COMMISSIONER FOR INLAND REVENUE v PEOPLE'S STORES (WALVIS BAY) (PTY) LTD 52 SATC 9

Division:	Appellate
Judges:	CORBETT CJ, JOUBERT JA, HEFER JA, NESTADT JA AND NICHOLAS AJA
Date:	14 November 1989 and 22 February 1990
Also cited as:	1990 (2) SA 353(A)

Income tax - Gross income - Accruals - 'The total amount . . . accrued to or in favour of' the taxpayer - Meaning of -Whether equivalent to 'to which he has become entitled' or 'became due and payable' - Retailer selling wares to its customers on '6-months-to-pay' revolving credit scheme - At year-end amount representing instalments not yet payable still outstanding - Date of accrual of income - Valuation of accruals consisting of rights to future payments -Instalments not yet payable to be included in gross income of taxpayer in the year of assessment in which he became entitled to them - Being the year in which he acquired the right to them - To be included at no more than the present value of the right to receive those instalments in the future - Section 1: definition of 'gross income' of the Income Tax Act 58 of 1962.

Respondent carried on business as a subsidiary in a large group of companies as a retailer of clothing, footwear, household textiles and related goods and sold its wares to its customers for cash and on credit.

The bulk of its credit sales were made under its so-called '6-months-to-pay' revolving credit scheme, whereby amounts charged to a customer's account were payable in six equal monthly instalments. At or soon after every month end, a statement of account was rendered to each customer. The instalment reflected on the statement as payable had to be paid before the next statement date. In other words, a purchase made in January would be reflected on the statement rendered at or soon after the end of that month. One-sixth of the purchase price would be reflected on the statement as payable. It would have to be paid before the date of the next statement rendered at or soon after the end of February.

During the 1983 tax year the respondent sold goods under its revolving credit scheme for a total amount of some R1,3m. At year-end an amount of R341 281 representing instalments not yet payable was still outstanding. The Commissioner for Inland Revenue(appellant) included the latter amount in the taxable income on which the

taxpayer was assessed for normal tax for the year in question, subject to a deduction of R7 702 in terms of s 11(*j*) of the Act for debts considered to be doubtful.

Having unsuccessfully objected to the assessment, the respondent appealed to the Special Court on the grounds that-

(*a*) The instalments not yet payable nor paid of R341 218 did not constitute an 'amount, in cash or otherwise, received by or accrued to or in favour of' the taxpayer within the meaning of 'gross income' defined in s 1 of Act 58 of 1962, and ought therefore not to have been treated as such.

(*b*) Alternatively, the instalments not yet payable nor paid . . . ought not to have been included in the taxpayer's gross income at their face value. They should have been included at no more than the present value of the right to receive those instalments in future.

Two questions were submitted to the Special Court for decision:

(*a*) Ought the value of the instalments not yet payable nor paid to have been included in the taxpayer's gross income?

(*b*) If so, at what value ought those instalments to have been included in the gross income? Ought it to have been done at the face value or at the value to the taxpayer or at the market value or at some other value?

The Special Court held that the value of the instalments not yet payable nor paid was correctly included in the taxpayer's gross income. It also held that the outstanding debts had to be valued at their market value.

The matter was remitted to the Commissioner 'for further investigation and assessment in accordance with the principles set out by the Special Court'. Being dissatisfied with the decision of the Special Court, the Commissioner appealed in terms of s 86A(2)(*b*) of the Income Tax Act 58 of 1962 to the Appellate Division

against the Special Court's ruling that the outstanding debts had to be valued at their market value. The taxpayer cross-appealed against the Special Court's decision that the value of the instalments not yet payable nor paid was correctly included in the taxpayer's gross income.

Held

(i) That income, although expressed as an 'amount' in the definition of 'gross income', need not be an actual amount of money but may be 'every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value . . . including debts and rights of action'.

(ii) That income in a form other than money must, in order to qualify for inclusion in 'gross income', be of such a nature that a value can be attached to it in money.

(iii) That the fact that the valuation of the income may sometimes be a matter of considerable complexity does not detract from the principle that all income having a money value must be included.

(iv) That no more is required for an accrual in terms of the definition of 'gross income' than that the person concerned has become entitled to the 'amount' in question.

