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Baker Tilly Greenwoods Advisory Services Proprietary Limited
Registration No.: 1968/006454/07

13th Floor, Pier Place
31 Heerengracht Street
Cape Town, 8001
P O Box 3311, Cape Town, 8000
South Africa

T: +27 (021) 410 8500

info@bakertillygreenwoods.co.za
www.bakertillygreenwoods.co.za

IGNORANCE IS CERTAINLY NOT BLISS: THE CONSTITUTIONAL COURT REDRAWS THE GAAR MAP IN *ABSA V SARS*

On 22 April 2026, the Constitutional Court handed down its judgment in *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service* [2026] ZACC 15. It is the first time our apex court has interpreted the General Anti-Avoidance Rules ("GAAR") in sections 80A to 80L of the Income Tax Act 58 of 1962 ("ITA") since their introduction in 2006 – and the result is a markedly more muscular GAAR than many had bargained for.

The Court dismissed Absa's appeal with costs and sent a clear message: a taxpayer can be a "party" to an impermissible avoidance arrangement *even where it had no knowledge of the very steps that produced the tax benefit*. For corporate South Africa, advisors and structured-finance participants, this is a judgment that demands re-reading of every existing tax opinion and re-thinking of every multi-tier funding structure.

Background in brief

Between 2011 and 2015, Absa and its wholly-owned subsidiary United Towers subscribed for preference shares in PSIC Finance 3 (RF) (Pty) Ltd ("PSIC3") to the value of approximately R1.9 billion. The transactions were originated by the Macquarie Group. Absa received tax-exempt dividends on the preference shares, and Macquarie provided a "shortfall" guarantee to make good any tax that might unexpectedly attach to those returns. Unbeknown to Absa (so it was assumed for purposes of the appeal), the funds flowed downstream from PSIC3 into PSIC4, then into the Delta 1 Finance Trust ("D1 Trust"), and ultimately into floating-rate notes issued by Macquarie Securities South Africa Ltd. The D1 Trust used the interest received to acquire Brazilian government bonds, the interest on which was distributed back through the chain as tax-exempt income, exploiting Article 11(4)(b) of the South Africa–Brazil double tax agreement read with section 25B of the ITA. SARS issued section 80J notices and re-characterised the dividends received by Absa as taxable interest for the 2014 to 2018 years of assessment.

The legal questions

The merits before the Constitutional Court turned on two crisp legal questions:

First, was Absa a *"party"* to the impermissible avoidance arrangement as contemplated in section 80L of the ITA, given that it had no knowledge of the downstream steps which generated the tax benefit?

Second, did Absa obtain a *"tax benefit"* within the meaning of the GAAR, when the avoidance (at least on Absa's case) occurred in the hands of D1 Trust and PSIC4 further down the chain?

Underlying both questions sat a more fundamental issue: is the GAAR purpose enquiry now objective, or does the taxpayer's subjective intent still hold sway?

The Court's analysis

A wider net: "party" without knowledge

The majority adopted a deliberately broad, purposive construction of the word "party." Section 80L defines a party as any person who *"participates or takes part in an arrangement,"* and the Court held that this language *"strongly and persuasively admits of a purposive construction."* Knowledge of every downstream step, said Majiedt J, is not required:

> *"Participation does not require omniscience, but it does require a conscious step into the structure from which the avoidance benefit flows. Thus, instead of requiring actual or*

constructive knowledge of the avoidance steps, there must be an objective determination whether there has been participation in the causal chain."

The Court's reasoning was anchored in a concern about wilful blindness and structural avoidance. To require knowledge, said the majority, *"would create a dangerous precedent that allows investors to profit from tax avoidance simply by remaining ignorant, even wilfully so, of the schemes into which their funds are channelled."* On the facts, Absa's role was decisive: *"without Absa's capital injection, no downstream steps exist."* That objective causal contribution was enough to make Absa a party – its ignorance of the Brazilian bond swap was beside the point.

From subjective to objective: the long-awaited confirmation

Perhaps the most significant doctrinal shift in the judgment is the Court's express confirmation that the GAAR purpose enquiry is now objective. Under the repealed section 103(1), the courts (most notably in *Conhage*) had treated the purpose test as essentially subjective, focused on what the taxpayer subjectively intended to achieve with the transaction or arrangement. The 2006 amendment was designed to break with that approach, and the Constitutional Court has now put the matter beyond doubt:

> *"This wording is indicative of an objective test, as the focus is not on the taxpayer's stated intent or purpose, but on the reasonable prevailing facts and circumstances. That is a fundamental change from section 103(1) which the courts by and large, particularly the Supreme Court of Appeal in Conhage, interpreted to relate to the taxpayer's subjective purpose."*

The objectivity of the purpose enquiry is, the Court reasoned, fortified by the section 80G presumption: an avoidance arrangement is presumed to have been entered into for the sole or main purpose of obtaining a tax benefit, and the onus is on the taxpayer to prove the contrary in the light of *"the relevant facts and circumstances"* – language that clearly connotes an objective enquiry.

