APPELLANT

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

and

CASE NUMBER: IT 24503

MR Y APPLICANT/APPELLANT

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

J U D G M E N T

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14:15 on 12 November 2020.

N D I T A J

[1] The proceedings in this matter commenced by way of two consolidated appeals in terms of section 107 of the Tax Administration Act 28 of 2011 ("the TAA"). The combined hearing of the two appeals was postponed by agreement between the parties. Pursuant thereto, two interlocutory applications were launched. The taxpayer in case number IT 24502, Mr X brought an application seeking, (i) the striking-out of certain allegations from the Respondent's, the Commissioner for the South African Revenue Service (SARS) Rule 31 statement (its pleaded case), and (ii) an order declaring that two legal issues arising on the pleadings be determined separately. In case number IT 24503, the taxpayer, Mr Y also brought applications identical to those brought by Mr X.

[2] In respect of both case number IT 24502 and IT 25403, the Commissioner for the South African Revenue Services (SARS) brought an application in terms of section 118(3) of the Tax Administration Act No. 28 of 2011 ("the Tax Administration Act"), read with Tax Court Rule 42(1), for an order declaring that, the taxpayer (Mr X), has a duty to begin to lead evidence at the (postponed) appeal hearing. A similar application was brought was brought by SARS in respect of the taxpayer, Mr Y.

[3] The taxpayers also brought an application to have the legal issue raised by SARS in the Rule 31 statement to the effect that each taxpayer's appeal to this court is formally defective, and invalid. The second leg of the separation application is premised on the question whether SARS's pleaded allegations are capable of sustaining the conclusion that "a tax benefit" resulted from any of the identified arrangements (as defined in the GAAR).

Factual background

[4] The factual background underpinning both interlocutory applications lodged by the taxpayers, as can be discerned from the affidavit deposed to the taxpayers' attorneys, Mr Z, is largely common cause. In order to fully comprehend the two interlocutory applications to strike out, I find it necessary to explain from the outset that the assessments to which the appeals relate are assessments made by SARS in the purported exercise of special powers under the general anti-avoidance rules ("the GAAR") contained in sections 80A to L of Part 11A of Chapter 111 of the Income Tax Act 58 of 1962 ("the ITA"). The applications to strike out flow from the special nature of SARS's powers under GAAR. I first deal with the factual background pertinent to the determination of Mr X's application.

The X Application

[5] On 26 October 2015, the Commissioner dispatched to Mr X a notice of audit letter informing him that an audit would be conducted into his 2006 to 2012 years of assessment. Shortly thereafter, and on 30 October 2015, the Commissioner issued a letter incorporating both his audit findings and a section 80J notice, indicating his intentions to invoke the GAAR in raising the additional assessment. The section 80J notice reads thus:

> "(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 sub-section (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 sub-section (1) has been withdrawn; or
>
> (*c*) Determine the liability of that party 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).

[6] In the section 80J notice, the Commissioner alleges that Mr X was, pursuant to preliminary audit findings, involved in certain arrangements which, despite them being reportable, were not disclosed. These are envisaged in section 80 A and which provide as follows:

> "**80A Impermissible tax avoidance arrangements**—An avoidance arrangement is an impermissible arrangement if it its sole or main purpose was to obtain a tax benefit and—
>
> (*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 business 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).[1]

[7] In terms of section 80B the Commissioner may determine the consequences of an impermissible tax avoidance. The section provides thus:

> "**80B Tax consequences of impermissible tax avoidance—**(1) The Commissioner may determine the consequence under this Act of any impermissible avoidance arrangement for any party by—
>
> (*a*) Disregarding, combining, or re-characterising any steps in or parts of the impermissible avoidance arrangement;
>
> (*b*) Disregarding any accommodating tax-indifferent party or treating any accommodating or tax –indifferent party and any other party as one and the same person;
>
> (*c*) Deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining any tax treatment of any amount;

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[1] S.80 was inserted by section 34(1) of Act 20 of 2006 deemed to have into operation on 2 November, 2006 and applicable to any arrangement (or any steps therein or parts thereof)entered into on or after that day).

(*d*) Reallocating any gross income, receipt or accrual of a capital nature or expenditure or rebate amongst the parties ; or

(*e*) Re-characterising gross income, receipt or accrual of a capital nature or expenditure; or

(*f*) Treating the impermissible avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention of diminution of the relevant tax benefit.

(2) Subject to the time limits imposed by sections 99,100 and 104(5)(b) of the Tax Administration Act, the Commissioner must make compensating adjustments that he or she is satisfied are necessary and appropriate to ensure the consistent treatment of all parties to the impermissible avoidance arrangement."[2]

[8] The transactions alleged to constitute impermissible avoidance arrangement in *casu* involve agreements concluded between various South African companies, including A Investments as well various companies in the Isle of Man. More specifically, these arrangements are said to consist of the following:

1. The transactions between A Investments, its subsidiaries and the Isle of Man companies, giving rise to certain Trade subsidiaries holding deemed to have come into
2. The declaration of certain A Investments promissory notes to X;
3. The 'settlement' of the promissory notes held by X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries; and
4. In each case following a sale by A Investments the payment by A Investments of amounts to X.

The Commissioner further alleges that each arrangement involving the steps listed above is separate arrangement for the purposes of the GAAR, consisting of a set of preconceived transactions which, together, constitute a "scheme".

[9] Mr X responded to the section 80J notice, on 22 January 2016 and explained that after consultations with his lawyers, he was unable to submit reasons in terms of section 80J (2) as to why the Commissioner should not invoke GAAR against him because the Commissioner had failed to provide proper reasons for its election to invoke the GAAR against him. More

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[2] Section 80B inserted by section 34 of Act No. 20 of 2006 deemed to have come into operation on 2 November 2006 and applicable to any arrangement (or any steps therein or parts thereof) entered into on or after that date. Sub-section (2) substituted by section 271 read with paragraph 65 of Schedule of Act No.28 of 2011).

specifically, according to Mr X, the section 80J notice was too vague, generalised, and in some places, contradictory. The taxpayer further indicated that paragraph 65 of the section 80 J notice reflects that there must either have been one arrangement, or more than one arrangement in relation to which the Commissioner may invoke the GAAR. However, paragraph 65 referred to arrangements both in singular and in plural. In addition, it was, according to the taxpayer difficult to fathom which particular transactions the Commissioner regarded as preconceived, and therefore part of a scheme, and how many schemes were considered to exist. Mr X ultimately challenged the validity of the section 80J notice on the basis that it had not provided reasons for the Commissioner to invoke GAAR against him. In his letter he asked the Commissioner to provide certain details, which if provided, would, in his opinion cure the defect he had raised concerning the section 80J notice.

[10] The Commissioner responded to Mr X's letter on 18 February 2016, and denied the vagueness alleged by the taxpayer in the section 80J notice, The Commissioner is of the view that he had provided sufficient reasons for his decision to invoke the GAAR.

[11] Subsequent to the correspondence between the parties, the Commissioner on 22 August 2016, issued a finalisation of audit letter, raising additional assessments against the taxpayer. The reasons advance by the Commissioner for the invocation of GAAR are similar to those provided in the section 80J, notice. Attached to the finalisation was an annexure providing details of the arrangements in relation to which the GAAR was applied to raise the additional assessments against the taxpayer.

[12] On 30 August 2016, the Commissioner raised the additional assessments set out in the finalisation letter resulting in a tax liability of R25 933 404.10. Mr X objected to the additional assessment on the grounds that the Commissioner failed to properly identify the arrangements in respect of which he sought to invoke the GAAR on 14 March 2017. On 17 July 2017, the Commissioner disallowed the taxpayer's objection. The taxpayer appealed against the assessment to this court.

The Rule 31 statement

[13] On 31 January 2018, the Commissioner filed its ground of assessment as envisaged in Tax Court Rule 31. The taxpayer avers that in the Rule 31 statement, the Commissioner sought to broaden its case by including significant averments that did not form part of the assessment in terms of section 60J(3)(*c*). Furthermore, the inclusion of these averments in the Rule 31 assessment is, according to the taxpayer, an attempt to remedy certain shortcomings which were already identified by the taxpayer in his objection.

[14] I have already outlined the taxpayer's stance with regard to the Commissioner's reference to arrangements in the singular and plural. The taxpayer points out that the identification of the "tax benefit" resulting from the identified arrangement is a further requirement for the exercise of the GAAR. In both the section 80J notice and the finalisation of audit letter, the Commissioner identified the tax benefit on which he relies as follows:

> "67. Each arrangement factually resulted in a "tax benefit" for X in that (by virtue of the way that the arrangements were structured, including the tax accounting treatment adopted by A Investments), the fee amounts paid by the clients flowed to X without South African Income Tax or STC being levied at any stage. Had the A Investments structure not been employed, the fee accounts would have been taxable in the hands of the recipient (and, if those fee amounts had been channelled through a corporate intermediary, would have attracted STC at some stage because the artificial credits created via the Isle of Man transactions would not have been available)."

According to Mr X, the above paragraph as well as other paragraphs in the section 80J notice and the finalisation of audit letter, clearly show that the Commissioner conveyed, first his intention, then his decision to exercise his powers under the GAAR specifically on the basis that each arrangement consisting of the steps set out in paragraphs 65.1 to 65.4 of the section 80J notice resulted in a tax benefit. Much detail is provided in the section 80J notice, but for the purpose of this judgment, suffice to mention that the structures alleged to have resulted in the benefit are the S structure, the T structure and the 2012 structure. As such, so avers that taxpayer, an objective reading of the section 80J notice and the finalisation of audit letter (especially when read in contradistinction to the Rule 31 statement) reveals that the basis on which SARS exercised its powers under the GAAR was that each arrangement as a whole, produced a tax benefit. According to Mr X, the aforegoing approach remains a defective basis for the Commissioner's decision to exercise his powers under the GAAR against him. According to Mr X, the Commissioner's allegations, even if accepted as correct, are incapable of sustaining a conclusion that any of the arrangements relied upon resulted in any tax benefit in that:

> "14.1 In the case of each of the S structure, the T structure and the 2012 structure, the arrangement as a whole produced the reserves (or, on SARS' allegation STC credits) that were ultimately sols by A Investments.
>
> 14.2 It was these sales by A Investments that produced the funds paid to J and X;
>
> 14.3 In each case, had the arrangement not been entered into, A Investments would have nothing to sell;
>
> 14.4 If A Investments had nothing to sell, no fees could have been paid or become due,

14.5 Thus even on SARS's allegation, if there had been no arrangement, there would have been no fees or right to fees and hence no income tax liability.

14.6 The arrangement did not avoid any liability for tax, since without it, there could not have been tax or other tax liability."

[15] Against this backdrop, the nub of the taxpayer's case is that the Commissioner impermissibly sought to address the defects earlier referred to, by pleading in his Rule 31 statement a basis for exercising his powers under the GAAR that differs from the basis set out in the Commissioner's 80J letter and finalisation of audit letter. Put differently, whereas the Commissioner decided to exercise his powers under the GAAR on the basis that each arrangement as a whole resulted in a tax benefit, in his Rule 31 statement the Commissioner now alleges not only that (i) the arrangement as a whole resulted in a tax benefit, but also that (ii) one or more of the constituent parts of the arrangement separately resulted in a tax benefit. Finally, the taxpayer alleges that under the GAAR, the powers of the Commissioner do not enable him to broaden his case from that on which the assessment was raised as formulated in the 80J notice and in the finalisation letter. In other words, the broadening of the Commissioner's case as suggested by the taxpayer, amounts to a novation of the whole of the factual basis of the disputed assessment for the purposes of Rule 31(3).

The paragraphs ought to be struck out

[16] I have already outlined the basis upon which the Commissioner's approach to the GAAR is being assailed. The taxpayer seeks to strike out paragraph 53 of the Rule 31 statement in its entirety. In paragraph 54.4, he seeks to remove the words "for services rendered", whilst in paragraph 55 the words "separately and".

For the sake of context, paragraph 55 of the Rule 31 statement reads thus:

> "Each arrangement including steps listed above is a separate arrangement for the purpose of the GAAR, consisting of a set of preconceived transactions which separately and together constitute a 'scheme'."

The Respondent's opposing affidavit

[17] The Commissioner, in an affidavit deposed to by Dr N, a Specialised Auditor in the employ of the respondent, assailed the foundational basis upon which the application to strike out on the ground that it is based on what the applicant perceives to be the correct approach in viewing the section 80J notice and the finalisation of audit letter, According to the Commissioner, the pleaded basis for the Commissioner's exercise of his powers under the GAAR is no different from the basis relied upon in section 80J and the finalisation notice.

The inclusion of the separately and in paragraph 55

[18] It will be recalled that the crux of the applicant's complaint concerning the above paragraph is that the Commissioner sought to include the words "separately and," in the Rule 31 assessment to cure the defects in the section 80J notice as well as the finalisation letter. The Commissioner retorts to this allegation by stating that the taxpayer misconstrues or misreads the Rule 31 statement. According to the Commissioner, it has never been his contention that the S structure, T structure and the 2012 structure each constitute an "arrangement" which consists "of the steps set out in subparagraph 65.1 to 65.4 of the section 80J notice". In addition, the manner in which the Commissioner identified the arrangement or arrangements in paragraph 65 of the section 80J notice, imply that the Commissioner identified each of the transactions listed therein as constituting an "arrangement". The Commissioner points out that he identified the "arrangement" or "arrangements" in paragraph 85J notice as follows:

> "85. For the purpose of this analysis, the arrangement or arrangements consist/s of the following:
>
> 85.1 The transaction between A Investments, its subsidiaries and the Isle of Man companies, giving rise to certain A Investments subsidiaries holding promissory notes issued by A Investments.
>
> 85.2 The declaration of certain A Investments promissory notes to J and X.
>
> 85.3 The 'settlement' of the promissory notes held by J and X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries;
>
> 85.4 In each case following a sale by A Investments of amounts to J and X; and
>
> 85.5 In the specific case of the payment to J, the declaration dividend by J to its shareholder trusts funded by those payments."

