REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case No.: **IT 24502**

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

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

(3) REVISED.

30 September 2025 _____

DATE SIGNATURE

In the matter between:

MR TAXPAYER G **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

J U D G M E N T

LOOTS AJ

Introduction

[1] The appellant has brought a tax appeal to this court in terms of section 107 of the Tax Administration Act 28 of 2011 ("the TAA"), appealing against the respondent's assessment in respect of his income for the tax periods from 2008 to 2014 (six additional assessments were raised against the appellant on 31 August 2017). These assessments are in respect of the years of assessment 2008, and 2010 to 2014, and total R46 664 500.00.

[2] The above additional assessments followed an investigation that culminated in an audit, following which the respondent issued a notice in terms of section 80J(1) ("the 80J notice") of the Income Tax Act 58 of 1962 ("the ITA"). The section 80J notice included that the respondent intended engaging the provisions of the general anti-avoidance rules ("GAAR") as contained in Part IIA of Chapter III of the ITA which, *inter alia*, empowers the respondent to re- characterise any steps in, or parts of, an impermissible avoidance arrangement where the provisions of the GAAR are met.

[3] The respondent contends that the applicant engaged in a complicated tax-driven scheme, the purpose of which was to create a pool of secondary tax on companies ("STC") credits. The STC credits could be used to offset anticipated STC liabilities arising on future dividend declarations by third-party South African companies that received the dividends from the scheme. The scheme, if successful, so the respondent contends, could be used to create a potentially endless pool of STC credits that could be "sold" (transferred in return for a fee) to South African entities by way of receiving dividends. The purchasers, in turn, would be able to use the STC credits to reduce their anticipated liabilities for STC when in turn declaring dividends to their shareholders, thus reducing their true tax liability.

[4] The respondent, furthermore, advances that the appellant earned substantial compensation for his efforts (totalling the aforementioned R46 664 500.00), but that he did not receive the compensation as taxable income (as would be the case in the ordinary course). Instead, he structured the compensation to be in the form of dividends declared (which created amounts receivable by him) and received by him in the form of payments made against claims that had been transferred tax-free to him.

[5] The scheme the appellant created and implemented as a whole (and the part of the scheme from which he derived the R46 664 500.00) thus, according to the respondent, falls within the web of the provisions of the general anti-avoidance rules ("GAAR") as contained in Part IIA of Chapter III of the ITA.

[6] The appellant disputes that either the arrangements which gave rise to the STC credits in the hands of the external companies, or the arrangements which gave rise to him receiving the funds that are the subject of the reassessment and of the present appeal are impermissible arrangements within the contemplation of the GAAR provisions contained in section 80A to L of the ITA.

The tax regime operable at the relevant time in respect of STC credits

[7] The tax regime in operation at the time of the schemes was as follows:

a. Dividends received were not taxable in the hands of the recipients in terms of section 10(1)(*k*) of the ITA.

b. STC was payable by companies on dividends they declared.

c. In determining the dividends attracting STC, qualifying dividends accrued as receivable by a company (that is dividends declared in favour of the company by another company) were deducted, so that STC was payable on the net of dividends declared by the company less dividends that accrued to the company.

d. Dividends receivable by a company were colloquially referred to as creating an STC credit for the recipient company. If the STC credits were not used by a company, they could be carried forward for later use to offset a future liability for STC.

e. Relevant hereto, foreign companies were not subject to STC.

The general structure of the schemes

[8] In light of the above tax regime, the appellant created a structure that would enable Teea Investments (Pty) Ltd ("Teea") to acquire reserves or companies that had further distributable reserves. The administration and management of the schemes that followed the structure the appellant had created, was done by Skipper Capital Ltd ("Skipper") for which Skipper was remunerated or compensated in the same manner as was the appellant for the design of the structures. Both Skipper and Teea are South African Companies

[9] The appellant contends that the main objective of the schemes was to create distributable reserves in a readily saleable form because Teea would be selling distributable reserves and had to be able to do so fairly easily.

[10] In order to sell distributable reserves fairly easily, the structures the appellant created had to meet certain criteria:

a. there had to be companies that wished to acquire distributable reserves, alternatively companies that needed distributable reserves for the purpose of declaring dividends on preference shares issued by them.

b. the companies that had distributable reserves in which shares were purchased and the companies in the structure that received the incoming dividend from the aforesaid companies met the following five requirements:

    i. they had no liabilities.

    ii. they had no assets other than cash or possibly negotiable instruments or loans to a shareholder, preferably in the form of a promissory note.

    iii. they had no contingent liabilities.

    iv. they had no undisclosed liabilities.

    v. they had no trading history.

[11] The manner in which the appellant achieved the above prerequisites was “to start afresh with a new company”. The reason for this was that, should a new company only ever receive an incoming dividend and nothing else, there could be no undisclosed liabilities, since there would be no trading history.

[12] The same prerequisites applied to companies holding distributable reserves. How Teea was able to source such companies remains shrouded in mystery.

[13] The scheme also had to not fall foul of the provisions section 90 of the Companies Act 61 of 1973 (“the 1973 Companies Act”), and then section 46 of the Companies Act 71 of 2008 (“the 2008 Companies Act”). These sections, in series, contain the liquidity requirements for companies having declared dividends. The risks posed by these sections were overcome by liquidating the company paying the dividend.

[14] Utilising the above principles, the appellant created three schemes (collectively “the schemes”):

a. the Moonsun scheme;

b. the Amber scheme; and

c. the Amazonite scheme.

[15] For them to work, the schemes had the following general features:

a. The company at the bottom of the structure Moonsun Ltd ("Moonsun"), Amber Resources Ltd ("Amber"), and Amazonite Ltd ("Amazonite") had to be foreign companies in a tax exempt jurisdiction (in this case incorporated in the Isle of Man) with large reserves and a loan receivable from a holding company (in respect of the schemes under discussion HER Ltd ("HER") also incorporated in the Isle of Man), so that they were not liable for STC on dividends they declared.

b. Dividends were to be declared in the course of winding up or deregistration of the companies declaring the dividends (failing which they would not qualify for the STC exemption).

c. Next, the shares in Moonsun, Amber or Amazonite had to be acquired by South African companies for no consideration in real terms. This would create reserves in these companies from which dividends could be declared (i.e. distributable reserves). As explored below, this meant that the dividends received from Moonsun, Amber or Amazonite could, in turn, be on-declared to their shareholders and so create the STC credits.

The Moonsun scheme

[16] 13 September 2007 Teea acquired all the issued shares in Anyolite Trading A (Pty) Ltd ("Anyolite A") and Anyolite Trading B (Pty) Ltd ("Anyolite B") as trading stock.

[17] Also on 13 September 2007, on what appears to have been 50/50 basis, Anyolite A and Anyolite B acquired all the issued shares in Anyolite Trading C (Pty) Ltd ("Anyolite C"), as trading stock.

[18] On the same day, Skipper-Sec Securities (Pty) Ltd ("Skipper-Sec") as nominee for the appellant and Skipper subscribed for 5 new ordinary shares in Anyolite C (representing 2% of the issued share capital of Anyolite C).

[19] On 14 September 2007, Anyolite C acquired all the issued shares in Agete Investments (Pty) Ltd ("Agete") (the first tier South African company in the Moonsun scheme as per the general structure of the schemes described above), as trading stock.

[20] On 15 September 2007, Teea acquired 5 ordinary shares in Anyolite C from Skipper-Sec, ex dividend.

[21] On 17 September 2007, Anyolite B acquired 19 ordinary shares in Anyolite C from Anyolite A.

