REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION: CAPE TOWN)

Case No.: **IT 76704**

(1) REPORTABLE: **YES** / NO

(2) OF INTEREST TO OTHER JUDGES: **YES** / NO

(3) REVISED.

24 May 2024
DATE

SIGNATURE

In the matter between:

TAXPAYER EJP Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

---

J U D G M E N T

MYBURGH AJ

[1] This is an application by the appellant, **"the taxpayer EJP"** to have the statement of grounds of assessment and opposing appeal in terms of Tax Court Rule 31[1] of the respondent, the Commissioner for the South African Revenue Service (**"SARS"**), set aside as an irregular step in terms of High Court Rule 30(1), alternatively to be struck out in terms of High Court Rule 23(2). (The taxpayer relies on the High Court Rules[2] by virtue of Tax Court Rule 42 which permits the use of High Court Rules where the procedure in question is not covered by the Tax Court Rules.)

[2] The nub of the taxpayer's case is this: SARS's rule 31 statement represents a fundamental and impermissible change of tack from its assessment and seeks to rescue SARS from the consequences of its refusal to accept the cogency of information provided to it by the taxpayer on numerous occasions. SARS has invoked and exercised its GAAR powers[3] on a defective factual basis and now, having accepted what the taxpayer told it prior to the assessment, it is attempting to bypass its procedural obligations by unlawfully exercising a fresh administrative power of assessment through the rule 31 statement. The changes to the rule 31 statement thus constitute irrelevant matter to the dispute which do not have to be addressed in the appeal and hence should be set aside in terms of High Court Rule 30(1) or struck out in terms of High Court Rule 23(2). The rule 31 statement contravenes Tax Court Rule 31(3) which prohibits the inclusion of a ground of assessment which 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.

[3] SARS counters that: Tax Court Rule 31(3) permits the change it has made to one of the factual grounds and the consequential changes to the legal grounds. The rule 31 statement does not novate the whole of the factual basis of the assessment in that the main features of the arrangement that made it an impermissible avoidance arrangement remain unchanged. The rule 31 also statement does not novate the whole of the legal basis of the assessment and hence the changes are permitted. It follows that the consequential change to the remedy is permissible. Furthermore, SARS is permitted to make the changes by virtue of section 80J(4) of the ITA which allows the revision or modification of the grounds for applying the GAAR at any stage until the issue is finally determined by SARS, the Tax Court, or an

---

1 Rules promulgated under section 103 of the Tax Administration Act 28 of 2011 (**"the TAA"**).

2 The Uniform Rules of Court

3 The General Anti-Avoidance Rules (**"the GAAR"**) found in sections 80A to 80L of the Income Tax Act 58 of 1962. Where I refer to statutory provisions without mentioning the statute, it is a reference to the Income Tax Act.

appellate court. Lastly, SARS is not obliged to issue a revised assessment as the changes to the grounds of assessment and to the remedy did not alter the original assessment.

A THE TRANSACTIONS

[4] Those being the lines drawn by the parties, I turn to the transactions (in SARS's view the impermissible tax avoidance arrangement) that gave rise to the dispute. In October 2023 the taxpayer, who was an employee and director of the Company A group of companies (**"Company A"**), started the process of restructuring his affairs (**"the restructuring"**). At the time he held Company A shares both directly (i.e. in his own name) and indirectly through two companies, Company B (Pty) Ltd (**"Company B"**) and Company C Investments (Pty) Ltd (**"Company C"**). He was also a discretionary beneficiary in the **"The trust"** which would feature in the restructuring.

[5] The objective of the first of two groups of transactions was to move the taxpayer's assets, both directly, and indirectly held, to a holding company and to achieve the objective it did the following: First, the taxpayer acquired all the shares in Company D (Pty) Ltd (**"the Company D shares acquisition"** and **"Company D"**), a process that was completed by 25 November 2014. Second, in December 2014, Company D acquired the taxpayer's assets, including his directly and indirectly held Company A shares in return for shares in itself (**"the taxpayer EJP's assets acquisition"**). Third, in March 2015, Company D distributed R1 391 276 400 to the taxpayer (**"the distribution"**).[4] Company D funded the distribution by issuing 955 A-Class ordinary shares (**"the A-Class shares"**) to the trust for R1.39 billion (**"the subscription proceeds"**). Fourth, on the same day, the taxpayer and the trust concluded a call-option agreement (**"the call-option agreement"**). Under the call-option agreement, the taxpayer acquired an option to purchase the A-Class shares for a premium of R1.39 billion (**"the call-option premium"**). The call-option premium was payable on 26 March 2015 or, if agreed by the taxpayer and the trust, on a later date. The aspect of the first group of transactions that featured prominently in what followed was the distribution by Company D to the taxpayer and the fact that it was funded by the subscription proceeds.

