REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN, WESTERN CAPE)

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

03 July 2026 _____

DATE SIGNATURE

In the matters between:

COMPANY AF (PTY) LTD	Appellant in Case No. **IT 76725**
COMPANY CR (PTY) LTD	Appellant in Case No. **IT 76750**
COMPANY DH (PTY) LTD	Appellant in Case No. **IT 76751**
COMPANY ABC INVESTMENT CO (PTY) LTD	Appellant in Case No. **IT 76752**
NEWMAN (PTY) LTD	Appellant in Case No. **IT 76753**
COMPANY BR INVESTMENTS {PTY) LTD	Appellant in Case No. **IT 76754**
COMPANY SZ (PTY) LTD	Appellant in Case No. **IT 76755**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **Respondent in all the above cases**

J U D G M E N T

FRANCIS, J

Introduction

[1] These seven appeals were heard together by agreement. They share a common factual matrix and substantially the same legal issues. Each arises from an additional income tax assessment issued by the Commissioner for the South African Revenue Service ("SARS") on 9 June 2022 in respect of the appellant's 2017 year of assessment. The assessments were raised under the general anti-avoidance rules ("the GAAR") in Part IIA of Chapter III of the Income Tax Act 58 of 1962 ("the ITA"), comprising sections 80A to 80L.

[2] Until 28 February 2017, the seven appellants were shareholders in RASS Investments (Pty) Ltd ("RASS"), a company that built and leased self-storage facilities. Together they held 57 377 of the 59 891 issued ordinary shares in RASS. On 28 February 2017, they disposed of their entire shareholding to SRIA Investments (Pty) Ltd ("SRIA"), a wholly owned subsidiary of ANCIENT Ltd ("ANCIENT").

[3] The disposal was structured as a composite transaction of four inter- conditional steps. RASS declared a pre-closing dividend. SRIA subscribed for new RASS shares. The dividend was paid out of the subscription proceeds. The appellants then sold their original, by then nominal, shares to SRIA for R1 000.

[4] None of the appellants declared a capital gain in their 2017 returns. They treated the amounts received from RASS as exempt dividends. Applying the GAAR, SARS disregarded the dividend and subscription steps, treated the full amount received by the appellants as proceeds on the disposal of their shares, and assessed them to capital gains tax ("CGT") accordingly. SARS also imposed understatement penalties of 75% under sections 222 and 223 of the Tax Administration Act 28 of 2011 ("the TAA"), penalties for the underestimation of provisional tax under paragraph 20(1) of the Fourth Schedule to the ITA, and interest under section 89*quat* of the ITA.

[5] The appellants objected. SARS disallowed the objections, and these appeals followed.

[6] The central question in each appeal is whether the GAAR applies to the composite transaction. Two further questions arise. The first is the appellants' preliminary objection to the Commissioner's pleading of the avoidance arrangement. The second is the fate of the penalties and interest. I deal with each in turn.

[7] After argument was completed, two appellate judgments bearing on this matter were delivered, the judgment of the Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Erasmus* [2026] 2 All SA 27 (SCA), and the judgment of the Constitutional Court in *Absa Bank Ltd and Another v Commissioner for the South African Revenue Service*

(CCT 72/24) [2026] *ZACC* 15 (22 April 2026). I invited and received written submissions on both, including a reply by the appellants directed specifically to the reach of *Absa Bank.* The parties also referred, in their supplementary exchange, to an unreported judgment of this Court, *Mr* G *Taxpayer v Commissioner for the South African Revenue Service 41 SATC 179 ("Mr Taxpayer* G*")*, and furnished notes on it. I have considered all these cases and the parties' notes thereon in preparing this judgment.

PARTIES AND BACKGROUND

[8] The appellants are seven companies, namely Company AF (Pty) Ltd, Company CR (Pty) Ltd, Company DH (Pty) Ltd, Company ABC (Pty) Ltd, Newman (Pty) Ltd, Company BR Investments (Pty) Ltd and Company SZ (Pty) Ltd. JAZZ Property Investments (Pty) Ltd, the eighth shareholder, is not an appellant.

[9] RASS was incorporated in 2003. By 2016, it owned seven immovable properties held through wholly owned subsidiaries. The founding shareholders were Mr Van der Hof ("Mr Van der Hof"), the managing director of RASS and the controlling mind of Company BR Investments, and his cousin, Mr Buffalo, who controlled Company DH and Company SZ. Further investors were later attracted, including Mr Bells (the majority shareholder through Company ABC), Mr Martins (later Newman), Mr Apples (later Company CR), and the CJL Testamentary Trust ("the CJLMarbles Trust") (later Company AF).

[10] Capital was initially invested mainly through shareholder loans, with shares issued at nominal value. Throughout its existence, RASS applied its profits to new developments and paid no dividends. From 2013, the other directors were Mr Bells (non-executive chair) and Mr Du Orange (non- executive), representing JAZZ.

THE FACTUAL MATRIX

[11] The factual background is set out at length in the pleadings and the evidence and is largely common cause. The parties draw very different inferences from it. I summarise only the salient facts.

Project Marbles

[12] In early 2015, RASS began a process to restructure the business. The impetus came from Mr Bells, who sought greater flexibility, reduced risk, and the ability to realise part of his investment in a controlled fashion. Mr Van der Hof and the founders wished to continue growing the business.

[13] The project, named “Project Marbles”, had three objectives. They were to introduce new investors through a capital raise, allow some existing shareholders to partially disinvest using the proceeds, and restructure RASS into separate vehicles for mature (leased-up) and development properties.

[14] Tax advice was obtained from EG, represented by Mr Emmanson, and later confirmed by June. A critical feature of the advice was that shareholders who were individuals or trusts should first transfer their RASS shares to investment companies on a roll-over basis under section 42 of the ITA. The effect was that when value was later distributed to those investment companies by way of dividend, the dividend would be exempt from income tax and dividends tax, since it was paid to resident companies. Dividend tax would arise only when investment companies, in turn, distributed dividends to their individual or trust shareholders. The understanding was that any disinvestment would be effected through share repurchases, treated as dividends, avoiding the double layer of tax that a sale of shares would attract.

[15] In May 2016, the RASS shareholders resolved to implement Project Marbles. The first step was the transfer of shares by non-corporate shareholders to investment companies under section 42.

[16] RASS appointed Bridge Capital Advisors to run a public capital-raising process. An investment teaser was released to the market in July 2016, announcing RASS’s intention to restructure and raise new capital.

The approach by ANCIENT

[17] On 18 July 2016, ANCIENT’s chief executive, Mr Calvin, wrote to Mr Van der Hof expressing interest in acquiring all of the shares in RASS in exchange for, at each shareholder’s election, cash or shares in ANCIENT. The letter said nothing of a pre-closing dividend or share subscription.

[18] Mr Van der Hof did not favour a transaction that would require him and his family to give up their investment and livelihoods. Under Project Marbles, they would have remained substantially invested and in management. ANCIENT required that the Van der Hof family exit the business.

[19] Mr Van der Hof discussed the approach with Mr Bells and Mr Buffalo. He secured an agreement with Mr Buffalo that they would use their combined 25.1% shareholding to block any transaction Mr Van der Hof did not favour. Under RASS’s Memorandum of Incorporation, this gave them an effective veto; transactions of this nature requiring 75% shareholder approval.

[20] On 26 July 2016, Mr Van der Hof and Mr Bells signed an agreement for a "termination amount" to be paid by the RASS shareholders to Mr Van der Hof should they sell all their shares and claims to a purchaser. It was fixed at 7.5% of any positive difference between the total purchase price and the Project Marbles value of R226 807 015.

[21] On 4 August 2016, Mr Van der Hof wrote to ANCIENT stating that shareholders holding more than 75% of RASS's shares would disapprove of any deal unless a premium at least comparable to the CGT effect was offered. This was the first indication of a desire to avoid CGT on a sale.

[22] On 11 August 2016, ANCIENT offered to purchase RASS's rental enterprises as a going concern for R410 million. The offer did not include the premium Mr Van der Hof had sought.