(v) That any right (of a non-capital nature) acquired by the taxpayer during the year of assessment and to which a money value can be attached, forms part of the 'gross income' irrespective of whether it is immediately enforceable or not, but that its value is affected if it is not immediately enforceable.

(vi) That the decision in *Lategan* v *Commissioner for Inland Revenue* 1926 CPD 203, 2 SATC 16 reflects the law correctly.

(vii) That the value of the instalments not yet payable nor paid at the tax year-end must be included in the taxpayer's gross income for that tax year.

(viii) That the outstanding instalments constituted rights to receive payment in the future and these rights had to be valued, such value being obviously affected by their lack of immediate enforceability; they accordingly had to be valued at their market value.

The appeal and the cross-appeal were both dismissed with costs, to include, in the case of the appeal, the costs of two counsel.

D M Fine SC for the appellant (respondent in the cross-appeal): The present appeal raises two allied issues, namely: (1) What meaning is to be assigned to the word 'accrued' in the definition section of gross income, in the Income Tax Act of 1962 (the Act), ie does it mean 'entitled to' as found by the Special Court, following the judgment of Watermeyer J in *Lategan* v *Commissioner for Inland Revenue* 1926 CPD 203;1 or does the word 'accrued' bear the meaning as contended for by the taxpayer, namely 'due and payable'? (2) If the word 'accrued' means 'entitled to', what amount must be brought into account in the taxpayer's 'gross income', ie is it the face value of the outstanding book debts, less permissible deductions; or is it the actual or market value of the outstanding debts? The word 'accrued' means 'entitled to'. The outstanding book debts must be brought into account at their face value, and the only permissible deductions are those set out in the Act. In concluding that the word 'accrued' should bear the meaning 'entitled to', and that accordingly the instalments not due and payable should be taken into account, the Special Court held that the decision in the *Lategan* case(*supra*) which had not been dissented from, or overruled, and which had stood for 60 years, had to be applied. This finding was correct for the reasons which follow: 'Gross income', in terms of the Act, is defined as

'in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, *received by or accrued to* or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature . . .'

(My emphasis.) 'Gross income' has therefore two bases, ie receipts and accruals. See *Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 261.2 The Income Tax Act then under consideration was Act 40 of 1925, and s 7(1) which, for all intents and purposes, contains the same wording as its present counterpart, read as follows:

' ''Gross income' means the total amount whether in cash or otherwise *received by or accrued to* or in favour of any person, other than receipts or accruals of a capital nature . . .'

(My emphasis.) At the time *Lategan's* case was decided, the governing legislation was the Income Tax Act 41 of 1917, and s 6 thereof, which defined 'gross income', read as follows: 'the total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature'. It is clear therefore that the legislature throughout has had both these independent concepts of receipts and accruals in mind. In *Lategan's* case it was contended that the instalments not yet due, ie payable in the future, but not in the year of assessment, were not amounts of money accrued to him in terms of the Income Tax Act, and consequently did not form part of his gross income for the year of assessment. The court, *per* Watermeyer J (whose judgment

was concurred in by Benjamin and Louwrens JJ), rejected this contention. The learned judge

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then went on to say that debts payable in the future should be brought into account at their actual value, and that something should be deducted from their face value so as to determine their actual value. Reference is made in the *Lategan* judgment to s 21(2)(*e*) of that Act, which reads:

> 'No deduction as regards income derived from any trade may be made in respect of any of the following matters: . . .
>
> (*e*) any debts owed to the taxpayer, except such as are proved to the satisfaction of the Commissioner to be bad or doubtful, deductions for doubtful debts being made according to a value estimated by the Commissioner.'

