



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 864/2024

In the matter between:

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

APPELLANT

and

PIETER JOHAN ERASMUS

RESPONDENT

Neutral citation: *The Commissioner for the South African Revenue Service v Erasmus* (864/2024) [2026] ZASCA 22 (05 March 2026)

Coram: MOCUMIE, KEIGHTLEY and UNTERHALTER JJA and BLOEM and NUKU AJJA

Heard: 5 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 05 March 2026 at 11h00.

Summary: Tax Law – general anti-avoidance rule (GAAR) under Income Tax Act 58 of 1962 (ITA) – appeal against GAAR assessment – statement of grounds for opposing appeal (rule 31 statement) in terms of rule 31 of rules promulgated under Tax Administration Act 28 of 2011 (TAA rules) – modification and amendment of

GAAR assessment in rule 31 statement – irregular step application under uniform rule 30 by taxpayer in respect of rule 31 statement – whether modification and amendment authorised under s 80J(4) of ITA or TAA rule 31(3).

ORDER

On appeal from: The Tax Court of South Africa, Western Cape (Myburgh AJ sitting as member of the Tax Court):

- 1 The appeal is dismissed with costs.
 - 2 The appellant is directed to pay the respondent's costs in the appeal, including the costs of two counsel.
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JUDGMENT

Keightley JA (concurring):

Introduction

[1] This is an appeal against the judgment and order of the Tax Court of South Africa, Western Cape (the tax court) setting aside, as an irregular step, a statement (the rule 31 statement) delivered by the appellant, the Commissioner of the South African Revenue Service (the Commissioner), in terms of rule 31 of the rules promulgated under s 103 of the Tax Administration Act 28 of 2011 (the TAA rules, and the TAA, respectively). In the rule 31 statement the Commissioner set out his grounds for opposing a tax appeal lodged by a taxpayer, Pieter Johan Erasmus (the

taxpayer), against a dividends tax assessment in respect of which the Commissioner had applied the general anti-avoidance rule (the GAAR) under ss 80A to 80L of the Income Tax Act 58 of 1962 (the ITA). The taxpayer, who is the respondent before this Court, filed an application under rule 30 of the Uniform Rules of Court (uniform rule 30) seeking to have the rule 31 statement set aside as an irregular step. The tax court granted that order. It subsequently granted the Commissioner leave to appeal against its judgment and order in terms of s 135 of the TAA.

[2] The disputed tax assessment related to dividends, totalling an amount in excess of R1,2 billion, paid to the taxpayer by Treemo (Pty) Ltd (Treemo) on 27 March 2017. The taxpayer had declared the dividends for purposes of his 2016 year of assessment, but had claimed that any tax that may have been payable was offset by a significant balance of secondary tax on companies credit (STC credit) that had been acquired by Treemo in terms of the then applicable s 64J of the ITA.¹ The taxpayer declared that no tax was due by him in respect of the dividends he had received.

[3] The Commissioner took a different view. He concluded that a series of transactions, culminating in the acquisition of the taxpayer's shares in Treemo, and the consequent payment of dividends, was an impermissible avoidance arrangement as envisaged under the GAAR. He assessed the taxpayer to an adjustment dividends tax of R183,5 million and an understatement penalty of R137,6 million and interest (GAAR assessment). Aggrieved by the GAAR assessment, the taxpayer lodged an objection under s 104 of the TAA. When the Commissioner disallowed the

¹ Subsections 64J(1) and (5) of the ITA provided, at that time, that the beneficial owner of a dividend paid by a company holding STC credits, would not be subject to dividends tax, such tax effectively being funded by a reduction of the STC credits held by the company declaring the dividend.

objection, the taxpayer filed an appeal to the tax court on 22 March 2023. The rule 31 statement was filed by the Commissioner on 28 July 2023.

The GAAR process

[4] Central to the issues in dispute in this appeal are the GAAR provisions and their application by the Commissioner in the GAAR assessment and, subsequently, in the rule 31 statement. Section 80A of the ITA prescribes the features of an ‘impermissible avoidance arrangement’ (avoidance arrangement). An ‘arrangement’ is defined, in relevant part, in s 80L as meaning ‘any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof ...’. An ‘avoidance arrangement’ is defined in that section as meaning ‘any arrangement that, but for this Part,² results in a tax benefit’.

[5] Section 80B of the ITA deals with the tax consequences of an impermissible tax avoidance arrangement. It provides, in relevant part:

‘(1) The Commissioner may determine the tax consequences under this Act of any impermissible tax avoidance arrangement for any party by-

(a) disregarding, combining, or re-characterising any steps in or parts of the impermissible avoidance arrangement;

...