[22] On 10 October 2007 Teea acquired Moonsun Ltd ("Moonsun") from HER for R2 097 741 667.00. The purchase consideration was settled by Teea assuming certain loan obligations owed by HER to Moonsun on the basis that Teea arranged for the shares in Moonsun to be registered in the name of Agete.

[23] Therefore:

a. Agete did not pay for the shares in Moonsun. This created large reserves for Agete (since it had a valuable asset in the form of a receivable which had been donated to it).

b. Moonsun had a large loan receivable from HER and matching reserves.

c. Moonsun was not liable for STC on dividends it declared because it was a foreign company.

d. All of the above transactions took place without the introduction of cash.

[24] Immediately after the acquisition of Moonsun, a Mr Littel ("Littel") and a Mr Stuart ("Stuart") were appointed as directors of Moonsun. Moonsun thus became a resident of South Africa for the purposes of the ITA.

[25] On 11 October 2007, in anticipation of liquidation, Moonsun paid a dividend to its shareholder, Agete, amounting to R2 097 741 667.00 the equivalent to the purchase consideration for Moonsun) through the distribution, *in specie*, of Teea notes B001 to B003.

[26] Once the Moonsun dividend (which did not attract STC) was declared, Moonsun was liquidated.

[27] Because of the provisions of section 64B(3) of the ITA (applicable at the time) (which, in calculating its net amount for STC purposes, allowed a taxpayer to deduct dividends contemplated in section 64B(5)(*c*) of the ITA (applicable at the time)), Agete's receipt of the Teea notes B001 to B003 created STC credits its hands.

[28] On 15 October 2007, in anticipation of its own liquidation, Agete paid a dividend to Anyolite C, again *in specie*, by distributing the Teea notes B001 to B003 to Anyolite C. Agete was thereafter also liquidated. Through this process STC credits were created in the hands of Anyolite C.

[29] On 16 October 2007, Anyolite C requested Teea to split notes B001 to B003, thereafter declaring and paying a similar dividend, *in specie*, to:

a. Anyolite A (Teea note B004 amounting to R688 059 266.67);

b. Anyolite B (Teea notes B002 and B005 amounting to R1 325 772 733.33); and

c. to Skipper-Sec, as nominee of Skipper and the appellant, (Teea note B003 amounting to R83 909 666.67).

[30] As before, the dividends received from Anyolite C created STC credits in the hands of Anyolite A, Anyolite B, and Skipper-Sec (who received the dividend because its shares had been sold to Teea, ex dividend).

[31] Teea note B003 translated to R41 954 833.34 for the appellant and an equal amount to Skipper.

[32] On 7 February 2008, Teea note B003 was transferred to Teea in terms of an agreement concluded between Teea and the appellant; and Teea and Skipper, respectively. In terms of this agreement (the "2008 Agreement") the appellant agreed to accept the following in full and final settlement of his claim against Teea (following the dividend from Anyolite C):

a. All rights in and to 50% of the net proceeds that may accrue to Teea in the form of dividends or otherwise from Anyolite A and Anyolite B and any company or companies in which shares of any sort are acquired, directly or indirectly, by Teea on or after 7 February 2008.

b. All rights in and to 50% of any net proceeds that may accrue to Teea from the direct or indirect disposal or encumbrance of any of the shares held by Teea in the companies referred to in the immediately preceding paragraph (including by way of the granting of an option or similar rights over these shares or by way of an arrangement that reduces the value of these shares).

[33] Over the relevant years of assessment Teea paid the appellant R23 690 750.00 in terms of 2008 Agreement.

The Amazonite scheme

[34] On 17 November 2009, Teea acquired all the issued shares in Ametrine Moon Trading X (Pty) Ltd ("Ametrine X"), Ametrine Moon Trading Y (Pty) Ltd ("Ametrine Y") and Ametrine Moon Trading Z (Pty) Ltd ("Ametrine Z") (collectively the "the Ametrine companies"), said to be acquired as trading stock.

[35] On 14 July 2011, the Ametrine companies acquired 118 shares in MRP Holdings (Pty) Ltd ("MRP") (the first tier South African Company in the Amazonite scheme), said to be acquired as trading stock, and Skipper-Sec acquired 2 shares in MRP, holding these as nominee for the benefit of Skipper and the appellant.

[36] On 20 July 2011 Teea acquired Amazonite Ltd ("Amazonite"), from HER, for the purchase consideration of R5 301 900 000.00.

[37] As was the case with Moonsun, on paper, Amazonite had a vast loan receivable from HER and matching vast reserves. It was also not liable for STC on dividends it declared because, as with Moonsun, it was a foreign company.

[38] Teea again paid the purchase consideration assuming certain loan obligations of HER to Amazonite on the basis that Teea arranged for the shares in Amazonite to be registered in the name MRP. MRP did not pay for the shares in Amazonite. This created vast profits and thus reserves for MRP as, again on paper, it had an asset in the form of a receivable of billions of Rands, which it had received for no consideration, since the asset had been donated to MRP.

[39] Teea issued four promissory notes for the purchase consideration of Amazonite, as follows:

a. Teea Note TI-D00l for R1 237 110 000;

b. Teea Note TI-D002 for R2 164 942 500;

c. Teea Note TI-D003 for R1 811 482 500; and

d. Teea Note TI-D004 for R88 365 000 ("the Amazonite notes").

[40] On 22 July 2011, Amazonite paid a dividend to MRP (Amazonite's shareholder) equal to the aforementioned purchase consideration for Amazonite. This was done by distributing the Amazonite notes, *in specie*. The Amazonite dividend did not attract STC.

[41] Because of the repeal of section 65B(5)(*c*) of the ITA by the time of the implementation of the Amazonite scheme, in contradistinction to the Moonsun and Amber schemes, Amazonite declared a dividend before becoming a South African resident.

[42] Following the declaration of the dividend, Littel and Stuart were appointed as directors of Amazonite, causing Amazonite to become a resident of South Africa (for purposes of the ITA) and making Amazonite subject to income tax and STC.

[43] Again, in keeping with the general attributes of the schemes, after the Amazonite dividend was declared, Amazonite was liquidated.

[44] MRP received the Amazonite dividend amounting to the Amazonite purchase consideration (in the form of the Amazonite notes) and this created STC credits in the hands of MRP. The incoming dividend ranked for deduction in MRP and the outgoing dividend was subject to STC, but the net amount was zero and the net result was the companies could declare dividends without having to pay STC.

[45] On 22 July 2011, MRP paid a dividend to its shareholders, in specie, as follows:

a. Teea notes TI-D001, Teea Note TI-D002, and Teea Note TI-D003, totalling R5 213 535 000, to the Ametrine X, Ametrine Y and Ametrine Z; and

b. Teea Note TI-D004 to Skipper-Sec as nominee for Skipper and the appellant.

[46] Following the declaration of the dividend MRP was liquidated. The MRP outgoing dividend paid to the Ametrine companies and Skipper-Sec created STC credits in the hands of these receiving companies, who could each declare a dividend equal to the dividend received without attracting STC.

[47] Skipper-Sec received the equivalent of R88 365 000. The appellant's 50% interest in Skipper-Sec amounted to R44 182 500.

[48] On 25 July 2011, Teea Note TI-D004 was transferred to Teea in terms of an agreement concluded between:

a. Teea and the appellant; and

b. Teea and Skipper ("the 2011 Agreement").

[49] In terms of this agreement, in exchange for the promissory note, the appellant agreed to accept the following in full and final settlement of his claim against Teea:

a. All rights in and to 50% of the net proceeds that may accrue to Teea in the form of dividends or otherwise from Ametrine X, Ametrine Y, Ametrine Z and any company or companies in which shares of any sort are acquired, directly or indirectly by Teea on or after 25 July 2011; and

b. All rights in and to 50% of any net proceeds that may accrue to Teea from the direct or indirect disposal or encumbrance of any of the shares held by Teea in the companies referred to in the immediately preceding paragraph, (including by way of the granting of an option or similar rights over these shares or by way of an arrangement which reduces the value of these shares).