An allowance was therefore made, and an amount was deducted from the face value to allow for the fact that the debts were not payable at the close of the year of assessment. The only deductions contemplated are those deductions which are permitted by statute, and in the *Lategan* case (although not expressly stated), those allowable in terms of ss 17 and 21(2)(*e*) of that Act. The relevance of these submissions has application to the second point. The *Lategan* principle is followed in *Ochberg* v *Commissioner for Inland Revenue* 1933 CPD 256.3 There,
under consideration, was Act 40 of 1925 and the concept of 'accrued', ie whether it meant 'entitled to' or 'due and payable' (at 264).4 The learned judge (Watermeyer J, Sutton J concurring) concluded that the value of the right to claim in the future was part of the taxpayer's gross income, and had to be included in the year of assessment. In *ITC* 431(1938) 10 SATC 429 *Lategan's* case was (at 436) again followed. The court, in that case, also held that, once the amount accrued, there was no right to place the amount of the unpaid instalments to a suspense or reserve, regard being had to the provisions of s 12 of Act 40 of 1925. *Lategan's* case has been commented on and discussed in a number of cases, but has never been expressly dissented from. See, for example, *Commissioner for Inland Revenue* v *Delfos*(*supra*); and *Hersov's Estate* v *Commissioner for Inland Revenue* 1957(1) SA 471(A).5

In each of these cases the facts under consideration were distinguishable, and the meaning of the word 'accrued' was not really under consideration. In *Hersov's* case the entitlement to the benefit was conditional upon the death of Hersov, and consequently Hersov was neither entitled to the sum, nor was it due and payable. In the *Delfos* case the taxpayer's salary was due and payable, ie, it had been credited to his account, and he was also entitled to payment thereof. Indeed, *Silke on South African Income Tax* 10ed at 24-6, although he points out that the *Lategan* principle has been doubted, also indicates that it has never been expressly dissented from, and at 25, dealing with the *Delfos* and *Hersov* cases, says: 'In both the *Hersov* and *Delfos* cases the meaning of the word 'accrued' was not a question before the court, since either the 'entitlement' or the 'due and payable' principle would have yielded the same result in the particular circumstances.' Despite criticism, the word 'accrued' means 'entitled to'. There are cogent reasons for this conclusion: (1) There is adequate machinery in the Act for protecting the taxpayer by allowing instalments not due and payable, but to which the taxpayer is entitled to, to be taken into account as provision is made:

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(*a*) for debts which are irrecoverable (see s 11(*j*) of the Act); and(*b*) for debts which are doubtful. If doubtful debts are recovered in the following year, then they are written back into the taxpayer's income. See *Delfos'* case(*supra*) at 255.6 (2) *Lategan's* case was decided under Act 41 of 1917, and the definition of 'gross income' has now been extended by the introduction of the words 'or otherwise'. These words must be assigned some meaning, and they are wide enough to cover instalments not yet due and payable, but to which the taxpayer has become entitled. (3) Section 7(1) of the Act deems income to have accrued, and the word 'deemed' must be given a meaning in the context of at least meaning *prima facie*. In the circumstances, the court *a quo* was correct in its interpretation of the word 'accrued'.

It is on the second question, where the Special Court found in favour of the taxpayer, that the court erred, for the following reasons: The present value principle, or face value principle, conflicts with the provisions of the Act in the following respects: (1) Deductions allowed in determination of taxable income are specially laid down in terms of s 11. See in particular s 11(*j*) and (*j*). (2) Section 23(*e*) specifically provides that:

> 'No deductions shall in any case be made in respect of the following matters, namely - (*e*) income carried to any reserve fund or capitalized in any way;'.

See *ITC* 431(*supra*). If the present value system were to apply, ie only the face value or market value of the book debts were to be taken into account (in the case where the debts had not been sold), there would be no method for taxing that portion of income which was received in the following year; say, for example, book debts outstanding but not yet due and payable are R100, their present value is found to be R75, applying the criterion which the Special Court took into account, that amount is brought into account, the full amount is recovered in the following year, then it does not seem that, if this occurs, there would be any method to tax the additional amount of R25.