[6] The purpose of the second group of transactions was to deal with the acquisition by Company E International Holdings Limited (**"Company E"**), or a nominated subsidiary, of Company A. While the taxpayer's indirect shareholding in Company A via Company B was initially excluded, during January 2015 Company E commenced negotiations with Company B to acquire its Company A shares. Negotiations were successful. In pursuance of the successful negotiations, on 19 February 2015, it was agreed that Company B would buy the Class C ordinary shares in Company A from Company D (**"the Company B repurchase"**).

---

[4] The distribution as defined was made up of three distributions from Company D to the taxpayer of R167 696 5422, R1 222 303 458 and R1 276 400.

Company D used the proceeds of the Company B repurchase (**"the Company B repurchase proceeds"**) to subscribe for new Class E ordinary shares in Company B. Company D then exchanged its shares in Company A and Company B for Company E shares (**"the Company AE share exchange"**). On 17 April 2015, the second group of transactions became unconditional and by 20 April 2015 all the transactions in the second group had taken place. The relevant part of the second group of transactions was the Company B repurchase and the utilisation of the Company B repurchase proceeds by Company D to subscribe for shares in Company B rather than funding the distribution.

B REQUESTS FOR INFORMATION

[7] Four years after the transactions, on 20 March 2019, SARS, in terms of section 46 of the TAA,[5] made a "request for relevant information" regarding the taxpayer's 2015 to 2018 tax years. A similar request, this time including a notification of audit of the 2016 to 2018 tax years followed on 24 June 2019. The taxpayer responded, with supporting documentation to both requests. Section 46 resides under Part B of the TAA which is headed "Inspection, Request for Relevant Information, Audit and Criminal Investigation" and addresses SARS's relative disadvantage when it comes to its limited knowledge of taxpayers' affairs by providing it with, *inter alia*, extensive information gathering powers.

[8] The taxpayer responded to the first request on 30 April 2019. In his response, he told SARS about the taxpayer asset acquisition (i.e. that he had sold his directly and indirectly held shares in Company A to Company D, for shares in the latter) and expressed the view that section 42 was applicable. He disclosed receipt of the distribution and explained that, but for R167 696 542, the distribution did not reduce Company D's contributed tax capital (**"CTC"**). The taxpayer annexed (*inter alia*) the agreements pertaining to the taxpayer asset acquisition, the Company D directors' resolution authorising the distribution and two letters from Company D about Secondary Tax on Companies (**"STC"**) credits pertaining to the distributions.

[9] The taxpayer responded to the second request on 5 August 2019. The relevant questions and answers in the request and response were: (1) SARS asked why the taxpayer had not disclosed the distribution in his 2016 ITR12 return. The taxpayer explained that this had been an oversight which he had tried, without success, to rectify on SARS e-filing, due to the tax period being under audit. He added that there was no dividends tax payable on the distribution and thus no "tax consequences" arising from the oversight. (2) SARS asked the taxpayer to explain how the distribution was treated for tax purposes. The taxpayer responded

---

[5] Section 46(1) of the TAA provides that: "SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing, that SARS requires."

that of the three distributions that made up the distribution as defined, the first qualified as a "return on capital" and the taxpayer reduced his "base cost" by a similar amount. The other two distributions, he said, qualified as tax exempt dividends. (3) SARS asked the taxpayer to explain the commercial rationale for the transactions involving him, Company D and the trust and the involvement of the Company F Group (**"Company F"**) in those transactions. The taxpayer responded that the first two distributions making up the distribution as defined were used to pay the call option premium, and the third was used by the taxpayer to pay living expenses. The transactions between him and the trust were the call option agreement, an addendum amending it, and the receipt from the trust, by the taxpayer, of interest on loans. The call option premium's commercial purpose was to provide the trust with cash and the call option agreement's purpose was to make the taxpayer able to buy the relevant shares from the trust. Finally, as regards Company F's involvement in these transactions, the taxpayer explained that Company F had made suggestions and had sold Company D to him. Finally, SARS asked the taxpayer to identify the counterparty to the Company DE share exchange. The taxpayer responded that he "was not party to these transactions" and "does not have the relevant information".