(f) treating the impermissible avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit.

(2) Subject to the time limits imposed by sections 99, 100 and 104(5)(b) of the Tax Administration Act, the Commissioner must make compensating adjustments that he or she is satisfied are necessary and appropriate to ensure the consistent treatment of all parties to the impermissible avoidance arrangement.’

² ‘Part’ means Part IIA, which is comprised of ss 80A to L.

[6] Of particular significance is s 80J, which states:

‘Notice

(1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.

(2) Any party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.

(3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2)-

(a) request additional information in order to determine whether or not this Part applies in respect of an arrangement;

(b) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or

(c) determine the liability of that party for tax in terms of this Part.

(4) *If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the Commissioner, he or she may revise or modify his or her reasons for applying this Part or, if the notice has been withdrawn, give notice in terms of subsection (1).*’ (Emphasis added).

[7] Between March and June 2019, the taxpayer received requests from the Commissioner for relevant material in terms of s 46 of the TAA in relation to his 2015 to 2018 years of assessment. In June 2019 he received a ‘notification of audit’ letter in respect of, among other things, the distributions he had received from Treemo. The taxpayer responded to these requests by providing the Commissioner with relevant information and material.

[8] On 30 July 2020, the Commissioner issued the taxpayer with a notice in terms of s 80J (the s 80J notice). It notified the taxpayer that the Commissioner had completed his preliminary audit in respect of certain of the transactions discussed in previous correspondence. The Commissioner's view was that the GAAR provisions were applicable to the arrangement described in detail in the s 80J notice.

[9] That arrangement, as described, concerned a complex set of share transfer transactions involving several entities, the taxpayer and the Black River View Trust, previously known as the PJ Erasmus Family Trust (the Trust). The taxpayer is a discretionary beneficiary and creditor of the Trust. For the purposes of the appeal, it is unnecessary to traverse the details of all the transactions identified and dealt with in the s 80J notice. A summary of essential details suffices.

[10] The transactions took place in the period from approximately October 2014 to March 2015. The first phase comprised the acquisition of shares by Treemo in several entities that held substantial STC credits and the consequent transfer of those credits to Treemo. The Commissioner referred to this in the s 80J notice as the 'dividend strip' transactions. In October 2014 the Trust acquired shares in Treemo, partly funded by a loan from the taxpayer. The s 80J notice recorded that at this stage, Treemo had no significant assets or liabilities other than a deferred tax asset related to the STC credits it had acquired in the first phase of transactions.

[11] On 12 December 2014 the taxpayer and Treemo concluded a sale and subscription agreement in terms of which the taxpayer sold shares held by him in Pepkor to Treemo for a consideration of R510 million in exchange for the issue to him of class B shares in Treemo. The agreement also provided for the sale by the taxpayer of the class C shares held by him in an entity, Newshelf 1093 (Pty) Ltd

(Newshelf), for a consideration of R750 million, which was settled by the issue to him of class B shares in Treemo (the Newshelf share transfer). On the same date the taxpayer ceded to Treemo his rights and obligations in terms of a put and call option linked to the Newshelf share transfer.

[12] The next stage recorded in the s 80J notice concerned certain transactions that took place between February and March 2015. In February, Newshelf repurchased the shares previously transferred to Treemo (as well as other Newshelf shares that had been transferred to another entity connected to the taxpayer, Klee Investments (Pty) Ltd (Klee)). This transaction is referred to in the s 80J notice as the ‘Newshelf repurchase’. The cash proceeds from the Newshelf repurchase were recorded in Treemo’s annual financial statements as amounting to R1,6 billion. On 25 March, the directors of Treemo approved several cash distributions to the taxpayer (R1,2 billion) and the Trust respectively. As indicated, these were paid on 27 March 2015.

[13] The Commissioner stated in the s 80J notice that this was four days before the STC credits would have ‘expired’ for tax purposes. He recorded further that Treemo utilised R1,2 billion of its balance of STC credits with the result that neither the taxpayer nor the Trust was liable for dividends tax on the distributions paid to them.

[14] It was this series of transactions that the Commissioner concluded in the s 80J notice constituted an avoidance arrangement. The Commissioner’s view was that the ‘dividend strip’ phase of the arrangement was aimed at ultimately shielding the taxpayer and the Trust from the R183,5 and R1,3 million dividends tax for which they, respectively, otherwise would have been liable.

