REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Case No.: **2024/8**

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

23/05/2025
DATE

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SIGNATURE

In the matter between:

BCJ Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

This judgment is handed down electronically by circulation to the parties' legal representatives' e-mail addresses. The date of hand-down is deemed to be 23 May 2025.

SLINGERS, J

Background

[1] On 1 December 2019, the Sollo Trust issued a negotiable promissory note **("PN")** in the amount of R157 044 048 to Musical Investments (Pty) Ltd. The PN had a payment date of 15 February 2020. On 3 December 2019, Jazzbit (Pty) Ltd and the Rhythmic Family Trust entered into a loan agreement whereby Jazzbit (Pty) Ltd advanced an amount of R160 860 000 to the Rhythmic Family Trust. This loan was signed by the applicant on behalf of both parties thereto. Prior to the loan, Jazzbit (Pty) Ltd was wholly owned by the Rhythmic Family Trust. Jazzbit (Pty) Ltd advanced an amount of R160 862 661 from its existing cash reserves, with an amount of R3 811 861 being paid directly into the bank account of the Rhythmic Family Trust and the balance of R157 043 658 being paid into the account of the applicant. This gave rise to a loan account in terms whereof the applicant owed the Rhythmic Family Trust the amount of R157 043 658.

[2] On 3 December 2019, the Rhythmic Family Trust and Musical Investments (Pty) Ltd entered into a vested right agreement in terms whereof Musical Investments (Pty) Ltd contributed to the Rhythmic Family Trust in the amount of R157 044 408. This amount was settled via the out and out cession of Musical Investments (Pty) Ltd.'s right, title and interest as a holder in the PN. In exchange, Musical Investments (Pty) Ltd became a vested beneficiary of the Rhythmic Family Trust solely in relation to a stipulated amount of income in the amount of R160 860 000 **("the vested amount")** to be paid on 3 December 2019. Once this amount was distributed to Musical Investments (Pty) Ltd, it would cease to be a beneficiary of the Rhythmic Family Trust.

[3] The Rhythmic Family Trust, Choral Investments (Pty) Ltd [is a related party to Musical Investments (Pty) Ltd] and Jazzbit (Pty) Ltd concluded a sale of shares agreement in terms whereof Choral Investments (Pty) Ltd acquired all the shares issued by Jazzbit (Pty) Ltd for the purchase consideration of R160 860 000. This was settled via Choral Investments (Pty) Ltd assuming the liability in respect of the loan agreement concluded between Jazzbit (Pty) Ltd and the Rhythmic Family Trust. The Rhythmic Family Trust approved a distribution to Musical Investments (Pty) Ltd which consisted of R3 816 000 in cash and the PN.

[4] The parties state that a capital gain of R143 321 952 was vested in Musical Investments (Pty) Ltd and arose from the said sale of shares issued by Jazzbit (Pty) Ltd.

[5] The Rhythmic Family Trust approved, but did not pay a distribution of capital in the amount of R157 044 000 to the applicant and the amount owing by the Rhythmic Family Trust was offset against the amount owing by the applicant to the Rhythmic Family Trust.

[6] On 22 June 2023 the Commissioner for the South African Revenue Services **("CSARS")** issued a letter of findings **("LOF")** and a section 80J notice: sale of shares and capital gain for the 2020 year of assessment pertaining to the transactions set out above. The LOF set out a primary basis of assessment as well as an alternative basis of assessment, which was the application of the general anti-avoidance rule **("GAAR").**

[7] Only the alternative assessment based on the GAAR is relevant to this judgment.