[10] In addition to the information contained in the two responses, SARS already had in its possession, Company D's 2015 AFS, which indicated that after the balance sheet date, Company D had issued shares to the trust for R1.3 billion and had paid the dividend the day after the issue of the new shares.

C THE GAAR NOTICE

[11] On 30 July 2020, possessed of all the knowledge and documents provided in the three responses detailed above, SARS issued a notice in terms of section 80J(1) (**"the GAAR notice"**).

[12] The GAAR provisions empower SARS to impose a tax liability on a taxpayer where it has been party to an impermissible avoidance arrangement. Sections 80A, B and C are the provisions relevant to this case.

[13] Section 80A defines an impermissible avoidance arrangement:

> **"80A. Impermissible tax avoidance arrangements.**—An avoidance arrangement is an impermissible avoidance arrangement if 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 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)."

[14] Section 80B sets out the tax consequences of impermissible tax avoidance:

"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-characterising any steps in or parts of the impermissible avoidance arrangement;

(*b*) disregarding any accommodating or 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 purposes of determining the tax treatment of any amount;

(*d*) reallocating any gross income, receipt or accrual of a capital nature, 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, or 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.

(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."

[15] Thus, in determining the tax consequences commonly called "the remedy", SARS may *inter alia* disregard parts of the impermissible avoidance arrangement, as it did in this case.

[16] The GAAR is different to most fiscal provisions in that SARS must call for the taxpayer to make representations before it may issue an assessment. This it does by way of the GAAR notice which must conform to the prescripts contained in section 80J:

> **"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) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.
>
> (3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2)—
>
> (*a*) request additional information in order to determine whether or not this Part applies in respect of an arrangement;
>
> (*b*) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or
>
> (*c*) determine the liability of that party for tax in terms of this Part.
>
> (4) If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the Commissioner, he or she may revise or modify his or her reasons for applying this Part or, if the notice has been withdrawn, give notice in terms of subsection (1)."

[17] What the GAAR provisions mean involves an interpretation of the cited provisions. In *Capitec*,[6] Unterhalter AJA said this about the correct approach when undertaking this exercise:

> "[25] . . . The much cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasises, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.
>
> …

---

[6] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99, 2022 (1) SA 100 (SCA).

> [50] . . . The meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also understanding the words and sentences that compromise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of the sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.
>
> [51] . . . The proposition that context is everything is not a license to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[18] In *Tshwane City v Blair Atholl*,[7] it was observed that the Supreme Court of Appeal:

> "[63] . . .has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue."

[19] In *ITC 1930*,[8] Savage J cautioned against an interpretation that:

> "[7] . . . would strain at the language of the provision and lead to an unbusinesslike and unwieldy result…"

[20] Informed by the cited cases, all of which set out principles that I do not think are contentious, I understand the guiding principles to be the following: The interpretive exercise is a search for the meaning embedded in the text, and in this sense meaning is "the most compelling and coherent account the interpreter can provide". Meaning is ascertained by way of a unitary exercise "making use of the sources of interpretation" (i.e. the triad of text, context, and purpose). The exercise must be undertaken in an open-minded fashion. One must guard against the application of the triad of text, context, and purpose in a mechanical fashion. The interpretative exercise must not be aimed at the rationalisation of a predetermined result. Regard must be had to the relationship between the words, the concepts, or ideas they express, and the place of the contested provision within the whole. Words and language matter. Without them there can be no interpretive exercise. They are the inevitable point of departure. Context is not everything. It is not a licence to attribute a meaning that is untethered to the text and architecture of the document. Finally, one must guard against a meaning that strains the language of the provision and leads to an unbusinesslike and unwieldly result.