[15] Significantly, for purposes of this appeal, the s 80J notice laid particular emphasis on the transactions involving the Newshelf repurchase. Paragraph 43 records the Commissioner's view that it was clear that the parties planned and anticipated the Newshelf repurchase; the proceeds from that repurchase were intended to flow to the taxpayer and the Trust; and that they anticipated a significant liability for dividends tax arising from the Newshelf repurchase. The paragraph concludes that:

‘Accordingly, the parties facilitated the dividend strip and the [taxpayer]/Treemo investment in order to contrive a situation whereby *the (Newshelf) repurchase dividend would flow through Treemo to [the taxpayer] and the Trust and the liability for dividends tax could be offset via the STC credits obtained* (via the dividend strip).’ (Emphasis added).

[16] The proposed remedy contained in the s 80J report is similarly significant. Paragraph 49 records the following proposed remedy:

‘Ideally, the remedy applied by the Commissioner should reverse or nullify any impermissible tax benefits created by the structure. In our view, in the present case this may be achieved by disregarding all transactions and entities *other than the repurchase by Newshel[f] and the flow of the repurchase dividend ... to [the taxpayer] and the Trust*. [The taxpayer] and the Trust would thus be liable for dividends tax at a rate of 15%.’ (Emphasis added).

[17] The taxpayer exercised his right under s 80J(2) to respond to the s 80J notice (the s 80J(2) response) on 28 September 2020. He explained that during October 2013 he had commenced restructuring his various assets with a view to consolidating them in a single holding company. Treemo was identified for this purpose, and, on 12 December 2014, the taxpayer transferred his assets to Treemo in exchange for shares in the company.

[18] The s 80J(2) response addressed the Newshelf repurchase. It explained that this transaction had taken place within the broader context of the acquisition by Steinhoff International Holdings Limited (Steinhoff) of an approximately 92% interest in the equity share capital of Pepkor (Steinhoff/Pepkor transaction). This transaction was negotiated with the majority Pepkor shareholders (the taxpayer being one) who would be required to exchange their Pepkor shares for shares in Steinhoff. It involved the taxpayer and Treemo, being the entity holding the taxpayer's shares in Pepkor, which he had previously held through Newshelf. Newshelf's repurchase of the class C shares held in it by Treemo was part of the process in terms of which Treemo's Pepkor shares would be exchanged for Steinhoff shares.

[19] Significantly, for purposes of this appeal, the taxpayer explained in the s 80J(2) response that Treemo had used the proceeds from Newshelf's repurchase of the class C shares to subscribe for class E shares in Newshelf. It was these shares that ultimately Treemo had exchanged for shares in Steinhoff. The taxpayer explained that, contrary to the analysis conducted and recorded in the s 80J notice, the proceeds of the Newshelf repurchase had not flowed to the taxpayer via the dividends declared and paid to him by Treemo. The s 80J(2) response expressly stated that:

'However, this distribution was funded from the share subscription proceeds received by Treemo from the BRV Trust. It was not a distribution of a portion of the Newshelf repurchase. In particular, subsequent to the repurchase by Newshelf of its shares from Treemo, Treemo, in terms of the relevant transaction agreements, used the repurchase proceeds to subscribe for a new class of share in Newshelf, which would subsequently be exchanged for shares in Steinhoff.' (Emphasis added).

Further, as regards the proposed remedy, the taxpayer responded that, because the Newshelf repurchase dividend did not flow to the taxpayer, ‘the proposed remedy cannot be applied’.

[20] On 25 November 2020 and having received the s 89J(2) response, the Commissioner requested certain additional information from the taxpayer in terms of s 80J(3)(a) of the ITA. This was provided by the taxpayer on 25 January 2021. It included details of a call option agreement, referred to in his 30 April 2019 response to the Commissioner, that he had entered into with the Trust on 25 March 2015 (the Trust call option agreement).

[21] The subject matter of the Trust call option agreement was 955 new class A shares issued and acquired by the Trust in Treemo. The taxpayer advised the Commissioner that, as he had recorded in his earlier response, the dividend received by him from the Treemo distribution had been used to pay the call option premium. A copy of the Trust call option agreement had been attached to the taxpayer’s earlier response to the Commissioner on 30 April 2019. He further recorded that in a second response to the Commissioner on 5 August 2019, he had provided the same details and explanation.