[19] The Commissioner further contends that it is clear from the introductory words of paragraph 85 that he (the Commissioner) identified each of the transactions listed in subparagraphs 85.1 to 85.5, above as constituting an arrangement. Any two or more would constitute "arrangements". The Commissioner also highlighted the fact that paragraph 65 of the Rule 31 statement unequivocally states that "each arrangement involving the steps listed above is a separate arrangement for the purposes of the GAAR consisting of a set of preconceived transaction which, separately and together constitute a 'scheme'." Likewise, so avers the Commissioner, paragraph 86 of the section 80J notice and paragraph 82 of the finalisation of audit letter state that "each arrangement involving the steps listed above is a separate arrangement for the purposes of the GAAR consisting of a set of preconceived transactions which together, constitute a 'scheme'."

[20] Flowing from the aforegoing, the Commissioner alleges that it communicated the following to the taxpayer:

> [20.1] Each arrangement constitutes a separate arrangement and consists of a set of preconceived transactions;
>
> [20.2] The words “separately and together” in the Rule 31 statement and the word “together” in the section 80J notice and the finalisation of audit letter is only relevant in relation to what the Commissioner considers to be a “Scheme”;
>
> [20.3] It has absolutely no bearing on how the Commissioner identified the arrangement or arrangements in either section 80J notice, the finalisation letter or the Rule 31 statement;
>
> [20.4] A scheme is constituted by each arrangement separately or by viewing each of the arrangements together (“separately and together”) (in terms of the Rule 31 statement), whereas, a “scheme” is constituted by viewing each of the arrangements together (in terms of the section 80J notice and the finalisation of audit letter).

[21] To recap, Mr X’s case is that the Commissioner exercised his powers under the GAAR in the section 80J notice and the finalisation audit letter is that each arrangement as a whole produced a tax benefit, but that he sought to broaden it in the Rule 1 statement to “one or more of the “constituent parts” of the arrangement ‘separately resulted in a tax benefit’.” The Commissioner emphatically denies this assertion and explains that the inclusion of the words “separately and” in paragraph 55 of the Rule 31 statement does not alter the foundational basis upon which the applicant was assessed, as communicated in the section 80J notice and in the finalisation of audit letter. According to this averment, all that the words “separately and” do, is to state that each of the arrangements individually constituted a scheme. Consequently, the use of the words “separately and”, contrary to Mr X’s understanding, does not add to what the Commissioner had already pleaded in paragraphs 55 and 56 of the Rule 31 statement, other than to convey that it also constitutes a “scheme”. Accordingly, the words therefore do not serve to broaden the basis upon which Mr X was assessed. Neither do they novate the whole of the factual basis of the disputed assessment. The Commissioner states that the inclusion of the words “separately and” in the Rule 31 statement serves to clarify the basis of the assessment.

The inclusion of the words for "services rendered"

[22] It will be recalled that the applicant alleges that the words "for services rendered" in paragraphs 54.4 of the Rule 31 statement fall to be struck out on the basis that such words were not used in neither the section 80J notice nor in the finalisation of audit letter. The Commissioner responds to this allegation by stating that the applicant makes this allegation erroneously because paragraph 47 of the section 80J notice and paragraphs 42 and 44 of Annexure A to the finalisation of audit letter unequivocally state that the purported dividends in specie are in fact fees in the hands X for services rendered. I deem it expedient to cite the relevant paragraphs. Paragraph 47 of the section 80J notice reads thus:

> "47. The purported dividends in specie are in fact fees in the hands of X for services rendered. Alternatively, the amounts could simply be seen as the return from the scheme of profit-making entered into inter alia by X."

Paragraphs 42 and 44 of Annexure A to the finalisation notice read as follows:

> "42. Put differently, SARS does not accept the assertions by X that this return from the A Investments structure came in the form of dividends in specie."
>
> 44. The purported dividends in specie are in fact fees in the hands of X for services rendered. Alternatively, the amounts could simply be seen as the return from a scheme of profit-making entered into inter alia by X."

[23] With regard to the alleged vagueness or insufficiency of the Commissioner's reasoning for issuing a section 80J, the Commissioner states that had this indeed been the case, Mr X would have launched an application to compel the production of further reasons, as did the taxpayer in *Commissioner for South African Revenue Service v Sprigg Investment 117 CC t/a Global Investments* 2011 (4) SA 551 SCA and in ITC 1911 80 SATC 407.

The applicant's reply

[24] In reply, Mr X persisted with the contention that the Commissioner's Rule 31 statement amounts, in the identified respects, (i) to an impermissible broadening of the basis on which the Commissioner "determined the liability" of the taxpayer under the GAAR, and alternatively (ii) to the inclusion of a ground which would require the issue of a revised assessment, as contemplated in Tax Court Rule 31(3).

The Y application

[25] The Y application, like the X one, is premised on the fact that SARS, in the Rule 31 assessment sought to broaden its reasons for exercising the GAAR as set out in its section 80J notice, dated 30 October 2015, as well as the finalisation of audit letter dated 22 August 2016. According to Mr Y, SARS was required to stand or fall by the reasons that appear in the section 80J notice and finalisation of audit letter. Mr Y also relies, for the striking out application on Rule 31(3) which provides that "SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment." The applicant alleges the Commissioner's attempt to broaden its case:

> [25.1] amounts to a novation of the factual and legal basis on which the Commissioner purported to exercise its power under the GAAR;
>
> [25.2] would require, to found a valid assessment, the issue of fresh or revised section 80J notice; and
>
> [25.3] would, if allowed to stand, constitute a different determination and therefore a different "assessment" as defined in section 1 of the Tax Administration Act from that to which the applicant objected, against which he appealed, which is the subject matter of the proceedings before this court.

[26] The legal basis for Mr Y's striking out application is premised on what was said by the Tax court in ITC 1862 (75 SATC 34) when it explained the nature of an assessment under the since-repealed section 103(1) of the Act (which contained the predecessor to the current GAAR to the following effect:

> "[59] Identifying the Commissioner's true case is important because of the nature of section 103. It involves the exercise of an extraordinary administrative power enabling the Commissioner to overturn the express and ordinary consequences of applying the Act. The exercise of that power involves his 'determining' a liability for tax. An appeal in this context is against the Commissioner's 'decision' (section 103(4)), namely his determination of a tax liability and its amount.
>
> [60] The basic jurisdictional requirement for the exercise of the power is that the Commissioner is 'satisfied' of the various requirements. Once the Commissioner reaches the requisite level of satisfaction, an appeal must, of necessity go to whether he justified in being so satisfied. He must stand or fall by his reasons for exercising the power."

[27] Linked to the above restatement of the law, is the allegation that SARS sought to broaden its reasons for exercising its power under the GAAR. According to Mr Y, this is apparent from a mere comparison of the Rule 31 statement, on the one hand, with the section 80J notice and the finalisation of audit letter, on the other hand. He further alleges that

SARS's reason for exercising the power should be the same in all three documents, namely, the section 80J notice, the finalisation of audit letter and the Rule 31 statement.

[28] Against this backdrop, I turn to summarise the factual basis underpinning the Y striking out application.

The Y factual background

[29] On 26 October 2015, Mr Y received a notice of audit letter from the Commissioner informing him that an audit would be conducted in his 2006 to 2012 years of assessment. Four days later, and on 30 October 2015, the Commissioner issued a letter incorporating both its audit findings and the section 80J notice, indicating amongst other things that the Commissioner intended to invoke the GAAR to raise an additional assessment. I have already alluded to the jurisdictional prerequisites for SARS to invoke the GAAR in the X application. The Commissioner identified in the section 80J notice certain transactions involving agreements concluded between:

> [29.1] various South African companies, including A Investments (Pty) Ltd ("A Investments"); and
>
> [29.2] various companies in the Isle of Man.

[30] Similar to the X application, the section 80J notice identified three different structures affected by the transactions. These are "the S structure", "the T structure" and "the 2012 structure". More specifically, under the main heading: "Basis of Assessment General Anti-avoidance Rule" in paragraphs 85 and 86, the Commissioner states the following:

> "85 For the purpose of this analysis, the arrangement or arrangements consist/s of the following:
>
> 85.1 The transactions between A Investments, its subsidiaries and the Isle of Man companies, giving rise to certain A Investments subsidiaries holding promissory notes issued by A Investments:
>
> 85.2 The declaration of certain A Investments promissory notes to J and X;
>
> 85.3 The "settlement" of the promissory notes held by J and X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries;
>
> 85.4 In each case following a sale by A Investments the payment by A Investments of amounts to J and X; and
>
> 85.5 In the specific case of the payments to J, the declaration of dividends by J to its shareholder trusts funded by those payments;"

86. Each arrangement involving the steps listed above is a separate arrangement for the purpose of the GAAR, consisting of a set of preconceived transactions, which, together, constitute a "scheme".

[31] Subsequent to the receipt of the section 80J notice, the taxpayer, in a letter dated 22 January 2016, informed the Commissioner that he was unable to advance reasons why the Commissioner should not invoke the GAAR for the following reasons:

[31.1] The section 80J notice was too vague, generalised, in places contradictory and overall unclear to him to submit reasons why the GAAR should not be invoked against him;

[31.2] The taxpayer specifically drew the Commissioner's attention to paragraph 85 of the section 85J noticed and indicated in relation thereto that there must either have been one arrangement, or more than one arrangement in relation to which the Commissioner sought to invoke the GAAR;

[31.3] It was impossible to discern from the Commissioner's letter which particular transactions he regarded as preconceived and therefore part of the scheme, and how many such schemes he considered to exist.

[32] The upshot of Mr Y's letter is that the section 80J notice letter was invalid in that it provided no reasons for the Commissioner's decision to invoke the GAAR against him as was required to be provided in terms of section 80J (1).

[33] In his response to Mr Y's assertions as alluded to above, the Commissioner denied that the section 80J notice was vague for the taxpayer to respond thereto. He further stated that he had provided sufficient reasons for his decision to invoke the GAAR. After further exchanges, the Commissioner ultimately issued a finalisation letter on 22 August 2016, wherein he indicated that:

[33.1] the taxpayer had unjustifiably failed to respond to the section 80J notice notwithstanding the fact that "all relevant facts and circumstances as well as the relevant law and the application thereof to those facts and circumstances" had been set out in the section 80J notice; and

[33.2] SARS would therefore proceed to invoke the CAAR and raise an additional assessment against the taxpayer totalling R1 281 463, including interest and penalties.

Attached to the Finalisation of Audit letter was Annexure "A" which is identical to section 85 and 86 of the section 80J notice. On 30 August 2016, the Commissioner proceeded to raise the additional assessment referred to in the Finalisation of Audit letter. This resulted in a liability of R1 460 870, 96 on the part of the taxpayer.

[34] On 14 March 2017, Mr Y objected to the additional assessment on the ground that the Commissioner had failed to properly identify the arrangements in relation to which he had sought to invoke the GAAR. In addition, he had failed to specify which parts of the S structure, the T structure and the 2012 structures referred to in the section 80J notice, he had identified as amounting to arrangements which were subject to the application of the GAAR. On 7 July 2017, Mr Y's objection was disallowed by the Commissioner, and the former appealed against the assessment, thus the present appeal wherefrom the application to strike out arose.

SARS's Rule 31 statement

[35] The Commissioner, as is procedure in terms of Rule 31, filed his statement of grounds of assessment, opposing appeal. I have already set out the basis on which the Commissioner sought to exercise his power under the GAAR as reflected in sections 85 and 86 of the section 80J notice.

[36] Mr Y alleges that it is plain from the section 80J notice and the finalisation of audit letter that the Commissioner exercised his powers under the GAAR on the basis that the S structure, the T structure and the 2012 structure resulted in a tax benefit to Mr Y and that each arrangement as a whole produced a tax benefit. In addition, the Commissioner alleges that the relevant tax benefit was in each case received "by the J shareholders" but did not allege that Mr Y, who is not a J shareholder himself received the tax benefit. Instead he stated that: "The J shareholder trusts and X enjoyed the entire tax benefit created in respect of the fees paid by A Investment's client and are thus the only relevant 'parties' for the purpose of section 80B". Consequently, Mr Y alleges that the Commissioner's decision to exercise his powers against Mr Y is defective in that:

> [36.1] The Commissioner did not allege the receipt of any tax benefit by the taxpayer himself;
>
> [36.2] The relationship between the taxpayer and the TT Trust did not form part of any of the arrangements in respect of which the Commissioner sought to exercise his powers under the GAAR (nor did the Commissioner allege that the TT Trust or the taxpayer was part of any of the arrangements).
>
> [36.3] The section 80J notice and the Finalisation of Audit letter do not implicate the receipt of a tax benefit by the taxpayer in that:
>
> > [36.3.1] In the case of each of the S structure, the T structure and the 2012 structure, the arrangement as a whole produced the reserves (or, on SARS's allegations, STC credits) that were ultimately sold by A Investments;
> >
> > [36.3.2] It was these sales by A Investments that produced the funds paid to J and X;

[36.3.3] In each case, has the arrangement not been entered into, A Investments would have had nothing to sell;

[36.3.4] If A Investments had nothing to sell, no ”fees” could ever have been paid or become due;

[36.3.5] Thus, even on SARS’s allegations, if there had been no arrangement, there would have been no fees or right to fees, and hence no income tax liability;

[36.3.6] The arrangement therefore did not avoid any liability for tax (and hence did not result in a tax benefit), since without the arrangement, there could have been no income tax.