---

7 2019 (3) SA 298 (SCA).

8 *ITC 1930* (2019) 82 SATC 271 (C).

[21] So what is the most compelling and coherent account of section 80J, the provision which regulates the procedure that must be followed prior to SARS assessing a taxpayer in terms of the GAAR? First, the provision is peremptory,[9] both in the sense that a GAAR notice must be given, and as regards what a GAAR notice must contain. The GAAR notice must detail the arrangement and explain why SARS holds the view that it is an impermissible avoidance arrangement and this can only be done with reference to section 80A which defines an impermissible tax avoidance agreement. A GAAR notice must also explain what SARS proposes to do where it has determined that there is such an agreement, i.e. what it proposes as a remedy. Here section 80B is the reference point. It is only possible to give content meaning to section 80J(1), by reading it with reference to its immediate statutory context which is, *inter alia*, sections 80A and B.

[22] Turning to the taxpayer's response to a GAAR notice. On receipt of a GAAR notice the taxpayer, in terms of section 80J(2), is given an opportunity to respond. Sections 80J(1) and (2) are linked, as a question and answer are linked. What must be addressed depends on what is said in the GAAR notice. As said, the GAAR notice must set out SARS's understanding of the arrangement and the factual and legal basis for the imposition of the GAAR notice. The GAAR notice must also explain how it proposes the GAAR be applied, i.e. the remedy, for example, which transactions it proposes to disregard and the tax consequence of doing so. The section 80J(2) response must address <u>those</u> aspects. The taxpayer does not have to respond, s/he may elect to remain silent and leave the GAAR notice unanswered. The taxpayer does not have to go beyond a meaningful and sufficiently detailed and substantiated response to the GAAR notice. The purpose of the response is to "submit reasons to the Commissioner why the provisions of this Part should not be applied". While the text is broadly formulated, in my view, it would strain the language of sections 80A, B and J and lead to an unbusinesslike and unwieldy result should it be read to impose an obligation on a taxpayer to go beyond a response to the particular application of the GAAR as formulated in the GAAR notice and explain in general why the GAAR should not be imposed. A GAAR response is also not a response to a request for relevant information as such, although it may well be necessary to provide documentation in order to substantiate the representations.

[23] Once the taxpayer has submitted representations, SARS, in terms of section 80J(3), must either request additional information, withdraw the GAAR notice or issue a GAAR assessment. Those are its three options.

---

[9] *Commissioner for the South African Revenue Service v ABSA Bank Limited and Another* (596/2021) [2023] ZA SCA 125 (29 September 2023) at para 15.

[24] In terms of section 80J(4), SARS, if additional information comes to its knowledge, may at any stage after it has issued a GAAR notice revise or modify its reasons for applying the GAAR or if it withdrew the GAAR notice, issue a new GAAR notice. There is thus a consequence should the taxpayer elect not to respond or be coy in his response to the GAAR notice or withhold material information as a residual uncertainty will remain.

[25] As stated, on 30 July 2020, SARS, having formed a preliminary view that the GAAR was applicable, issued the GAAR notice. In the GAAR notice SARS expressed the view that: (1) the parties' planned and anticipated the Company B repurchase; (2) the Company B repurchase proceeds were intended to flow to the taxpayer and the trust; (3) the taxpayer and the trust anticipated a dividends tax liability arising from the Company B repurchase; and (4) they facilitated a dividend strip in order to contrive a situation where the Company B repurchase dividend would flow to the taxpayer and the trust, where dividends tax liability could be offset by the STC credits. The remedy envisaged was the disregarding of all transactions except for the Company B repurchase and an imposition of dividends' tax and penalties on the taxpayer. SARS had thus, despite everything it had been told in the responses to the requests for relevant information, decided not to believe the taxpayer that the subscription proceeds funded the distribution. As a result, SARS's proposed remedy was not competent in the sense that, if all the transactions except for the Company B repurchase were disregarded, the remedy could not be achieved as the distribution was not funded by the Company B repurchase proceeds. The distribution was funded by the subscription proceeds.