The EG advice

[23] On 16 August 2016, Mr Van der Hof consulted Mr Emmanson of EG regarding the tax implications of a potential transaction with ANCIENT, expecting to be told that it would carry a tax burden that would make it uncompetitive with Project Marbles.

[24] Mr Emmanson confirmed that an outright sale of properties by RASS would attract a double layer of tax, namely CGT on the sale, followed by dividend tax on the distribution of the proceeds by the investment companies. He advised, however, that there was another way to achieve the same commercial objective without a double layer of tax.

[25] On 18 August 2016, EG furnished an unsigned draft opinion proposing a three-step structure. First, RASS would distribute its full value to its shareholders as a dividend, the payment remaining outstanding on loan account. Secondly, ANCIENT would subscribe for 99.9% of the shares in RASS at a price equal to the value of the underlying property less outstanding debt (excluding the dividend claim). Finally, RASS would repay the loan with dividend proceeds, after which the remaining interest in RASS would be sold to ANCIENT at nominal value.

[26] The opinion advised that the structure would not give rise to adverse tax consequences. The dividend would be exempt under section 10(1)(k), the subscription would not be a disposal for CGT, and the sale of shares at nominal value would not give rise to significant CGT. The opinion did not address whether the GAAR might apply. A June opinion of 18 April 2016, communicated to the shareholders, had warned that if the sole or main purpose of a step in a structure was to obtain a tax benefit, the GAAR might apply.

[27] On 29 August 2016, ANCIENT made a revised offer to purchase either the rental enterprises or all of the shares in the RASS group for R429 million. Clause 8 recorded that the parties would take structuring advice and negotiate in good faith to accommodate their advisers' recommendations. Mr Van der Hof had told ANCIENT of the EG advice, which is why clause 8 was included.

[28] On 30 August 2016, Mr Van der Hof asked Mr Van Wolf, RASS's corporate finance consultant, to arrange a meeting between Mr Emmanson and ANCIENT's tax specialists to settle the form of the transaction.

[29] On 2 September 2016, Mr Van der Hof wrote to all RASS shareholders describing the key components of the proposed transaction. He explained that ANCIENT would be "buying 100% of [RASS]" and "buying the shares of [RASS]". He stated that the reason for the structure was that "only dividend tax will be payable should the shareholder Investee's distribute the sale proceeds. No Capital Gains Tax will be payable. The structure has been agreed by our own and ANCIENT tax specialists".

[30] Mr Van der Hof identified the first of five "key risks" as the possibility that the Receiver might not agree with the consultants' interpretation and might enforce the maximum tax liability. The worst case, he said, was that the Receiver would also claim CGT, increasing the tax burden to almost 38%. He added that the tax specialists did not foresee this, but the risk remained.

[31] Between 3 and 8 September 2016, shareholders representing 82.75% of the issued shares resolved to authorise the board to proceed with the ANCIENT transaction. The Amia Trust (Mr Van der Hof's family trust) abstained but indicated it would respect the majority decision. The Lan Trust (represented by Company AF) did not respond.

[32] On 9 September 2016, Mr Van der Hof informed shareholders that agreement had been reached on the structure. The shares (not the properties) in RASS would be sold, there would be no CGT liability, only dividends tax would be payable when the investment companies distributed the proceeds, and the price had been increased to R432.5 million.

[33] On 21 September 2016, RASS and ANCIENT signed a Memorandum of Understanding. It recorded, for the first time in a joint document, that the transaction would take the form of a pre-closing dividend, a subscription for new shares, and a sale of the remnant shares at nominal value. Project Marbles was terminated the next day.

[34] On 18 October 2016, EG issued its final opinion, confirming the draft. It did not substantively address the GAAR but stated that, as the proposed transaction would increase RASS's authorised share capital in order to implement a commercially (and not tax) motivated transaction, it would not, in the firm's opinion, be designed substantially or predominantly to evade the requirements of any tax legislation.

The asset-for-share transactions

[35] Between about 19 October and 24 November 2016, the six non-corporate shareholders transferred their RASS shares to investment companies in exchange for shares in those companies, by transactions to which section 42 of the ITA applied. This had been intended for April or May 2016 but required rectification.

[36] From late 2016 until 28 February 2017, RASS's issued shares were held by eight corporate shareholders. The seven appellants held 57 377 of the 59 891 issued shares between them. JAZZ Property Investments (Pty) Ltd, holding 2 514 shares (4.20%), is not an appellant.

Shareholder approvals

[37] On 21 October 2016, a general meeting of RASS shareholders received presentations on the progress and details of the ANCIENT transaction. A computation showed net shareholder value at 1 February 2017 estimated at R295 million (R4 925 per share), a 31% premium on the Project Marbles valuation of R226 million as at 2 November 2016.

[38] The shareholders approved payment to Mr Van der Hof of the termination fee of R6 675 258, calculated as 7.5% of the positive difference between the total purchase price of the RASS shares and shareholder loans and the Project Marbles value.

[39] On 21 November 2016, a special general meeting resolved to convert RASS's authorised shares to no-par-value shares and to increase authorised share capital from 1 million to 100 billion ordinary shares to facilitate the transaction.

The formal agreements

[40] Between 6 and 9 December 2016, the Subscription and Share Purchase Agreement ("the Main Agreement") was signed by SRIA (the Subscriber), ANCIENT, RASS (the Company), Trading, RASS CC, the RASS shareholders, Mr Bells, Mr Van der Hof and his son, At Van der Hof.

[41] The introduction to the Main Agreement recorded:

> 3.1 The Existing Shareholders own all of the issued shares of the Company.
>
> 3.2 The Existing Shareholders wish to extract some of the value created within the Company.
>
> 3.3 The Subscriber wishes to acquire a 100% shareholding in the Company together with the Shareholder Loans.
>
> 3.4 The Parties have accordingly agreed that, in order to achieve their respective objectives —
>
> > 3.4.1 the Company will, prior to the Closing Date, declare a distribution to the Existing Shareholders in respect of the Shares held by them in order for the Existing Shareholders to extract the value created in the business of the Company;
> >
> > 3.4.2 the Subscriber will acquire a 99.99% interest in the Company, through the subscription for Shares in the Company as provided for in this Agreement, which Shares will not share in or have any right to the distribution described in clause 3.4.1 above; and
> >
> > 3.4.3 the Existing Shareholders will sell and transfer to the Subscriber their existing shares in the Company (together with their Shareholder Loans) in order to constitute the Company as a wholly owned subsidiary of the Subscriber,
>
> on the terms and subject to the conditions contained in this Agreement.

[42] Two escrow agreements were entered into, providing for parts of the subscription consideration to be held in trust against potential claims under rental and other guarantees.

[43] On 19 January 2017, a First Addendum varied certain terms. On 22 February 2017, RASS and the shareholders signed an agreement in respect of the pre-closing distribution. On 23 February 2017, a Second Addendum increased the subscription consideration by R2.1 million, raising the rental escrow to R10 million.

Implementation

[44] Between about 16 and 28 February 2017, the parties implemented the transaction in accordance with the agreements. There were four main steps.

> Step 1 - Dividend declaration. RASS declared a distribution to its existing shareholders of R274 666 901 (a dividend of R274 666 302 and a return

of contributed tax capital of R599), payable only after receipt of the subscription amount.

Step 2 - Share subscription. SRIA subscribed for 598 850 109 new ordinary shares for R280 325 530, comprising the agreed value of RASS (R274 666 901) plus R5 658 629 to fund severance payments to Mr Van der Hof and his son on the change of control. The subscription gave SRIA 99.99% of RASS, reducing the existing shareholders to 0.01%.

Step 3 - Dividend payment. RASS used the subscription proceeds to pay the dividend to the exiting shareholders. The severance liability was also paid.

Step 4 - Sale of shares. The exiting shareholders sold their 59 891 original shares (now 0.01%) to SRIA for R1 000. The shareholder loans were also acquired.

[45] After implementation, each exiting shareholder had received its proportionate share of the value of RASS (R274.666 million) by way of dividend, plus repayment of its shareholder loans. SRIA obtained 100% of RASS.