[22] It was after the taxpayer’s 25 January 2021 response to the Commissioner’s request for further information that the Commissioner issued the GAAR assessment. The Commissioner recorded that ‘[d]espite the contents of the [s 80J(2) response] and the [taxpayer’s 25 January 2021 response], we are not dissuaded from our findings as set out in the [s 80J notice].’ The Commissioner proceeded to ‘reiterate’ the analysis and grounds of assessment that were stated in the s 80J notice. The avoidance arrangement described in the GAAR assessment was exactly as it had

been described in the s 80J notice, with the Newshelf repurchase forming a central part. The Commissioner expressed the view that:

‘Despite the averments made in ... [the s 80J(2) response], the steps set out above are clearly an “arrangement”. In our view, Treemo was acquired solely for the purpose of utilising the STC credits transferred in terms of the dividend strip, and the aforementioned STC credits were so utilised to shield *the dividend arising from the Newshelf repurchase and paid to [the taxpayer].*’ (Emphasis added).

[23] The taxpayer’s averments in his s 80J(2) response, that the dividends were funded by the share subscription proceeds received by Treemo from the Trust, were rejected by the Commissioner on the basis that they were ‘not supported by the documentation and information in our possession.’ The Commissioner’s view remained that it was the proceeds from the Newshelf repurchase that had funded the dividends forming the subject-matter of the GAAR assessment. In the same vein, there was no change to the remedy proposed in the tax assessment: the Commissioner proposed ‘disregarding all transactions and entities other than the repurchase by Newshelf and the flow of the repurchase dividend ... to [the taxpayer] via the Trust.’ The adjustment amount of dividends tax recorded in the tax assessment was based on the proposed remedy.

[24] As I have indicated, the taxpayer’s objection to the tax assessment was disallowed, leading to the taxpayer’s appeal, lodged on 20 March 2023, and the Commissioner’s filing of the rule 31 statement on 28 July 2023. In the interim, the taxpayer had instituted judicial review proceedings in respect of the GAAR assessment (review). The Commissioner succeeded on a point in limine raised in response to the review, and it was removed from the high court roll on 18 August 2023.

The rule 31 statement

[25] Rule 31 of the TAA rules provides:

‘(1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing

the appeal within 45 days after delivery of-

...

(d) in any other case, the notice of appeal under rule 10.

(2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of-

(a) the consolidated grounds of the disputed assessment;

(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and legal grounds upon which SARS relies in opposing the appeal.

(3) *SARS may include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless it constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.*’ (Emphasis added).

[26] In the rule 31 statement the Commissioner expressly stated that he had modified his reasons for applying the GAAR from those set out in the s 80J notice. He had done so based on what he referred to as additional information contained in, and annexures to, the taxpayer’s replying affidavit in the review proceedings. The Commissioner recorded, too, that the determination of the tax consequences of the avoidance arrangement had also been amended.

[27] The major change to the Commissioner’s reasons was that he no longer asserted that the funds for the distribution payments to the taxpayer were derived

from the Newshelf repurchase. The Commissioner now accepted the explanations previously provided by the taxpayer that the source of the funds was the subscription consideration paid to Treemo by the Trust for the issue of the new class A shares in that company. It was this transaction, together with the Trust call option agreement between the Trust and the taxpayer for the acquisition of those shares by the latter, that lay at the centre of the avoidance arrangement described in the rule 31 statement.

[28] The rule 31 statement recorded that this series of transactions had taken place between 25 March and 27 March 2015. It involved: the Trust call option agreement, on 25 March, giving the taxpayer the option to purchase 955 class A shares in Treemo for a consideration of R1,39 billion; on the same day, the approval of distributions totalling R1,4 billion by Treemo to be funded from the subscription proceeds from the issuance of additional class A shares to the Trust; the subscription for new shares by the Trust in Treemo for a consideration of R1,39 billion on 26 March; the payment of the distributions by Treemo on 27 March; the simultaneous use, by the taxpayer, of most of the total of the distributions he received to pay the R1,39 billion call option premium to the Trust; and, also simultaneously, the Trust's use of these funds to pay the subscription consideration to Treemo for the class A shares.

[29] According to the Commissioner, this circular flow of funds (rather than the Newshelf repurchase transactions), preceded by the original 'dividend strip', was what constituted the avoidance arrangement, rendering the GAAR provisions applicable. Consequently, the Commissioner proposed an amendment to the tax consequences of the avoidance arrangement by disregarding all but the taxpayer's acquisition (through the call option agreement) of the direct shareholding in Treemo and the declaration and payment to him of the dividends. Despite this amendment,

the amount of dividends tax for which the Commissioner sought to hold the taxpayer liable remained R183,5 million.

[30] The Commissioner expressly asserted that in making the modifications and amendments recorded in the rule 31 statement he had acted in terms of s 80J(4) of the ITA and rule 31(3) of the TAA rules. It is the Commissioner's reliance on these provisions that lies at the heart of the irregular step application and of this appeal.