D TAXPAYER'S RESPONSE TO THE GAAR NOTICE

[26] The taxpayer responded to the GAAR notice on 28 September 2020. On the first page of an 18-page document, he flagged the proposed remedy as an issue. Under the heading "Restructure of Taxpayer EJP's affairs", he informed SARS that the distribution was funded by the subscription proceeds. Under the heading "Company E / Company A transaction", he informed SARS that the proceeds of the Company B repurchase were "re-invested by Company D in a different class of shares in Company B (which shares were subsequently exchanged for shares in Company E". Under the heading "SARS's proposed remedy", the taxpayer again flagged the proposed remedy and made it clear that "The step defined by SARS as the 'the dividend step' was undertaken by companies in the Company F stable. Mr Taxpayer EJP had no involvement and was not party to these transactions". He also stated that "The distribution to Mr Taxpayer EJP was therefore not dependent and/or based on the Company B repurchase and neither was it funded by such repurchase". The taxpayer's non-involvement in the Company F transaction was again mentioned in the part of the response dealing with "the sole or main purpose" of the arrangement. As part of the conclusion it was again said that the Company B repurchase proceeds did not flow to the taxpayer and thus that

"the proposed remedy cannot be applied". In the paragraph by paragraph response to the GAAR notice and Annexure "A" similar statements were made.

[27] In my view the taxpayer, in his comprehensive, well-reasoned and substantiated response to the GAAR notice, explained to SARS exactly where it had gone wrong.

[28] After the taxpayer's response to the GAAR notice, SARS again requested additional information, this time in terms of section 80J(3)*(a)*, which is the information gathering provision within the GAAR. The taxpayer responded on 25 January 2021. In his response he explained to SARS that he concluded the call option agreement in order to acquire protection vis-à-vis the Company D shares held by the trust and that the distribution proceeds were used to pay the call option premium to the trust. He also provided a timeline that included an entry that the distribution was funded by the subscription proceeds.

E THE GAAR ASSESSMENT

[29] On 24 February 2021, SARS notified the taxpayer that it was not dissuaded from its findings in the GAAR notice and assessed the taxpayer for dividends tax and penalties as envisaged in the GAAR notice. SARS did so in the face of the information provided to it by the taxpayer in the responses to requests for relevant information and the response to the GAAR notice.

[30] The taxpayer challenged the assessment by way of review proceedings in the Western Cape High Court. The review application was struck from the roll in a judgment delivered on 8 August 2023. As SARS did not agree to pend the objection and appeal proceedings while the review ran its course, the taxpayer objected to the assessment on 25 May 2021, which objection was disallowed on 15 August 2022. The taxpayer filed his appeal on 22 March 2022 and SARS its rule 31 statement on 28 July 2023.

F RULE 31(3)

[31] Rule 31(3) provides that SARS may include in its rule 31 statement a new ground of assessment unless it constitutes a novation of the whole of the factual or legal basis of the disputed assessment or requires the issue of a revised assessment. For reasons that will become apparent, I deal only with the second instance of disqualification, i.e. whether the issue of a revised assessment is required.

[32] An assessment is "the determination of the amount of a tax liability or refund . . . by way of self-assessment by the taxpayer or assessment by SARS".[10] An additional assessment is an assessment referred to in section 92 of the TAA.[11] Section 92 of the TAA provides that: "If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice." The provision thus places an obligation on SARS to issue an additional assessment if it is satisfied that an original assessment does not reflect the correct application of a tax Act which is prejudicial to it (or the fiscus), in order to correct the prejudice.

[33] What is meant by prejudice? Does it mean that an assessment must only be revised if SARS takes the view that the taxpayer should pay more tax or penalties than in the original assessment? Or is the prejudice that the original assessment is faulty (i.e. does not reflect the correct application of a tax Act) and to proceed nonetheless will prejudice SARS in its prosecution of its case? If the former, SARS is not obliged to issue an additional assessment or further revised assessment in terms of section 92 of the TAA, as it does not seek more tax and penalties than it did in the original assessment. If the latter SARS is obliged to do so. However, here we are not dealing with a normal assessment, we are dealing with a GAAR assessment. The question is whether the GAAR procedure requires the issue of a new assessment.