[37] Flowing from the aforegoing, Mr Y alleges that the Commissioner’s Rule 31 statement departs from both the section 80J notice and finalisation of audit letter in that in the Rule 31 statement, the Commissioner alleges a tax benefit was received by Mr Y himself. Furthermore, in the Rule 31 statement, the Commissioner now alleges a relationship between Mr Y and the TT Trust as basis for invoking the GAAR, whereas no such allegation was in neither the section 80J letter nor finalisation of audit letter. Mr Y further alleges that whereas the Commissioner decided to exercise his powers under the GAAR on the basis that each arrangement as a whole resulted in a tax benefit, in his Rule 31 statement he alleges that (i) the arrangement as a whole resulted in tax a benefit and that (ii) one or more of the “constituent parts” of the arrangement “separately” resulted in a tax benefit.

The paragraphs sought to be struck out

[38] The applicant alleges that because of the disjunct between Rule 31 statement, on the one hand, and SARS’s section 80J notice and the finalisation of audit letter, it was impermissible for SARS to invoke the GAAR. For this reason, Mr Y applies that the following parts of SARS’s Rule 31 statement be struck out;

[38.1] the last sentence of paragraph 59 which reads: “The distribution of such income to the TT Trust and J’s shareholders, took place at the direction of Y”;

[38.2] the words “for his own benefit” contained in paragraph 60;

[38.3] the word “Y” contained in the third line of paragraph 60.3;

[38.4] paragraph 63 in its entirety;

[38.5] the words “for services rendered, which services actually rendered by Y as described in paragraph 60 above” contained in paragraph 64.4;

[38.6] the words “including the TT Trust as a conduit for Y, all of which was done on the instruction of, inter alia, Y” contained in paragraph 64.5;

[38.7] the words “separately and” contained in paragraph 66;

[38.8] the words “and Y” contained in paragraph 66;

[38.9] the words “at the instance of Y” contained in paragraph 66;

[38.10] the words “including Y” contained in paragraph 67;

[38.11] the words “and Y” contained in paragraph 66.2.1;

[38.12] the words “and Y” in the fourth line of paragraph 68.2.3.2 thereof and in the fourth line of paragraph 68.2.4.2 thereof;

[38.13] the words “and Y” in the fourth line of paragraph 68.2.4.2 thereof;

[38.14] paragraphs 68.3.3, 68.3.4 and 68.3.5 in their entirety, alternatively, the word “Y” in the last line of paragraph 68.3.4; and

[38.15] the words “specifically the TT Trust and Y as a trustee” in paragraph 69 thereof.

[39] Mr Y alleges that the paragraphs, words and/or phrases sought to be struck out broadens SARS assessment after it had made its determination – which determination is the assessment under the GAAR. According to the Mr Y, to permit the words/phrases and paragraphs complained of would amount to a different determination and therefore a different assessment.

The Commissioner’s opposing affidavit

[40] The Commissioner, in an affidavit deposed by SARS’s Specialised Auditor, Dr N, emphatically denies that the he has attempted to broaden his case in the Rule 31 statement. According to the Commissioner, the pleaded basis for the Commissioner’s exercise of his powers under the GAAR does not differ from the section 80J notice and the finalisation of audit letter.

[41] I now turn to summarise each of the grounds of this application as reflected in the Commissioner’s affidavit.

(a) The inclusion of the words “separately and”.

(b) The failure of the Commissioner to identify a tax benefit received by the applicant.

(c) The remaining contentions.

The inclusion of the words "separately and"

[42] It is well to recall that Mr Y's complaint to the inclusion of the words "separately and" in paragraph 65 of the Rule 31 statement is that those words were not contained in either the section 80J notice or in the finalisation letter. The relevant paragraph of the Rule 31 statement reads thus:

> "65. Each arrangement involving the steps listed above is a separate arrangement for the purposes of the GAAR, consisting of a set of preconceived transactions which, separately and together, constitute a scheme."

The Commissioner contends that Mr Y's complaint is unfounded as it is attributable to his misreading or misconstruing of the basis upon which the Commissioner circumscribed the "arrangement" or "arrangements" in the Rule 31 statement. Furthermore, so avers the Commissioner, it has never been his contention that the S structure, the T structure and the 2012 structure each constitute an arrangement which consists "of the five steps set out in subparagraphs 85.1 to 85.5 of the section 80J notice". This much, according to the Commissioner is clear from the introductory words of paragraph 85 wherein he identified each of the transactions listed in subparagraphs 85.1 to 85.5 of the section 80J notice. The aforesaid paragraphs read as follows:

> "85. For the purpose of this analysis, the 'arrangement' or 'arrangements' consist/s of the following:
>
> 85.1 The transactions between A Investments, its subsidiaries and the Isle of Man companies, giving rise to certain A Investments subsidiaries holding promissory notes issued by A Investments;
>
> 85.2 The declaration of certain A Investments promissory notes to J and X;
>
> 85.3 The 'settlement' of the promissory notes held by J and X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries;
>
> 85.4 In each case following a sale by A Investments the payment by A Investments of amounts to J and X; and
>
> 85.5 In the specific case of the payments to J, the declaration of dividend by J to its shareholder trusts funded by those payments."

[43] According to the Commissioner, by comparison, paragraph 65 of the Rule 31 statement states "that each arrangement involving the steps listed above is a separate arrangement for the purpose of the GAAR consisting of a set of preconceived transactions, which separately and together, constitute a 'scheme'." The corresponding paragraph 86 of the section 80J notice and paragraph 82 of the finalisation of audit letter state "that each arrangement involving the steps listed above is a separate arrangement for the purposes of

the GAAR consisting of a set of preconceived transactions, which together, constitute a 'scheme'." Based on this reasoning, the Commissioner contends that he has clearly communicated to the taxpayer that each arrangement constitutes a separate arrangement and consists of a set of preconceived transactions. Furthermore, the words "separately and together" in the Rule 31 statement, and the word "together" in the section 80J notice and the finalisation of audit letter is only relevant to what the Commissioner considers to be a "Scheme" and has no bearing on how the Commissioner identified the "arrangement" "or arrangements" in either the section 80J notice or the finalisation of audit letter or the Rule 31 statement. The Commissioner further emphasises that he made it clear that a "scheme" is constituted by each arrangement separately or by viewing each of the arrangements together ("separately and together") (in terms of the Rule 31 statement), whereas a "scheme" is constituted by viewing each of the arrangements together (in terms of the section 80J notice and the finalisation of audit letter). Accordingly, so avers the Commissioner, Mr Y's contention to the effect that the basis upon which the Commissioner exercised his powers under the GAAR, in the section 80J notice and the finalisation of audit letter was that each arrangement as a whole produced a tax benefit, but that he sought to broaden his this in the Rule 31 statement to "one or more of the "constituent parts" of the arrangement "separately" resulted in a tax benefit, is manifestly wrong. Similarly, the Commissioner contends that the words "separately and", contrary to Mr Y's understanding, does not alter the foundational basis upon which the Mr Y's tax liability was assessed, as communicated in the section 80J notice and in the finalisation of audit letter. Neither does it, contrary to Mr Y's understanding, add to what the Commissioner has already pleaded in paragraphs 65 and 66 of the Rule 31 statement, other than to convey that it also constitutes a "scheme". In the alternative, the Commissioner contends that the addition of the words "separately and" do not constitute the novation of the whole of the factual or legal basis of the disputed assessment, as the inclusion of these words merely confirms and clarifies the basis of the assessment, as set out in the Rule 31 statement and the finalisation of audit letter.

The identification of a tax benefit received by Y

[44] Mr Y complains that the Commissioner did not allege the receipt of any tax benefit by him, either in the section 80J notice or the finalisation of audit letter, but that in each case, the benefit was contended by the Commissioner to have been received by the J shareholders. The Commissioner retorts to this complaint by pointing out that the TT Trust is a shareholder of J whilst Mr Y is the trustee of the aforesaid Trust, and a director and principal of J. According to the Commissioner, the TT Trust and J are "connected persons" by virtue of paragraph (*d*)(v) of the definition thereof in section 1. Furthermore, in terms of section 80F, for the purpose of, *inter alia*, determining whether or not a tax benefit exists for purposes of the GAAR, the Commissioner may treat parties who are connected persons in relation to each other as ne and the same person. The Commissioner further avers that in paragraph 87 of the section 80J

notice, he unequivocally stated that “each arrangement factually resulted in a tax benefit for J’s shareholders”. The Commissioner contends that because the TT Trust, is one such shareholder of J which the Commissioner alleges obtained a tax benefit, Mr Y, by virtue of him being a connected person to the TT Trust, is in terms of section 80F, treated as having also obtained a benefit. The Commissioner states that he applied the remedy envisaged in section 80B(1)(*c*) of the Income Tax Act to treat J, the TT Trust and the applicant as one and the same person for the purpose of determining the tax treatment of the amounts paid by A Investments to the TT Trust.

[45] The Commissioner further states that any suggestion to the effect that the section 80J notice does not refer to Mr Y as having received a tax benefit, is unmeritorious. This, according to the Commissioner is so because the section 80J notice was addressed to Mr Y in his personal capacity as the main trustee of the TT Trust. Furthermore, it was clearly spelt out in the section 80J notice that the Commissioner sought to rely on section 80J to categorise his tax-exempt dividend income as taxable income. More specifically, in paragraph 67 of the section 80J notice, the Commissioner outrightly alleged that J was a conduit for fee income generated by Mr Y.

[46] I now turn to summarise the Commissioner’s response to Mr Y’s remaining contentions. The Commissioner has dealt with each contention on the basis of the lay out of the notice of motion.

[47] It will be recalled that at paragraph 1.1 of the notice of motion, the applicant seeks the striking out of the last sentence of paragraph 59 of the Rule 31 statement which reads: “The distribution of such fee income to the TT Trust and J’s shareholders, took place at the direction of Y.” The Commissioner responds to this assertion by stating that an inquiry was held under Part C of the Tax Administration Act where evidence was given under oath. According to the Commissioner, in that inquiry, Mr Y gave evidence that he proposed and drafted the necessary resolutions to give effect to the dividend payments to J and X as set out in paragraphs 30.6 of the section 80J notice and paragraph 26.6 of the finalisation of audit letter. With regard to paragraph 1.2 where the applicant seeks to strike out the words “for his own benefit” in paragraph 60, the Commissioner states that he came to the conclusion that J was itself nothing more than a conduit for fee income generated by Mr Y and his co-principals, for their own benefit as set out in paragraph 63 of the section 80J notice and section 67 of the Finalisation of Audit letter.

[48] The applicant in paragraph 1.3 of the notice of motion seeks that the word "Y" contained in paragraph 60.3 be struck out. In his response thereto, the Commissioner avers that the fee income in question was distributed to J's shareholders, which shareholders are family trusts related to its principals. Mr Y, as one of the principals of J, actively worked on each of the A Investments arrangements and in the process generated the fee income that flowed to J. As concluded in paragraph 67 of the section 80J notice and paragraph 63 of the finalisation of audit letter, J was a conduit for fee income generated by the applicant, "Y". As regards to the word "Y" in paragraph 60.3 of the Commissioner's Rule 31, the Commissioner once again reiterates that as J's principal, Mr Y worked on each of the A Investments arrangements and generated income that flowed to J. This allegation is also made in paragraph 66 of the section 80J notice and paragraph 62 of the finalisation of audit letter. In paragraph 1.5 of the notice motion, Mr Y complains of the words "for services rendered, which services were actually rendered by Y as described in paragraph 60 above" in paragraph 64 of the notice. To this end, the Commissioner alleges that Mr Y performed all the work necessary for the operations of A Investments, including locating deals, accounting, preparation of financial statements, tax related activities, administration, drafting of resolutions and all the secretarial work. This averment corresponds with paragraph 35.5 of the notice and paragraph 29.5 of the letter. Furthermore, so contends the Commissioner, Mr Y was the directing mind of A Investments and actively worked on each of the A Investments arrangements, and in the process generated the fee income that flowed to J. For this, reason, the Commissioner concluded as reflected in paragraph 67 of the notice and paragraph 63 of the letter that J itself was nothing more than a conduit for fee income generated by the applicant.

[49] The applicant in paragraph 1.6 of the notice of motion, seeks the striking out of the words "including the TT Trust as a conduit for Y, all of which was done on the instruction of, *inter alia*, Y" contained in paragraph 64.5 of the Commissioner's Rule 31 statement. The Commissioner objects to the striking out of the above words on the basis that TT Trust is a shareholder of J that received the dividend payments. As reflected in paragraph 67 of the section 80J notice and paragraph 63 of the finalisation of audit letter, the Commissioner concluded once again, that J was the conduit for fee income generated by the applicant and his co-principals for their own benefit. The Commissioner further avers that Mr Y also gave evidence in the enquiry earlier referred to, wherein he (the applicant) admitted that he proposed and drafted the necessary resolutions that gave effect to the dividend payments to J and X. In paragraph 1.9 of the notice of motion, the applicant complains that the words "at the instance of Y" in paragraph 66 of the Commissioner's Rule 31 falls to be struck as it constitutes new matter. The Commissioner similarly relies on the fact that the applicant drafted the resolutions that gave effect to J and X.

[50] In paragraphs 1.10 to 1.13, the applicant bemoans the inclusion of the word "Y" in paragraphs 67, 68.2.1, 68.2.3.2, 68.2.3.3 and 68.2.4.2 of the Rule 31 statement. I deem it necessary to refer to some of the specific paragraphs assailed by the applicant;

> "67. Had the A Investments structure not been employed, the fee amounts would have been taxable in the hands of the recipients, including Y.
>
> 68.1 Section 80A(*a*)(i): Each voidance arrangement described in paragraph 64 above was entered into or carried out by means or in a manner that would not normally be employed for bona fide business purposes other than obtaining a tax benefit, in that the fee amounts were channelled to the persons who provided the quid pro quo for such fees via various third party entities (A Investments, its subsidiaries and, in the case of J shareholders, J) solely for the purpose of using the A Investments mechanism to shield the income from income tax and the dividend payments funded by those amounts of STC.
>
> 68.2.1 Each avoidance agreement result in significant tax benefit for the J shareholders, including the TT Trust and Y, (described above), but has no negative effect on their business risks or net cash flows (apart from their effect attributable to the tax benefits that would be obtained but for the provisions of the GAAR, being the tax benefits created by the arrangements (section 80C(1). A Investments and its subsidiaries add no commercial value to the transactions whereby fees flow from A Investments counterparties to the J shareholders.
>
> 68.2.2 The transfer of funds in this manner results directly in a tax benefit for the ultimate recipients and in the current circumstances, specifically Y and the TT Trust and significantly offsets or eliminates any business risk for those parties; and
>
> 68.2.3. Round-trip financing takes place irrespective of whether the round-tripped amounts can be traced to funds transferred to or received by any party in connection with each avoidance arrangement, specifically, Y and the TT Trust.
>
> 68.2.4. As a direct or indirect result, it is ensured that fee income that would have been subject to tax in the hands of J shareholders, specifically, the TT Trust and Y, completely escape any liability for tax."