[46] Absent the GAAR, the tax consequences were these. The dividend was exempt from income tax under section 10(1)(k)(i) and from dividends tax under section 64F(1)(a). The return of contributed tax capital reduced the base cost of the appellants' shares to nil under paragraph 768(2) of the Eighth Schedule. The subscription increased RASS's contributed tax capital. The disposal of the shares for R1 000 resulted in a negligible capital gain. No material CGT was payable.

PROCEDURAL HISTORY AND PLEADINGS

[47] On 9 May 2017, RASS submitted a reportable arrangement disclosure to SARS under section 38 of the TAA in relation to the transaction.

[48] SARS conducted an investigation and audit. On about 18 November 2020, the Commissioner extended the three-year period under section 99(1)(*a*) of the TAA for issuing additional assessments in respect of six appellants' 2017 years of assessment. Company AF was not affected, its return having been submitted late.

[49] On 11 February 2021, the Commissioner issued notices under section 80J(1) of the ITA and section 42(2)(*b*) of the TAA, recording the preliminary view that the GAAR applied. The notices defined as "the Additional Elements" of the transaction "the

declaration and payment [of the dividend] and the dependent subscription, issue and allotment of the Subscription Shares", and stated that the GAAR applied to "one or more aspects of the Transaction (including the Additional Elements)". The appellants responded on 22 April 2021, denying that the GAAR applied.

[50] On 9 June 2022, the Commissioner issued Finalisation of Audit Letters (FOALs') and raised the additional assessments. The FOALs stated that the revised structure introduced additional elements (the subscription and pre- sale dividend) which had no commercial effect other than to avoid CGT on the sale of the original shareholding, and that the structure simply incorporated a "dividend stripping mechanism" to avoid CGT. The Commissioner's application of the GAAR regarded the composite transaction, incorporating the Additional Elements, as an ordinary sale of shares by the RASS shareholders to the ANCIENT group through SRIA.

[51] The additional assessments increased the appellants' taxable income by the capital gains arising on the sale of their shares at the 80% inclusion rate and assessed normal tax (CGT) accordingly. They imposed understatement penalties of 75% under sections 222 and 223(1)(iv) of the TAA, imposed penalties for the underestimation of provisional tax under paragraph 20(1) of the Fourth Schedule, and levied interest under section 89*quat*(2) of the ITA.

[52] The appellants objected between 20 and 22 July 2022. On 13 and 14 December 2022, the Commissioner disallowed the objections. On 21 February 2023 the appellants lodged the present appeals.

[53] The parties delivered their pleadings, the Commissioner's rule 31 statements, the appellants' rule 32 statements, and the Commissioner's rule 33 replies. In the rule 31 statements, the Commissioner pleaded, principally, that the inclusion of the Pre-closing Distributions and the Subscription in the transaction rendered it an impermissible avoidance arrangement. In the alternative, he pleaded that the Pre-closing Distributions, the Subscription, the payment of the Subscription Consideration, the payments from it, and the allotment and issue of the Subscription Shares ("the Impugned Steps") were themselves an impermissible avoidance arrangement.

[54] Evidence was heard over 26 days. The appellants called eight witnesses. SARS called one expert, Professor Harvey Wainer. By agreement, each witness' evidence was admitted in all seven appeals. At the start of the hearing the appellants abandoned certain grounds, including the prescription ground under section 99(4) of the TAA and the ground relating to the quantification of the amounts taxed. That abandonment narrowed the issues and was not, in my view, unreasonable conduct of the kind that bears on costs.

THE ALTERNATIVE-ARRANGEMENT OBJECTION

[55] The appellants contend that the Commissioner may not rely, in the alternative, on a different "arrangement" as the basis of GAAR liability from the one on which the assessment was actually raised. There is, they say, only one arrangement properly before the Court, the composite transaction comprising all four steps. They invoke the principle, established in this Court and accepted on appeal, that a rule 31 statement may not introduce a ground of assessment that novates the whole factual or legal basis of the assessment or requires a fundamentally revised assessment.

[56] Taken at its highest, the argument runs as follows. The Commissioner is confined, on appeal, to the assessment as raised and to the grounds on which it was raised. The rule 31 statement may sharpen and explain those grounds, but it may not substitute a new assessment by another name. An “arrangement” is the unit on which the GAAR operates. If the assessed arrangement was the composite transaction, an alternative case that a different arrangement (the Impugned Steps standing alone) is impermissible, is not a refinement but a fresh determination dressed as a pleading. I take that argument as it stands and deal with it on its own terms before turning to the recent authority.

[57] SARS contends that the alternative formulation is permissible for several reasons. The section 80J notices and the FOALs repeatedly invoked the "Additional Elements" and applied the GAAR to "one or more aspects of the Transaction". Section 80J(4) permits the Commissioner to revise or modify his reasons at any stage. The alternative changes nothing of substance. The factual basis, the legal basis, the material facts, the remedy and the tax amount all stay the same. And rule 31(3) does not bar the Commissioner from refining his case.

[58] After argument, the Supreme Court of Appeal decided Erasmus. It bears directly on this issue. The Commissioner there issued a section BOJ notice and a GAAR assessment on one factual footing. He then, in the rule 31 statement, gave a materially different account of how the impugned dividends had been funded and sought a different remedy, though the tax amount stayed substantially the same. The Supreme Court of Appeal held that this was not permissible. It treated the question as one of power rather than procedure. Section 80J(4), properly construed, does not permit the Commissioner to revise or modify the reasons for invoking the GAAR after the GAAR assessment has been issued, and a rule 31 statement may not be used to introduce what is in substance a new GAAR assessment.

[59] The position here is not materially distinguishable. The section 80J notices and the FOALs consistently identified the assessed “arrangement” as the composite transaction of all four steps, applying the GAAR to that transaction. The alternative pleaded in the rule 31 statement, the Impugned Steps standing alone as a discrete impermissible avoidance

arrangement, is a different arrangement. If upheld, it would require a fresh section 80J notice and a new assessment, because it alters the very thing the Commissioner determined to be impermissible. That SARS would arrive at the same rand figure does not save it. *Erasmus* holds that identity of quantum does not cure a change in the factual basis and the remedy.

[60] SARS's reliance on section 80J(4) meets the answer the Supreme Court of Appeal gave in *Erasmus*. The power to revise or modify reasons is a pre- assessment power, not a litigation tool to be deployed once the GAAR determination has crystallised in an assessment. Nor does the recurring reference to the "Additional Elements" assist the Commissioner. Those references, and the "one or more aspects" language on which SARS relies, were made in support of the composite-transaction case. They identified the steps said to taint the whole, not a free-standing alternative arrangement. The notices nowhere reserved a separate, steps-only determination, and to read them as having done so by implication would permit exactly what *Erasmus* forbids in terms.

[61] The preliminary point is therefore upheld. The Commissioner is bound to the composite transaction as the assessed arrangement. The alternative formulation is struck from the rule 31 statement, and the appeals fall to be decided on the footing that the arrangement is the composite transaction described in the section 80J notices and the additional assessments.

[62] One further matter must be addressed, lest the order striking the alternative be misunderstood. Striking the alternative does not require the Court to treat the composite transaction as a seamless, indivisible whole to be examined only from the outside. Section 80L defines an "arrangement" to include any scheme, including all steps therein or parts thereof, and that definition runs throughout Part IIA. When the question is whether the composite transaction is an impermissible avoidance arrangement, it is both legitimate and necessary to examine its constituent steps and the way they interlock. The purpose of the arrangement, and the presence or absence of a tainted element, can be assessed only by looking at what the steps do and how they fit together. Analysing the role of the dividend and subscription steps within the composite transaction is a different thing from treating those steps as a separate arrangement for the purposes of the assessment. *Erasmus* prohibits the latter. It does not touch the former. *Absa Bank* points the same way. The GAAR is concerned with the substance of an arrangement assessed as a whole, with its avoidance features identified by examining the steps that give rise to them.

[63] In what follows, I examine the composite transaction, paying close attention to the dividend and subscription steps as integral components.

