

# Tax Avoidance vs Tax Evasion in South African Law

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## INTRODUCTION

The distinction between tax avoidance and tax evasion is one of the more practically significant aspects of South African tax law. Taxpayers are entitled to organise their affairs in a tax-efficient manner, but the law does not give unlimited licence to do so. Where arrangements become artificial or lack genuine commercial substance, the General Anti-Avoidance Rule (“GAAR”), contained in the Income Tax Act 58 of 1962 (“the Act”), empowers SARS to intervene. This article sets out where SARS draws the line, as well as what happens when it is crossed.

## THE BASIC DISTINCTION

At its core, tax avoidance is lawful because it merely refers to the structuring of transactions in a tax-efficient way through means which are permitted by the law, such as the use of tax credits or deductions. Tax evasion, however, is not lawful because it necessarily involves some kind of misrepresentation, non-disclosure, or, in some cases, outright fraud. The clearest examples are failing to declare income or claiming deductions that do not exist.

There are also instances where transactions walk a fine line between the two: arrangements that comply with the letter of the law but have no real commercial substance behind them. They are technically valid, but their ultimate purpose is to manufacture a tax benefit rather than to achieve a *bona fide* economic outcome. This would sit squarely within the territory which GAAR is designed to address.

## GAAR

Sections 80A to 80L of the Act give SARS the power to recharacterise or disregard what the legislation calls “impermissible avoidance arrangements.” Under section 80A, an arrangement falls within GAAR’s scope if it gives rise to a tax benefit and it is apparent that the arrangement’s sole or primary purpose is to secure that benefit - especially where the arrangement appears abnormal or lacks commercial substance.

Section 80C goes further, identifying specific features that point toward impermissibility: round-tripping of funds (where money flows in a circle between related parties without any genuine transfer of value), the use of accommodating parties (third parties who participate in a transaction purely to lend it some semblance of legitimacy), and transactions that do not give rise to any material economic effect beyond their tax consequences. The inquiry is not limited to the legal form of the transaction, and the purpose and real-world impact are equally (and often more) relevant.

## WHAT OUR COURTS HAVE SAID

South African courts have moved steadily toward a substance-over-form approach in tax matters. The Supreme Court of Appeal’s decision in *CSARS v NWK*<sup>1</sup> is the leading example: even agreements that are legally valid may be disregarded where they do not reflect genuine economic activity but rather a simulation thereof. Simulation, in this context, refers to the practice of disguising a transaction as something it is not — the dressing up of one legal act in the form of another in order to achieve an outcome which the parties could not, or would not, pursue openly. The court broadened that concept to capture arrangements that, while technically effective, are not what they purport to be. Having said that, the courts have also been careful not to go too far. In *Commissioner for SARS v Bosch*<sup>2</sup>, it was confirmed that structured transactions are not automatically impermissible simply because they produce a tax advantage. The analysis remains fact-specific, and the focus is always on purpose and substance rather than form.

It is worth noting the conceptual distinction which our courts maintain: a simulated transaction is invalid in law *ipso facto*, whereas an avoidance arrangement is legally valid unless it crosses the line, in which case it may be set aside under GAAR.

## THE DIFFERENCE IN PRACTICE

The practical difference boils down to the following: tax avoidance involves disclosed arrangements with at least some genuine commercial purpose, while tax

evasion involves wilful concealment, falsity, or fraud. Full disclosure to SARS and a credible business purpose are the two factors most likely to keep an arrangement on the right side of the line.

## CONSEQUENCES

Where SARS successfully applies GAAR to an avoidance arrangement, the tax benefit is disallowed and the taxpayer's liability is redetermined and possibly subject to understatement penalties and interest on tax owing. Tax evasion, however, carries more serious consequences: criminal charges are a very real possibility, in addition to the usual administrative penalties and interest. The distinction between avoidance and evasion is not merely technical - it has real implications for how SARS and the courts will treat the taxpayer involved.

## PRACTICAL CONSIDERATIONS

Any transaction with a significant tax dimension should be supported by genuine commercial substance and a clear, well-documented economic purpose. Circular structures, self-cancelling arrangements, and transactions that depend on accommodating parties warrant particular caution. Above all, full and accurate disclosure to SARS is not optional; it is the baseline.

## CONCLUSION

South African tax law has moved away from a purely surface-level reading of arrangements toward a purposive, substance-based analysis. Legitimate tax planning remains entirely permissible, but arrangements that exist primarily to manufacture a tax benefit risk being dismantled under GAAR. Where the line falls in any given case turns on three things: purpose, substance, and honesty in disclosure.

<sup>1</sup>*Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA)

<sup>2</sup>*Commissioner for the South African Revenue Service v Bosch and Another* (394/2013) [2014] ZASCA 171



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