The irregular step application

[31] On 18 August 2023 the taxpayer served on the Commissioner a Notice to Remove Cause of Complaint under uniform rule 30 (rule 30 notice). The rule 30 notice recorded, first, the Commissioner's expressed modification of his reasons for applying the GAAR to the averred avoidance arrangement in the rule 31 statement and, second, his similarly expressed amendment to the determination of the tax consequences of the avoidance arrangement.

[32] The taxpayer's first complaint was that s 80J(4) did not permit of the modification and amendment. This was because, on a proper interpretation of s 80J(4), any such modification or amendment required the Commissioner to issue a new, modified or amended s 80J(1) notice. Further, the taxpayer averred, it was not open to the Commissioner to effect a modification or amendment after he had raised a tax assessment in terms of s 80B.

[33] The taxpayer's second, and related complaint, was that s 80J(4) only permits modifications where additional information comes to the knowledge of the Commissioner. The taxpayer averred that the information relevant to the modification and amendment effected in the rule 31 statement was previously known

to the Commissioner. Consequently, the Commissioner could not rely on s 80J(4) for this reason as well.

[34] The third complaint related to the Commissioner's reliance on rule 31(3). Such reliance, according to the taxpayer, was impermissible because the modification and amendment amounted to a novation of the whole of the factual or legal basis of the disputed assessment. Alternatively, it required the issue of a revised assessment. Consequently, it fell outside the permissible power of the Commissioner to effect changes under the rule.

[35] Finally, the taxpayer contended that to permit the modifications and amendments in the rule 31 statement, without affording him the opportunity to respond thereto would infringe his right to fair administrative action. In the interests of clarity, I point out that the taxpayer did not persist with this ground in the appeal.

[36] For these reasons, the taxpayer averred that the inclusion of a new alleged basis for liability, in contravention of rule 31(3), amounted to an irregular step. The notice called on the Commissioner to withdraw the rule 31 statement. The Commissioner's failure to do so led to the irregular step application that served before the high court.

[37] In his opposition to the irregular step application, the Commissioner explained what had led to the modification and amendment. He said that he had been sceptical of the taxpayer's explanation that the source of the funds for the dividend payments to him was the proceeds from the Trust's subscription of shares in Treemo, rather than the Newshelf repurchase. The taxpayer had not provided the Commissioner

with any evidence that the Trust had had funds to acquire the shares in Treemo, which were the subject of the Trust call option agreement.

[38] According to the Commissioner, it was only when the taxpayer annexed to his replying affidavit in the review application a Treemo bank statement dated 27 March 2015 (the bank statement), showing the receipt of cash from the Trust in the amount of R1,39 billion, that his scepticism had dissipated. Furthermore, in the same affidavit, the taxpayer had drawn the Commissioner's attention to note 5 in Treemo's audited financial statements for the relevant period, recording the issue of new shares to the Trust.

[39] Although these annual financial statements had been provided previously to the Commissioner, it was only when the taxpayer drew his attention to note 5, and provided the bank statement, explained the Commissioner, that he had accepted the taxpayer's explanation of the source of funds for the payment of the dividends. This, stated the Commissioner, was the first concrete and independent evidence to support the taxpayer's explanation. It was this that led to the modification and amendment in the rule 31 statement. The Commissioner averred that this additional information justifiably caused him to 'jettison' his earlier scepticism, accept the taxpayer's first explanation, and effect the modification and amendment under s 80J(4).

[40] The Commissioner disputed the validity of the taxpayer's interpretation of s 80J(4), which formed the basis of the latter's first complaint. He contended that there is no obligation on the Commissioner to provide the taxpayer with another s 80J(1) notice following modifications or amendments to the reasons for applying the GAAR. In fact, averred the Commissioner, he had no power to do so. This is because, on his interpretation, he may only issue a fresh s 80J(1) notice in

circumstances where, acting under s 80J(3)(b), he has withdrawn an original notice. Having determined the tax liability of the taxpayer in terms of the GAAR, as provided for in s 80J(3)(c), the Commissioner's view was that he could not issue a fresh s 80J(1) notice. This process was inherently fair, stated the Commissioner, because the issue of his tax liability would, in due course, be determined in the tax appeal proceedings.