[50] Over the relevant years of assessment Teea paid the appellant R22 740 585.00 in terms of the 2011 Agreement.

The Amber scheme

[51] Since the Amber scheme did not lead to additional assessments on which this court needs to pronounce, it will only be briefly discussed insofar as it may be relevant for the present proceedings.

[52] Amber was set up in a similar manner to the Moonsun scheme in 2008. However, the appellant did not obtain shares in Skavoc Investments (Pty) Ltd ("Skavoc"), being the company in the comparable position to MRP.

[53] The reason the appellant advanced for this was that there was only a 1.6% margin on the Anyolite A and Anyolite B transaction and the appellant suggested to Teea that Teea could implement the Moonsun structure with Amber without the appellant sharing in the structure in the manners contemplated by the Moonsun and Amazonite schemes. This, the appellant testified, was in an attempt to allow Teea to acquire further reserves and thereby meet their obligations to him.

[54] Therefore, in contradistinction to the Moonsun and Amazonite schemes, although the appellant was ultimately compensated from the Amber scheme, it was not through a dividend, but rather payment in terms of the aforementioned 2008 Agreement (concluded with Teea) by Andesine Trading OPQ (Pty) Ltd ("Andesine OPQ").

Realising the schemes

[55] Although, as will become evident further down in this judgment, this court is primarily concerned with the part of the schemes which led to the appellant receiving the tax-exempt dividends from Anyolite C and MRP, as with the Amber scheme, an overview of the realisation of the complete schemes (including the part which leads to the appellant's gains) serves to complete the picture.

[56] Anyolite A, Anyolite B, Ametrine X, Ametrine Y, Ametrine Z, and Andesine OPQ entered into arrangements with external companies (i.e. the end users not part of the structures created) to enable these companies to use the STC credits created.

[57] Following debate between the applicant and the respondent's counsel, and notwithstanding the applicant in certain respects wishing to characterise the elements of the structure differently, in my view the below representation fairly represents the implementation of the schemes in simplified terms. Because the external companies are not before the court, and the essence of the schemes is the same from this point on, I will record the execution of the Moonsun scheme in nominal amounts (centred around R100.00), through Anyolite A, with the final user (Teea's customers) simply being referred to as "the external company". Thus, in this example:

a. In the Moonsun scheme, representing the first time that cash would be introduced into the scheme, the external company would buy a specific class of shares in Anyolite A, from Teea for cash of R102.00;

b. Teea would immediately repay R100.00 to Anyolite A.

c. Anyolite A would immediately declare a dividend to the external company of R100.00.

d. Apart from the dividend declared to the external company, the shares held by the external company (according to the external company's share class) would have no entitlement to any value from Anyolite A. This results in the external company's investment in Anyolite A, immediately upon the dividend declaration, being worth nothing.

e. The external company would claim an STC credit of R100.00 based on the dividends received.

f. With the STC rate at the time being 10%, the external company would avoid STC of R10 (being STC credit of R100.00 multiplied by the STC rate) when the external company declared its own dividends.

g. From a cash flow perspective, the external company would save a net cash amount of R8.00, calculated by deducting the R102.00 the external company paid for the shares from the R100.00 dividend and the R10.00 STC saving.

h. Having received R102.00 from the external company as an investment, but having immediately distributed a R100.00 dividend to the external company, Teea would make a cash gain of R2.00.

i. Teea's R2.00 gain was, in essence, the fee the external company paid.

[58] Thereafter, in respect of the Moonsun scheme (but equally applicable in principle to the Amazonite scheme), this R2.00 gain would be distributed up the line through the structures as an STC free dividend until the appellant received his share, again STC free and tax-exempt.

[59] The result of the implementation of the scheme was that the dividends declared from Moonsun, gave rise to STC credits that flowed up the structure through successive dividends, leading thereto that no STC was payable at any level in any of the South African companies on the dividends declared.

[60] The dividends the appellant received from Anyolite C would be tax-free in his hands. These dividends (in the form of his share in the promissory notes) were settled by the receipt of rights against Teea, which ultimately allowed him to claim his portion of the gain Teea had made.

[61] Having set out the structures of the schemes and the method by which the appellant derived the benefit from the implementation of the schemes he created with considerable effort, I now turn to the GAAR and its application on the facts that served before us.

The application of the GAAR

[62] As stated earlier in this judgment, sections 80A to 80L of the ITA contain the GAAR.

[63] As per *Commissioner for the South African Revenue Service v Absa Bank Limited and Another* 2024 (1) SA 361 (SCA) the GAAR addresses taxpayer arrangements that have the effect of conferring a tax benefit to the taxpayer through the impermissible avoidance of a tax liability that would otherwise accrue.

[64] As has been set out repeatedly, including in, *Commissioner for South African Revenue Service v Knuth And Industrial Mouldings (Pty)* Ltd 62 SATC 65 (at page 74) and *Commissioner for South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) (at paragraph 42), tax avoidance is permissible in that taxpayers are free to structure their affairs so that they pay the minimum amount of tax for which they are liable. They may, however, not evade or impermissibly avoid tax.

[65] It is with the impermissible avoidance of tax with which the GAAR concerns itself.

[66] Thus, within the confines of the provisions of sections 80A to 80L of the ITA, the provisions of the GAAR confer upon the respondent the authority to investigate transactions and to raise additional assessments to counteract the consequences of impermissible avoidance arrangements.

The respondent's case

[67] The respondent contends that the appellant was not only party to, but the creator of, several impermissible avoidance arrangements as contemplated in section 80A of the ITA.

[68] In the respondent's Statement of Grounds of Assessment in terms of Rule 31 of the Rules issued under section 103 of the Tax Administration Act 28 of 2011 ("the Rule 31 Statement" and "the TAA"), echoing the section 80J Notice, the respondent describes the arrangements as they pertain to the appellant as follows:

> "53. As stated previously, the Commissioner contends that all of the transactions, their constituent parts and the cash flows described above constitute an impermissible avoidance arrangement for the purposes of Part IIA of the IT Act.
>
> 54. The "arrangement" or "arrangements" consist of the following:
>
> 54.1. The transactions between Teea, its subsidiaries and the Isle of Man companies, giving rise to certain Teea subsidiaries holding promissory notes by Teea;
>
> 54.2. The declaration of certain Teea promissory notes to [the appellant] (described in detail in paragraphs 37 to 42 above);
>
> 54.3. The "settlement" of the promissory notes held by {the appellant} via Teea becoming obliged to pay those parties the net income from specific transactions involving specific Teea subsidiaries (described in paragraphs 37 to 42, above);
>
> 54.4. in each case following a sale by Teea, the payment by Teea of amounts to [the appellant] for services rendered.
>
> 55. 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 together, constitutes a scheme.
>
> 56. Each arrangement was entered into to obtain a tax benefit, is in any event presumed in terms of section 80G to have been entered into to obtain a tax benefit, and factually resulted in a tax "benefit" for [the appellant] in that (by virtue of the way that the arrangements were structured, including the tax/accounting treatment adopted by Teea) the fee amounts paid by the counterparties flowed in part to [the appellant] without South African income tax or STC being levied at any stage."