W H Trengove SC (with him *P A Solomon*) for the respondent (appellant in the cross-appeal): Before the

Special Court various questions were posed, but only the following two are relevant to this appeal: (1) 'Ought the value of the instalments not yet payable nor paid to have been included in the taxpayer's gross income?' and(2) 'If so, at what value ought those instalments to have been included in gross income? Ought it to have been done at face value or at the value to the taxpayer or at the market value or at some other value?' The Special Court held that it was bound by the well known principle expressed in *Lategan* v *Commissioner for Inland Revenue* 1926 CPD 2037 and accordingly that(i) the rights to the future instalments formed part of the taxpayer's gross income, and(ii) they were to be included in gross income at current market value. Section 1 of the Income Tax Act 58 of 1962 ('the Act') provides that any person's 'gross income' for any given year or period of

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assessment, means . . .' When does an amount 'accrue' to or in favour of a taxpayer? On the one hand, 'accrued' does not mean 'received'. This is apparent from the fact that 'accrued' is used in conjunction with 'received'. It is in any event placed beyond doubt by s 7(1) which provides that income is deemed to have accrued to a person 'notwithstanding that such income . . . has not been actually paid over to him'. On the other hand, a mere *spes* or a conditional right to claim an amount, does not give rise to an accrual. *Ochberg* v *Commissioner for Inland Revenue* 1933 CPD 256 at 263-4;8 *Mooi v Secretary for Inland Revenue* 1972(1) SA 675(A) at 683G.9 The difficult question is whether an unconditional right to claim payment of an amount in future, gives rise to an accrual even though the amount is not yet due and payable or in fact paid. In *Lategan* v *CIR*(*supra*), Watermeyer J (with whom Benjamin J and Louwrens J concurred) answered the question as follows: Section 6 of the 1917 Act defined 'gross income' as 'the total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature, in any year or period assessable under this Chapter from any source within the Union or deemed to be within the Union . . .'. The court accepted that, although 'amount usually means an amount of money', it had to be given a wider meaning to include 'not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value' (at 208-9).10 (The present definition makes it clear that the 'amount' may be 'in cash or otherwise'.) The court inferred from certain sections of the Act and from the views expressed by Gregorowski J in *De Beers Consolidated Mines v Commissioner for Inland Revenue* 1922 WLD 184, 'that value of earnings is the basis of taxation' and, accordingly, that a taxpayer's income for taxation purposes
'includes, not only the cash which he has received or which has accrued to him, but the value of every other form of property which he has received or which has accrued to him, including debts and rights of action'. The words 'has accrued to or in favour of any person', accordingly mean 'to which he has become entitled' (at 209).11 The court held further so far as a debt is concerned which is payable in the future and not in the year of assessment, that it 'might be difficult to hold that the cash amount of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled to a right to claim payment of the debt in the year of assessment, but he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so.' Accordingly, 'the value of this right' had to be included in the taxpayer's gross income for taxation purposes (at 209-10).12 The question was however whether s 21(2)(*e*) of the Act did not militate against that construction. It provided for a deduction for bad and doubtful debts owed to the taxpayer. That suggested that all unpaid debts had to be included in 'gross income' at their face value. The court concluded however that s 21(2)(*e*) was 'a section merely providing a

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method for fixing the value of the debts to be brought up as "gross income" before any deduction is made to arrive at taxable income' (at 210).13 The court expressed its conclusion as follows (at 210-11):14

> 'In my opinion, therefore, the answer . . . is that the instalments (that is, the instalments not yet due and payable at the end of the tax year) must be regarded as gross income, but something must be deducted from their face value to allow for the fact that they were not payable at the close of the year of assessment. Assuming that the right to receive the instalments was not converted into money by sale or otherwise during the year of assessment, the value to be fixed (apart from any question whether the debt was good or bad) would be the present worth of the instalments at the end of the year . . .'

The *Lategan* judgment accordingly subscribed to the following propositions: (1) The value of a right acquired during the year of assessment, to claim payment of an amount in future, accrues during that year of assessment, even though the amount is not yet due and payable at the year-end, and only becomes due and payable thereafter. (2) The value or 'present worth' of that right accrues, and not its face value. That is so because that which accrues is not the cash to which the taxpayer will ultimately be entitled, but his vested right to claim payment of that amount at a future date. (3) Where the right has not been converted into money by sale or otherwise during the year of assessment, its value is determined at the end of the year of assessment. Watermeyer J, with whom Sutton J agreed, again applied the *Lategan* principle in *Ochberg v CIR* 1933 CPD 256 at 264.15 In *Commissioner for Inland Revenue v Delfos* 1933 AD 24216 it was not necessary to determine whether the *Lategan* case had been correctly decided, because the taxpayer became entitled to the salary in question and it became due and payable to him, within the same year of assessment. The members of the court nevertheless expressed divergent views on the *Lategan* principle. See *per* Wessels CJ at 251,17 *per* Curlewis JA at 255,18 *per* De Villiers JA at 260,19 and *per* Stratford JA at 262.20 Beyers JA did not express