THE LEGAL FRAMEWORK

[64] Section 80A defines an "impermissible avoidance arrangement" as an "avoidance arrangement" the sole or main purpose of which was to obtain a tax benefit and which exhibits one or more of the tainted elements in paragraphs (*a*) to (*c*). An "avoidance arrangement" is, by section SOL, any arrangement that, but for Part IIA, results in a tax benefit.

[65] Section 80B empowers the Commissioner to determine the tax consequences of an impermissible avoidance arrangement by disregarding, combining, or re-characterising steps, or by treating the arrangement as not having been entered into or carried out.

[66] The enquiry is sequential. First, is there an arrangement? Secondly, does it result in a tax benefit but for Part IIA? Thirdly, was its sole or main purpose to obtain that benefit? Fourthly, does it display at least one tainted element? SARS bears the onus on the existence of the arrangement, the tax benefit and the tainted elements. Once those are shown, section 80G(1) raises a rebuttable presumption that the sole or main purpose was to obtain the tax benefit, which the taxpayer must displace on a balance of probabilities. The four requirements are cumulative and distinct. A finding on one is not a finding on another, though the same facts may bear on more than one.

[67] Part IIA is a remedial provision. It is neither penal, to be read restrictively against the fiscus, nor a charging provision creating liability of its own force. It directs how an arrangement otherwise effective at law is to be treated for tax once its statutory conditions are met, and it is construed purposively in the ordinary manner of fiscal legislation. A taxpayer is free to arrange its affairs to pay less tax. What Part IIA disallows is the fiscal advantage of an arrangement that meets all four of its conditions. The presence of the GAAR on the statute book is itself notice that the freedom to structure is not unlimited.

The status of Absa Bank

[68] Because the appellants' reply is directed principally at the reach of Absa Bank, I must decide at the outset how much of that judgment binds this Court. The appellants contend that the ratio is narrow. The case was a restricted review on two questions, and the majority's observations on "sole or main purpose", on the "tax benefit" comparator, and on the counterfactual were obiter and of persuasive force only. The Commissioner reads the judgment more broadly. Neither reading is wholly correct, and precision matters, because the precedential weight of Absa Bank affects the reasoning that follows.

[69] *Absa Bank* arose on a restricted review. The two questions the Constitutional Court decided were whether a taxpayer who did not know of the downstream steps of a structure was nonetheless a "party" to the arrangement under section 80L (the party issue), and whether

Absa had obtained a "tax benefit" (the tax-benefit issue). On both, the majority found against the taxpayer. I accept that the Court was not asked to decide every question that can arise under the GAAR, and that remarks truly extraneous to those two issues do not bind me as ratio. A judgment of the apex court is to be read for what it decided, not for the breadth of the propositions a headnote or a litigant may extract from it. But the appellants press the point too far.

[70] Two of the propositions the appellants would set aside as obiter were in fact the grounds on which the Court decided the very issues before it. The first is the objective character of the enquiry. The Court held that the purpose enquiry under the present GAAR, read with section 80G, is objective. The question is the purpose the arrangement is reasonably to be regarded as having in the light of all the relevant facts and circumstances, not merely the purpose the taxpayer asserts. That is a step in the path to the disposition of both issues, and it binds me. The second is the counterfactual. In holding that Absa had obtained a tax benefit, the Court rejected the taxpayer's "no transaction" comparator and held that the proper comparison is with the transaction stripped of its avoidance features. On that comparison, the benefit was plain. That holding was not an aside. It was the reasoning by which the tax-benefit issue, one of the two issues for decision, was resolved, and it too binds me. A subordinate court is not free to disaggregate an apex judgment into severable propositions and retain only the holdings it finds congenial.

[71] The practical consequence is this. On the party issue, *Absa Bank* does not assist either side here, but it forecloses one argument. The Court held that a taxpayer need not know of every step to be a party, and that wilful blindness is no defence. The appellants were no such party. They conceived the structure, negotiated it and drove it. If even an uninformed participant is a party, those who designed the arrangement plainly are, and no question of imputed participation arises. On the objective character of the enquiry, and on the counterfactual, *Absa Bank* binds me, and I apply both. On any finer matter genuinely outside the two issues the Court decided, I treat its remarks as persuasive only.

[72] Two further points in the reply concern *Absa Bank's* reach rather than its merits. First, to the extent the appellants find in *Absa Bank* anything bearing on the limits of a rule 31 statement, the pleading question was not argued in that case and was not necessary to its decision. It does not displace *Erasmus*, which dealt with that question directly and after argument, and which I have followed on the preliminary issue. Secondly, the appellants invoke the majority's reaffirmation of *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA), that a taxpayer may choose the most tax-efficient means of achieving a given commercial result, and say it is dispositive in their favour. That the majority endorsed *Conhage* is not in doubt, and I accept it. Whether the principle rescues this structure is a question of substance that I address under "Sole or main purpose" below. The

answer turns not on whether the principle survives Absa Bank (it plainly does) but on what the principle protects and whether this arrangement falls within it.

TAX BENEFIT

[73] The appellants say no tax benefit arose because, but for the ANCIENT transaction as structured, they would have pursued Project Marbles, which carried no CGT. The Commissioner says the comparator is the transaction the appellants actually carried out, stripped of its avoidance features, which is a disposal of their shares for full -value and so attracts substantial CGT. Absa Bank settles the approach. The comparison is not with "no transaction", nor with some different transaction the taxpayer says it would have preferred, but with the arrangement that was in fact implemented, shorn of the features whose only operation is fiscal.

[74] The appellants object that to call the transaction a "sale" assumes the very conclusion in issue. It does not. The transaction was, in legal form, four things: a declared dividend, a share subscription, the application of the subscription money to the dividend, and a sale of the emptied shares for R1 000. I do not disregard that form, and the enquiry at this stage is not whether any step was tax-driven. That is the later question under section 80A. What the tax-benefit enquiry requires is the economic substance of what was done: where the value of RASS went, who came to bear the risks and rewards of the business, and what each party in fact gave and received. The objective facts answer that. The flows of money, the change of control and the parties, own contemporaneous descriptions establish what the transaction did. Labelling a step as fiscal in advance does not. One cannot ask what tax a transaction would have borne without first knowing, in economic terms, what it did.

[75] Much of the evidence is unchallenged. Project Marbles was a genuine, well- advanced restructuring aimed at introducing new capital, allowing partial disinvestment, and preserving the existing shareholders' control over and involvement in RASS. Mr Van der Hof and Mr Buffalo held a combined 25.1% blocking stake and had agreed to use it to veto any transaction that did not meet their requirements. Mr Van der Hof's evidence that he would not have recommended the ANCIENT deal had it carried a CGT cost was firm and was not shaken in cross-examination. Mr Bells corroborated that the single-layer tax outcome was central to the deal's commercial attractiveness.

[76] I accept that evidence as truthful. It does not, however, answer the statutory question, which is not whether the taxpayers preferred one transaction to another but what the transaction they actually carried out did. The economic substance of what was implemented is not really in dispute. The appellants achieved a complete exit from RASS. Control passed entirely to ANCIENT, and the appellants extracted, in cash, the full economic value of their

shareholding (R274.666 million), with the purchaser funding the transaction. That is, in substance, a sale of their shares for full value. The contemporaneous documents say as much. The Main Agreement records that the existing shareholders “wish to extract ... the value created” and that the subscriber “wishes to acquire a 100% shareholding”. Mr Van der Hof’s own circular described ANCIENT as “buying the shares” and referred to “the sale proceeds”.

[77] The comparator follows from that substance and from Absa Bank. Stripped of the pre-closing dividend and the subscription, the features whose only operation was fiscal, what the appellants carried out was a disposal of their entire economic interest in RASS for cash provided by the purchaser. That is a sale of shares. A sale of shares of that value would have attracted substantial CGT. The dividend and subscription routed the same value out as an exempt dividend, leaving only an empty shell to be sold for R1 000, so the disposal yielded a negligible gain. The difference between the CGT that a sale of the substance would have borne and the nil result produced is the tax benefit within the meaning of section 80L.