[8] The LOF recorded that the provisions of GAAR were applicable because the analysis of the impugned transactions show that the steps and parts thereof constitute an "arrangement" which results in the avoidance of liabilities for dividends tax and/or CGT and is thus an "avoidance arrangement" as defined in section 80L of the Income Tax Act. Furthermore, the avoidance arrangement appears to be an "impermissible avoidance arrangement" as provided for in section 80A.[1] This conclusion was based on:

(i) the sole or main purpose appeared to be the tax benefit;

(ii) it was not carried out in a manner which would normally be employed for *bona fide* business purposes other than obtaining a tax benefit, as contemplated in section 80(*a*)(i);

(iii) it resulted in a significant tax benefit for the applicant (taxpayer) with no significant effect on the business risk or cash flows thereof other than those attributable to the tax benefit, as contemplated in section 80C(1);

(iv) the legal effect, as a whole, differs from the legal form of its steps, as contemplated in section 80C(2)(*a*);

(v) it includes round-trip financing as contemplated in section 80D;

(vi) section 80A(*a*)(ii) of the Income Tax Act, Act 58 of 1962, as amended read with sections 80C(2)(*b*)(ii) and 80E are applicable;

(vii) it involves elements that have the effect of offsetting or cancelling each other as contemplated in section 80C(2)(*b*)(iii); and

(viii) it creates rights and obligations that would not normally be created between persons dealing at arm's length, as contemplated in section 80A(*c*)(i).

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[1] All references to section 80 should be understood as references to section 80 of the Income Tax Act.

[9] On 28 August 2023, the applicant responded to the LOF and the section 80J notice dated 22 June 2023. This letter explicitly states that:

> "The 'general anti-avoidance rule'-related (GAAR-related) matter, dealt with in terms of section 10A to 80 L of the Income Tax Act, 58 of 1962, is addressed in our separate letter relating to the Notice."

The letter goes on to state that:

> "14. The above principal cuts to the heart of the matter: the parties to the arrangements believed that certain commercial, exchange control and tax consequences would flow from entering into certain transactions."

[10] In a separate letter also dated 28 August 2023, the applicant set out his grounds for disagreeing with the section 80J notice. In this letter, the applicant avers that an impermissible avoidance arrangement consists of four elements which must be present before GAAR can be invoked. These four elements are:

(i) the existence of an arrangement

(ii) that has at its sole or main purpose

(iii) to obtain a tax benefit; and

(iv) circumstances that broadly be described as being abnormal.

[11] If the arrangement occurred within the context of business, then the applicable abnormal circumstances would be that the arrangement:

(i) was entered into or carried out in a manner or by means which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or

it lacks commercial substance, either in whole or in part, when the provisions of section 80C are considered.

[12] In addressing the determination of the abnormal circumstances, the letter of 28 August 2023 set out that it is to be objectively determined and that the Commissioner bears the burden to establish that any one of the relevant indicators for abnormality is present. CSARS accepts that it bears an evidential burden.[2]

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[2] See paragraph 3 of CSARS's note in response to the Taxpayer's heads of argument, where it states:

> "We shall assume, purely, for the purposes of argument, but without concession, that CSARS bears an evidential burden in respect of the so-called 'tainted' elements."

[13] The letter of 28 August 2023 further records that it appears that CSARS applied the "abnormality" requirements applicable to an arrangement concluded within a business context. The letter *inter alia* concludes that the Commissioner failed to demonstrate that the arrangement in question occurred in a business context.

[14] On 20 November 2023 CSARS issued a letter of assessment: sale of shares and capital gain **("LOA")** for the 2020 assessment. Although this letter addressed the application of the GAAR, the dominant effect of the arrangement, and the tax benefit of the arrangement, it did not address the allegation that it failed to demonstrate that the arrangement occurred within a business context.

[15] In correspondence dated 26 February 2024, CSARS informed the applicant that it has been advised by a representative of Sollo that no consideration was paid by Musical Investments (Pty) Ltd in respect of the PN, that no payment was made by Sollo in respect of the PN and that the PN was not redeemed but cancelled before the payment date. Choral Investments (Pty) Ltd and Musical Investments (Pty) Ltd failed to file any returns to the transactions and the existence of both entities have been terminated. Furthermore, the applicant was informed that there was no evidence of how the capital gain vested in Musical Investments (Pty) Ltd was treated or that any tax liabilities arose and/or was settled in that regard.