[41] Regarding the taxpayer's complaint involving rule 31(3), the Commissioner disputed that the modifications and amendments fell within the prohibitions detailed in the rule. He accepted that they were material. However, he contended that it was only a prohibited novation if the changes introduced new factual or legal grounds that completely changed the original factual or legal grounds relied on by the Commissioner. In other words, a prohibited change was one that caused the entire substratum of the original grounds of assessment to fall away. The Commissioner's stance was that the changes he had effected were limited to the source of funding for the dividends and no more. There was no change to the balance of the factual averments. The legal basis remained the GAAR. Consequently, there was no prohibition of the Commissioner's power to amend in this case.

[42] Neither, contended the Commissioner, did the changes 'require a revised assessment', within the meaning of rule 31(3). This was because 'assessment' is defined in the TAA as 'the amount of tax liability or refund'. In the taxpayer's case, the changes in the rule 31(3) statement had no effect on the amount of dividends tax, understatement penalty and interest raised in the original letter of assessment. There being no merit in any of the grounds of complaint, the Commissioner sought that the application to have the rule 31 statement set aside as an irregular step be dismissed.

[43] The Commissioner contended that he had acted within his powers in effecting the changes to the reasons originally provided for the application of the GAAR. This being the case, the Commissioner averred further, he was also empowered to amend the proposed remedy under s 80B to ensure a 'fit' with the permissibly modified reasons.

[44] The tax court granted the application and ordered that the rule 31 statement be set aside as an irregular step. While it noted that it was arguable that the changes did not amount to a novation prohibited under s 31(3), the high court found that it was unnecessary to make a finding on this issue.

[45] In the tax court's view, it was s 80J(4) that was pivotal. This was because, it found, it was necessary for the Commissioner to establish, as a jurisdictional fact, that the modification of the reasons for applying the GAAR was based on additional information having come to his attention. The tax court was not persuaded that the Commissioner had satisfied this jurisdictional requirement. The Commissioner had not learned anything new to trigger the modifications. Instead, found the tax court, he had changed his view as to the cogency of the information he already possessed prior to the issue of the GAAR assessment.

[46] In addition, the tax court agreed with the submission of the taxpayer that once a GAAR assessment has been raised, the Commissioner may not invoke the s 80J(4) power to justify changes to its reasons recorded in the rule 31 statement. This, found the court, would be to allow a circumvention of the GAAR provisions and render them inoperable. It concluded that modifications to the Commissioner's reasons is not permitted 'without the issue of a new GAAR notice and thereafter a new GAAR assessment.'

The appeal

[47] On appeal the parties agreed that the key question was whether the Commissioner, acting under rule 31, may change the factual grounds of a GAAR assessment and, consequently, the proposed GAAR remedy. It is important to appreciate that, at its heart, this is a question of powers rather than procedure, although the powers question may have procedural implications. Put simply, was what the Commissioner did in his rule 31 statement a competent exercise of his powers under the relevant tax laws? If so, the appeal must succeed. If not, the rule 31 statement lacks lawful foundation and the high court acted correctly in setting it aside as an irregular step.

[48] As I have already observed, the Commissioner relied on two potential sources of power to justify the modification and amendment effected: s 80J(4) and rule 31(3). The tax court limited its inquiry to the former. In his written submissions, the Commissioner maintained his reliance on s 80J(4), contending that the high court had erred in both of its findings in relation to this section.

[49] The Commissioner submitted that s 80J(4) should be interpreted as an empowering provision, rather than one that restricts the Commissioner's ability to revise his reasons for applying the GAAR. In support of this approach, he placed reliance on the words 'at any stage' in s 80J(4). He contended that this meant that the Commissioner could modify his reasons for applying the GAAR post a s 80B determination, up until the point at which a final determination of tax liability is made, by the Commissioner, the tax court, or a court on appeal. For this reason, he contended, the tax court had erred in finding that the s 80J(4) power cannot be invoked after a GAAR assessment under s 80B has been raised.

[50] In his oral submissions to this Court, counsel for the Commissioner adopted a revised approach to s 80J(4) and the issue of its application after a GAAR assessment has been raised. He submitted that the words ‘at any stage’ were significant primarily because they signified that the Commissioner has the power to effect modifications to his reasons for applying the GAAR, even though the source of this power is not necessarily s 80J(4).

[51] Counsel’s contention was that even if it were to be found that the latter section cannot be relied upon by the Commissioner as the source of his power to modify his reasons after a determination under s80B has been made, he nonetheless has the power to do so under rule 31(3).³ In other words, rule 31(3) operates as an independent source of power. The question then would be whether the Commissioner acted within his powers under this rule in effecting the changes reflected in the rule 31 statement. Counsel submitted that neither of the prohibitions in rule 31(3) applied in this case: the changes effected in the rule 31 statement did not amount to a proscribed novation, nor did they require a revised assessment.