[69] This the respondent says is so, because:

a. the avoidance arrangements' sole or main purpose was to obtain a tax benefit, both in the hands of the above referred external companies (Teea's customers) and in the appellant's hands.

b. the avoidance arrangements in fact gave rise to tax benefits in the hands of the above referred external companies and in the hands of the appellant.

c. the avoidance arrangements, as contemplated by section 80A of the ITA were, in the context of business, entered 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.

d. the avoidance arrangements lacked commercial substance, taking into account the provisions of section 80C of the ITA.

The appellant's case

[70] The appellant, on the other hand, contends that what was termed the Teea arrangements, did not result in any "tax benefits" and for that reason alone, did not constitute avoidance arrangements as defined in section 80L of the ITA.

[71] In addition the appellant contends that the Teea arrangements did not have, as their sole or main purpose, the obtaining of a tax benefit or benefits and, therefore, did not constitute impermissible tax avoidance arrangements within the meaning of section 80A of the ITA.

[72] The Teea arrangements were, so the appellant contends, not 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.

[73] They did not lack commercial substance, in whole or in part.

[74] They did not create rights or obligations that would not normally be created between persons dealing at arm's length.

[75] They, therefore, are not susceptible to the application of the GAAR.

An arrangement

[76] Section 80L of the ITA 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"

[77] In paragraph 65 of the section 80J notice the respondent identified the "arrangement" or "arrangements" to be:

a. the transactions between Teea, its subsidiaries and the Isle of Man companies, giving rise to certain Teea subsidiaries holding promissory notes issued by Teea;

b. the declaration of certain Teea promissory notes to the appellant;

c. the "settlement" of the promissory notes held by the appellant via Teea becoming obliged to pay those parties the net income from specific transactions involving specific Teea subsidiaries; and

d. in each case following a sale by Teea, the payment by Teea of amounts to the appellant.

[78] Thus, the Rule 31 statement sets out the "steps" of an "arrangement" that constitute the scheme as:

> "…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 together, constitutes a scheme".

[79] The Moonsun scheme and the Amazonite scheme is alleged to each comprise "an arrangement" followed by the allegation that "each arrangement factually resulted in a "tax benefit" for [the appellant]…".

[80] In respect of the appellant specifically, the respondent advances that the appellant received payment from Teea of amounts that gave rise to the tax benefit because he structured the schemes in such a way that he was due to be remunerated in the form of tax-exempt dividends rather than taxable income. In reality, so the respondent contends, the appellant did not receive a dividend at all, he received payment of his fee in terms of the aforementioned 2008 and 2011 Agreements, which gave rise to rights against Teea in settlement of the promissory notes that were the subject of these dividends.

[81] The respondent, accordingly, urges this court to find that the appellant designed the Moonsun and Amazonite schemes to both create STC credits and to obtain a tax benefit not only for the Teea customers, but also by creating STC credits and to obtain a tax benefit for himself by being remunerated in the form of tax-exempt dividends.

[82] I am satisfied that the schemes and their steps constitute arrangements as defined by section 80L of the ITA.

Did the appellant obtain a tax benefit?

[83] Section 1 of the ITA defines a "tax benefit" to include "any avoidance, postponement or reduction of any liability for tax", with section 80L of the ITA defining an avoidance arrangement as "any arrangement that, but for this Part, results in a tax benefit".

[84] In *Smith v CIR* 1964 (1) SA 324 (A*)* at 333 E-G, the court held that:

> "[t]he ordinary, natural meaning of avoiding liability for a tax on income is to get out of the way of, escape or prevent an anticipated liability . . ."

[85] In ***Hicklin v CIR*** *41 SATC 179*, the court found that an "anticipated liability" for tax need not be a certain liability but may be a vague, remote possibility considered by the taxpayer.

[86] Citing, *inter alia*, *Smith* and *Hicklin*, the appellant argues that a tax benefit exists only if an anticipated tax liability before a transaction (which will not be affected if the transaction is not implemented) is postponed, reduced or avoided by the transaction in question.

[87] In support of this contention the appellant further cites the following passage from paragraph 88 of *Sasol Oil Proprietary Limited v CSARS [2019] 1 All SA 106 (SCA)* decided with reference to the repealed section 103 of the ITA:

> "If the parties had not entered into the impugned transactions, would Sasol Oil have had a liability for tax that it avoided, or escaped from, by entering into them?"

[88] The appellant, as was the case with the majority in Sasol Oil, answers this question in the negative and, therefore, argues that because the Moonsun and Amazonite schemes were offered to Teea on a "take it or leave it" basis, he could not anticipate, and did not face, a tax liability before the transactions were entered into.

[89] Because of their structure, as seen above, the appellant also did not face any tax liability when the Moonsun and Amazonite schemes were executed. Under these circumstances, the appellant argues that there can be no avoidance, postponement or reduction of a liability for tax that never existed and, therefore, no tax benefit.

[90] The test the appellant, therefore, champions in the present instance is one where the transaction which took place is compared to no transaction at all.

[91] If this test is compared to *Sasol Oil*, one sees that *Sasol Oil* is not authority for the appellant's proposition. The context to the above quoted extract from paragraph [88] of the judgment is provided by what went before it and what came after it, which was this:

> "[88] Sasol Oil argues that the impugned transactions must, in order to fall foul of s 103(1), have the effect of getting out of the way of, escaping or preventing, an anticipated tax liability (*Smith v CIR* 1964 (1) SA 324 (A) at 333E and *Hicklin v SIR* 1980 (1) SA 481 (A) at 492H). Thus it must have anticipated liability for tax, which it avoided through the impugned transactions. *If the parties had not entered into the impugned transactions, would Sasol Oil have had a liability for tax that it avoided, or escaped from, by entering into them?*
>
> [89] In answering this question one must determine what liability for tax Sasol Oil had avoided by entering into the impugned transactions. The Commissioner stated in his Rule 10 Statement that the impugned transactions 'had the effect of avoiding liability for the payment of tax imposed' under the Act. This was because if the oil had been sold to Sasol Oil by SOIL, the amounts received by or accrued to SOIL from such sales would have been included in determining the net income of SOIL for the purposes of s 9D. Such inclusions would have resulted, in terms of 9D(2), in amounts being included in the income of Sasol Oil for the 2005 year of assessment.
>
> [90] Sasol Oil points out that this proposition is flawed: after the conclusion of the impugned transactions, the controlled foreign company in the Isle of Man was STI; STI was wholly owned by SIH; STI did not sell oil to Sasol Oil directly; even if it had, STI's net income would not have been included in Sasol Oil's income. This is because the shares in STI were held by SIH. Thus Sasol Oil did not have any participation rights in STI. Accordingly, it was not obliged to include the net income of STI in its income for income tax purposes. In addition, Sasol Oil argues, the foreign business exclusion applied.

> [91] In July 2001, when the supply chain including SISL was created, Sasol Oil had no anticipated liability for tax based on the application of s 9D. This did not change in 2004 when SOIL was incorporated and took over the procurement function. There was never an intention that SOIL would have sold crude oil to Sasol Oil, and the Commissioner did not prove that there was. If Sasol Oil had done nothing to avoid an anticipated tax liability it would still have not had a tax liability as a result of the application of s 9D. There was no imminent tax liability in respect of SOIL's income anticipated in 2001. And of course there was no evidence as to what was contemplated by the Sasol Group in relation to its restructuring that resulted from the adoption of the Liquid Fuels Charter: we do not know who conceived of the change of shareholding between 2001 and 2004 and how that was implemented."

(Emphasis, in italics, added)

[92] *Sasol Oil* is authority for the proposition that, when a taxpayer is faced with a choice between changing its *modus operandi* in achieving its aim, or continuing on its present course to achieve its aim, and none of these choices leads to any anticipated avoidance, postponement or reduction of any liability for tax, then the taxpayer can say that there was no tax benefit.