[51] The Commissioner avers that as a "connected person" to the alleged impermissible avoidance arrangement, Mr Y's name was justifiable included as the TT Trust received dividends from J funded by the "fees" from the aforesaid arrangement. According to the Commissioner, the invocation of the GAAR, is perfectly valid in the light of Mr Y's personal involvement in the arrangements.

[52] Insofar as the striking out of paragraphs 68.3.3, 68.3.4 and 68.3.5 (of paragraph 1.4 of the notice of motion), in their entirety, alternatively, the word "Y" in the last line of paragraph 69 and the words "specifically the TT Trust and Y as trustee" in paragraph 69 thereof, the Commissioner insists that allegations justifying the inclusion of "Y" and the "TT Trust" were made in the section 80J and the finalisation of audit letter to the following effect:

[52.1] Mr Y performed all the work necessary for the operations of A Investments;

[52.2] The principals of J (Y included) actively worked on each of the A Investments arrangements generating income to J;

[52.3] The fee income so generated was distributed to J's shareholders, which shareholders are family trusts related to its principals.

[53] The upshot of the Commissioner's affidavit is simply that there are no good grounds for striking out the passages referred to by the applicant as no new matter is introduced in the Rule 31 statement. Furthermore, the Commissioner was, on the facts, fully entitled to invoke the GAAR. I now turn to summarise the applicant's replying affidavit.

The applicant's replying affidavit

[54] Mr Y, in reply persists with his contention that the Commissioner, in his Rule 31 statement, was not at liberty to broaden the basis on which he "determine[d] the [taxpayer's] liability" under the GAAR, i.e. in terms of section 80J(3)(*c*) read with section 80B(1) thereof. This contention is based, in the first place, on the provisions of the GAAR and the nature of the Commissioner's powers thereunder, and in the second place, on the limitation contained in Rule 31(3). According to Mr Y, the Commissioner, having issued a notice in terms of section 80J(1), is afforded the benefit of considering the reasons received from the taxpayer in terms of section 80J(2), and is also permitted to request additional information in terms of section 80J(3)(*a*). In terms of section 80J (4), the Commissioner may also revise or modify his reasons for invoking the GAAR, should additional information come to his knowledge. The Commissioner has not suggested that any "additional information" has come to his knowledge. To the contrary, the Commissioner specifically avers that he has not modified or broadened his reasons for applying the GAAR.

[55] Mr Y insists that the procedure the Commissioner must follow in order to determine liability of a taxpayer under the GAAR obliges him in terms of section 80J(1) to issue a notice to the taxpayer setting out his reasons for believing that the GAAR may apply in respect of an arrangement. The taxpayer then has an opportunity to submit reasons why the provisions of the GAAR should not be applied. After considering the taxpayer's submissions, the Commissioner may either:

[53.1] request additional information;

[53.2] withdraw the initial notice in terms of section 80(1); or

[53.3] proceed to determine the taxpayer's liability for tax in terms of the GAAR (section 80J(3)(*c*)).

[56] The applicant emphasises that the content of the section 60J notice issued to the taxpayer, and the content of the subsequent determination of liability in the finalisation of audit letter are identical. However, the Commissioner's Rule 31 statement departs from the stated basis on which the GAAR was invoked. According to the applicant, the fact that the Commissioner must, in his Rule 31 statement of the grounds of assessment and in justifying the disputed assignment, disclose the basis on which he in fact exercised his power to determine the taxpayer's liability under the GAAR, is not a mere legal pedantry of formalism, but rather an important check and balance to ensure that to ensure inter alia that the taxpayer is:

[56.1] provided with a fair opportunity to understand the basis on which liability under the GAAR is determined; and

[56.2] afforded an opportunity to challenge the exercise by the Commissioner of his extremely and incisive powers under the GAAR.

The applicant further avers that the Commissioner's willingness to ride roughshod over these principles indicates either a failure on his part to appreciate the true nature and extent of his powers under the GAAR, or that he simply disregard for the rights of the taxpayer.

[57] Responding to the Commissioner's averment that the insertion of the words "separately and" does not broaden the pleaded case beyond the basis on which the Commissioner actually determined the taxpayer's liability under the GAAR, the Applicant states that it is not up to the Commissioner to delineate the arrangement or arrangement on which he relies in his Rule 31 statement – at least not in a manner that departs from how he did so in his section 80J notice and his finalisation letter.

The issues for determination

[58] The issues that fall for determination in the application to strike out primarily relate to whether the application the Commissioner novated the basis for the assessment of the tax liability in respect of both taxpayers. Linked to the issue is the interpretation of the Commissioner's powers to modify an assessment under the GAAR.

Analysis

[59] It is well to recall that the striking out application is rooted in the fact that the disputed assessments were made in the exercise of special powers conferred on the Commissioner under the GAAR rules contained in Part 11A of Chapter 111 of the Income Tax Act. At the heart of each of the striking out applications is the contention by the taxpayers to the effect that it is impermissible for the Commissioner to seek to broaden, amplify or change the basis for determination of a taxpayer' tax liability. In order to properly consider the powers of the Commissioner under the GAAR it is necessary to first restate the old GAAR provisions as contained in section 103(1) of the Income Tax Act. It reads thus:

> "(1) Whenever the Commissioner is satisfied that any transaction, operation, or scheme (whether entered inti or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property)—
>
> (*a*) has been entered into or carried out which has the effect of avoiding or postponing liability for the payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act, or of reducing the amount thereof: and
>
> (*b*) having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out—
>
> (i) was entered into or carried out—
>
> (*aa*) in the case of a transaction, operation or scheme in the context of business , in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of the tax benefit; and
>
> (*bb*) in the case of any transaction, operation or scheme, being a transaction, or scheme not falling within the provisions of the item (aa), by means of a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme in question; or
>
> (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; and
>
> (*c*) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit, the Commissioner shall determine the liability for any tax, duty or levy imposed by this Act, and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out, or in such a manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction."

[60] As regards the old GAAR, the basic jurisdictional requirement for the exercise of the power is that the Commissioner must be "satisfied" of various requirements. Under the new GAAR the relevant provisions are contained to in section 80A – L of the Income Tax Act but the requirement that the Commissioner must be satisfied has been specifically excluded by the legislature. It is clear from the provisions of both GAARs that certain procedural requirements must be met before in order to trigger the Commissioner's power under the GAAR to determine a taxpayer's liability. Section 80B(1) of the Income Tax sets out the Commissioner's powers to determine the tax consequences under the GAAR and provides as follows:

> **"80B. Tax consequences of impermissible tax avoidance—**(1) The Commissioner may determine the tax consequences under this Act of any impermissible avoidance arrangement for any party by—
>
> (*a*) Disregarding, combining, or re-characterisation any steps in or parts of impermissible avoidance arrangement;
>
> (*b*) Disregarding any accommodating or tax-indifferent party or treating any accommodating or tax-indifferent party as one and the same person;
>
> (*c*) Deeming persons who are connected persons in relation to each other to be the one and the same person for the purposes of determining the tax treatment of any amount;
>
> (*d*) Reallocating any gross income, receipt or accrual of a capital nature or expenditure or rebate amongst the parties;
>
> (*e*) Re-characterising any gross income, receipt, or accrual of a capital nature or expenditure; or
>
> (*f*) Treating the impermissible avoidance arrangement as if it had not been entered into or carried out, out in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit."

[61] As can be recognised from the provisions of both GAARs, before the Commissioner can exercise his powers under the GAAR, there must first be an "impermissible avoidance agreement". In turn, for an impermissible avoidance agreement to be said to exist, the following four requirements must be fulfilled:

> [61.1] First there must be an "arrangement" as defined in section 80L. (Section 80L defines an "arrangement" as 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.)
>
> [62.2] Second, the arrangement must result in a tax benefit. (Section 1 of the Income Tax defines an arrangement as "any avoidance, postponement or reduction of any liability for tax".) If the arrangement results in a tax benefit, then it constitutes an

> "avoidance arrangement. Both GAARs recognise the notion of a "tax benefit" i.e. any avoidance, postponement or reduction of any liability for tax. Courts have held that "a tax benefit" – refers to getting out of the way of, escaping or prevented an anticipated liability for tax. Naturally, in the absence of an anticipated liability for tax benefit.
>
> [62.3] Third, the "avoidance arrangement" must have the characteristics of abnormality and or lack of commercial substance as set out in section 80C and 80D,
>
> [62.4] Fourth, the "avoidance arrangement" must have had as its "sole" or "main purpose" the obtaining of a "tax benefit".

The substantive trigger for the exercise of, or parts thereof arises where the Commissioner forms an opinion that that there is an impermissible avoidance arrangement.

[62] Mr E SC, who represented both taxpayers (Mr X and Mr Y) outlined in argument the following as the basis for which the taxpayers seek the striking out:

> [62.1] The Commissioner exercised his powers under the GAAR against each of the taxpayers, and "determined" the liability of each, on 22 August 2016;
>
> [62.2] The Commissioner delivered his Rule 31 statement in each appeal at the end of January 2018, i.e., about 17 months after he had "determined" the liability of each, on 22 August 2016 on a particular basis;
>
> [62.3] The basis for tax liabilities pleaded by the Commissioner in his Rule 31 statements travels beyond the basis on which the Commissioner "determined" the taxpayer's liability in August 2016.

[63] I have in this judgment already indicated that in the old GAAR, the basic jurisdictional requirement for the exercise of the power is that the Commissioner must be "satisfied" of the various requirements, whereas the new GAAR does not have such a requirement. Mr E SC, contended that notwithstanding the exclusion of this jurisdictional requirement this requirement must be held to apply to the current version of the GAAR. This, according to the argument is so because it would be contrary to the most basic principles of administrative law, which hold that where a statute imposes a jurisdictional requirement for the exercise of a power, the administrative functionary (the Commissioner) cannot lawfully exercise the power without first applying her mind to whether the jurisdictional fact is present, and coming to the conclusion that it is. To this end, the taxpayers relied on the judgment of Desai J in ITC 1862 wherein the pronouncement appearing hereunder was made. It should be noted that the proper context of the court's pronouncement is the old GAAR:

> "[59] Identifying the Commissioner's true case is important because of the nature of section 103. It involves the exercise of an extra-ordinary administrative power enabling the Commissioner to overturn the express and ordinary consequence of applying the Act. The

> exercise of that power involves his "determining" a liability for tax. An appeal in this context is against the Commissioner's "decision" (section 103(4)), namely, his determination of a tax liability and its amount.
>
> …
>
> [60] The basic jurisdictional requirement for the exercise of the power is that the Commissioner is "satisfied" of the various requirements. Once the Commissioner reaches the requisite level of satisfaction, and exercised the power to determine the tax liability on the strength of such satisfaction, an appeal must, of necessity go to whether he was justified in being so satisfied. He must stand and fall by his reasons for exercising the power, If the Commissioner did not make his tax determination on the basis of being "satisfied" about an alternative scheme, he cannot rely on the alternative when his section 103(1) determination is challenged on appeal."

The above dicta was quoted with approval by Rogers J, in ITC 1876 adding the following:

> "I agree with those observations and they appear to me to apply as much to what can legitimately be relied on by the Commissioner in his [pleading] as to what he can rely upon at the end of the trial in the tax court. That is not to say that if, having assessed on the basis of being satisfied of certain matters the Commissioner discovers other facts which cause him to be satisfied on other matters, he cannot issue a further assessment on his new satisfaction. However, it only upon reaching satisfaction on the new elements that he can issue a fresh assessment. What he cannot do is support his existing assessment on the basis of matters on which he not satisfied when he issued that first assessment."

It continues:

> "[20] Be that as it may, it appears to me that a distinction needs to be drawn between a tax appeal which is concerned with objective questions of fact and law on the one hand and tax appeals which are concerned with the powers he has upon being satisfied of particular matters. In the former class of case would belong the sort of situation where the Commissioner disallows an item of expense as a deduction on the basis that it is of capital nature and then later seeks to support the disallowance on the new basis that it was not incurred during the production of income. Various objective criteria must exist in order for the expenditure to be deducted and it might be said that, subject to fair play and the other party being sufficiently forewarned before trial, it is not unfair that either party may raise additional ground to show why, objectively speaking, the item was not deductible.
>
> …
>
> [21] In the case of the powers which the Commissioner can exercise upon being satisfied of particular matter, one is dealing with a different situation. One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. One is dealing rather, with a situation where a particular fiscal result follow only if the Commissioner himself is satisfied of certain matters.

> In the latter case it is the Commissioner's satisfaction upon the points in question which constitutes the jurisdictional fact for the issuing of the assessment."