[52] Tempting as it may seem to be to confine the inquiry in this appeal to rule 31(3), it would be incorrect to do so. This is because there is an inextricable connection between the Commissioner’s power under s 80J(4) and his power under rule 31(3), as I shall explain. For this reason, it is necessary to consider the ambit of both powers more fully.

³ Counsel for the Commissioner accepted that the exercise of this power would be subject to the requirements of the principle of *audi alteram partem*.

[53] Prior to the revised approach adopted in his oral submissions, the Commissioner urged an interpretation of s 80J(4) that permits the exercise of that power after a GAAR assessment has been raised. That interpretation is premised on the widely framed term, ‘at any stage’, and the submission that this is meant to afford him the necessary flexibility to modify his reasons for applying the GAAR up to the stage until a contested GAAR assessment has been finally determined by him or the appropriate court. On this interpretation, the exercise of the power is not limited to the GAAR stage of proceedings preceding an assessment.

[54] I appreciate that there is no express textual limitation indicating that the exercise of the power is so limited. Section 80J(4) does not say, for example, ‘at any stage before a determination under subsection (3)(c) is made’. However, in my view, there are persuasive reasons for rejecting this interpretation. Textually, there is an obvious drafting link between ss (4) and ss (1) of s 80J. In terms of the latter, the Commissioner is required ‘*prior to determining any liability of a party for tax under section 80B*’ to give notice of his view that ‘the provisions of this Part may apply’ and he must ‘set out *in the notice his or her reasons therefor*’. Section 80J(4) uses very similar language in giving the Commissioner the power, ‘at any stage after giving notice’ under ss(1), to ‘*revise or modify his or her reasons*’ for applying the GAAR.

[55] This sequence of provisions indicates that the power to modify extends only to the reasons given in the notice under ss (1): it is these reasons that the Commissioner may modify, not those on which he may rely at subsequent stages of the tax assessment or dispute resolution process. Moreover, in considering the purpose of the provision, once a GAAR assessment is raised, the ss (1) notice is overtaken and no purpose could be served by giving the Commissioner the power to

modify it. If this is so, it follows that the s 80J(4) power is time-bound and is only available to the Commissioner before he makes a determination under s 80B.

[56] Tax Courts have adopted this approach in their judgments.⁴ In *ITC 76704*⁵ the court agreed with the submission that:

‘[o]nce a GAAR assessment has been raised, SARS cannot invoke the provisions of section 80J(4) (whose operation is limited to the pre-assessment / audit phase) to justify revisions or modifications to the reasons for exercising the GAAR power. ... Section 80J(4) cannot justify introducing a new GAAR assessment through a rule 31 statement ...’⁶

[57] In a recent judgment, *United Manganese of Kalahari (Pty) Ltd v Commissioner of the South African Revenue Service and four other cases (United Manganese)*,⁷ the Constitutional Court considered the argument that this approach by the Tax Courts is correct. The Constitutional Court pronounced, obiter, that this argument ‘is not without merit’.⁸ Further, that s 80J(4):

‘...appears to accommodate the case of a change of reasons before the GAAR assessment is issued: if the assessment has not yet been issued, the Commissioner must either revise or modify the existing section 80J(1) notice or, if it has been withdrawn, issue a fresh one.’⁹

[58] Although the Constitutional Court found it unnecessary to decide the issue, the view expressed is strongly persuasive and aligns with my interpretation of the section. I agree with the findings of the Tax Court in *ITC 76704* and endorse the

⁴ ITC 1862 (2013) 75 SATC 34; ITC 1876 (2015) 77 SATC 175. See also Emilé Cronjé ‘The interplay between anti-avoidance measures and curbing tax evasion and impermissible tax-avoidance arrangements’, dissertation submitted in part-fulfilment of Master of Laws degree, University of Pretoria, 2024, pp 42-46.

⁵ *Taxpayer EJP v Commissioner for the South African Revenue Service ITC 76704* [2024] ZATC 22; 87 SATC 331.

⁶ *Ibid* para 41.

⁷ *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* (CCT 94/23; CCT 98/23; CCT 66/23; CCT 72/24; CCT 320/23) [2025] ZACC 2; 2026 (2) SA 227 (CC); 2025 (5) BCLR 530 (CC).

⁸ *Ibid* para 319-320.

⁹ *Ibid* para 320(c).