[93] Contrary to what appears from the above extract from *Sasol Oil*, where no course adopted to achieve Sasol Oil's aims would have resulted in an anticipated tax liability for Sasol Oil, in the present instance the appellant does not postulate two ways of achieving his aim to derive compensation from the implementation of the scheme he had created and in respect of which he testified that:

> "Now, as far as I was concerned, I selfishly thought that I am expending a lot of time, and I hope expertise on doing this, and I need to protect my own interests, because otherwise I could be faced with a situation where I develop the structure, Teea or anybody else uses it, and I get no compensation for that."

[94] What the appellant postulates is that he would rather have shelved the scheme and not have been compensated for his efforts at all, than considering an alternative to the present method of him deriving compensation for his time, expertise, and efforts in the form of tax-exempt dividends. Not only do I find this inherently improbable, but if one were to compare the impugned transaction to the comparator of no transaction at all, as the appellant contends, most tax avoidance transactions would escape the reach of the GAAR. This would not only lead to an incorrect, but also an absurd result.

[95] I, therefore, agree with counsel for the respondent that this extreme "but for" test the appellant postulates is the wrong test to determine, for purposes of the GAAR, whether or not an impugned transaction results in the avoidance of tax.

[96] The correct question to ask when considering whether a taxpayer has had a tax benefit, in my view, is that: But for the transaction being structured in a way which avoids the imposition of tax, would the taxpayer have incurred a tax liability? If the taxpayer would have incurred a tax liability, then, quite clearly, it achieved a tax benefit as a result of the transaction.

[97] As the Court of Final Appeal of the Hong Kong Special Administrative Region in *CIR v Tai Hing Cotton Mill (Development) Ltd* (2007-08) Vol 22 IRBRD 2/2007, at paragraph 14, per Lord Hoffman NPJ, stated in reference to section 61A of the Inland Revenue Ordinance, Cap. 112, which represents the GAAR in that jurisdiction:

> "In my opinion however, s.61A raises a straightforward question of causation and comparison. If the effect of the transaction is that your liability to tax is less than it would have been on some other appropriate hypothesis, you have had a tax benefit. Provided that the calculation is properly done, the section is not concerned with how the elements of the calculation are categorised for other purposes of tax law."

[98] In the present case, therefore, the "tax benefit" enquiry requires a comparison, on the one hand of the tax liability that the appellant would have faced if the amounts were paid to him directly as a fee, commission, or sale price and, on the other hand, of the tax liability the appellant faced under the present arrangement in terms of which he received tax-exempt dividends (and subsequent tax-exempt payments in terms of the aforementioned 2008 and 2011 Agreements).

[99] Viewed in this light, the tax benefit to the appellant is evident.

The purpose test

[100] Having established that the appellant did receive a tax benefit and, because section 80A of the ITA requires that the avoidance arrangement must, as a *sine qua non*, have as its sole or main purpose the obtaining of a tax benefit, in the absence of which the GAAR will not be applicable (irrespective of whether the arrangement gave rise to a tax benefit), the focus of the enquiry next turns to whether the Moonsun and Amazonite schemes (or any part thereof) had as their sole or main purpose the obtaining of the tax benefit the appellant had derived from their implementation.

[101] In order to escape the GAAR, what the taxpayer receiving the benefit is required to prove was confirmed by the Supreme Court of Appeal in *CSARS v Absa, supra*, at paragraph 14, as follows:

> "Section 80G(1) provides that an avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit. A party obtaining a tax benefit is required to prove that, in the light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement. Subsection (2) provides that the purpose of a step in or part of an avoidance arrangement may be different from a purpose attributable to the arrangement as a whole. In terms of s 80H, the Commissioner may apply the GAAR provisions to steps in or parts of an arrangement."

[102] In terms of the purpose test contained in section 80G of the ITA, an avoidance arrangement is, therefore, presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit, unless the party obtaining a tax benefit proves otherwise.

[103] The party obtaining that tax benefit may rebut that presumption by proving that "reasonably considered in light of the relevant facts and circumstances" obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.

[104] The appellant, therefore, bears the onus of proving that the sole or main purpose of the arrangement was not to obtain a tax benefit.

Is the purpose test subjective or objective?

[105] Since the advent of what has come to be termed the new GAAR, there has been much debate about whether the purpose test is subjective or objective.

[106] In *Secretary for Inland Revenue v Gallagher 1978 (2) SA 463 (A)* at 471B, the court drew the distinction between an objective and a subjective test, as follows:

> "By an objective test in this context is evidently meant a test which has regard rather to the effect of the scheme, objectively viewed, as opposed to a "subjective" test which takes as its criterion the purpose which those carrying out the scheme intend to achieve by means of the scheme."

And at 471B-D that, in the context of section 103(1) of the ITA:

> "By an objective test in this context is evidently meant a test which has regard rather to the effect of the scheme, objectively viewed, as opposed to a 'subjective' test which takes as its criterion the purpose which those carrying out the scheme intend to achieve by means of the scheme. Although appellant's counsel did not press this submission in argument before us, he did not abandon it. In the circumstances it is appropriate to state that, in my view, the test is undoubtedly a subjective one. This was obviously the view of Oglivie Thompson CJ when he delivered the judgment of this Court in Secretary for Inland *Revenue v Geustyn, Forsyth and Joubert* (*supra* at 576G–H); and in *Glen Anil Development Corporation v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 730H Botha JA, relying on Geustyn's case, also adopted a subjective test in applying the analogous provisions of s 103(2) of the Act. Section 103 (1) draws a clear distinction between the "effect" of a scheme and the 'purpose' thereof . . . and this virtually rules out an interpretation which seeks to give 'purpose" an objective connotation and to equate it, more or less, to "effect'."

Before concluding, at 471E, that:

> "If the subjective approach be adopted (as it must) then it is obvious that of prime importance in determining the purpose of the scheme would be the evidence of the respondent, the progenitor of the scheme, as to why it was carried out."

[107] Recently, in *CSARS v Absa, supra,* at paragraph 32, in which the court referred to paragraph 12 of *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) 1999 (4) SA 1149 (SCA)*, the Supreme Court of Appeal stated:

> "In *CIR v Conhage* this court held that the effect, purpose and normality of a transaction are essentially questions of fact. What must be determined in every case is the subjective purpose of the taxpayer. In that matter the court was dealing with s 103(1) of the ITA which contained an anti-avoidance provision predating the comprehensive GAAR provisions now set out in the ITA. Nevertheless, similar considerations relating to the determination of the purpose and effect of the transaction or arrangement applied."

(Footnotes redacted)

[108] In his heads of argument, the appellant contended for the subjective test, subject to the provisions of section 80G of the ITA. In argument the appellant agreed with the respondent that section 80A, read with section 80G of the ITA calls for "a more objective test".

[109] That the wording of section 80A signifies a break from purpose test applied in respect of the now repealed section 103(1) of the ITA, also appears from the following extract from Silke on South African Income Tax*, Lexis Nexis, Electronic Edition* ("Silke"), at paragraph 19.38:

> "The most radical way in which the new GAAR in Part IIA of Chapter III of the Act breaks ranks with the previous GAAR, contained in the now-repealed s 103(1), is that the opening words of s 80A herald a concept of purpose that is determined objectively, not subjectively. In other words, the requisite purpose is that of the 'arrangement' itself, and not the subjective purpose of the taxpayers who entered into it."

[110] The Draft Comprehensive Guide to the General Anti-Avoidance Rule (13 December 2010, p 21) although stating that section 80A, in terms, shifts the emphasis from the taxpayer's purpose to that of the arrangement, holds that evidence of the taxpayer's subjective purpose is not excluded, and must be taken into account together with the relevant facts and circumstances contemplated in section 80G, to create a "more objective standard".