[16] On or about 22 March 2024, the applicant instituted the current application in terms of rule 52(2)(*a*) of the Tax Court Rules wherein the court is asked to determine whether or not CSARS provided an adequate response to the applicant's request for reasons pertaining to why CSARS maintains that the arrangement occurred within a business context.

[17] In correspondence dated 13 May 2024, CSARS reiterated that the finalization of audit letter containing the grounds of assessment were sufficiently detailed to enable the applicant to formulate his objection/s to the assessment. This letter encouraged the applicant to consider the withdrawal of this application and to forthwith lodge his objection/s.

[18] The applicant elected not to withdraw the application. On the contrary he directed correspondence to CSARS dated 2 July 2024 wherein he reiterated that he was entitled to understand why the Commissioner believed the arrangement occurred within a business context.

[19] In response to the letter of 2 July 2024, CSARS directed correspondence to the applicant dated 19 July 2024 wherein it set out reasons why it believed the arrangement lacked commercial substance. The letter once again encouraged the applicant to withdraw his application.

[20] It is common cause that the application was not withdrawn. Consequently, CSARS proceeded to file its answering affidavit. It is CSARS's position that it had provided the applicant with sufficient reasons with which to lodge his objection to the assessment.

Discussion

[21] The applicant's assessment was issued under section 80B(1) of the Income Tax Act and under GAAR. Section 80B provides CSARS with remedies to vary the tax consequences of an 'impermissible avoidance arrangement'. This it did by substantially increasing the applicant's taxable income by including capital gain he allegedly failed to declare.

[22] The substantial increase in the applicant's taxable income aggrieved him which caused him to have recourse to rule 6 of the Tax Rules.[3] Rule 6 provides that a taxpayer who is aggrieved by an assessment, may prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referenced in rule 7.

[23] As seen from the introduction, the applicant sought reasons from CSARS in respect of why CSARS accepted that the arrangement occurred within a business context.

[24] It is the applicant's case that CSARS furnished inadequate reasons and therefore he seeks an order directing it to issue such reasons which would enable him to properly formulate an objection against the assessment issued by it in relation to his 2020 income year of assessment. CSARS avers that it has furnished the applicant with adequate reasons necessary for him to formulate his objection against the assessment.

[25] In accordance with rule 7(2)(*b*), a taxpayer who lodges an objection to an assessment, must set out the grounds of the objection in detail which includes specifying the part or specific amount of the disputed assessment objected to as well as specifying the grounds on which the assessment is disputed. An objection which fails to comply with the requirements of rule 7(2) may be rejected as invalid.

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[3] Any reference to Rules in this judgment is a reference to the Tax Rules.

[26] For reasons to be adequate, it must constitute more than mere conclusions. It should refer to the relevant facts and law as well as the reasoning processes which resulted in the conclusions.[4] Not only should CSARS inform the taxpayer of its decision, but also of the reasons for its decision in a simple manner which does not require the taxpayer to speculate or assume the reasons therefor.[5] These prerequisites for valid reasons are encapsulated in *Ansett Transport Industries (Operations) Pty Ltd & Another v Wraith & Others*[6] and quoted with approval in *Commissioner for South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment*[7] wherein it held that:

> "[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am not in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation."

[27] The reasons furnished by CSARS enabled the applicant to understand:

(i) why it alleges the existence of an "arrangement";

(ii) why it alleges the arrangement yielded a tax benefit; and

(iii) why it alleges that the transactions lacked commercial substance.

[28] However, in responding to the applicant's requests for reasons as to why it found the arrangement to have occurred within a business context, CSARS furnished reasons why it believed the arrangement lacked commercial substance. This was not the issue CSARS was asked to provide reasons for.

