

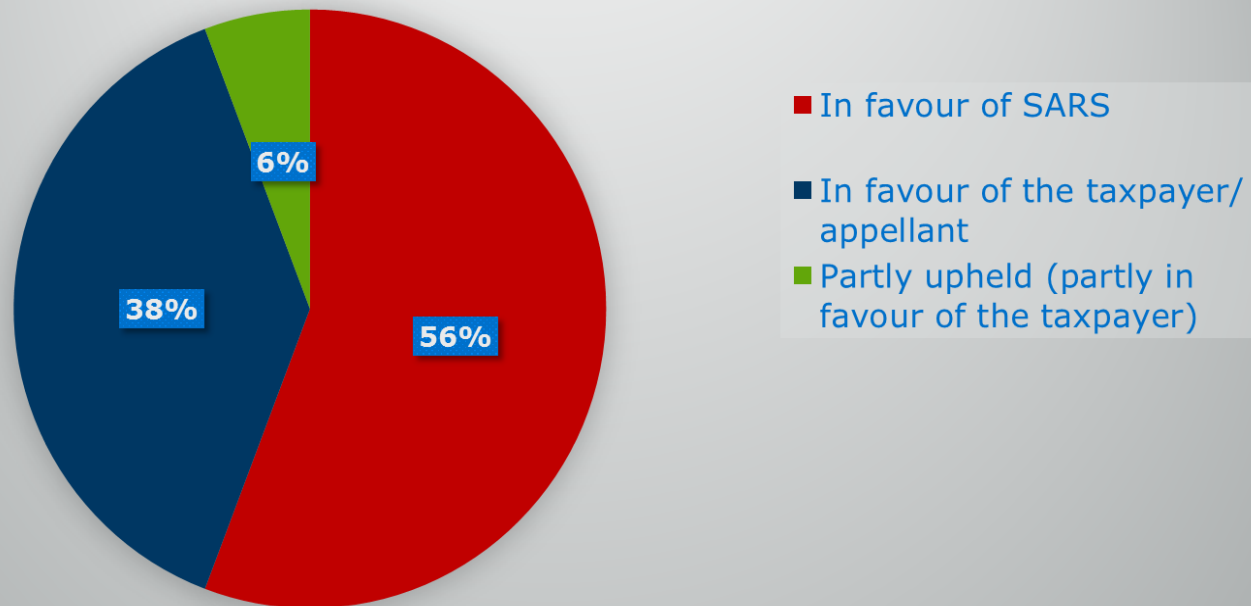
KEY LESSONS FROM THE SCA ON PACKAGE STRUCTURING

SAPA CONFERENCE
SEPTEMBER 2016



TRY AND NOT GO TO COURT

Outcome of Reported Judgments: 012014 - 032016



YOU NEED TO PROVE YOU ARE INNOCENT

Section 102 of the Tax Administration Act –

“(1) A taxpayer bears the burden of proving-

- a) That an amount, transaction, event or item is exempt or not taxable;
- b) That an amount or item is deductible/ may be set off;
- c) The rate of tax applicable to transaction, event, item or class of taxpayer;
- d) That an amount qualifies for reduction in tax payable;
- e) That a valuation is correct; or
- f) Whether ‘decision’ that is subject to objection and appeal under a tax Act is. Incorrect

Why does it read this way?



BACKGROUND TO SALARY STRUCTURING

- Previous best authority was in ITC 1663 61 SATC 363 and ITC 1682 62 SATC 380
- Courts confirmed lawful to enter into salary sacrifice agreement (tax court)