[111] Although there was ultimately no dispute between the parties, I will nevertheless, for the sake of completeness summarise the respondent's arguments, these being that:

a. section 80A of the ITA does not envisage a subjective "purpose test". In this regard:

   i. First, echoing Silke, there is an intended and distinct difference between the now-repealed section 103(1) and section 80A of the ITA. Section 103(1) referred to the subjective purpose of the taxpayer in entering the transaction, operation or scheme, whereas section 80A refers to the purpose of the avoidance arrangement itself as opposed to the purpose of the parties in entering or carrying on the avoidance arrangement. The difference signifies a move towards an objective "purpose test" and away from a purely subjective test, where the taxpayer's *ipse dixit* was accepted as evidence of purpose as long as it was justified having regard to the established facts.

   ii. As stated earlier, as recorded in the Draft Comprehensive Guide to the General Anti-Avoidance Rule (13 December 2010, p 21), section 80A, in terms, shifts the emphasis from the taxpayer's purpose to that of the arrangement. Evidence of the taxpayer's subjective purpose is not excluded, but it must be taken into account together with the relevant facts and circumstances contemplated in section 80G to create a "more objective standard".

   iii. Under section 80G(1) an 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 the tax benefit proves that, reasonably considered in the light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement. Here too, the emphasis is on objective considerations.

[112] To the above I might add that:

a. it appears that a major weakness in section 103(1) of the ITA was that the application of the subjective test could, for example, lead thereto that two taxpayers who had separately entered into two identical transactions with the same external features and the same fiscal consequences, would be treated differently in terms of section 103(1) because the one taxpayer had the subjective purpose required by section 103(1) and the other did not. Or, as was articulated in *Hicklin v CIR*:

> "Thus, what may be normal because of the presence of circumstances surrounding the entering into or carrying out of an agreement in one case, may be abnormal in an agreement of the same nature in another case because of the absence of such circumstances."

b. it is generally accepted that the legislator changes wording of a provision for a reason. It is therefore unlikely that the change in wording between the repealed section 103(1) and section 80A was coincidental rather than a deliberate change to address a perceived issue with the wording as it stood.

c. The extract from *Absa Bank*, above, does not signify a purely objective test which, as is pointed out in Silke, also at paragraph 19.38, would have entailed that the *ipse dixit* of the taxpayer would have had little or no value.

[113] In the premises, while in the present matter, for the reasons set out below, a shift in emphasis in respect of the purpose test, would not alter the outcome, I agree with the parties that it does appear that there has been a shift to a more objective purpose test to determine the sole or main purpose of the avoidance arrangement. It would, therefore, appear that the correct way to determine the purpose of the arrangement is to view the arrangement holistically, taking all relevant facts and circumstances into account. Thus to include a definite shift in the weight afforded to the factors previously considered under section 103, and a definite shift away from the subjective purpose of the taxpayer being paramount to the objective purpose of the arrangement (while retaining, as one of the factors, the stated subjective purpose of the taxpayer).

Was the sole or main purpose of the arrangements the obtaining of a tax benefit?

[114] As appears from what is said earlier in this judgment, the respondent's contentions in regard to whether the sole or main purpose of the arrangement was to obtain a tax benefit rests on two legs:

a. First, the respondent advances that the real (or at least the main) purpose of the schemes was to create and sell STC credits.

b. Secondly, the respondent advances that the appellant dressed up his fee (which would otherwise have been subject to income tax) as the proceeds of a tax-exempt dividend.

[115] It is with the second leg that this court needs to engage primarily, given that the appellant (as the taxpayer) received the tax-exempt dividend which the respondent has reclassified as taxable income pursuant thereto. However, before turning to the appellant's compensation, I will briefly address the first leg advanced above.

The sale of STC credits / distributable reserves

[116] The appellant contends that the purpose of the structure of schemes is the generation and sale of distributable reserves for the possible use by companies to offset STC on dividends they declared. This could for example have been used (through the issue of preference shares to the financiers) to raise finance for these companies at rates better than that which they would have obtained through direct loan finance. This is why the margins alluded to above (especially in respect of the Amber scheme) was important and relatively tight, as the benefit of obtaining distributable reserves had to, for example, outweigh the benefit of obtaining finance through a traditional loan.

[117] The respondent thereagainst advances that the sole or main purpose for the schemes was to generate STC credits through which the Teea customers, and the appellant himself, obtained a tax benefit. The scheme was structured so that STC credits could be sold to an outside party (the Teea customers) and carried out by means or in a manner (as described in the example in relation to the Moonsun scheme above) which would not normally be employed for *bona fide* business purposes, other than obtaining a tax benefit. While a company requires reserves to declare dividends, the acquisition of reserves was not the real purpose of scheme. The reserves were merely the mechanism though which the dividends and STC credits were transferred (illustrated by the fact that Teea thought that it could negotiate a higher fee when STC was abolished as the window of opportunity was limited.)

[118] Thus, returning to the structure of the schemes, set out in broad terms earlier in the judgment (with the focus on the Moonsun and Amazonite schemes) it would appear that the steps in the implementation of the structure do show that it was tax driven. This is so because:

a. The appellant's explicit prerequisite for the implementation of the scheme was that foreign companies with distributable reserves in which shares should be purchased by Teea should have no trading history. For a company, such as Moonsun, to have distributable reserves of approximately R2 097 000 000.00 with no trading history, is most unusual. Save that the appellant presented to Teea that this is the kind of company that is required, the appellant stated that he was not involved at this level, and was therefore not able to shed light on how Moonsun came into such large distributable reserves.

b. The appellant testified that it was necessary to get a foreign company (such as Moonsun and Amazonite) because there was a provision in the STC provisions of the ITA that did not subject the dividend declared by a foreign company to tax. The appellant, correctly, acknowledged the vital importance of the STC credits by acknowledging that to have used a South African company would have reduced the reserves available.

c. In the case of Moonsun, Moonsun had a single asset, the R2 097 000 000.00 claim against HER, in respect of which Moonsun held a promissory note from HER.

d. Teea assumed liability for the debt owed by HER to Moonsun by issuing three promissory notes to Moonsun under circumstances where Teea had insignificant assets in relation to the face value of the promissory notes. At this point in the schemes, reserves were met by promissory notes (as the actual asset). Promissory notes which were worth nothing in real terms.

e. Returning to Moonsun, when Moonsun declared its dividend to Agete, it carried with it STC credits and no tax was payable by Moonsun.

f. This meant that Agete could in turn declare a dividend to the extent of the dividend received from Moonsun (the STC credit) without incurring any liability for STC.

g. The attractiveness of an investment by the external company into the structure was enhanced because of the availability of the STC credits. It gave the external company more financial reason to invest in the structure, as the appellant readily conceded.

h. After Teea acquired the shares in the non-trading foreign subsidiaries, Moonsun, Amber and Amazonite, Teea gifted the shares in those companies to its subsidiaries, Agete, Skavoc and MRP respectively. They paid nothing for those shares. This would create maximum profits for the declaration of dividends to the external company and so facilitate the scheme. Whatever Agete, Skavoc and MRP respectively had to pay for shares, would have reduced the available profits for distribution, increasing the costs of the schemes which would quickly reach the point of being unattractive for the promotors of the scheme.

i. The appellant's evidence that the companies declaring the dividends up the line were placed in liquidation (by the declaration of a liquidation dividend) so as to avoid any possible complications resulting from undisclosed liabilities in those companies, is inconsistent with his prerequisite that Teea only dealt with "clean" companies (such as a shelf company), with inter alia no trading history and undisclosed liabilities. It is more likely that the reason for the liquidation of the companies were that the STC legislation at the time required distributions to be made by companies in anticipation of their liquidation in order not to pay STC on their dividends.

j. With reference to the above example, the external company would obtain an "advantage" of R98.00 of STC credits in return for a R2 payment (that remained in the structure for distribution to the appellant and Skipper).

k. Even if the nominal purpose of the structure was, as the appellant claimed, to buy and sell distributable reserves, these distributable reserves would only be attractive to the external companies in the manner in which the structure operated if they caried with them STC credits.