[78] Project Marbles is not the comparator, and the reason has nothing to do with labelling any step as fiscal. The appellants’ case is that the transaction implemented differed from Project Marbles solely because of the tax cost. That does not fit the facts and does not meet the comparator Absa Bank requires. Project Marbles and the implemented transaction were not two routes to one commercial end. They led to different commercial ends. Project Marbles would have left the existing shareholders invested in, and in control of, RASS alongside new investors. It was a recapitalisation with partial disinvestment, not an exit. The implemented transaction was a complete exit, a clean break, a full change of control, and an immediate cash realisation of the whole shareholding. ANCIENT’s requirement that the Van der Hof family leave the business made the two mutually exclusive. Project Marbles is therefore neither “no transaction” nor the implemented transaction shorn of its fiscal features. It is a different transaction, and a taxpayer does not displace a tax benefit by offering, as the counterfactual, an abandoned plan that would have produced a materially different commercial result.

[79] Nor is the appellants’ position improved by the related submission that, had the deal carried CGT, it would not have proceeded at all. They did not, in terms, advance a “no transaction” case and I do not decide this against them on that footing. Whether expressed as a preference for Marbles or as a willingness to walk away, the submission cannot make the existence of a tax benefit depend on the taxpayer’s stated readiness to forgo the very advantage the structure secured. On the objective enquiry the GAAR requires, the question is what the arrangement did, not what the taxpayers say they would otherwise have chosen.

[80] I have considered whether the structure might be explained, independently of tax, as one that an arm's-length acquirer would require for non-fiscal reasons, for example balance-sheet or regulatory considerations on Star-Age's side, including any constraint arising from its status as a property REIT. The evidence does not support that explanation. The structure originated with the sellers' advisers, not the purchaser. ANCIENT's opening and revised offers contemplated a straightforward acquisition of shares or enterprises. The pre-closing dividend and subscription entered the picture only after, and because of, the EG tax advice. No witness, for either party, identified any commercial advantage to ANCIENT in the dividend-and-subscription mechanism that a direct purchase would not have delivered. Mr Lucas, ANCIENT's chief executive, did not suggest that the mechanism served any REIT distribution, leverage or balance-sheet requirement, and no such case was pleaded. The acquirer's acceptance of the chosen form, recorded in clause 8 of the revised offer, was a willingness to accommodate the sellers' tax structuring, not an independent commercial preference of its own.

[81] SARS has discharged the onus of proving a tax benefit. The first of the four requirements is satisfied.

SOLE OR MAIN PURPOSE

[82] Once the tax benefit is established, section 80G(1) presumes that the sole or main purpose of the arrangement was to obtain it, and the appellants must rebut that presumption.

[83] Under the predecessor general anti-avoidance provision, section 103(1), the purpose test was understood as a subjective one, directed at the taxpayer's actual state of mind. The 2006 reform that produced sections 80A to 80L recast it. As *Absa Bank* holds, and as I have found that holding to bind me, the purpose enquiry under the present GAAR is objective. The question is the purpose that the arrangement, viewed in the light of all the relevant facts and circumstances, is reasonably to be regarded as having, not merely the purpose the taxpayer says it subjectively held. The taxpayer's evidence of intention remains relevant and admissible and may bear on the rebuttal of the presumption. What the objective standard means is that such evidence does not control the result. It is weighed against the objective features of the transaction and the contemporaneous record. The purpose enquiry asks why this structure was chosen. The tainted element enquiry that follows asks what the structure is.

[84] The appellants submitted that, if the purpose test is objective, the rebuttable presumption in section 80G(1) is rendered meaningless, since no evidence of subjective good faith could ever displace an objective characterisation. The submission misunderstands the function of the presumption. Section 80G(1) operates on the burden of proof, not on the content of the test. Once SARS has proved the arrangement, the tax benefit and a tainted

element, the presumption casts on the taxpayer the onus of satisfying the Court, on a balance of probabilities, that obtaining the tax benefit was not the sole or main purpose. That onus is not discharged merely by professing a benign state of mind, because the test is objective. But it is not incapable of being discharged. It may be displaced by objective material, for example proof that the impugned structure was required by an independent third party for its own non-fiscal reasons, or that the feature said to be fiscal in fact served a substantial commercial function that an ordinary transaction would not have served. The presumption is therefore not empty, and it is by reference to that kind of material, not the witnesses' assurances alone, that the appellants' case must be tested.

[85] The purpose of doing the deal must be kept apart from the purpose of giving it the form it took. The appellants' case is at its strongest put as one of mixed motive, and I take it that way. The appellants undoubtedly had a genuine commercial objective, to realise the value of their investment, with ANCIENT acquiring control. The GAAR is not concerned with that objective, and the Commissioner accepts that the transaction had a proper commercial purpose. But section BOA asks for the sole or main purpose, and where commercial and fiscal purposes coexist the question is which predominated in the choice of the impugned structure. A genuine commercial reason for doing the deal does not answer the different question of why the deal was given this form. The commercial objective, a sale and a change of control, could have been achieved by a straightforward sale of shares. The pre- closing dividend funded by the purchaser's _subscription added nothing to the commercial result. Its one discernible function, which an ordinary sale would not have served, was to convert what would otherwise have been taxable proceeds of sale into an exempt inter-company dividend. On the facts, that fiscal purpose was the main purpose of the structuring. The commercial purpose was fully served by the sale itself.

[86] Put as a but-for test directed at the structure rather than the deal, the question is whether, absent the tax benefit, this particular mechanism would still have been chosen. On the evidence, the answer is no. Two explanations for the mechanism were canvassed. The first is the appellants' own, that it was the way to achieve a single layer of tax. That is, on its face, a fiscal explanation. The second, which I have considered although the appellants did not press it, is that an acquirer might require such a mechanism for its own commercial reasons. I have already explained, in dealing with the tax benefit, why that explanation fails on the facts. With both candidate explanations examined, only the fiscal one remains. The mechanism would not have been adopted but for the tax benefit, because everything else it achieved could have been achieved, more simply, by a sale.

[87] The contemporaneous record points firmly to that conclusion, independently of any witness' recollection. The shareholder circular of 2 September 2016 told shareholders, in terms, that "[n]o Capital Gains Tax will be payable" and that only dividends tax would arise on

later distribution. The EG opinions were directed to achieving a single layer of tax. The termination fee was calculated by reference to a sale price, which assumes a sale. These documents were created while the transaction was being designed, and they speak with one voice about why the structure took the form it did.

[88] Tested against that record, and reading each item the appellants relied on in the way most favourable to them, their evidence does not rebut the presumption. Mr Van der Hof's evidence that he would not have recommended a CGT-bearing·transaction was, I accept, honestly given. But it does not bear on the purpose of. the structuring, because it speaks to whether he would have done the deal at all, not to why the deal was given this form. It also sits uneasily with the termination agreement, which was expressly calculated on a sale price and a sale of "all their shares and claims". Mr Buffalo's evidence that he "never thought about tax" is difficult to reconcile with the fact that he was an experienced businessman, professionally advised, and that the tax treatment was discussed repeatedly at shareholder level. As to Mr Bells, the appellants pointed to the IBC Trust resolution authorising him to proceed unless net after-tax proceeds fell more than 10% below projection and said it shows no more than ordinary price sensitivity. There is force in that general observation, but the resolution does not assist the appellants here. On the figures, the 10% threshold was not reached, so the resolution authorised the deal to proceed on the structured basis and is evidence of the centrality of the after-tax outcome, not against it.

[89] I do not rest the conclusion on adverse credibility findings against these witnesses, and it is unnecessary to make them. The point is narrower and, on the objective approach required by the GAAR, sufficient. Whatever the witnesses' private states. of mind, the arrangement must be assessed objectively, in the light of the contemporaneous documents and the commercial reality. Assessed that way, it is reasonably to be regarded as having had the obtaining of the tax benefit as its main purpose. The subjective evidence, even taken at its highest and read in the appellants' favour, does not displace that characterisation.