[29] It is common cause that the term *'business context'* has not been defined in the Income Tax Act. This common cause fact would, in my view, make it all the more important and necessary for the applicant to understand which facts and/or legal principles and reasoning caused CSARS to conclude that the arrangement occurred within a business context.

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4 *Gavric v Refugee Status Determination Officer and Others* 2019 (1) SA 21 (CC).
5 *Natal Estates Ltd v Secretary for Inland Revenue* 37 SATC 193.
6 (1983) 48 ALR 500 at 507.
7 73 SATC 114.

[30] Section 80A distinguishes between an avoidance arrangement occurring in the context of business and in a context other than business and provides that:

> **"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;"

[31] The personal income tax finalization of audit letter dated 20 November 2023, subsequent letters and replying affidavit sets out:

(i) the impugned transactions had no commercial benefit or exposure;

(ii) the impugned transactions were concluded in a manner that would not attract the potential tax liabilities;

(iii) there are various aspects to the arrangement which do not appear genuine;

(iv) the transactions were simulated in order to allow the Trust to vest the capital gain which should be taxable in its hands;

(v) the transactions constitute an arrangement as defined in section 80L;

(vi) the arrangement in question results in an avoidance of liabilities for dividends tax and/or CGT and is thus an "avoidance arrangement"*;* and

(vii) the avoidance arrangement is an impermissible avoidance arrangement as provided for in section 80A;

(viii) the transactions were not entered into or carried out in a manner which would normally be employed for *bona fide* business purposes other than obtaining a tax benefit, as contemplated in section 80A(*a*)(i); and

(ix) the transactions resulted in a tax benefit as contemplated in section 80C(1).

[32] It is clear that CSARS found that the arrangement was entered into or carried out by means or in a manner which would not normally be employed for bona fide purposes, other than obtaining a tax benefit and that it lacked commercial substance. However, before these findings could occur, CSARS would have to make a preliminary assessment that the arrangement occurred within a business context. This follows from the provisions of section 80A(*a*).

[33] The reasons furnished may enable the applicant to properly object to the assessments that the arrangement was entered into or carried out by means or in a manner which would not normally be employed for bona fide purposes, other than obtaining a tax benefit and that it lacked commercial substance but it does not enable him to object to the preliminary assessment that it occurred within a business context.

[34] It does not follow from the parties to the arrangements' belief that certain commercial, exchange control and tax consequences would flow from entering into certain transactions that this was the basis on which CSARS found the arrangement to have occurred within a business context.

[35] The reasons and explanations furnished by CSARS do not set out why it accepts that the arrangement occurred within a business context. Therefore, when the reasons furnished are measured against the prerequisites for valid reasons as set out in *Gavric* and *Sprigg* it is found lacking.

[36] The assessment letters in a GAAR assessment have a heightened significance. This is because it has been held that an appeal against the GAAR assessment is an appeal against the Commissioner's satisfaction on the facts constituting the necessary components for such an assessment. The Commissioner could not afterwards attempt to justify a GAAR assessment on the basis that he had now satisfied himself on different facts. Therefore, it is important that reasons and reasoning for concluding that the arrangement occurred within a business context be set out before the taxpayer is required to object to the assessment. The Commissioner's right to depart from the grounds given in a letter of GAAR assessment is restricted.[8]

Costs

[37] During the hearing of the application the applicant advised that he was not seeking a punitive costs order.

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8 *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Services and four other cases* [2025] ZACC 2

Conclusion

[38] In the circumstances, I make the following order:

(i) the respondent is directed to properly respond to the paragraph 1.5 of the applicant's request for reasons for the assessment issued in relation to his 2020 year of assessment, within 10 days of receipt of this order; and

(ii) the costs of the application shall be borne by the respondent on a party party scale on Scale C.

SLINGERS, J

23 May 2025

Before the Hon Madam Justice Slingers

Hearing: **14 April 2025**

Judgment Delivered: **23 May 2025**