THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 29 September 2023

Status: Immediate

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Commissioner for the South African Revenue Service v Absa Bank Limited and Another (596/2021) [2023] ZASCA 125 (29 September 2023)

The Supreme Court of Appeal (SCA) today upheld an appeal against a judgment of the Gauteng Division the High Court, Pretoria (the high court) which reviewed and set aside tax assessments raised against Absa Bank and its subsidiary, United Towers Proprietary Limited (collectively referred to as Absa Bank).

The Commissioner for the South African Revenue Service (SARS) initiated an investigation into a series of transactions involving Absa Bank and several other entities in 2016. SARS conducted an audit of these transactions which covered the 2015, 2016 and 2017 tax periods, commencing in May 2018. During the audit SARS obtained information from Absa Bank. At the conclusion of the audit process On 30 November 2018, SARS issued notices to Absa Bank, in terms of s 80J of the Income Tax Act, 58 of 1962 (the ITA). The notices signified an intention to apply the General Anti-Avoidance Rule (GAAR) provision of the ITA on the basis that Absa Bank had participated in an impermissible tax avoidance arrangement. The notices provided for the submission of a response by Absa Bank. The submission period was extended to 28 February 2019 at the request of Absa Bank.

On 15 February 2019, Absa Bank submitted a request to SARS, in terms of s 9 of the Tax Administration Act, 28 of 2011 (the TAA), to withdraw the notices. It was contended that the application of GAAR was tainted by an error of law since the notices indicated that SARS accepted that Absa Bank was not a party to an avoidance arrangement. They requested that the period for the filing of a response to the notices be extended further. SARS extended the period to 31 March 2019. On 5 March 2019, SARS informed Absa Bank that it was not withdrawing the notices. It disputed the submissions by Absa Bank and stated that their objections should be addressed in the process of responding to the notices as envisaged by s 80J.

On 29 March 2019, Absa Bank launched an application to review the refusal to withdraw the s 80J notices. They simultaneously submitted responses to the s 80J notices. While the review application was pending before the high court, SARS, acting in terms of s 80B of the ITA, determined that Absa Bank were liable for additional tax. It issued additional assessments on the basis that they were parties to an impermissible avoidance arrangement, on 17 October 2019.

Absa Bank then amended its review application to introduce a review of the assessments.

The high court concluded that the decision not to withdraw the s 80J notices was administrative action susceptible of review. It held that the basis upon which the notices were issued and the assessments were raised, were inextricably linked. It found that SARS was bound by the facts it recorded in the notices, as had been disclosed by Absa Bank. The high court therefore found that the grounds of review involved only questions of law. This constituted exceptional circumstances as envisaged by s 105 of the TAA, which entitled it to hear the matter. It upheld the grounds of review, found that the notices and assessments were unlawful, and set them aside.

The appeal came before the SCA with the leave of the high court. Three issues arose for decision:

a) Whether a decision not to withdrawal s 80J notice is reviewable prior to or after the issuing of an assessment envisaged in s 80B of the ITA?
b) Whether the high court was correct to characterise the challenge as being wholly questions of law which entitled it to exercise its jurisdiction in terms of s 105 of the TAA; and if so
c) Whether the high court was correct in its determination of the dispute?

The SCA found, on the first question, that the refusal to withdraw a s 80J notice can have no adverse effect or impact upon a taxpayer. Its effect left the notice in place until a final decision was made to determine a tax liability. It found that the high court had correctly held that the issuing of a s 80J notice did not constitute administrative action. Contrary to the high court, it held that the act of keeping the notice extant also did not constitute administrative action.

The SCA held that the s 80J notices were overtaken by the decisions to impose a tax liability as provided by s 80B. The review of the refusal to withdraw the notices was therefore academic.

In relation to the review of the assessments, s 105 of the TAA applied. The SCA confirmed the principle that the high court will only exercise its jurisdiction in exceptional circumstances. It found that the high court was wrong in finding that SARS had accepted and was therefore bound by the facts disclosed by Absa Bank. It held that participation in an arrangement; its purpose and effect; and whether it constituted an impermissible avoidance arrangement involve questions of fact and law. The high court had therefore erred in its characterisation of the dispute as being wholly one of law. The high court was therefore incorrect to find that exceptional circumstances were present to entitle it to exercise jurisdiction in terms of s 105 of the TAA.

The SCA upheld the appeal with costs and set aside the high court orders. It substituted the orders with one dismissing the application with costs.

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