[90] The appellants' reliance on *Conhage* requires fuller treatment, because they put it at the forefront of their reply and say that *Absa Bank's* express endorsement of it is dispositive. I accept the premise. *Absa Bank* reaffirmed the principle stated by Hefer JA in Conhage. Within the bounds of the anti- avoidance provisions, a taxpayer may arrange his affairs to attract less tax, and where the same commercial result can be achieved in different ways, he may choose the way that attracts less tax. The principle is part of our law and was not weakened by *Absa Bank*. But it does not carry the weight the appellants put on it, and the reason is in the principle itself. What *Conhage* protects is a choice between different means of achieving the same commercial result. In *Conhage*, the taxpayer had a genuine need for capital, and a sale-and-leaseback was one of several legitimate ways to raise it. The tax advantage was incidental to a real choice between routes, each of which produced the capital

the taxpayer needed. Here the commercial result the appellants sought, a sale and a change of control, was fully achieved by the sale itself. The dividend-and-subscription mechanism was not an alternative means of effecting a sale. It produced the same commercial result as a sale while changing only the fiscal character of what the sellers received. *Conhage* permits a taxpayer to choose between routes to one commercial destination. It does not protect a step grafted onto the chosen route whose only distinguishing operation is to alter the tax outcome. The Commissioner's concession that the transaction had a proper commercial purpose is therefore not, as the appellants contend, dispositive. The concession goes to the purpose of doing the deal, which is not in issue, and not to the purpose of structuring it in a way that, on the evidence, was adopted for its fiscal effect.

[91] The appellants have not rebutted the presumption in section 80G(1). The sole or main purpose requirement is accordingly satisfied.

TAINTED ELEMENTS

[92] At least one of the tainted elements in section 80A(*a*) to (*c*) must be present. I am satisfied that more than one is. This enquiry is distinct from the purpose enquiry. It asks what the arrangement is, judged by the statutory indicia, and I decide it on the Court's own analysis of the transaction, using the expert evidence only as background to ordinary commercial practice.

[93] The appellants submitted that the Commissioner relies on a single feature, the closed circle of funds with nil net effect on RASS, to make out several tainted elements, and that this is impermissible double-counting. The premise is partly right and the conclusion wrong. The same primary facts may answer more than one of the statutory indicia, because the indicia are not directed at the same defect. Abnormality under section 80A(*a*) addresses the manner and means of the arrangement, measured against what arm's length parties pursuing a bona fide business purpose would do. Lack of commercial substance under section 80C addresses its economic effect, in particular, its effect or want of effect on business risk and net cash flow apart from tax. The arm's-length indicium in section 80A(*c*)(i) addresses the rights and obligations the arrangement creates. That one set of facts engages all three is what one would expect of an arrangement whose only operative feature is fiscal, since such a feature will at once be an abnormal manner, lack economic effect, and create rights an arm's-length party would not. Each element is nonetheless independently grounded, as appears below.

Abnormality

[94] The abnormality enquiry is objective: The questions are whether the means or manner of the arrangement would not normally be employed for bona fide business purposes, other than obtaining a tax benefit, and whether the rights or obligations created would not normally be created between persons dealing at arm's length.

[95] Dividend declarations and share subscriptions are each commonplace on their own, and pre-sale distributions are a familiar feature of commercial life. A seller may, before a sale, declare a dividend of genuine accumulated profits so that retained earnings are extracted by those who earned them rather than passing to the buyer in the price. What distinguishes the present arrangement from those ordinary cases is that the distribution here was not of value the company had generated and retained at all. RASS had paid no dividends in its history and applied its profits to development. It had no distributable cash to fund an R274 million dividend. The dividend was instead funded, rand for rand, by the acquirer's simultaneous subscription for new shares at the same value, and the emptied shares were then sold for a nominal sum. The money described a closed circle, and the company's net financial position was unchanged by the dividend-and-subscription steps taken together. A genuine pre-sale dividend moves the company's own accumulated value to its owners and leaves the company correspondingly poorer. The buyer pays a price reduced by what was taken out. This mechanism did the opposite. It left RASS exactly as valuable as before. The value reached the sellers not from the company's own resources but from the purchaser, and it came to them in the guise of a dividend rather than as the price of their shares. A combination of steps whose mutual effect on the company is nil, but which transforms the fiscal character of what the sellers receive, is not a manner normally employed for bona fide business purposes other than obtaining a tax benefit.

[96] Professor Wainer, an expert of considerable experience, testified that this combination, a full-value dividend immediately funded by an acquirer's subscription that restores the company's value and followed by a nominal disposal of the remnant shares, is abnormal in a commercial context, and that he had encountered it only in tax-avoidance schemes. His evidence was not met by any contrary expert evidence.

[97] I do not treat Professor Wainer's opinion as determinative of the legal question, and the conclusion above does not depend on it. Whether the arrangement is abnormal for the purposes of section 80A is a matter for the Court, decided on the structure's own features, the closed circle of funds and the nil net effect on RASS, set against the genuine pre-sale dividend it did not resemble. His evidence is accepted only so far as it confirms what those features already indicate about ordinary commercial practice. It supplies context, not the answer.

[98] The appellants' lay witnesses said they understood such structures to be "common". Lay impression cannot displace the objective assessment. Nor does it assist the appellants that the legislature later enacted targeted anti- dividend-stripping rules in section 22B and paragraph 43A of the Eighth Schedule. That the legislature thought specific intervention necessary shows that such transactions were occurring and were regarded as objectionable, not that they were normal.

[99] The arrangement was thus entered into by means, and in a manner, that would not normally be employed for bona fide business purposes other than obtaining a tax benefit. Section 80A(*a*) is satisfied.

Lack of commercial substance

[100] Section 80C(1) provides that an arrangement lacks commercial substance if it would result in a significant tax benefit but does not have a significant effect on the business risks or net cash flows of the party, apart from any effect attributable to the tax benefit. This element is directed at economic effect, and it is on economic effect, not on the manner of the arrangement, that I decide it.

[101] The dividend-and-subscription mechanism did not alter the parties' commercial risk profile. The purchaser acquired the business. The sellers received R274 million. The economic result was that of a sale. What changed was the fiscal characterisation of the consideration, and nothing else.

[102] The appellants say their risk profile changed because they exchanged illiquid shares for cash. So it did. But that change is attributable to the disposal itself, not to the mechanism by which the disposal was dressed. A direct sale of the shares for R274.666 million would have produced exactly the same change in the appellants' risk and cash position, the same illiquid asset surrendered, the same cash received, the same exposure to the business extinguished. The dividend-and-subscription mechanism added nothing to that change and subtracted nothing from it. It introduced no new business risk, deferred or accelerated no net cash flow, and altered no commercial exposure beyond what the underlying sale already carried. Where the only difference between doing the thing directly and doing it through the mechanism is the tax result, the mechanism has no significant effect on business risk or net cash flow apart from the tax benefit.

[103] Section 80C(2)(*b*)(iii) identifies, as indicative of a lack of commercial substance, elements that have the effect of offsetting or cancelling each other. The dividend created a liability of about R274.666 million. The subscription created an asset valued at approximately R280.325 million. The liability was settled out of the asset. The net effect on RASS was nil.

The dividend and the subscription offset each other almost exactly. That is a clear instance of the indicator described in the subsection.

[104] The composite transaction therefore lacks commercial substance within the meaning of section 80C, and on a footing distinct from abnormality, not because the manner was unusual, but because the mechanism made no difference to risk or cash flow that the underlying sale did not already make.

Rights or obligations not at arm's length

[105] It is enough, under section 80A(*c*)(i), that the arrangement created rights or obligations that would not normally be created between persons dealing at arm's length. The transaction as a whole need not be shown to be non-arm's-length.

[106] Arm's-length parties do not, in the ordinary course, structure a takeover by having the target declare a dividend equal to its entire value, the acquirer subscribe for new shares at that same value, the target apply the subscription proceeds to discharge the dividend, and the sellers then part with their emptied shares for a nominal sum. That circuitous route answers no commercial need that a straightforward sale would not have met. The acquirer was bound to fund a dividend it would never receive, and the sellers were to be paid the company's whole value otherwise than as the price of their shares. Those are not rights and obligations that arm's-length parties, concerned only with the commercial outcome, would normally create.