himself on the correctness of the *Lategan* rule. In *Commissioner for Inland Revenue* v *Polonsky* 1942 TPD 249 at 25421 the court merely referred to the divergence of opinion in the *Lategan* and *Delfos* cases but found it 'unnecessary to decide whether there is a difference in meaning between the two interpretations or not'. In *Commissioner for Inland Revenue* v *Butcher Brothers*(*Pty*) *Ltd* 1945 AD 301 at 31822 *Lategan's* case was quoted only for the proposition that the word 'amount' used in s 7(1)(*d*) of the 1925 Act meant an amount having an ascertainable money value. The correctness of the *Lategan* principle was not addressed. In *Pyott Ltd* v *Commissioner for Inland Revenue* 1945 AD 128 at 13523 and in *Sacks* v *Commissioner for Inland Revenue* 1946 AD 31 at 4324 the *Lategan* case was referred to, only to be distinguished. In *Hersov's Estate* v *Commissioner*

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for Inland Revenue 1957(1) SA 471(A)25 Centlivres CJ, who delivered the unanimous judgment of the court, seemed to incline against the *Lategan* principle (at 481A-B),26 but did not find it necessary to arrive at a definite conclusion (at 481H).27 In *Rishworth* v *Secretary for Inland Revenue* 1964(4) SA 493(A)28 the court merely referred to the divergence of opinion (at 499E-F).29 In *Secretary for Inland Revenue* v *Silverglen Investments*(*Pty*) *Ltd* 1969(1) SA 365(A)30 the court referred to the judgment of Wessels CJ in the *Delfos* case, but merely to make it clear that it was 'no authority for the view that gross income, as defined, does not, in relation to a year of assessment, include both receipts and accruals during that year, or for the view that the Secretary may, at his pleasure, exclude from a taxpayer's income in one year the amounts returned by him as accrued during that year, in order that they may be taxed in a subsequent year in which they will be or have been received' (at 376G).31 In *Mooi* v *Secretary for Inland Revenue* 1972(1) SA 675(A)32 the court again referred to the divergence of opinion but did not attempt to resolve the controversy (at 682H-683A).33 Textbook writers have also expressed divergent views on the *Lategan* principle. *Silke on South African Income Tax* 10ed at 21-6; Meyerowitz & Spiro: *Income Tax in South Africa* B at 38-9; Ingram: *The Law of Income Tax in South Africa* 32-3. The *Lategan* principle is wrong in so far as the legislature did not intend to include in the definition of 'gross income' a right to claim payment of an amount in future which has not yet become due and payable and has not in fact been paid. Section 7(1) provides *inter alia* that income shall be deemed to have accrued to a person 'notwithstanding that such income has not been actually paid over to him but remains due and payable to him'. The purpose of that provision is obviously to make it clear that income does not actually have to be paid to a taxpayer to accrue to him, provided that it is due and payable. But what then if it has neither been paid nor is due and payable to him? The inference is strong that such income is not to be regarded as having accrued. The same inference arises from s 11(*j*) and (*j*). They provide for allowances for bad and doubtful debts, but only in respect of 'debts due to the taxpayer', and not in respect of debts owing but not yet due to him. In other words, if the *Lategan* principle were to be applied, it would give rise to an anomaly. Debts due to the taxpayer would be included in his gross income but subject to the allowances for bad and doubtful debts. Debts owing to the taxpayer but not yet due to him, would also be included in his gross income but without any allowance for bad and doubtful debts under s 11(*j*) and (*j*). The inclusion of both receipts and accruals in 'gross income' creates a possibility of double taxation. *CIR* v *Delfos*(*supra*). That risk exists both on the *Lategan* interpretation as well as on the narrower interpretation of the definition. The risk is minimised, however, if accruals are limited to