[64] Mr E further contended that the Commissioner purported to determine Mr Y's liability for income tax on exempt dividend income that he did not receive and to which he was not entitled. This being the case notwithstanding that there no simulation or dishonesty is alleged. According to the argument, the powers of the Commissioner under the GAAR are extraordinary and far more extensive than those under the common law doctrine of simulation. Mr E SC, criticised the nature and ambit of the Commissioner's power labelling it as administrative in nature in that the tax liability is determined by way of administrative powers contained in the section 80B(1)(*a*) to (*f*) resulting in the outcome being determined not by the actual factual reality, but rather by the factual reality as altered by the Commissioner in the exercise of his powers under section 80B1. He found support for this contention in Silke[3] where the following is said:

> "It is only the [Income Tax] Act – by way of specific and general anti-avoidance provisions – that empowers the Commissioner (and the court in any appeal against an assessment) to assess the taxpayer on that basis of a deemed or notional transaction, that is to say, on the basis of a transaction that the parties did not enter into. The common law allows the Commissioner or the court to disregard a disguised or sham transaction and give effect to the real transaction, but neither the Commissioner nor the court has the power, at common law to deem the taxpayer to have derived an amount of income or capita that he did not in fact derive or to have incurred less expenditure than he actually incurred.
>
> …
>
> In sharp contrast to the restricted common-law powers of the Commissioner and the court to disregard a sham or disguise and give effect to the real transaction between the parties, both the now repealed s 103(1) and the new Part11 A of Chapter 111of the Act give the Commissioner extensive power to treat an otherwise valid transaction for the purposes of the Act as if it had not been entered into or to assess the parties on the basis of a notional transaction."

[65] Further relying on the judgment in *DA v President of RSA* 2012 (1) SA 417 SCA, at paragraphs 102, 108 and 121, Mr E SC argued that it matters not that the legislative provision conferring the power does not expressly require the administrator to "satisfy herself' or "form the opinion" or words to that effect, the administrator is nonetheless required to "undertake a proper enquiry of whether the . . . requirements" [for the exercise of the power] were satisfied, and she must come to the conclusion that they are. In similar vein, so goes the argument, the Commissioner must apply his mind to whether the four substantive requirements under the current GAAR are met, and he must be satisfied (i.e. he must "form a view" or "come to the

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3 De Koker *et al* Silke on South African Income Tax.

conclusion") that they are, before he exercises the power to "determine" the taxpayer's liability. It was further emphasised that the Commissioner's satisfaction (i.e. his view or conclusion) that the requirements are met remains – as under the "old GAAR" – the basic jurisdictional fact for the exercise of an extraordinary administrative power enabling the Commissioner to overturn the express and ordinary consequences of applying the Act. According to the taxpayer's argument, for SARS to simply proceed to apply the GAAR even if it does not hold the view that the requirements would result in absurdity.

[66] Mr S SC, who represented the Commissioner contended that the taxpayers' reliance on the deleted section 103(1) of the Income Tax Act, is misplaced as the whole point of the deletion was render section 103(1) inapplicable to any transaction entered into on or after 2 November 2006. According to the argument, both pieces of legislation reflect the general ant-avoidance rules in force at different times. Consequently, the taxpayers' reliance on ITC 1862 and ITC 1876, which deal exclusively with section 103(1) demonstrates the misconception upon which the taxpayers' application is founded. Referring to an Australian case, *FCT v Spotless Services Ltd* (1996) 186 CLR 404 at 414, dealing with the repeal of the old Australian GAAR (contained in section 260 of the Income Tax Assessment Act of 2006 and replaced it with a new GAAR in Part 1V, Mr S SC echoed the caution sounded by the High Court of Australia to the following effect:

> "Part 1V A is to be construed and applied according to its terms, not under the influence of "muffled echoes of old arguments" concerning other legislation."

In the light of the aforegoing, Mr S SC further submitted that the new GAAR was introduced to specifically meet challenges of the old GAAR, based on technical arrangements and more complicated structures as reflected in the Explanatory Memorandum on the Revenues Laws Amendment Bill, 2006 wherein in relation to the old GAAR the following is stated:

> "The GAAR has proven to be an inconsistent and, at times, ineffective deterrent to the increasingly sophisticated forms of impermissible tax avoidance that certain advisors and financial institutions are putting forward and some taxpayers are implementing. In addition, it has become clear that the GAAR has not kept with international developments. Finally, uncertainty has arisen with respect to the application of the GAAR in the alternative due to conflicting court decisions in this regard."

[67] With regard to the requirement that the Commissioner must be satisfied that a transaction, operation or scheme met the requirements of the Act, it was contended on behalf of the Commissioner that the new GAAR had done away with the jurisdictional requirement of satisfaction which had played a pivotal role under the old GAAR. According to the argument, the taxpayers' persistent reliance on ITC 1862 and ITC 1876 on the repealed section 103(1), in the application of the new GAAR, is misguided. Furthermore, so continues the argument, on both the factual and legal basis, the taxpayers misconceive the tax liability pleaded by the

Commissioner in his Rule 31 statement when they state that it (the Rule 31 statement) travels beyond the basis on which the Commissioner determined the taxpayer's liability in August 2016.

[68] In the light of the aforegoing contentions, I think, it makes better sense to first consider the interpretation that must be accorded to the new GAAR. The approach to statutory interpretation is restated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 SCA at 603 – 604 as follows:

> "[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose for which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads insensible businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties than the one they in fact made. 'The inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[69] It is clear from the provisions of the new GAAR that the lawmaker intended a departure from the provisions of old GAAR, and to this end, specifically excluded as a jurisdictional requirement that the Commissioner must be "satisfied". The corollary is that it is impermissible to read the jurisdictional requirements of the old GAAR into the new GAAR, and as such, the cases (ITC 1862 and ITC 1876) relied upon by the taxpayers are not applicable in the present circumstances. The reason for this is not far to find. Having regard to the fact that when interpreting a provision of the Income Tax Act, one may have regard to the explanatory memorandum which not only describes the purpose of the Amendment, but is also a permissible interpretation tool to understanding parliament's purpose for enacting existing section. As pointed out by Mr S SC, the Explanatory Memorandum identifies the purpose for the replacement of the old GAAR with the new GAAR and makes no mention of the Commissioner's "satisfaction". An interpretation of the new GAAR sections through the prism

of its predecessor may well have the effect of negating the very purpose of the new sections and the underlying mischief they were intended to address in the first place, which is that:

> "The GAAR has proven to be an inconsistent and, at times, ineffective deterrent to the increasingly sophisticated forms of impermissible tax avoidance that certain advisors and financial institutions are putting forward and some taxpayers are implementing.[4]"

Silke,[5] notwithstanding the reservations expressed relating to the constitutionality of the new GAAR, states that:

> "The now-repealed s 103(1) was triggered where the Commissioner was "satisfied" that all of its elements were simultaneously present, and his decision in this regard was subject to objection and appeal. The statutory requirement that he be so 'satisfied' rendered the provisions vulnerable to technical requirements as to whether this (apparently) jurisdictional fact was present in the context of a given factual scenario. In order no doubt to forestall any such arguments, the new GAAR makes no mention of the Commissioner's having to be satisfied in every respect: it simply defines in (in s 80A) what constitutes an 'impermissible avoidance arrangement' and (in s 80B) gives the Commissioner the power to 'determine the tax avoidance arrangement' by any of a specified range of actions 'for the prevention or diminution of the relevant tax benefit'…".

The intention of the legislature in this matter is so clear that to seek to extend it may well offend the purpose of its enactment. In *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others* (1306/18) [2020] ZASCA 02 (31 January 2020) the Court restated the principle as follows:

> "[67] The principle remains the same. As a general rule the words of a statute must be given their ordinary, grammatical meaning in the context in which they appear, unless to do so 'would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the Court is justified in taking into account'."

In conclusion, to import the requirements of the old GAAR into the new GAAR undermines the intention of the legislature and renders the new GAAR completely ineffective. Upon a proper consideration of all facts in this matter, there is no basis for adopting an interpretation that will extend the legislature's clear intention.

[70] Against the backdrop of this finding, the question that arises is whether the Commissioner is, under the new GAAR permitted to, after determining the taxpayer's liability to seek to broaden, amplify or change the basis of the determination without issuing a fresh assessment. Counsel for the Commissioner, Mr S argued that the new GAAR does not contain the jurisdictional requirement of the now-repealed section 103 to the effect that "once the

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4 *Commissioner for South African Revenue Service v Bosch and Another* 77 SATC 61.
5 De Koker *et al* Silke on South African Income Tax § 19:35.

Commissioner has, in the exercise of his powers under the GAAR, "determined" the taxpayer's liability he cannot thereafter seek to broaden amplify or change his basis for determination." According to the argument, section 129(2)(*b*) of the TAA, is indicative of the fact that the alteration of an assessment, or the Commissioner's amplification or clarification of the grounds or the basis of his assessment, contained in the section 80J notice and the finalisation of audit letter is permissible. Section 129(2)(*b*) of the TAA provides as follows:

> **"Decision by tax court—**(1) …
>
> (2) In the case of an assessment or 'decision' under appeal or an application in a procedural matter referred to in section 117(3), the tax court may—
>
> (*a*) …
>
> (*b*) Order the assessment to be altered,
>
> (c) …"

In *Africa Cash and Carry (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] 1 All SA 1 SCA wherein the taxpayer had contended that the assessments had been altered in a manner not contemplated in section 129(2)(*b*) as there was a fundamental change, and not just an obvious error which needed to be corrected, which resulted in a change in the basis of the assessment and called for reassessment, the Supreme Court of Appeal confirmed the Tax Court's interpretation of section 129(2)(*b*) to the following effect:

> "Subsection (*b*) envisages that when an assessment is ordered to be altered, the assessment is changed or modified in identified respects but the assessment is not completely transmuted or transmogrified into an entirely new entity comprising new DNA."

In the present matter, a much closer scrutiny must be paid to the provisions of section 80J(4).

Section 80J reads thus:

> **"80J. Notice.**—(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) . . .
>
> (3) . . .
>
> (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)."

[71] The section authorises the Commissioner to revise or modify his reasons for applying Part 11A, in the event that "additional information comes to his knowledge" at any time after issuing a notice in terms of section 80J (1) to the taxpayer. The provision does not make reference to "how" and "when" the Commissioner may revise or modify his reasons, but the reference to "any stage" clearly denotes that such course of action is not precluded at the Rule 31 statement stage. The "how" can be easily discerned from the provisions of section 80J(1) which require that the Commissioner give the taxpayer notice of his reasons for applying the GAAR. I agree with the submission made by Mr E to the effect that the Commissioner must give the taxpayer notice of such revised or modified reasons before he exercises his powers under the GAAR to "determine" the taxpayer's liability on the basis of such revised or modified reasons. This is in line with the principles of procedural fairness. In my judgment, SARS may, in terms of section 80J(4) revise or modify its reasons for invoking the GAAR in the event that additional information comes to it, at any time after issuing a notice in terms of section 80J(1), after giving a notice to the taxpayer. This makes logical sense when regard is had to the fact that the Commissioner would have additional information entitling him to modify his reasons, and the basis for revision or modification must surely be provided to the taxpayer who would be affected by such a decision.

[72] That said, there too is the jurisdictional fact which must first be satisfied, namely that additional information must have come to the knowledge of the Commissioner. There is no indication in these papers as to what knowledge would have come to the Commissioner which prompted the revision and the modification. This is understandable given the Commissioner's stance is that the Rule 31 statement introduces no new facts and is no different from the section 80J notice and finalisation of audit letter.

[73] Reference was made to the pronouncement in ITC 1862 to the following effect:

> "Once the Commissioner reaches the requisite level of satisfaction, and exercises the power under to determine the tax liability on the strength of such satisfaction, an appeal must of necessity go to whether he was justified in being so satisfied. He must stand by his reasons for exercising the power."

What is clear from the aforegoing is that section 80J (4) marks a departure from section 103(1) as defined in ITC 1862. But, the modifying or revising of the reasons for applying the GAAR is founded upon additional information coming to the knowledge of the Commissioner. What exactly does the revising or modifying entail? The Thesaurus dictionary defines **revise** and **modify** thus:

> **"Revise:** revise suggests a careful examination of something and the making of necessary changes.
>
> **Modify:** "modify suggests a difference that limits, restricts, or adapts to a new purpose."

The use of the words “revise” and “modify” indicates that the substance of the assessment should not be materially changed such that a new basis for the assessment is introduced. This interpretation is in line with approach adopted in *All Africa Cash and Carry, supra*. In the light of this interpretation, it must follow that the question that must be answered is whether the Commissioner’s Rule 31 statement completely changes the basis of the tax assessment such as to introduce facts giving rise to a new basis of the taxpayer’s liability. To arrive at an answer to this question, it is necessary to restate and evaluate the factual matrix.

The merits of the striking out applications

[74] To encapsulate, the taxpayer’s main basis for the striking out applications is that SARS introduced a variety of allegations into the Rule 31 statement which seek to broaden its pleaded case against the taxpayers beyond the basis on which the Commissioner “determined” the taxpayer’s respective liabilities in August 2016, and that, these being GAAR-assessments, it was impermissible to do so. Given the analysis of the interplay between section 103(2) and section 80J(4), above, what must be determined is whether the Commissioner’s Rule 31 statement completely changes the basis of the assessment such as to introduce facts giving rise to a new basis of the taxpayer’s liability. Put differently, it is whether the Commissioner’s Rule 31 amounts to a novation of the factual and legal basis on which the Commissioner purported to exercise its power under the GAAR. In a nutshell, what this court must decide is whether SARS introduced “new elements” to its Rule 31 statement.

The determination of Mr Y’s personal tax liability

[75] Insofar as the merits of the Y assessment are concerned, the contentious issues have already been set out in the factual background dealing with the parties’ affidavits. Due to the complex nature of the factual matrix in these applications, I herein repeat some of the relevant facts. The relief sought by Mr Y is that the identified allegations in the Rule 31 statement be struck out on the basis that the Commissioner therein goes beyond what he relied upon the section 80J notice and the letter of assessment. The nub of Mr Y’s complaint relates to paragraph 65 of the Rule 31 statement of the words “separately and” which reads thus:

> “Each arrangement involving the steps listed above is a separate arrangement for the purpose of the GAAR, consisting of a set of preconceived transactions which *separately and* together, constitute a scheme.”