[107] The arrangement accordingly created rights and obligations that would not normally be created between persons dealing at arm's length, and section 80A(*c*)(i) is satisfied.

Misuse or abuse

[108] The arrangement also results in the misuse or abuse of the dividend exemption in section 10(1)(*k*)(i), within the meaning of section 80A(*c*)(ii). This element calls for closer analysis than the others, because the appellants are right that the dividend was, in formal terms, a dividend, and right that section 10(1)(*k*)(i) does not on its face contain a source or anti-stripping qualification. The abuse enquiry is therefore not whether the words of the exemption were literally satisfied, which they were, but whether the purpose of the exemption was defeated by the use to which it was put. That enquiry is purposive, consistently with the character of Part IIA already described.

[109] The purpose of section 10(1)(*k*)(i) is not in serious doubt and is discernible from the structure of the Act. South African company tax is imposed at the level of the company that derives the income. If a dividend paid by one resident company to another were taxed again in the recipient's hands, the same corporate profits would bear tax repeatedly as they passed

up a chain of resident companies before reaching the ultimate individual or trust shareholder. At that point the dividends-tax regime is designed to collect the shareholder-level charge. The exemption exists to prevent that cascade. It relieves the economic double (or multiple) taxation of company profits moving between resident companies, leaving the single shareholder-level charge to fall, through the dividends-tax regime, when value finally leaves the corporate chain. It is a provision for the integrity of company-to-company distribution, not a mechanism for converting the proceeds of a disposal into a receipt that escapes tax altogether.

[110] Against that purpose the appellants advanced a textual argument that must be met directly. They submitted that the bulk of the distribution was not paid out of accumulated profits at all. It was funded by the subscription proceeds, which were contributed tax capital in RASS's hands. On that basis the "double taxation of profits" rationale does not fit, and if it does not fit, no abuse of it can be made out. The argument is superficially attractive but does not survive examination. It begins by mistaking the unit of analysis. Only R599 of the R274 666 901 distribution was a return of contributed tax capital. The remaining R274 666 302 was declared, characterised and claimed by the appellants as a dividend exempt under section 10(1)(*k*)(i), and it is the exemption of that amount, that footing, whose abuse is in question. The appellants cannot at once claim the provision's benefit for the sum as a dividend and resist the abuse enquiry by recharacterising the same sum as something other than a dividend. The argument also proves more than the appellants can have intended. If a distribution may be dressed as an exempt inter-company dividend whenever it is funded by a contemporaneous capital injection from the very party acquiring the company, the exemption could be used to extract the entire value of any target free of tax on every sale. That would turn a cascade-relief provision into a disposal-relief provision it was never meant to be. But the short answer is that the abuse does not depend on identifying the ledger from which the money came. The flaw is functional, not one of accounting. The subscription, a capital-raising instrument, was used to inject value into RASS for one immediate purpose: to distribute the company's entire worth to the exiting shareholders on the eve of their exit. The consideration for the disposal of their economic interest thus reached them as an exempt dividend rather than as taxable proceeds of sale. Whether the rand that travelled the closed circle is labelled profit or contributed capital when it passes through RASS does not change what the exemption was made to do, or the fact that, here, it was made to do something else.

[111] That is misuse or abuse in the sense the GAAR contemplates. It is not the mere exploitation of a gap or an ambiguity, and not the lawful selection of a less-taxed route among genuine alternatives, but the deployment of a relieving provision in a manner that defeats the object for which Parliament conferred it. I have not treated the later enactment of section 22B and paragraph 43A of the Eighth Schedule as establishing that the conduct was unlawful before them, and the appellants are entitled to insist that a subsequent targeted rule may

equally indicate that the prior law was thought to leave a gap. The legislative sequel is therefore not the basis of this finding. The finding rests on the purpose of section 10(1)(*k*)(i) as it stood, and on the use to which the appellants put it. The arrangement results in the misuse or abuse of that exemption within the meaning of section 80A(*c*)(ii).

Conclusion of the tainted elements

[112] More than one tainted element is present, each established independently of the others and on the distinct statutory footing identified above. The requirement in section 80A(*c*) is satisfied.

CONCLUSION ON THE GAAR

[113] Each jurisdictional requirement of section 80A is satisfied in respect of the composite transaction as assessed. The Commissioner was entitled, under section 80B, to disregard or re-characterise the dividend and subscription steps and to determine the tax consequences as those of a sale of the appellants' shares for full value. The additional assessments are upheld on the merits. One matter of quantum requires a word, lest that confirmation be misread. The tax that follows is capital gains tax on the disposal of the shares. It falls on the gain, namely the proceeds of the disposal less the base cost of the shares under the Eighth Schedule, and not on the gross amount the appellants received. The relevant base cost is that of the shares in the appellants' hands, comprising their cost of acquisition on the section 42 roll- over together with any further qualifying expenditure, and not the nil figure mentioned at [46] above. That figure described the transaction as it was structured, where the return of contributed tax capital reduced the base cost under paragraph 768(2) of the Eighth Schedule. Once the dividend, the subscription and that return of capital are disregarded and the transaction is re-characterised as a sale for full value, the base cost falls to be determined without them. The appellants abandoned the ground relating to the quantification of the amounts taxed, and I do not recompute the figure. I confirm the assessments on the footing that the capital gain falls to be determined under the Eighth Schedule as proceeds less base cost.

UNDERSTATEMENT PENALTIES

[114] SARS imposed understatement penalties of 75% under item (iv) and column 3 of the table in section 223(1) of the TAA, on the footing that the arrangement was an impermissible avoidance arrangement. Section 222(1) provides that an understatement penalty is payable unless the understatement results from a bona fide inadvertent error.

[115] The appellants' case is that they relied on professional advice and disclosed the arrangement as reportable, so that any understatement resulted from a bona fide inadvertent error. SARS's answer, in substance, is that a transaction the Court has found to be abnormal, to lack commercial substance, and to abuse the dividend exemption cannot at the same time be the product of an innocent error, particularly in the hands of sophisticated, professionally advised taxpayers.

[116] The appellants add a point of principle. The objective character of the GAAR enquiry must not be allowed to collapse the penalty enquiry into it. I agree, and the answer lies in the structure of section 222(1) itself. The objective findings on the GAAR go to what the arrangement is. Section 222(1) asks how the understatement in the return came about. The two enquiries are distinct, and the objective character of the GAAR enquiry confirmed in Absa Bank, which concerned party and tax-benefit issues, does not require the conduct enquiry under section 222(1) to be answered objectively as well.

[117] The Commissioner's objection, that a sophisticated taxpayer cannot innocently err about an abusive structure, fails because the test under section 222(1) is conduct-based, not outcome-based. It asks how the understatement arose. The question is whether the appellants conducted themselves as reasonable taxpayers. honestly and without the carelessness or indifference the penalty regime is designed to sanction. It is not a question of whether the structure was, viewed objectively and with hindsight, impermissible. The findings on the GAAR are objective findings about the character and effect of the arrangement. They are not findings that the appellants acted dishonestly or knew their advisers' view of the GAAR to be wrong or set out to mislead SARS. A transaction may be objectively impermissible under the GAAR and yet have been entered into by a taxpayer who genuinely and reasonably believed, on professional advice, that it was lawful. So understood, the bona fide inadvertent error exception is not emptied of content by the conscious character of tax planning. What it asks is whether the error in the return, here the treatment of the receipt as an exempt dividend, was made in good faith and with reasonable care, not whether the taxpayer consciously entered into the transaction.

[118] Two kinds of error should be distinguished. An error of legal judgment, that is, a reasonable but ultimately wrong view taken on competent advice on a genuinely unsettled question of law, is of a different order from a misstatement of what the transaction factually did. The appellants did not misdescribe the transaction. They disclosed its mechanics fully. Their error, if it was one, was a judgment □hat the GAAR did not strike a structure of this kind, a judgment that has turned out to be wrong, but that was made in good faith on specific professional advice in an area that was then far from settled.