[34] I was referred by the taxpayer's counsel to *ITC 1940*,[12] a case in which the taxpayer brought an interlocutory application to strike out certain averments in SARS's rule 31 statement, on the ground that it set out a different basis for exercising the GAAR powers from that set out in the GAAR notice and the finalisation of audit letter. The taxpayer argued that under the GAAR, SARS's powers did not permit it to broaden its case from that on which was formulated in the GAAR notice and, in the finalisation of audit letter. While the Court ultimately found that SARS had not novated the basis of the disputed assessment, Ndita J observed that: "In my judgment, SARS may, in terms of section 80J(4), revise or modify 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." [Emphasis added] This, the Court found, was in line with the principles of procedural fairness.[13]

---

10 Section 1 of the TAA.
11 Section 1 of the TAA.
12 83 SATC 202. A case in the Cape Town Tax Court heard by Ndita J on 12 November 2020.
13 [70] – [72].

[35] I am in accord with the general proposition that SARS may not broaden its case in its rule 31 statement from that set out in the GAAR notice and assessment, in a manner that negates the taxpayer's right to procedurally fair administrative action as catered for in section 80J(1) to (3).

[36] Section 80J(4) must be read within its immediate statutory context, i.e. section 80J as a whole. Section 80J(1) makes giving of the GAAR notice peremptory and explains what the notice must contain. Section 80J(2) provides the taxpayer with an opportunity to answer the GAAR notice. Section 80J(3)(a) to (c) obliges SARS to do one of three things within 180 days of receipt of the response, i.e. request information, withdraw the GAAR notice, or assess the taxpayer in terms of the GAAR. Section 80J(4) permits SARS to do two things if additional information comes to its notice. It may revise or modify its reasons for applying the GAAR (i.e. revise or modify the underpinning of the assessment), or if it has withdrawn the GAAR notice, issue a new one. Those are the two options and in both cases the jurisdictional fact for the revision or modification for the reasons for applying the GAAR, or the giving of a new GAAR notice, is additional information coming to SARS's notice. In this instance SARS opted to revise or modify its reasons for applying the GAAR in its rule 31 statement, without issuing a new GAAR notice or issuing a new assessment.

[37] The revision of modification of reasons for applying the GAAR, is something different to "a novation of the whole of the factual or legal basis of the disputed assessment". While SARS certainly did revise or modify the reasons for applying the GAAR in its rule 31 statement, it may be argued that its changes did not amount to "a novation of the whole of the factual or legal basis of the disputed assessment". But I do not need to decide whether it was the latter and express no view in that regard.

[38] One reading of section 80J(4), is that absent the receipt of additional information, SARS may not revise or modify its reasons for a GAAR assessment or issue a new GAAR notice at all. However, the Court in *ITC 1940* took a more benign approach where it found that SARS, in the event that additional information comes to its notice, has another bite at the cherry as long as it gives the taxpayer another opportunity to make representations, i.e. issues a new GAAR notice. It is not necessary for me to express a view on this issue (i.e. which approach is correct) as in both instances the jurisdictional fact remains that additional information came to SARS's notice.

[39] Additional "information"[14] is not additional "documentation". Information is "knowledge" or "intelligence" given.[15] In section 1 of the TAA "information" is defined as including "information generated, recorded, sent, received, stored or displayed by any means". In the same provision "document" is defined as "anything that contains a written, sound or pictorial record, or other record of information, whether physical or electronic form". Information is knowledge. A written document or a recording is the repository of knowledge. Information can be generated (i.e. created as statistics are created), recorded (this is self-evident), sent and received (for example by email), stored (for example in a box in an attic or on a hard drive, or displayed (for example on a notice board). None of this detracts from the meaning of additional knowledge. In simple terms SARS must have learnt something new, and it did not. Additional information did not come to SARS's notice, it changed its mind about what it already knew at the time it issued the GAAR notice. Thus, the jurisdictional fact underpinning SARS's right to revise or modify its reasons for applying the GAAR was absent.