In the amended Rule 32 statement, Mr Y attaches to the words “separately and” the following significance:

> “. . . whereas the Commissioner decided to exercise his powers under the GAAR on the basis that each arrangement as a whole resulted in a tax benefit . . ., in his Rule 31 statement the Commissioner now alleges not only that (i) the arrangement as a whole resulted in tax benefit, but also that (ii) one or more of the constituent parts of the arrangement ‘separately’ resulted in a tax benefit.”

In short, Mr Y’s complaint relates to the inclusion of the words “separately and” in paragraph 65 of the Rule 31 statement, which he claims were not contained in the section 80J notice and the finalisation of audit letter. This averment must be read in the context of the definition of “arrangement” in section 80L which reads “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”.

[76] The Commissioner’s use of his powers under the GAAR requires, as a first step, an identification by him of an arrangement. It was emphasised in argument that the basis on which Commissioner exercised his powers under the GAAR to determine Mr Y’s personal liability for income tax on tax-exempt dividend income received by the TT Trust on the basis that each of the “arrangements” consisted of the following steps:

> “85. For the purpose of this analysis, the ‘arrangement’ or ‘arrangements’ consist/s
>
> 85.1 The transaction between A Investments, its subsidiaries and the Isle of Man Companies, giving rise to certain A Investments subsidiaries holding promissory notes issued A Investments;
>
> 85.2 The declaration of certain A Investments promissory note to J and X:
>
> 85.3 The settlement of the promissory notes held by J and X via A Investments becoming obliged to pay those parties the net income from specific transactions involving specific A Investments subsidiaries;
>
> 85.4 In each case following a sale by A Investments the payment by A Investments of amounts to J and X; and
>
> 85.5 In the specific case of the payments to J, the declaration of dividends by J to its shareholders trusts funded by those payments;
>
> 86. Each arrangement involving the steps listed above is a separate arrangement for the purposes of the GAAR.”

Mr S SC argued that it is clear from the introductory words of paragraph 85 “For the purpose of this analysis the arrangement or arrangements consist of the following” that the Commissioner identified each of the transactions listed in subparagraphs 85.3 to 85.5 of the section 80J notice as constituting an “arrangement”. Furthermore, in paragraph 86 of the section 80J notice and paragraph 82 of the finalisation of audit letter, the Commissioner further identifies “arrangement” or “arrangements” as follows:

> “that each arrangement involving the steps listed above is a separate arrangement for the purposes of the GAAR consisting of a set of preconceived transactions, which together constitute a ‘scheme’.”

Likewise, in paragraph 65 of the Rule 31 statement, the Commissioner states: “that each arrangement involving the steps listed above is a separate arrangement for the purpose of the GAAR consisting of a set of preconceived transactions which together, constitutes a ‘scheme’ ”.

SARS’s contends that it was never its case that each arrangement (i.e. the S structure, the T structure and the 2012 structure) as a whole resulted in a tax benefit. Instead, its case is that any two or more of the five steps in paragraphs 85.1 to 85.5 of the section 80J notice would constitute “the arrangements”. This statement is not contained in the section 80J notice, nor the Rule 31 statement. The explanation is made for the first time in SARS’s opposing papers to this application wherein the deponent to SARS’s affidavit, Mr N, explains what he intended when he wrote the section 80J notice.

[77] Whereas, one understands the need to explain the notices on the part of Mr N, it must be stated from the outset that it is not only undesirable, but impermissible for Mr N to attempt to proffer an explanation of what his intention was when he issued any of the notices. His explanation of his intention is *ex post facto.* In *National Lotteries Board v South African Education Project*[6] the court held that further reasons are *ex post facto* justifications, not the true reasons for the decision, and accepting them would be unfair to an applicant for judicial review. The court further endorsed the following approach of the English Appeal Court in *R v Westminister City Council, Ex Parte Ermakov:*[7]

> “[T]he purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential difficulties . . . {1}In many cases it might be suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery,

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6 *National Lotteries Board v South African Education Project* 2012 (4) SA 504 (SCA) at para [27].
7 *R v Westminister City Council, Ex Parte Ermakov* [1995] 2 All ER 302 (CA) at 315h-316d.

> both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive."

Although the aforegoing was said in the context of a judicial review application, it is, by parity of reasoning equally applicable in *casu.*

[78] It is clear to me that the Commissioner communicated in both the section 80J notice and the finalisation of audit letter that the "arrangements" or "arrangement" were those contained in subparagraph 85 and 64 of the section 80J notice and the finalisation of audit letter. It is common cause that the words "separately and" do not feature in paragraph 86 of the section 80J notice. Neither do they feature in corresponding paragraph 82 of the finalisation of audit letter. In short, the words are new inserts in the Rule 31 statement. What must be determined is whether the addition of the words "separately and", fundamentally alter what was pleaded in the section 80J notice and finalisation of audit letter. In my view, the words "separately and together" is only relevant in relation to what the Commissioner considers a "scheme". I understand this to be so because in terms of the Rule 31 statement, a "scheme" is constituted by each arrangement separately or by viewing any of the arrangements together, whereas in terms of the section 80J notice and the finalisation of audit letter a "scheme" is constituted by viewing each of the arrangements together. It follows that the introduction of the words "separately and" in the Rule 31 statement does not alter the basis upon which Mr Y was assessed. Neither do they constitute the novation of the whole of the factual or legal basis of the disputed assessment.

[79] I now turn to consider the complaint relating to an alleged tax benefit received by Mr Y.

The identification of the tax benefit received by Mr Y

[80] Mr Y complains that the Commissioner did not allege the receipt of any tax benefit by Mr Y himself in both the section 80J notice and the finalisation of audit letter. According to the argument presented on behalf of Mr Y, SARS found expressly and unequivocally that the "J shareholder trusts and X enjoyed the entire tax benefit and are thus the only relevant parties and are thus the only relevant parties for the purposes of section 80B". This suggests that the Commissioner did not identify Mr Y as having obtained a tax benefit. SARS contends that it made it clear in the section 80J notice that the TT Trust, J and Mr Y were to be treated as "connected persons" in terms of the definition in section 1. Section 1 of the ITA defines "connected person" thus:

> **" 'connected person'** means—
>
> (*a*) in relation to a natural person—
>
> (i) any relative; and
>
> (ii) any trust of which such natural person or such relative is a beneficiary;

(*b*) in relation to a trust—

(i) any beneficiary of such trust; and

(ii) any connected person in relation to such beneficiary;

(bA) in relation to a connected person in relation to a trust (other than a collective investment scheme in property shares managed or carried on by any company registered as a manager under section 42 of the Collective Investment Schemes Control Act, 2002, for purposes of Part V of that Act), includes any other person who is a connected person in relation to such trust."

Regarding connected persons section 80F provides as follows:

"**80F. Treatment of connected persons and accommodating or tax-different parties.—**(1) For the purposes of section 80C or determining whether or not a tax benefits exists for the purposes of this Part, the Commissioner may—

(*a*) treat parties who are connected persons in relation to each other as one and the same person; or

(*b*) disregard any accommodating or tax-indifferent party or treat any accommodating or tax-indifferent party and any other person as one and the same person."

In turn, section 80C reads thus:

"**80C. Lack of commercial substance.—**(1) For the purposes of this Part, an avoidance arrangement lacks commercial substance if it would result in a significant tax benefit for a party (but for the provision of this Part) but does not have a significant effect upon either the business risks or net cash flows of that party apart from any effect attributable to the tax benefit that would be obtained but for the Provision of this Part.

(2) For purposes of this Part, characteristics of an avoidance arrangement that are indicative of an avoidance arrangement that are indicative of a lack of commercial substance include but are not limited to:

(*a*) The legal substance or effect of the avoidance as a whole is inconsistent with or differs significantly from, the legal form of its individual a whole is inconsistent with, or differs significantly from the legal form of its individual step; or

(b) The inclusion or presence of—

(i) roundtrip financing as defined in section 80D; or

(ii) an accommodating or tax indifferent party as described in section 80E; or

(iii) elements that have the effect of offsetting or cancelling each other"

[81] In paragraph 87 of the section 80J notice the Commissioner states that: "each arrangement factually resulted in a tax benefit for J's shareholder". It goes on in paragraph 90 where SARS states that:

> "In the present case, SARS is of the view that the TT Trust received the dividends from J (funded by A Investments Fees) because of the services performed by Y in respect of the A Investments arrangement. Furthermore:
>
> 90.1 The TT Trust and J are "connected persons" by virtue of paragraph (*d*)(v) of the definition thereof in section 1 of the IT Act; and
>
> 90.2 The TT Trust and Y are "connected persons" by virtue of paragraph (*b*)(i) of the aforementioned definition."

The undisputed fact is that the TT Trust is a shareholder of J. Mr Y is a trustee and beneficiary of the TT Trust and a director of, and principal of J. It is plain from paragraph 90 that the TT Trust, J and Mr Y were treated as one and the same person by the Commissioner. This is permissible in terms of section 80F which provides that to determine whether or not a tax benefit exists for the purposes of the new GAAR, "the Commissioner may treat parties who are connected persons in relation to each other as one and the same person". Upon a proper construction of the inclusion of the name of Mr Y in the Rule 31 statement, I am of the view that there is no novation of the Commissioner's case in the Rule 31 statement. This I say because the Commissioner specifically alleges that the TT Trust is one of the shareholders of J which obtained a tax benefit. Furthermore, in paragraph 67 of the section 80J notice, the Commissioner alleges that J "was a conduit for fee income generated by Y (and perhaps his co-principals for their own benefit". The Commissioner's allegation that J was merely a conduit for the fee income generated by Mr Y clearly refers to a tax benefit. Besides, the papers reveal that the section 80J notice was addressed to Mr Y in his personal capacity as well as in his capacity as the main trustee of the TT Trust. I agree with the submission by Mr S to the effect that Mr Y was advised in no uncertain terms through paragraph 90 and 91 of the section 80J notice that the Commissioner sought to rely on section 80J to re-categorise his tax-exempt dividend income as taxable income.

[82] It remains to be said that the taxpayers' case is further that the allegations and findings made by the Commissioner in the section 80J notice and in the finalisation of audit letter are, even if accepted as correct, incapable of sustaining the conclusion that the identified "arrangements" resulted in any tax benefit in that:

> [82.1] In the case of the S structure, the T structure and the2012 structure, the arrangement as a whole produced reserves (or is SARS allegations, STC credits) that were sold by A Investments;
>
> [82.2] It was these sales by A Investments that produced the funds paid to J and X;

[83.3] In each case, had the arrangement not been entered into, A Investments would have had nothing to sell;

[83.4] If A Investments had nothing to sell, no "fees" could ever have been paid or become due;

[83.5] Thus, even on SARS's allegations, if there had been no arrangements, there would have been no fees or right to fees, and hence no income tax liability;

[83.6] The arrangement therefore did not avoid any liability for tax (and hence did not result in a tax benefit) since without the arrangement, there could have been no income tax or other tax liability.

[83] I do not consider it necessary to deal with these allegations because it is beyond the scope and purview of this judgment to consider whether the arrangement/s did or did not avoid any liability for tax. Suffice to state that there has been no novation of the Commissioner's case in the Rule 31 as the relevant allegations were made in the section 80J statement as already alluded to in this judgment.

[84] Above, I have dealt with the merits of the striking out application in general terms. To recap, the words or phrases sought to be struck out from the Commissioner's Rule 31 statement are the following;

"15.1 the last sentence of paragraph 59 which reads: "The distribution of such income to the TT Trust and J's shareholders, took place at the direction of Y";

15.2 the words "for his own benefit" contained in paragraph 60;

15.3 the word "Y" contained in the third line of paragraph 60.3;

15.4 paragraph 63 in its entirety;

15.6 the words "including the TT Trust as a conduit for Y, all of which was done on the instruction of, inter alia, Y" contained in paragraph 64.5;

15.7 the words "separately and" contained in paragraph 66;

15.8 the words "and Y" contained in paragraph 66;

15.9 the words "(at the instance of Y)" contained in paragraph 66;

15.10 the words "including Y" contained in paragraph 67;

15.11 the words "and Y" contained in paragraph 66.2.1;

15.12 the words "and Y´ in the fourth line of paragraph 68.2.3.2 thereof and in the fourth line of paragraph 68.2.4.2 thereof;

15.13 the words "and Y" in the fourth line of paragraph 68.2.4.2 thereof;

15.15 the words "specifically the TT Trust and Y as a trustee" in paragraph 69 thereof."

I have excluded prayers in subparagraph 15.5 and 15.14 (1.5 and 1.14 of the notice of motion) as Mr Y does not persist with them. The taxpayers allege that the introduction of these words or phrases are new inserts in the Commissioner's Rule 31 statement and were not included in the section 80J notice and the finalisation of audit letter. The Commissioner on the other hand contends that there is no substance to the allegation that he has broadened his case by making the allegations referred to above. According to the Commissioner the section 80J notice and the finalisation of order letter reflects that corresponding statements were made. Furthermore, so goes the argument, in paragraph 68 of the section 80J notice, in dealing with the Basis of Assessment (a) that he intended to apply the provisions of the GAAR to the "arrangements", and (b) that the analysis of the application of the new GAAR to the arrangements "builds on the fact that the pattern set out" in the preceding paragraphs of the section 80J notice.

[85] In order to fully assess the competing contentions I find it is necessary to outline what was said by the Commissioner in the section 80J notice and the finalisation of audit letter in respect of each paragraph of the notice of motion.

Paragraph 1.1

The Commissioner sets out that in paragraph 30.6 of the section 80J notice and paragraph 26.6 of the finalisation of audit letter Mr Y gave evidence at a hearing in terms of section 50 of the Tax Administration Act 28 of 2011 that he had proposed and drafted the necessary resolutions to give effect to the dividend payments to J and X.