[119] Relying on the structure of the Moonsun, Amber, and Amazonite schemes described earlier in the judgment and immediately above, the respondent urges the court to find not only that the sole or main purpose of the schemes (as arrangements) in respect of the appellant was the obtaining of a tax benefit, but also that the sole or main purpose of the schemes was the obtaining of a tax benefit for the external companies (Teea's customers, as the respondent has termed them).

[120] However, the external companies are not before this court and have not had the opportunity of providing input on the purpose of the arrangements from their perspectives as the taxpayers, as the purpose test would allow them to do.

[121] Thus, while it would be attractive to express definitive views on the purpose of the schemes in general, given that:

a. the relevant "Teea customer" taxpayers are not before the court and that this court's findings may affect them (not only potentially, but actually, since it appears from the papers filed of record that the respondent has proceeded against certain of these external companies); and

b. it is not necessary to find that the schemes constituted impermissible avoidance arrangements as a whole to consider the purpose of the arrangements relevant to the appellant;

I make no definitive findings as to whether the sole or main purpose of the Moonsun, Amazonite and Amber schemes was the obtaining of a tax benefit for these external companies, and whether the schemes constituted impermissible avoidance arrangements *vis-à-vis* these taxpayers.

[122] However, since the implementation of the Moonsun, Amazonite and Amber schemes as a whole are factors which are to be taken into account when, holistically, assessing the question of the arrangements involving the appellant as a taxpayer, the manner of their implementation is not irrelevant.

The appellant's tax-exempt compensation

[123] As stated above, the respondent advances that the sole or main purpose of the arrangement by which the appellant received his compensation for creating and assisting in the implementation of the scheme was, likewise, to obtain a tax benefit in the form of tax-exempt dividends, which he was able to convert into a claim for payment (in terms of the aforementioned 2008 and 2011 Agreements). This in circumstances where, in truth, he earned taxable income.

[124] The essence of the arrangement as it applied to the appellant (as foreshadowed earlier in this judgment) was that:

a. the appellant obtained the dividend by (through Skipper-Sec) subscribing for ordinary shares in Anyolite C (in the Moonsun scheme) and in MRP (in the Amazonite scheme) (the companies that would come to hold the promissory notes);

b. the appellant obtained loan claims against Teea (essentially the right to future amounts that may be earned by Teea) following the distribution *in specie* to him of a share in the promissory notes from Anyolite C and MRP. This meant that if the structure was implemented, any dividends coming up, before they could go to Anyolite A and Anyolite B, had to pass through Anyolite C and in the words of the appellant "I would get my cut, so to speak". There is therefore no doubt that the appellant received the tax-exempt payments in lieu of what would otherwise have been taxable income;

c. to answer the question why he chose the method described above to derive benefit from the schemes he designed, the appellant testified that he wanted to protect his interests because he developed the structures and expended time and expertise on developing them. He had to protect his own interests so as to safeguard himself from the situation, again as he testified "where I developed a structure, Teea or anybody else uses it, and I get no compensation for that" and "I also had the risk, and for me it was a considerable risk that I had no control over Teea, no involvement in Teea and I did not know what else they might be doing";

d. according to the appellant he, therefore, designed a structure where he could not be circumvented; "that if the structure was implemented, I would share". The tax benefit the appellant would obtain through the implementation of the structure, according to his evidence, was secondary.

[125] As the respondent's counsel submitted, the appellant's apparent concern about safeguarding his financial and intellectual property interests in the manner in which he did appears contrived when measured against that:

a. the appellant's interests could have been effectively protected contractually. Thus, the appellant could have entered into a contract with Teea and the relevant parties, stipulating that the intellectual capital would be provided to them subject to confidentiality and non-disclosure agreements and by agreeing to the fee that must be paid to him. The contract could have also regulated the transmissibility to his heirs of the benefits due to him;

b. the appellant's taking up shares in Anyolite C and MRP, did not in any way serve to ensure that Teea could not use the appellant's structure;

c. contrary to the appellant's contentions that, by taking up shares in Anyolite C and MRP, he wished to ensure that his "fee" for designing the structure was not negotiated downwards, the appellant settled for a lesser "fee" in the 2008 and 2011 Agreements;

d. although I accept that the appellant could not necessarily testify on behalf of Skipper, the appellant's explanations make no sense in relation to Skipper, who was it would appear merely responsible for the administration of the implementation of the schemes. It does not explain why Skipper was remunerated on the same basis as the appellant which, as seen above, included that Skipper also had as its nominee Skipper-Sec;

e. the appellant, despite contending that "another reason that [he] liked and persisted with the idea of getting a dividend in the form of a promissory note", was that in his understanding this meant that if Teea went insolvent, he could not be subject to attack in terms of sections 26 to 31 of the Insolvency Act, failed to explain how these sections provide protection for him or indeed, whether these sections find any application in the event of the insolvency of Teea.

[126] Finally, applied to the appellant in respect of the question of whether the sole or main purpose of the arrangement was for him to obtain a tax benefit, *Conhage* (specifically paragraph [14] thereof), on which the appellant relied for the proposition that the arrangements involving the payments to him did not have as their sole or main purpose the obtaining ofa tax benefit, does not assist him. This, with the necessary contextual changes to take into account the stage of the enquiry, is for much the same reasons as discussed above in respect of the determination of whether the appellant obtained a tax benefit (with reference to *Sasol Oil*), read together with the appellant's unsatisfactory answers as to the payment structure as it applied to him.

[127] In my view, therefore, the sole or main purpose of the arrangements involving the appellant was for him to obtain a tax benefit in the form of tax-exempt benefits as against taxable income.

Abnormal means, lacking commercial substance

[128] Despite what is set out above, on the arguments presented to the court, the appellant can escape the GAAR should none of the below further requirements be met:

a. The first is that the avoidance arrangement must have been "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" (section 80A(*a*)(i) of the ITA); or

b. The second is that the avoidance arrangement "lacks commercial substance, in whole or in part, taking into account the provisions of section 80C" (section 80A(*a*)(ii) of the ITA); or

c. The third is whether it has it has created rights or obligations that would not normally be created between persons dealing at arm's length (section 80A(*c*)(i) of the ITA); or

d. The fourth is that it would result directly or indirectly in the misuse or abuse of the provisions of the ITA (including the provisions of Part IIA of Chapter III) (section 80A(*c*)(ii) of the ITA).

The abnormality requirement

[129] Whether the avoidance arrangement had been 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, requires an objective determination of whether the method employed is normal in a business context.

[130] Referencing this requirement, the following features demonstrate that the arrangement was 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.