[40] Counsel for the taxpayer argued that given the GAAR notice must be sent before SARS exercises its GAAR power, the proper and sensible interpretation of section 80J(4) is that it also can only be applicable and available up to the time that the GAAR power is exercised. I was referred to *CSARS v ABSA Bank Limited*,[16] where it was held that:

> "Once the Commissioner has taken a final decision regarding the application of the GAAR and decided the tax liability and issued an assessment, the prior notice issued to the taxpayer [under section 80J(1)] ceases to have any relevance, save to the extent that its existence evidences the peremptory requirements of section 80J. Its content may be relevant in proceedings consequent upon the issuing of the assessment. Apart from this, the section 80J notice, is overtaken by events. At that stage the taxpayer is faced with a final decision to impose a tax liability by assessment. It must then be dealt with in accordance with the prescribed dispute resolution procedure provided by section 104 of the TAA."

[41] On this basis, it was argued, once a GAAR assessment has been raised, SARS cannot invoke the provisions of section 80J(4) (whose operation is limited to the pre-assessment / audit phase) to justify revisions or modifications to the reasons for exercising the GAAR power. In other words, Section 80J(4) cannot justify introducing a new GAAR assessment through a rule 31 statement, which is a document defending the grounds and basis of that GAAR assessment. I agree. This is not any assessment, it is a GAAR assessment and must comply with the provisions peculiar to the GAAR. To interpret the provisions in question, so as to allow the circumvention of the GAAR provisions would make them inoperative.

---

[14] It must of course be relevant and material.

[15] Chambers, 20th Century Dictionary, New Edition, p. 645.

[16] *Commissioner for the South African Revenue Service v ABSA Bank Limited and Another* (596/2021) [2023] ZA SCA 125 (29 September 2023) at para 22.

[42] SARS argues that the taxpayer's right to *audi alteram partem* is not affected in this instance because the taxpayer has the right to contest an assessment by way of the objection and appeal processes set out in the TAA and the Tax Court Rules. I disagree. The dispute resolution processes under the TAA cannot remedy the failure to permit a taxpayer a statutorily enshrined opportunity to be informed of SARS's proposed intention to apply the GAAR and to address SARS's proposed exercise of its GAAR power before assessment. In my view, this interpretation renders the GAAR notice provisions superfluous.

[43] SARS also argues that since the tax court is a court of revision which may substitute its own decision for that of SARS, the Court may exercise its powers in terms of section 129(2)*(b)* of the TAA to "refashion the remedy in the impugned assessment if it finds that the arrangement is an impermissible avoidance arrangement". This may be so but, in my view the question before me is not what the Tax Court may do, but rather what SARS must do to bring its case to Court in the proper manner. Only once it has done so does the Court gets to consider refashioning a remedy.

G CONCLUSION

[44] In the circumstances I find as follows:

44.1 In the case of a GAAR assessment, there must be compliance with the prescripts of section 80J read with, *inter alia*, sections 80A and B.

44.2 In terms of section 80J(4), SARS may revise or modify its reasons for applying the GAAR in the event of additional information coming to its notice at any stage after the issue of a GAAR notice.

44.3 In this instance additional information did not come to the knowledge of SARS after its issue of the GAAR notice, rather it changed its view as to the cogency of information that it possessed prior to the issue of the GAAR notice and the assessment.

44.4 SARS is thus not permitted to revise or modify its reasons for applying the GAAR at all, or adopting a more benign interpretation, is not permitted to do so without the issue of a new GAAR notice and thereafter a new GAAR assessment.

44.5 Tax Court Rule 31(3) permits SARS to include "a new ground of assessment or basis for the partial allowance or disallowance of the objection unless … the issue of a revised assessment is required".

44.6 The changes SARS seek to introduce in its rule 31 statement require the issue of a new GAAR notice and a new assessment and thus the rule 31 statement constitutes an irregular step which falls to be set aside in terms of High Court Rule 30(1).

[45] In the circumstances I order that:

(1) SARS's rule 31 statement is set aside as an irregular step.

(2) SARS is to pay the taxpayer's costs, including the costs of two counsel.

_____

MYBURGH AJ

Cape Town

24 May 2024

For the appellant: M W Janisch SC and B J Vaughan
instructed by Edward Nathan Sonnenbergs Incorporated

For the respondent: A M Breitenbach SC and D G West
instructed by the State Attorney