[119] On the facts, the section 222(1) enquiry favours the appellants. The advice they obtained was not perfunctory. EG gave a draft and then a final written opinion. and the final opinion expressly addressed, even if briefly, whether the structure was designed to evade tax and concluded that it was not. Nor did the appellants conceal the arrangement. They disclosed it as a reportable arrangement under section 38 of the TAA in May 2017, before any audit. A taxpayer bent on evading tax does not ordinarily volunteer the structure to the Commissioner. The June opinion's general warning that the GAAR "might" apply if a step had a tax-benefit purpose does not, without more, convert reliance on the later, specific EG opinion into recklessness or a failure of reasonable care. A general caution that an anti- avoidance rule may be in play is a feature of most structured transactions. It is not, of itself, notice that the particular structure is bad. A taxpayer who obtains a specific opinion directed to its own facts, and acts on it, does not act without reasonable care merely because an earlier, general advisory had flagged the topic in the abstract.

[120] This approach is consistent with the way the Constitutional Court dealt with an analogous understatement-penalty question in *The Thistle Trust v Commissioner for the South African Revenue Service* [2024] ZACC 19, and with the earlier judgment of the Supreme Court of Appeal in that matter, *Commissioner for the South African Revenue Service v The Thistle Trust* 2023 (2) SA 120 (SCA). It is right to be exact about what those courts did. In the Supreme Court of Appeal, SARS conceded, and that Court accepted the concession as correctly made, that the taxpayer's reliance on a tax opinion gave rise to a bona fide inadvertent error. In the Constitutional Court SARS's conditional cross-appeal on the penalty was dismissed on the ground that it was not in the interests of justice for that Court to sit as a court of first and last instance on the meaning of "*bona fide* inadvertent error". The Court emphasised that SARS bears the onus of bringing an understatement within a penalty category. I rely on *Thistle Trust* for that approach, not for any fully reasoned and binding holding on the exception's content. The Supreme Court of Appeal took a similar view in *Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* [2023] 2 All SA 44 (SCA), excusing the taxpayer from penalties on the basis of its reliance on professional advice. That judgment was set aside on the merits by the Constitutional Court in *Coronation Investment Management SA (Pty) Ltd v Commissioner for the South African Revenue Service* 2024 (6) SA 310 (CC), where the taxpayer succeeded on the underlying exemption and the penalty cross-appeal accordingly fell away, but the Supreme Court of Appeal's reasoning on the penalty, on which I draw, was not disturbed. So understood, this line of authority supports the conduct-based reading adopted here.

[121] What remains is the Commissioner's real point. How can sophisticated taxpayers innocently err about a structure later found abusive? The answer is that the GAAR findings are reached objectively and with the benefit of appellate authority delivered after the appellants acted. That the law's objective application now condemns the structure does not retrospectively render unreasonable a good-faith reliance, in 2016 and 2017, on a specific opinion in an area that was then, and remained until recently, genuinely unsettled. The error was one of judgment on a complex and debatable question, made in good faith and openly disclosed. It falls within section 222(1).

[122] Accordingly, the understatement penalties fall to be remitted.

PROVISIONAL TAX UNDERESTIMATION PENALTIES

[123] SARS imposed penalties under paragraph 20(1)(*a*) of the Fourth Schedule. The appellants' final estimates of taxable income were nil. Their actual taxable income, as determined by the additional assessments, exceeded R1 million, and the estimates were less than 80% of that amount, so the penalty was imposed.

[124] The appellants seek remission under paragraph 20(2). Paragraph 20(2) directs attention to whether the estimate was seriously calculated with due regard to the factors bearing on it and was not deliberately or negligently understated. A provisional estimate is a prediction, made before the year's tax position is known, and it falls to be assessed on the information reasonably available to the taxpayer when it was made, not with the hindsight of the final assessment. The standard is reasonable care in the making of the estimate, not prescience about how a contested question of law will ultimately be resolved. The existence of a contingent GAAR risk, known to be contested and the subject of specific advice that no tax was payable, does not of itself render an estimate that reflected that advice a negligent estimate. Nor, conversely, does professional advice operate as an automatic answer in every case, regardless of how obvious or how squarely adverse the risk was. The enquiry is one of degree, turning on what a reasonable taxpayer in the appellants' position, with the advice and information they had, would have estimated. Paragraph 20(2) confers a wide discretion.

[125] Applying that standard, the factors here weigh in the appellants' favour, but the assessment is one the statute commits, in the first instance, to the Commissioner's discretion. When the estimates were made, the appellants had specific professional advice that no CGT was payable, the GAAR question was unresolved, the issues were complex, and the GAAR's application was contested from the outset. I have considered whether to set the penalty aside outright and substitute a decision of my own. The proper course, given the width of the paragraph 20(2) discretion, is to remit it. So that the remittal is not an empty exercise, the Commissioner is directed to exercise the discretion in the light of this judgment and of the

standard stated above. In particular, he should weigh the specificity of the professional advice on which the appellants relied, their voluntary disclosure of the arrangement as reportable, the genuinely unsettled state of the GAAR as it bore on structures of this kind when the estimates were made, the absence of any concealment or misdescription of the underlying facts, and the proportionality of any penalty to the conduct in fact established, as distinct from the objective GAAR result.

[126] The provisional tax penalty is set aside and remitted to the Commissioner for reconsideration under paragraph 20(2), on the basis set out in the preceding paragraph.

INTEREST

[127] Section 89*quat*(2) provides for interest on the underpayment of provisional tax. The interest was correctly imposed. Section BOK provides that the interest payable under section 89*quat* may not be remitted under section 89*quat*(3) or (3A) where the GAAR has been invoked, and the GAAR has been invoked here. The interest is confirmed.

COSTS

[128] Under section 130 of the TAA, costs do not ordinarily follow the result in this Court. A costs order may be made where the Commissioner's grounds of assessment are held to be unreasonable, or where the taxpayer's grounds of appeal are held to be unreasonable, among other circumstances.

[129] The appellants pressed for at least the costs of the preliminary issue, which they said required discrete argument, and pointed to the asymmetry between a Commissioner who bears no personal risk and taxpayers who do. I have weighed that asymmetry. Real though it is as a general matter, it is not a circumstance section 130 makes relevant. The touchstone the section sets is unreasonableness of conduct, not the relative resources of the parties or the outcome. The preliminary point turned on Erasmus, decided only after argument had closed. Until then, the Commissioner's alternative formulation was a tenable, if ultimately unsuccessful, way of pleading, and advancing it was not unreasonable. Nor was the remission of the penalties the product of any unreasonable conduct by the Commissioner in imposing them. The penalty questions were genuinely arguable both ways. The appellants' abandonment of grounds at the outset sensibly narrowed the dispute. Success was divided. The appellants succeeded on the preliminary issue and on the penalties, and the Commissioner succeeded on the substantive GAAR application, which was the principal matter. But division of success is not, under section 130, a basis for a-costs order, and an issue-by-issue apportionment of the kind the appellants proposed would reintroduce, by another route, the result-follows-costs rule that section 130 deliberately displaces. In the exercise of my discretion, each party should bear its own costs.

ORDER

[130] In each of the above appeals, it is ordered that:

1) The appeal is dismissed.

2) The additional assessment issued by the respondent on 9 June 2022 in respect of the appellant's 2017 year of assessment is confirmed.

3) The understatement penalty imposed under sections 222 and 223 of the Tax Administration Act 28 of 2011 is remitted.

4) The penalty for the underestimation of provisional tax imposed under paragraph 20(1)(*a*) of the Fourth Schedule to the Income Tax Act 58 of 1962 is set aside and remitted to the Commissioner for reconsideration under paragraph 20(2) of that Schedule, on the basis set out in this judgment.

5) The interest imposed under section 89*quat* of the Income Tax Act 58 of 1962 is confirmed.

6) Each party shall bear its own costs.

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FRANCIS, J

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Mr J D Rabinowitz

Accountant Member

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Ms Y Y Molefe

Commercial Member