Paragraph 1.2

In respect of paragraph 1.2, paragraph 67 of the section 80J notice and paragraph 63 of the finalisation of audit letter the Commissioner concluded that J was itself nothing more than a conduit for fee income generated by Mr Y (and perhaps Mr Y's co-principals)

Paragraph 1.3

The Commissioner concluded in paragraph 66 of the section 80J notice and paragraph 62 of the finalisation of audit letter, that Mr Y, as one of the principals of J, actively worked on each of the A Investments arrangements and in the process generated fee income that flowed to J. The fee income in question was distributed to J's shareholders, which shareholders are family trusts related to its principals (who both generated the income and suggested and approved the distributions). Again, the Commissioner in paragraph 67 of the section 80J notice and paragraph 63 of the finalisation of audit letter concluded that J itself was nothing more than a conduit for fee income generated by Mr Y (and perhaps his co-principals for their own benefit.

Paragraphs 1.6 and 1.9

In paragraph 87 of the section 80J notice and paragraph 83 of the finalisation of audit, it is set out that the TT Trust is a shareholder of J that received the dividend payments. In addition, each arrangement actually resulted in a tax benefit for J's shareholders. The Commissioner further concluded that J itself was nothing more than a conduit for fee income generated by Mr Y (and perhaps Mr Y's co-principals) for their own benefit. As stated earlier, Mr Y gave evidence to the effect that he proposed the necessary resolutions to effect the dividend payments to J and X as set out in section 30.6 of the section 80J notice and paragraph 26.6 of the finalisation of audit letter.

Paragraph 1.10 to 1.3

It is contended on behalf of the Commissioner that the TT Trust received dividends from J funded by the "fees" from the impermissible avoidance arrangements. The "connected persons" provision was applied to include Mr Y.

Paragraph 1.15

The Commissioner contends that the statement is covered by the allegations made in paragraphs 67 and 87 of the section 80J notice and 63 and 83 of the finalisation notice.

[86] The above synopsis amply demonstrates that the contention that the SARS novated or altered materially the basis of its case in the Rule 31 statement is unmeritorious. Stated differently, the taxpayer has failed to demonstrate that SARS introduced "new elements" into the Rule 31 statement. For this reason, Mr Y's application to strike out the words or phrases in the paragraphs referred to in the notice of motion must fail.

Mr X's application to strike out

[87] The papers reveal that the issues in Mr X's assessments also arise from his involvement in the S structure the T structure and the 2012 structure. In the case of Mr X, SARS determined his liability on the basis that he received the tax benefit. Mr X seeks the striking out of what he perceives as the "new elements" in SARS's Rule 31 statement in terms of prayer 1.1 and 1.3 of the notice of motion. Mr X does not persist with seeking the striking out terms of prayer 1.2 of the notice of motion in his application.

[88] The reasoning applied in Mr Y's application equally applies to Mr X's application. I find it unnecessary to burden this judgment with repeating the same rationale. Suffice to state that Mr X's application must also fail.

The separation of issues

[89] It will be recalled that the applicants Mr Y and Mr X, in addition to the striking out, also sought the following relief;

If the court grants the relief sought in the striking out application prayers in whole or in part it:

> [89.1] must grant leave to the applicants to file an exception to the Commissioner's Rule 31 statement (prayer 2.1); and
>
> [89.2] direct that the exception be heard and determined separately, together with the question whether the applicants' appeals are invalid.

In the alternative, the taxpayers seek an order directing that the issue whether the allegations in SARS's Rule 31 statements, (as they will be read pursuant to the striking out), are capable of sustaining the conclusion that "a tax benefit arose, be determined as separate preliminary points together with the invalidity point". In the alternative to prayer 2, an order directing that the invalidity of the appeals point be heard and determined separately is sought.

[90] In the light of the findings I have made in the striking out application, it stands to the reason that the only issue for separation relates to the invalidity of the appeals. There is nothing contentious about separating the issue relating to the invalidity of the appeals as SARS agrees that it should be determined as a separate and preliminary point. An order to that effect must therefore be issued and each party must pay its own costs.

[91] At this point, I turn to consider one of the issues raised in this application, namely, the duty to begin in the appeal proceedings.

The duty to begin application

[92] The Commissioner brought an application in terms of Rule 51(2) of the rules promulgated under section 103 of the Tax Administration Act 28 of 2011, against each of the taxpayers seeking an order declaring that the taxpayers in each appeal bear the onus to adduce evidence at the hearing of the appeals against the disputed general anti-avoidance rules (GAAR-assessments). The Commissioner has applied the GAAR provided for in sections 80A to 80L of the Income Tax Act, to assess both taxpayers in certain amounts, by re-characterising, purportedly tax-exempt dividend income in the hands of a trust (in respect of Mr Y) as taxable fee income in the hands of the taxpayer. The order sought in the notice of motion is couched in the following terms:

1. Declaring that the respondent (the appellants in the appeal) bear the duty to begin adducing evidence at the hearing of this appeal;
2. Ordering the respondent to pay the costs of this application;

3. Granting the applicant such further and alternative relief.

[93] In an affidavit deposed by Ms F, SARS's Legal Counsel-Dispute Resolution, it is stated that the interlocutory applications fall under Rule 51(2) of the Tax Court Rules, but because an application such as the present is not specifically provided for in the rules, in terms of Rule 42(1) the most appropriate rule under the rules of the High Court Uniform Rules of Court, may, in the circumstances, be used by a party or the Tax Court. In terms Rule 42(2), if there is any dispute concerning the use of the High Court Rule, this must be resolved by the President of the Tax Court as a matter of law under section 118(3) of the TAA. According to the Commissioner, Rule 39(11) of the Uniform Rules of Court is the most appropriate rule and it reads thus:

> "Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon which such onus lies: Provided that such ruling may thereafter be altered to prevent injustice."

[94] The background to this application, according to the Commissioner, may be traced back to the pre-trial conference that took place on 20 March 2019, wherein the Commissioner expressed the view that the taxpayer bore the duty to begin during the determination of the appeal. The pre-trial minute dated 5 September 2019 reflects the following:

> "5.3.1 The appellant is of the view that, this being a GAAR-based assessment, the respondents bears the onus and the duty to begin.
>
> 5.3.2 The respondent is to consider its position in this regard and revert to the appellant, by no later than 17 April 2019, as to whether or not it accepts that it carries the onus and duty to begin. (The respondent subsequently responded that it disputes that it bears the duty to begin and that as onus is a matter of law, it does not appropriately form the basis for an agreement between the parties.)"

[95] The Commissioner's basis for contending that the taxpayers bear the onus to begin is premised on two legs. Firstly, the Commissioner alleges that where an impermissible avoidance arrangement (as defined in section 80A) has been entered into, section 80B entitles the Commissioner to prevent or diminish the tax benefit arising from the impermissible avoidance arrangement by performing any one or more of the acts set out in section 80B(1) of the ITA. According to this contention, Section 80G of the ITA creates a presumption that an avoidance arrangement has been entered into or carried out for the sole purpose of obtaining a tax benefit unless, and until the party obtaining a tax benefit proves that, reasonably considered in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole purpose of the avoidance arrangement. Secondly, section 102 of the TAA provides that the taxpayer bears the burden of proving (amongst other things) that an amount, transactions, event or item is not taxable or that "a decision" subject to appeal under a tax Act, is incorrect.

Section 104(2) provides that a decision includes a "decision that may be objected to or appealed against under a tax Act."

[96] According to the Commissioner, the determination made by him in terms of section 80B of the ITA, is "a decision" for the purposes of section 102 of the TAA, and the taxpayer accordingly bears the onus of proving that the Commissioner's determination (i.e. that the transactions described in the Rule 31 statement constitute impermissible avoidance arrangements), is incorrect. Given the incidence of the onus in terms of section 102 of the TAA and the presumptions in section 80G of the ITA, the Commissioner contends that the taxpayer is obliged to commence adducing evidence first. This, according to the contention, is so because, firstly, by reason of the fact that the party who bears the onus is generally required to commence adducing evidence and, secondly, because the presumption in section 80G of the ITA operates to place on the taxpayer the burden of proof that tax avoidance was not the sole or main purpose of the arrangement, and, in terms of High Court

Rule 39(13), the appellant is required to commence adducing evidence on that aspect, at least. The Commissioner further alleges that the nature of the evidence likely to be adduced, should the duty to begin rest on him, will substantially differ from the nature of the evidence required to be adduced should the duty to begin rest on the taxpayer. In expatiation, the Commissioner states that if a ruling is made that the Commissioner has to adduce evidence first, the Commissioner will in effect be required to prejudge the evidence likely to be led by the taxpayer on the issue and then, in anticipation as it were, adduce evidence to meet what he believes the taxpayer may put up by way of response.

[97] The taxpayer opposes the contention that it bears the duty to begin to adduce evidence at the hearing of the tax appeals on two grounds. According to an affidavit deposed to by taxpayer's attorney, the Commissioner's claim that the taxpayer has a duty go begin to adduce based on section 102 of the ITA, and section 80G is incorrect in that the assessment that is subject of the appeal in the Tax Court was made by SARS under the provisions of the GAAR. The taxpayers aver that the correct position, based on statutory provisions and authorities, SARS bears the onus of the duty to begin.

[98] The taxpayers further avers that the determination of the incidence of the duty to begin is premature at this stage, and having regard to the legal issues raised in the appeals, it may in fact never arise in this matter. This is so because during late 2019, the taxpayer's legal team detected, in the course of analysing the pleadings in the appeal, that the manner in which SARS has in its Rule 31 statement pleaded the "arrangement/s" and "tax benefit" on which it relied as the pleaded basis of its powers to assess the taxpayer under the GAAR, differed in material respects from the manner in which SARS had previously – in both its notice to the taxpayer in terms of section 80J of the ITA dated 30 October 2015 ("the section 80J notice")

and its finalisation notice of audit letter dated 22 August 2016 (the finalisation audit letter – circumscribed the "arrangement/s" and "tax benefit" on which it relied as the basis for assessing the taxpayer under the GAAR. Given the findings made in the striking out applications, it is no longer necessary to consider this contention.

Section102(1) of the Tax Administration Act provides as follows:

> "(1) A taxpayer bears the burden of proving—
>
> (*a*) That an amount, transaction, event or item is exempt or otherwise not taxable;
>
> (*b*) That an amount or item is deductible or may be set-off;
>
> (*c*) The rate of tax applicable to a transaction, event, item or class of taxpayer;
>
> (*d*) That an amount qualifies as a reduction of tax payable;
>
> (*e*) That a valuation is correct; or
>
> (*f*) Whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.
>
> (2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS."

[99] As regards the presumption of purpose relied upon by the Commissioner, section 80G provides thus:

> "**80G Presumption of purpose—(1) A**n avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit unless and until the party obtaining a tax benefit proves that, reasonably considered in the light of the facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.
>
> (2) The purpose of a step in or part of an avoidance arrangement may be different from a purpose attributable to the avoidance arrangement as a whole."

[100] The taxpayer contends that guidance as to the interplay between the two sets of onus provisions may be found in their predecessors. To this end, section 82 of the ITA provided as follows:

> "**82 Burden of proof as to exemptions, deductions, abatements, disregarding or exclusions—**(1) The burden of proof that any amount is—
>
> (*a*) Exempt from or not liable to any tax chargeable under this Act; or
>
> (*b*) Subject to any deduction abatement or set-off in terms of this Act; or
>
> (*c*) To be disregarded or excluded in terms of the Eight Schedule,

shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, or that such amount must be disregarded or excluded, and upon hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that it is wrong."

Section 103(4) on the other hand provides that:

> "Any decision of the Commissioner under subsection (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto is proved that the transaction, operation, scheme, agreement or exchange in shareholder or members' interest or trustees or beneficiaries of the trust in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved—
>
> (*a*) in the case of any such transaction, operation or scheme, that it was entered into or carried out solely or mainly for the purposes of the avoidance or the postponement of such liability or the reduction of the amount of such liability; or . . ."

The taxpayers acknowledge the linguistic differences between present onus provisions and their predecessors, but contend that the reasoning previously adopted by the courts, applies equally to the interplay between the (new) GAAR and the general onus provisions in section 102 of the TAA. According to the taxpayers, the presumption in section 80G(1) operates in respect of "an avoidance arrangement", i.e. unless and until the existence of "an avoidance arrangement" has been proved (by SARS) the presumption is not triggered. Furthermore, so goes the averment, because the existence of an "avoidance agreement" is squarely in dispute in these proceedings, SARS bears the onus of proof in this regard.

[101] I now turn to the evaluation of competing arguments. The applicable legal principles, have, due to the nature of this application, already been outlined under the background facts to this application. It must however, be stated that the taxpayer's basis for opposing the application to the effect that the need to determine the incidence of the duty to begin may never arise as the taxpayer intended to bring a striking out application in respect of portions of the Commissioner's Rule 31, has, due to the findings I have already made in the striking out application, fallen away.

[102] Counsel for the Commissioner, Mr S SC argued that the question of the duty to begin is decisively set out in Rule 44(1) of the TAA, which provides as follows:

> (1) At the hearing of the appeal, the proceedings are commenced by the appellant unless—
>
> (*a*) the only issue in dispute is whether an estimate under section 95 of the Act on which the disputed assessment is based, is reasonable or the facts on which an understatement penalty is imposed by SARS under section 221(1); or
>
> (*b*) SARS takes a point in *limine.*"

According to the argument, because the Tax Court is a creature of statute, and the provisions of Rule 44(1) unequivocally burden the taxpayers, as respondents, with a duty to begin the leading of evidence in a tax appeal, on this point alone, the Commissioner is entitled to the relief he seeks.