Constitutional Court's obiter dictum to the same effect. It follows that the Commissioner could not lawfully rely on the exercise of his power under s 80J(4) to justify the modifications and revisions recorded in his rule 31 statement. This being so, it is unnecessary to consider the further question of whether the Treemo bank statement attached to the taxpayer's replying affidavit in the review constituted 'new information' as required in terms of s 80J(4). Even if it did, the s 80J(4) power was no longer accessible to the Commissioner.

[59] What, then, of the question whether the Commissioner could rely on rule 31(3) as an independent source of authority to justify the moderations and revisions? As the Constitutional Court noted in *United Manganese*, when dealing with GAAR assessments, the letter of assessment has a heightened significance.¹⁰ One reason for this is that the GAAR permits the Commissioner, through the exercise of his administrative power, to impose a tax burden on a taxpayer, despite having acted in a way that was otherwise permissible within the substantive terms of the ITA.¹¹

[60] The lawful exercise of this power by the Commissioner requires compliance with the GAAR provisions as the source of the power. The Commissioner must be satisfied that certain preconditions are met before he can raise a GAAR assessment.¹² If so satisfied, the Commissioner may exercise his powers under s 80B(1) and determine the tax consequences for the taxpayer, which are incorporated into the letter of assessment. The tax consequences that the Commissioner may select as a remedy are those specifically listed in s 80B(1)(a) to (f).

¹⁰ *United Manganese* para 319.

¹¹ *Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A).

¹² *United Manganese* para 320.

[61] There are thus two essential components of the Commissioner's GAAR assessment powers. First, the reasons outlined in the s 80J(1) notice (subject to lawful modification at the pre-assessment stage under s 80J(4)). These explain the steps or parts of the arrangement that the Commissioner considers constitute an impermissible avoidance arrangement, and why they meet the necessary preconditions for the application of the GAAR. These reasons are critical and must deal with all the 'steps' or 'parts' constituting the 'avoidance arrangement', as defined in s 80L.¹³

[62] The second component is the remedy proposed in the s 80J(1) notice and adopted under s 80B(1) in the GAAR assessment. It is the substance of this remedy, and not the amount of the tax liability consequently calculated, that is essential: the chosen remedy evidences the exercise of the power to 'determine the tax consequences' of an avoidance arrangement under s 80B.

[63] It is common cause in this case that in his rule 31 statement the Commissioner both modified his reasons for applying the GAAR and the remedy adopted under s 80J(1). He did so, first, by omitting the Newshelf repurchase from the identified steps forming part of the arrangement. Instead, as noted above, the rule 31 statement placed reliance on the consideration paid by the Trust for its share subscription in Treemo, coupled with the call option scheme, as the source of funds for the dividends paid to the taxpayer. Second, and critically, the Commissioner amended the remedy determined in the s 80J(1) notice and the GAAR assessment letter. The Commissioner no longer sought to disregard the Newshelf repurchase, but rather

¹³ See para 4 above for the definition of 'arrangement'.

sought to disregard the transactions involving the Trust's subscription for shares in Treemo and the related call option agreement.

[64] The modification and amendment affect both components of the Commissioner's assessment powers under the GAAR. They go to the core of the determination made by the Commissioner under s 80B(1). In effect, they amount to a new exercise of that power without the requisite prior legal steps having been followed. This is not permitted under the GAAR provisions. As I have found, s 80J(4) doesn't give the Commissioner the power to do so. Nor is it expressly or impliedly authorised under any other GAAR provision. The lawful exercise of the GAAR assessment powers is a necessary precondition for the lawful exercise of the Commissioner's rule 31(3) power. In the absence of this, rule 31(3) cannot operate as an independent source of power to permit the modification and amendment effected by the Commissioner in his rule 31(3) statement.

[65] Moreover, even if, in principle, rule 31(3) might be available to the Commissioner, his reliance on the rule in this case is misplaced. The nature of the modifications and amendments is such that they necessitate the 'issue of a revised assessment', in this case, a revised s 80B(1) determination. Consequently, his exercise of the power is proscribed by the rule.

[66] For these reasons, the Commissioner could not lawfully effect the modification and amendment under either s 80J(4) or rule 31(3). The rule 31 statement is fundamentally flawed in this respect and constitutes an irregular step. The high court was correct in upholding the application under uniform rule 30 and in ordering that the s 31 statement be set aside. It follows that the appeal must fail.

[67] I make the following order:

- 1 The appeal is dismissed with costs.
- 2 The appellant is directed to pay the respondent's costs in the appeal, including the costs of two counsel.

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

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For the respondent: M W Janisch SC with B J Vaughan

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