



UNICUS TAX UPDATE

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Absa and Another v CSARS





HELLO & WELCOME!

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ABSA FACTS: SIMPLIFIED

- Absa invested in preference shares and received exempt dividends.
- SARS said that, lower in the structure, taxable interest was converted into tax-favoured income.
- The technical tax benefit first appeared in downstream entities, not directly in Absa.
- Absa said it did not know the downstream steps and did not obtain the tax benefit.
- SARS raised GAAR assessments on Absa.

THE CORE ISSUES

- Was there an impermissible avoidance arrangement under GAAR?
- Could Absa be a "party" to the arrangement if it did not know all the downstream steps?
- Could SARS assess Absa even though the tax benefit first technically arose lower in the structure?
- There was a dissenting judgment, but this deck focuses on the majority judgment.

MAJORITY ISSUE 1: THE ARRANGEMENT

- The majority looked at the structure as a composite arrangement, not as isolated legal steps.
- It treated the downstream steps as capable of converting taxable interest into tax-favoured income.
- The enquiry was objective and focused on the arrangement as a whole.
- The majority accepted SARS approach that the structure fell within GAAR.

MAJORITY ISSUE 2: BEING A “PARTY”

- The majority rejected a narrow knowledge-based meaning of "party".
- A taxpayer need not know every internal step to participate in an arrangement.
- The question is whether the taxpayer objectively formed part of the chain of transactions.
- Absa capital was treated as a constitutive part of the arrangement.

MAJORITY ISSUE 3: WHO CAN BE ASSESSED

- The majority held that SARS is not limited to the entity where the tax benefit first technically appears.
- It treated the lower entities as conduits.
- On the majority view, the value of the tax saving flowed through to Absa.
- Absa was treated as the commercial destination of the enhanced exempt return.

COMMON COMMENTARY

- Some commentary reads the judgment as very broad and potentially alarming.
- The concern is that SARS may assess a taxpayer who did not know about the avoidance steps.
- The concern is also that SARS may assess someone who did not personally obtain the tax benefit.
- Read too quickly, the judgment can sound like SARS may select any participant in the arrangement at random.

OUR CRITIQUE OF THAT COMMENTARY

- That reading is too blunt.
- Absa is better read as a pass-through-benefit case, not a random-targeting case.
- The majority did not assess Absa merely because it appeared somewhere in the structure.
- It assessed Absa because the lower entities were treated as conduits and the benefit was said to land with Absa.
- The factual engine of the judgment is benefit, not random participation.

WHY THE DISTINCTION MATTERS

- If the tax saving is absorbed lower down, and no value reaches the taxpayer, the Absa rationale is much weaker.
- If the taxpayer gets a better return, lower price, cheaper funding, or cleaner extraction because of the tax saving, the risk is different.
- A taxpayer cannot safely say: "The tax saving happened somewhere else, so it is not my problem."
- The question is where the value of the tax saving was intended to land.

PRACTICAL EXAMPLE FOR TAXPAYERS

- A business owner is offered a better commercial outcome than the market would normally allow.
- The explanation is not better risk, better security, or better assets.
- The explanation is that tax is reduced, avoided, deferred, or converted somewhere in the arrangement.
- The owner may not know the technical mechanics.
- But if the improved economics depend on that tax result, the owner may not be an innocent bystander.

LEGITIMATE TAX INCENTIVES ARE DIFFERENT

- Tax efficiency is not automatically suspicious.
- Some tax benefits exist because Parliament deliberately created them.
- Legitimate incentives usually have a clear statutory basis, public guidance, known limits, and identifiable providers.
- The problem is not a public tax incentive; the problem is a private tax-saving mechanism that cannot be clearly explained.

WARNING SIGNS AFTER ABSA

- The return is unusually high, or the price or funding cost is unusually favourable.
- The tax explanation is vague: "trust us", "counsel signed off", or "you do not need to know".
- The commercial outcome seems to depend mainly on tax not being paid in the ordinary way.
- The taxpayer is told the tax benefit is elsewhere and therefore cannot be their problem.
- Those are reasons to ask harder questions before entering the arrangement.

PRACTICAL TAKEAWAY

- Absa does not mean SARS can randomly assess anyone in an avoidance arrangement.
- It does mean SARS may look past the formal place where the tax benefit first arises.
- If the value of the tax saving is passed to you, you may be exposed even if the mechanics sit elsewhere.
- The post-Absa discipline is simple: ask how the tax saving works, where it is created, and who keeps it.

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