Recast of the "tax benefit" and "but-for" tests

On the tax benefit issue, the Court took two important steps.

First, it held that section 80B empowers SARS to determine the tax consequences for *"any party"* – the Commissioner is not confined to assessing only the entity that directly avoided an anticipated liability. In the Court's own words:

> *"There is no requirement in the GAAR, and in section 80A in particular, that the taxpayer against whom the GAAR is invoked must personally have secured that benefit. It is sufficient that such an arrangement existed, and, once established, SARS' remedial powers under section 80B extend to determining the tax consequences for 'any party'."*

This is a finding of considerable breadth. Even where a taxpayer has not personally obtained a tax benefit, it remains vulnerable to a GAAR assessment if it participated, objectively viewed, in the causal chain of the arrangement. The reach of the GAAR is not confined to those who personally obtained a tax benefit.

Second (and more importantly for everyday tax planning) the Court recast the "but-for" counterfactual. The question is *not* what would have happened if the transaction had never been entered into, but what would have happened if the transaction had taken place *stripped of its avoidance features*. In Majiedt J's words:

> *"the proper comparison is not with 'no transaction', but with the transaction stripped of its avoidance features."*

Applied to Absa, the consequence was striking. Stripped of the Brazilian bond swap, the conduit trust and the back-to-back PSIC structure, what Absa held in economic substance was a fixed-yield, risk-protected funding instrument, indistinguishable from an interest-bearing loan. The Court rejected the argument that Absa had merely received an enhanced economic advantage flowing from someone else's tax benefit:

"It is a fallacy to argue that SARS ought to be restricted to applying the GAAR provisions only to the parties that directly avoided the tax, but by careful design were mere special purpose vehicles which were interposed in the arrangement as mere conduits… Absent the tax avoidant features of the arrangement, it would, in effect, have been a loan by Absa."

In short, the GAAR now bites where the tax benefit is engineered upstream and dressed up downstream just as readily as where it occurs the other way around. The tax benefit, on the Court's substance-over-form approach, was Absa's all along.

Practical implications for tax advisors, accountants and corporate taxpayers

The *Absa* judgment will have a profound impact on tax advisors, accountants, and corporate taxpayers, and its implications demand immediate attention. Four practical shifts deserve careful consideration.

First, **the objective purpose test changes how tax opinions must be written.** Opinions drafted under the older subjective-purpose framework – which leaned heavily on the taxpayer's documented commercial rationale and board minutes – are no longer enough. The objective characteristics of the arrangement now take centre stage: economic substance, the presence of accommodating or tax-indifferent parties, round-trip financing, mismatches between legal form and economic effect. Advisors should stress-test every structuring opinion against the section 80C indicators *as the primary lens*, with the taxpayer's stated purpose as a secondary consideration.

Second, **the no knowledge defence is gone.** Investors, lenders, institutional funders and intermediate holding vehicles can no longer comfortably rely on the fact that the impermissible features sat downstream and were not disclosed to them. Due diligence must now follow the funds – into SPVs, trusts and offshore conduits – to a degree that, candidly, was not market practice before *Absa*.

Third, **there is no longer a personal-benefit requirement under the GAAR.** The Court confirmed that SARS may invoke the GAAR against any participant in an arrangement, even one who did not personally secure the tax benefit. A participant in a funding chain cannot assume that SARS is confined to the entity in whose hands the benefit formally arose. Every participant's exposure must be assessed — not only that of the entity closest to the avoidance step.

Fourth, **substance must match form on a holistic basis, not a transaction-by-transaction basis.** The Court endorsed a composite view of arrangements: a step that is commercially sound in isolation may still be tainted when viewed as part of a broader chain. For tax advisors structuring or reviewing intra-group financing, treaty-based investments, preference share funding or any multi-entity arrangement, the right question is not "*is each leg defensible?*" but "*does the arrangement as a whole, viewed objectively and stripped of its avoidance features, still hold up*?"

The judgment is, in many ways, the GAAR doing precisely what it was redesigned in 2006 to do. But the breadth of its reach – capturing parties without knowledge, taxing economic beneficiaries upstream of the actual avoidance, and re-characterising legally valid instruments by reference to their economic substance – represents a meaningful contraction of the space within which taxpayers and their advisors operate. Ignorance, in the post-*Absa* world, is certainly not bliss.