[131] It is clear that the appellant, himself a tax expert, had expended much time and effort in designing a scheme that would take advantage of the tax regime as it existed at the time of their implementation. The appellant explained in detail how carefully he put the schemes together. He considered all the relevant legislation including the ITA, the 1973 Companies Act, the 2008 Companies Act, the Competition Act, the Security Transfer Tax Act, and the Insolvency Act. The appellant carefully considered the tax implications not only for the entities that benefitted from the STC credits but, also for his personal tax liability. This not only resulted

in peculiarities in the schemes in in general, as is apparent from the description of the schemes themselves, but also where related to the appellant obtaining the benefit:

[132] Repeating what is set out above in respect of the structure of the schemes, in the Moonsun and Amazonite Schemes (the schemes relevant to the present matter), no cash was required in the initial set-up of the structure, which simply involved journal entries. These journal entries included:

a. the initial creation of the ostensible debt owing by HER to Moonsun, Amber and Amazonite.

b. the purchase of those companies by Teea.

c. the donation of the shares in those companies to other companies.

d. all the dividends from Moonsun, Amber and Amazonite, creating STC credits.

e. all the successive dividends up the line, creating successive STC credits.

f. the creation in form of an amount payable to the appellant.

[133] Further, as the explanation of the schemes and the example earlier in the judgment demonstrate:

a. Teea purchased shares in a clean Isle of Man company (for example Moonsun) for the full-face value of the receivables by Teea taking over the liability of HER. Moonsun had no trading history but curiously had huge receivables (derived from an amount receivable from an unknown private entity). There was no explanation for this.

b. Teea gifted the shares in Moonsun to its subsidiary, Agete, thereby creating huge reserves in Agete for no consideration;

c. the dividends were declared up the line;

d. when the external company was introduced, it paid R2 for STC credits of R10 (by way of example) and this was the only time that cash was exchanged;

e. once the cash was introduced, the appellant received the benefits, as the dividends declared to him reflected a value that was enhanced by the absence of STC on the dividends declared;

f. while the reason for Teea issuing promissory notes (which notes were split up to make up the total amount owed) for its liabilities to its subsidiaries is certainly questionable in the context of normal business transactions, unless those promissory notes were earmarked for parties at the top of the structure, including the appellant. There appears to be no sound normal business or commercial reason why Teea undertook to pay the appellant vast sums, on demand, in terms

of promissory notes when knowing at the time that it would not be able to honour the promissory notes when called upon, rather than structuring the payment to the appellant as a commission on successful “sales” of the STC credit carrying reserves;

g. it would, therefore, appear that Teea was comfortable that the appellant would not call on the promissory notes at any time before Teea would be in a position to honour them, since this would likely have collapsed the schemes the appellant had designed. This is underscored by the appellant’s renegotiation of the payments to him in terms of the 2008 and 2011 Agreements (the terms of which he crafted). As stated earlier, in terms of the 2008 and 2011 Agreements, the appellant agreed to forego his rights in the promissory notes in exchange for the rights contained in the 2008 and 2011 Agreements, which led to him earning significantly less money than contemplated by the promissory notes;

h. Teea’s subsidiaries, and the foreign companies (Moonsun, Amber and Amazonite) had no liability for normal tax, and the scheme ensured that the fee income that would have been subject to tax in the hands of the appellant was exempt from any liability for tax.

[134] As in this case, the facts underpinning the question of whether the avoidance arrangement 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 (although it is a separate enquiry) often also answers whether an arrangement has created rights or obligations that would not normally be created between persons dealing at arm's length.

[135] Thus, for the reasons advanced above, and contrary to what the appellant argued, it is unlikely that the rights and obligations created between him and Teea would have normally been created between persons dealing at arm’s length. I need only again to refer to Teea indebting itself to the appellant for vast amounts of money without having the means to pay it, and then when the scheme finally becomes operational, for the appellant to give up his rights in terms of the promissory notes and to accept lesser amounts in terms of the 2008 and 2011 Agreements, which he drafted and presented to Teea.

[136] I accept the appellant’s argument that novel business structures and arrangements are not, *per se*, abnormal in the context of the GAAR but, in the present instance, I find that the arrangements were entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than for the appellant obtaining a tax benefit, and that they created rights and obligations which would not normally be created at persons dealing at arm’s length.

[137] Having found that the arrangements in relation to the appellant were 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, and that that they created rights and obligations not normally created between parties acting at arm's length , it is strictly speaking unnecessary for me to deal with the remaining requirements. I will nevertheless, briefly, address them.

Lack of commercial substance

[138] An avoidance arrangement is presumed to lack commercial substance as contemplated in section 80C of the ITA if it would result in a significant tax benefit for a party but has no significant effect upon either business risks or net cash flows of that party (aside from the purported tax effects).

[139] In respect of the schemes as they relate to the external companies, for the reasons advanced immediately above (while I make no final findings in this regard for the reasons aforesaid) the arrangements do carry many of the hallmarks of a lack of commercial substance when measured against section 80C of the ITA, as read with, *inter alia*, sections 80D (Round trip financing) and 80E (Accommodating or tax-indifferent parties) thereof.

[140] In respect of the appellant, if one looks at the structure of the schemes as they related to him (and at the same time to Skipper), and the reasons he proffered for requiring the tax-exempt dividend against the promissory notes (to later be exchanged for tax-exempt payments in terms of the 2008 and 2011 Agreements) the arrangements did not, in real terms, alter the appellant's business risks and net cash flows when compared to the position he would have been in had Teea remunerated him for the structure he had created contractually. The arrangements therefore only resulted in a significant tax benefit to him.

[141] To the extent necessary, I find that the avoidance arrangements through the Moonsun and Amazonite schemes, insofar as they relate to the appellant, also lacked commercial substance.

Misuse or abuse of the provisions of this Act

[142] Section 80A(*c*)(ii) of the ITA provides that an avoidance arrangement would be an impermissible avoidance arrangement, in any case, if it would result directly or indirectly in the misuse or abuse of the provisions of the ITA (including the provisions of Part IIA of Chapter III).

[143] While I recognise that this is a standalone basis upon which to find that the avoidance arrangements pertaining to the appellant were impermissible avoidance arrangements, the respondent did not advance this as a separate basis upon which the court was to consider the question of whether the avoidance arrangements were impermissible avoidance arrangements.

[144] I, therefore, make no findings in this regard.

Conclusion and costs

[145] In the premises, the respondent's re-characterising of "compensation" payments received by the appellant as taxable income was justified. By his own admission, the appellant structured the scheme and spent time, skill, and effort doing so. It would also appear that he did assist in the implementation of the Moonsun, Amazonite and Amber schemes, being at least involved in the drafting of certain agreements. In so doing, the appellant structured his compensation in the form of dividends and made sure that he received payment in respect of those dividends in terms of the 2008 and 2011 Agreements, the second of which was a pre-ordained element of the Amazonite structure considering the chronology and the manner in which the Moonsun scheme was implemented. He was not otherwise compensated for his efforts.

[146] Therefore, as submitted by counsel for the respondent, structuring the receipt of compensation as tax-exempt dividend income constituted an impermissible avoidance arrangement and was correctly identified as such by SARS.

[147] In respect of the question of costs, relevant to this appeal, section 130(1)(*b*) of the TAA provides that this court may, upon application by the respondent, award costs in its favour if the appellant's grounds of appeal are held to be unreasonable.

[148] The respondent has indeed applied to this court for costs to be awarded in its favour as provided for in section 130(1)(*b*) of the TAA, including the costs of two counsel, on the basis that the appellant's grounds of appeal are unreasonable.

[149] However, considering the nature of the grounds of appeal, as demonstrated by what has gone before in this judgment, based on complex facts and involving aspects of the principles of the application of the GAAR in respect of which there is very little guidance in the way of definitive decided caselaw, I am of the view that the appellant's grounds of appeal cannot be said to have been unreasonable, as contemplated by 130(1)(b) of the TAA.

[150] Accordingly, as has been set out in the order at the head of this judgment, I make the following order:

a. The appeal is dismissed.

b. There is no order as to costs.

Acting Justice J H Loots
President

CONCUR:

Ms A van der Merwe Accountant Member

Ms B Mponco Commercial Member