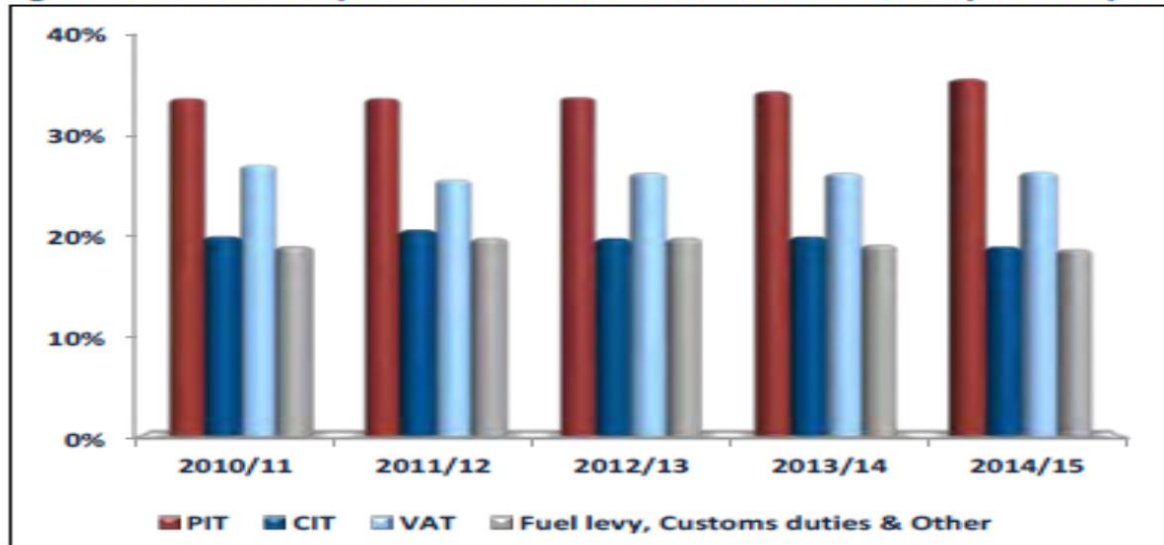


SARS AUDIT AND COLLECTIONS

Remain significant pressure to collect taxes.

Personal tax remains largest area of revenue collection (2015 - 33,8%)

Figure 1.4: Relative composition of main sources of tax revenue, 2010/11 - 2014/15



ANGLO v SARS

- Full reference Anglo Platinum Management Services v C:SARS (20725/2014) [2015] ZASCA 180
- Judgment delivered on 30 November 2015.
- Full bench of the Supreme Court of Appeal, highest court on tax matters, thus absolute authority.
- Involves a salary sacrifice scheme and whether par (c) or par (i) of the definition of “gross income” find application

ANGLO v SARS

- “Full Bench” - 5 judges
- Delivered by Cachalia JA and no dissenting judgements (all 5 judges concurred)
- Final authority on principles

ANGLO v SARS

- What happened:
 - SARS audit and attacked salary structuring
 - Taxpayer lost in Tax Court (SARS win)
 - Appeal directly to the Supreme Court of Appeal due to importance.

ANGLO v SARS

- What happened:
 - Employer had a motor vehicle scheme where employees forgo portion of their cash salary and in stead was provided with a company car.
 - Employer taxed the company car as a fringe benefit (small portion (par (i) “gross income” read with 7th Schedule).
 - SARS wanted to tax the full value of the cash component given up by the employee to get the company car (par (c) “gross income”).

ANGLO v SARS

- What happened – Cont.:
 - Court to decide who is right (SARS or employer):
 - I.e. is the motor vehicle scheme valid?
 - Question turned on whether a legitimate salary sacrifice was achieved?

(SARS conceded yet again that salary sacrifice arrangements are completely lawful)

PRINCIPLES (QUOTED)

Principle #1

“In the commercial world employers and employees are entitled to structure salary packages in a tax efficient manner”

Principle # 2

“... salary sacrifice arrangements, whereby employees sacrifice or forego a portion of their cash salaries in return for some quid pro quo or fringe benefit from the employer that reduces their tax liability, are perfectly lawful.”

Principle # 3

“It is a question of fact in each case whether a salary sacrifice agreement was achieved.”



PRINCIPLES QUOTED

Principle #4

“In this regard a court is not concerned with the subjective belief of the parties to the agreement – no matter how genuine this belief may be –”

Principle # 5

“but [only] with whether the facts, objectively viewed, establish that this result was attained.