[103] Counsel for the taxpayers, Mr E, contended on their behalf that the Commissioner's reliance on Rule 44(1)(*a*) in his replying affidavit, shows that he (the Commissioner) has engaged in "a change of tack", and that is impermissible as he was required to make out his case in the founding affidavit. Moreover, at a pre-trial meeting held on 20 March 2019, the taxpayers recorded that because the disputed assessments were made under the GAAR, the onus of proof and the duty to begin was on SARS. Subsequent thereto and during August 2019, SARS attorney wrote to the taxpayer's attorneys contending that the taxpayers bore the onus of proof and therefore the duty to begin. Mr E criticised the Commissioner's strict reliance on the provisions of Rule 44(1), arguing that the "literalist interpretation" ignores the logical link between onus of proof and the duty to begin. Furthermore, the Commissioner does not dispute that it bears the onus of proof in respect of certain elements of the GAAR, and the respondents others, but contends that it does not follow that the Commissioner has the duty to begin.

[104] Flowing from the above submissions, it is plain that the determination of the duty to begin must begin with the interpretation of Rule 44(1) in the context of the GAAR assessments. It was reiterated by Counsel for the taxpayers that GAAR is extra-ordinary in nature as recognised in ITC 1862 SATC 34 and ITC 1876 77 SATC 175 where it was held that:

> "Identifying the Commissioner's true case is important because of the nature of section 103. It involves an exercise of an extra-ordinary administrative power enabling the Commissioner to overturn the express and ordinary consequences of applying the Act."

It is well to recall that the two decisions related to the erstwhile section 103(4) of the IT Act were made in the context of the repealed GAAR. Counsel for the Commissioner criticised the taxpayer's reliance on statutory predecessors of the onus provisions contained in repealed

legislation. Although I have held that the two decisions may not be relied upon in the interpretation of the new GAAR, which had specifically omitted the need for the Commissioner to be "satisfied", I think that insofar as the procedural aspect of onus is concerned, one should not throw the baby out with the bath water. This I say because the four substantive requirements that must be present before SARS can invoke its powers under the GAAR remain the same. As correctly pointed out by Mr E, the existence of an "impermissible arrangement" contemplated in sections 89A and 80B of the Act requires –

(i) an "arrangement";

(ii) that results in a "tax benefit";

(iii) abnormality/lack of commercial substance; and

(iv) the sole or main purpose of obtaining a tax benefit.

Before I analyse the context of Rule 44(1) it remains to be said that the Commissioner further contended that where a dispute between the Commissioner and the taxpayer relates to an assessment under the GAAR (as is the case in *casu*) and also the imposition of an understatement penalty under section 221(1) of the TAA (as contemplated in the Rule 44(1)(*a*), the duty to begin will rest on the taxpayer because the imposition by SARS of the understatement penalty is not the sole issue in dispute between the parties, and the onus of proof that each party bears in relation to the dispute is thus irrelevant to the question of the duty to begin. The taxpayers on the other hand contend that the express exceptions created under Rule 44(1)(*a*) "correlate" with instances where SARS bears the onus of proof, and the duty to begin. Thus, the rule itself recognises and entrenches the logic that where SARS bears the onus of proof, the taxpayer should not have the duty to begin.

[105] I turn to consider whether the onus of proof that each party bears in relation to the dispute is relevant to the question of the duty to begin.

[106] LAWSA[8] summarises the relationship between the onus of proof and the duty to begin as follows:

> **"The Sequence of Evidence**
>
> In civil proceedings, the plaintiff, if he or she bears the burden of proof, first adduces his evidence . . . If, on the other hand, the burden of proof is on the defendant, the defendant commences and the plaintiff follows. Where the burden rests upon the plaintiff in respect of any one of the issues and upon the defendant in respect of any others, the plaintiff begins and the defendant follows, but the plaintiff has the right to call rebutting evidence on any issues in respect of which the onus was on the defendant.

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8 Joubert *et al* (eds) The Law of South Africa 3ed vol 18 par 199 and par 268.

Right to Begin

The burden of proof determines the sequence of the evidence. The general rule in civil proceedings is that the party bearing the burden on the pleadings, first adduces evidence, followed by his or her opponent."

[107] Rule 39 of the Uniform Rules of Court contains provisions which demons A Investments that the duty to begin follows from the onus of proof. To this end, Uniform Rule 39(5) and (9) provide that where the onus of proof is on the plaintiff, or the defendant respectively, "that party may briefly outline the facts intended to be proved and . . . may then proceed to the proof thereof." In similar vein, Uniform Rule 39(13) provides as follows:

"When the onus to adduce evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is on him, and may then close his case. The defendant, if absolution is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

[108] Against this backdrop, I acknowledge that in *Commissioner, South African Revenue Service, v Pretoria East Motors* 2014 (5) SA 231 (SCA), Ponnan JA, observed that the question of onus in the appeal which was before the Supreme Court of Appeal, must be approached on the basis that the taxpayer bore the responsibility to show on a preponderance of probabilities that the decisions of SARS, against which it had appealed, were wrong, but:

"That, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties."

Commenting further on the burden of proof, the learned judge said the following:

"[8] It is so that the taxpayer's *ipse dixit* will not lightly be regarded as decisive. But it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it – a 'formidable and difficult' one to discharge (per Trollip JA; *Barnato Holdings Ltd v Secretary for Inland Revenue* 1978 (2) SA 440 (A) at 454A-B) – the interests of justice require that the taxpayer's evidence and questions of its credibility be considered with great care. Indeed the taxpayer's evidence under oath and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witnesses must be assessed as in any other case that comes before the court. (See *Malan v Kommissaris vir Binnelandse Inkomste* 1983 (3) SA 1 (A) at 18E.) It thus remains the function of the court to make a determination of the issues that arise for decision on an objective review of all of the relevant facts and circumstances. Not the least important of the facts, according to Miller J (ITC 1185 (1972) 35 SATC 122 (N) at 124), 'will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts

> in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities'."

[109] It must be acknowledged that the Supreme Court of Appeal in *Pretoria East Motors, supra*, was not confronted with the specific problem of the invocation of the GAAR by the Commissioner, as well as the interpretation of Rule 44(1). When the Court pronounced on the question of onus and the duty to begin, it did so on the basis of ordinary assessments. It also did not deal with the problem confronting this Court and to that extent, this court's approach requires a qualification.

[110] Firstly, the invocation of the GAAR in the present proceedings is different from an ordinary assessment in that the income tax liability is determined by the provisions of the Income Tax Act to an objectively-existing set of facts. Put differently, under the GAAR, income tax liability is not determined by the application of the law to the facts. It instead is determined by the Commissioner "determined" by the Commissioner himself – in the exercise of his powers in section 80J(3)(*c*) (to determine liability of that party for tax in terms of this Part) read with section 80B(1). The example proffered by Mr E is apt: For instance, assume A received dividend income from company X in which he holds shares. A is not liable to income tax on such dividend income tax in terms of section 10(1)(*k*)(i) of the Income Tax Act. This conclusion is arrived at by the application of the provisions of the Income Tax Act (section 10 in particular) to the objective fact that the income in question constitutes a "dividend" as defined. Secondly, the Commissioner has power under the GAAR to determine that a party is liable for income tax on a tax-exempt dividend income received by another even though (i) the parties are recognised and treated in law as separate and distinct legal personae, (ii) there are no dishonest dealings between any of the parties and (iii) the third party received dividend income in question in terms of valid and legally binding transactions. Thirdly, where a tax liability has been "determined" by the Commissioner under the GAAR, i.e. in terms of section 80J(3)(*c*), the administrative act of such determination is itself the "assessment" and if the taxpayer objects to and appealed against such assessment, it is the Commissioner's determination when the administrative act was performed which is appealed against.

[111] To recap, the Commissioner's argument is primarily that because the Tax Court is a creature of statute, and the provisions of Rule 44(1) unequivocally burden the taxpayers, as respondents, with a duty to begin the leading of evidence in a tax appeal, on this point alone, the Commissioner is entitled to the relief he seeks. The taxpayers on the hand contend, for several reasons that it could not have been the intention of the legislature to straitjacket the question of the duty to begin. With this in mind, I proceed to consider the interpretation that must be accorded to Rule 44(1).

The interpretation of Rule 44(1) in the context of GAAR assessments

[112] Counsel for the taxpayers, Mr E SC, submitted that the purpose and intention to Rule 44(1) is to recognise and give effect to the link between the onus of proof and the duty to begin- not to override it. According to the argument, on a broader basis, the purpose and intention of the Tax Court rules is (i) to provide a rational procedural framework for the ventilation of tax disputes, and (ii) to do so in a manner that is in keeping with the provisions of the TAA and ITA, as well as other applicable Tax Acts, including the onus related provisions. Accordingly, so goes the contention, SARS's literalist approach to interpretation must be rejected by the court.

[113] In considering the interpretation of Rule 44(1) it must be placed on record that it is not in dispute that the primary onus of proof is on SARS. I have already outlined the recognised relationship between the onus of proof and the duty to begin. Likewise, I have also set out, the four requirements that must be before SARS invokes when alleging the existence of an impermissible arrangement as contemplated in section 80A and 80B. What can be discerned from those provisions is that if SARS relies on the existence of an avoidance arrangement, it then bears the onus of proving same. It then becomes illogically to require the taxpayer to adduce first evidence concerning his purpose in carrying out an alleged avoidance arrangement. As correctly suggested by Mr E, there cannot logically be evidence (from the taxpayer) as to the purpose behind "an avoidance arrangement" unless and until there has been evidence (from SARS) to establish the existence of that "avoidance arrangement" on which SARS relies. In the matter at hand, the very circumstances of the existence of an "avoidance arrangement" are placed in dispute, it therefore is perfectly logical for SARS to commence the leading of evidence, and in turn, illogical to for the taxpayer to have to do so. It follows as a matter of fact that since the primary onus is on SARS, it should also bear the duty to begin. But, the question that arises is whether SARS strict reliance on Rule 44(1) is correct, notwithstanding the fact that the burden of proof rests on it.

[114] It must be stated from the outset that Rule 44(1) makes no reference or contains no provision relating to the GAAR. The only exceptions it creates to the taxpayer's duty to begin relate to (i) estimated assessments in terms of section 95 of the TAA, and (ii) understatement penalties in terms of section 222 (1). Mr E submitted, and I agree, that the GAAR assessments share a crucial feature with in common with the two exceptions in that the onus of proof, is, on all three instances on SARS. The exceptions correlate with instances where SARS bears the onus of proof in terms of section 102(2) of the TAA. It follows, in my view, that the intention behind the express exceptions created in Rule 44(1)(*a*) is clear recognition and entrenchment of the logic that where SARS bears the onus of proof, the taxpayer should not have the duty to begin. This is particularly so because it is evident from the wording of Rule 44(1)(*a*) that in promulgating the Tax Court Rules, the Minister intended to link the duty to begin to the onus

of proof. This view is fortified by the judgement in ITC *1636* 60 SATC 267 where the onus of proof in respect of the old GAAR was found to be on SARS, notwithstanding the general onus provisions (contained in the repealed section 82 and 103(4) of the ITA in the taxpayer). At page 323, the court held thus:

> "In my judgment, looking fairly at s 103, and in particular sub-ss(3)(4), the correct interpretation of the section is the following: The section, being a particular provision, is removed from the application of the general [onus] provisions contained in s 82; the primary onus of proving the fulfilment of the four requirements [of the GAAR] rests on the Commissioner; the provision relating to proof that that the effect of a transaction was a tax avoidance contained in sub-s(4) (a burden, as explained earlier, that rests with the Commissioner), did not affect an incidence of onus that would otherwise not had been there, but rather recognised where the onus already lay; the presumption in sub-s(4) was an aid improved to assist the Commissioner to establish one of the matters he is required to establish."

I emphasise that in ICT 1636, above, similar to the present matter, the general onus provisions (contained in section 82 of the ITA) contained no express legislative provision or specific exception on the question of onus of proof in respect of the GAAR. Furthermore, although the analysis applied to the old GAAR, the reasoning still is relevant to the question of onus in the new GAAR as the provisions are substantially the same. In my judgment, and for the reasons espoused above, SARS bears the primary onus and also bears the duty to begin.

[115] Even if I may be wrong on this aspect, Rule 42(1) as earlier alluded to, provides that if the Tax Court Rules do not provide for a procedure in the tax court, then the most appropriate rule under the Uniform Rules of Court, and to the extent consistent with Act, may be utilised by a party or the tax court. Seeing that there is no specific provision relating to the duty to begin in relation to the new GAAR, the most appropriate rule is Uniform Court Rule 39. I have already indicated that under Rule 39 (5) and (9) the duty to begin is on the party who bears the onus of proof. In *casu*, that party is SARS as it must prove the existence of the "impermissible arrangements" on which it relies. In my view, the duty to begin provisions of Rule 44(1)(*a*) are not to be construed so narrowly as to apply to only to the mentioned exceptions when the overriding effect of those very exception is to recognise the burden of proof. This approach, in my view is in keeping with the primary onus SARS acknowledges it has in this matter, as well as the burden of proof under Uniform Rule 39. I therefore hold SARS has the duty to begin.

Conclusion

[116] In conclusion, I have, with regard to the taxpayers applications to strike out held that no proper case has been made out for the granting of the relief sought. Therefore, both applications must be dismissed with costs, including costs of two counsel. Insofar as the separation application is concerned I concluded that in the light of the dismissal of the striking out application, the only order that may granted relates to the invalidity of the appeals. I therefore hold the question of the invalidity of the appeals shall be determined as a separate and preliminary point. Because this portion of the order was not opposed by SARS, each party should pay its own costs. Regarding the third issue in these proceedings, the duty to begin, I found that SARS has a duty to begin in both applications. It stands to reason that the taxpayers' applications succeed and that the respondent in those applications (SARS) must pay costs, inclusive of the costs of two counsels.

[117] In the result, the following order is issued:

[117.1] The taxpayer's applications to strike out are both dismissed with costs, inclusive of the costs of two counsels.

[117.2] The Commissioner's applications on the duty to begin in respect of both taxpayers are dismissed with costs, inclusive of the costs of two counsels.

[117.3] The taxpayers' applications to have the issue of the invalidity of the appeals is to be determined as a separate preliminary point succeeds. Each party will pay its own costs.

NDITA J