Principle #6

“[The court] must thus consider the oral and documentary evidence to assess the probabilities.”

COURT INTERPRETATION

- How did the court decide whether salary sacrifice valid?
 - Court says it will be valid if:
 - The employees receive remuneration in cash and partly as a fringe benefit;
 - Employer takes full responsibility (unconditionally assumes liability) for payments and contributions of the motor vehicle. Employee should therefore not have such an obligation; and

COURT INTERPRETATION

- Court said it will be valid if- Cont.:
 - Employees must completely forgo part of their salary (divest). I.e. cant have right to claim cash component later.

COURT INTERPRETATION

- How to determine if all these requirements are met?
 - The question is one of fact – whether facts, objectively viewed, establish that there was a salary sacrifice agreement.
 - What the employer and the employee think they are actually doing is not relevant – the question is, factually, what are they doing.

COURT INTERPRETATION

- A question of fact?
 - Employer must prove facts, i.e. what the employer and employee are actually doing (taxpayer bears the onus of proof):
 - How?
 - Documents, documents, documents;
 - Keeping a golden line through all documents (all documents to stick to the same principle and policies); and

IMPORTANT ITEMS

- Ensuring practical application of documents aligns what is in writing.
- Default options become critical, i.e. no travel allowance calculator and declaration, you cannot get a travel allowance (only employees who execute legal documents can get tax breaks).



DOCUMENTS

- In the Anglo case, SCA considered –
 - Employment contract
 - Package structuring agreement (allocation agreement)
 - Motor vehicle policy document;
 - Motor Vehicle use agreement;
 - Sale agreement between employer and employee; and
 - “Notional account”.



DOCUMENTS (CONT.)

- These documents (together with oral evidence) lead the court to come to the conclusion that the salary sacrifice scheme was completely valid.
- Without these documents, the employer would have had a very hard time trying to show that factually, all the requirements for a valid salary sacrifice agreement existed.

THE TAKE AWAY

- Take away for payroll professionals:
 - **Principle #1:** You are allowed to reduce employees tax through package structuring. Professional payroll person knows what breaks are available and how to use them.
 - **Principle #2:** Salary structuring agreement means that an employee structures cash or benefits. This demands there must be an agreement and consider using same term as the SCA calling it a “Salary Structuring Agreement”. Call a spade a spade and that will greatly assist if we have to defend you as tax attorneys.



THE TAKE AWAY

- Take away for payroll professionals:
 - **Principle #3:** A “question of fact” means that you cannot say as an employer we structure everyone. SARS will normally start with executives, expatriates and senior employees, searching for instances where you cannot prove your facts of salary structuring.

CHALLENGE SARS PRE AUDIT

- Can you challenge SARS on the reason for the audit?
 - Court case of Commissioner for the South African Revenue Services v Brown (561/2016) [2016] ZAECPEHC 17 (5 May 2016)
 - Appears waste of time and costs to challenge reason. Also raises suspicion on why you are fighting this.

LEGAL PRIVILEGE

- Legal professional privilege
 - Legal privilege determined by section 64 of the Tax Administration Act, 2011.
 - All our opinion work as a practice is signed-off by an admitted attorney and noted as subject to legal privilege. Statement such as:

“This opinion and the recommendations set forth hereunder are issued subject to South African legal privilege as this opinion is issued by an admitted attorney of the High Court of South Africa. As such, care should be taken to ensure this opinion and the recommendations herein contained are treated as strictly confidential to ensure that legal privilege is not waived. We note that, should SARS request a copy of this document, legal privilege may be raised in respect of same and cannot be claimed after this document has been disclosed to SARS.”



STRATEGY

- Dispute Resolution
 - How important is technical vs administrative defence?
 - Experience shows 1/3rd to 50% of dispute success is administrative and not technical.
 - Make sure SARS follow administrative rules SARS are bound to per TAA from commencement of audit.

THANK YOU