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amounts due and payable. The potential for double taxation would then only arise if the taxpayer does not receive payment on due date and if, despite the debtor's default, the debt remains recoverable and cannot be said to be bad. In terms of s 24, if a taxpayer enters into an agreement which is to the effect that ownership of property passes to the other party upon or after receipt by the taxpayer of the whole or a certain portion of the amount payable to him under the agreement, the whole of that amount is deemed to accrue to the taxpayer on the day the agreement is entered into. If the *Lategan* principle was correct, the whole amount would in any event have accrued to the taxpayer on the date the agreement was entered into. This provision would in other words have been superfluous. If the taxpayer is to be liable for tax on amounts which he has not received and which he has no right to claim during the year of assessment, he may well, through no fault of his own, be taxed beyond his means. The court would lean against an interpretation which would have that consequence. In case of doubt the *contra fiscum* rule must be invoked. *Estate Reynolds & others* v *Commissioner for Inland Revenue* 1937 AD 57 at 70;34 *Glen Anil Development Corporation Ltd* v *Secretary for Inland Revenue* 1975(4) SA 715(A) at 737F.35

As to the second issue, the rationale for the *Lategan* principle is that what accrues is the present right to claim an amount in future, and not the amount itself. What has to be included in the taxpayer's gross income, is the present value of that right, and not the face value of the amount. *Lategan* v *CIR* at 210, 211.36 If the *Lategan* principle is accordingly to be upheld, it can only be on the basis that what is to be included in the taxpayer's gross income is the present value of his right to claim payment of the amount in future. It cannot be on the basis that the face value of the amount itself it to be so included. That would be in conflict with the *Lategan* rationale for the inclusion of the debt in the first place. The appropriate measure of the value to be placed on such a right is the amount that can be obtained for it on the open market. *Lace*(*Proprietary*) *Mines Ltd* v *Commissioner for Inland Revenue* 1938 AD 267.37 The value of that right is to be determined as at the end of the year of assessment. *Caltex Oil*(*SA*) *Ltd* v *Secretary for Inland Revenue* 1975(1) SA 665(A).38 See however the views expressed in *Silke on SA Income Tax* 10ed at 34 para 2.17.

Fine SC in
reply. *Cur adv*

vult.
Postea (22 February).

HEFER JA: This is an appeal in terms of s 86A(2)(*b*) of the Income Tax Act 58 of 1962, as amended, ('the Act') against a decision of a special court. The question to be decided relates to the definition of 'gross income' in s 1 of the Act which provides that -

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' ''gross income", in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature . . .'

(I have emphasised the pertinent part of the definition.)

From the agreed statement of case presented to the special court it appears that the respondent ('the taxpayer') carries on business as a subsidiary in the Edgars group of companies as a retailer of clothing, footwear, household textiles and related goods, and that it sells its wares to its customers for cash and on credit. The bulk of its credit sales are made under its so-called six-months-to-pay revolving credit scheme. This entails that -

'(amounts) charged to a customer's account, are payable in six equal monthly instalments. At or soon after every month end, a statement of account is rendered to each customer. The instalment reflected on the statement as payable, has to be paid before the next statement date. In other words, a purchase made in January would be reflected on the statement rendered at or soon after the end of that month. One-sixth of the purchase price would be reflected on the statement as payable. It would have to be paid before the date of the next statement rendered at or soon after the end of February.'

(The quotation is from the agreed statement of case.)

During the 1983 tax year the taxpayer sold goods under the scheme for a total amount of some R1,3m. At year-end an amount of R341 281 representing instalments not yet payable was still outstanding. The appellant ('the Commissioner') included the latter amount in the taxable income on which the taxpayer was assessed for normal tax for the year in question, subject to a deduction of R7 702 in terms of s 11(*j*) of the Act for debts considered to be doubtful. Having unsuccessfully objected to the assessment, the taxpayer appealed to the special court on the grounds that -

'13.1 The instalments not yet payable nor paid of R341 218,0039 did not constitute an "amount, in cash or otherwise, received by or accrued to or in favour of" the taxpayer within the meaning of "gross income" defined in s 1, and ought therefore not to have been treated as such.

13.2 *Alternatively to* 13.1

. . .

13.2.2 The instalments not yet payable nor paid . . . ought not to have been included in the taxpayer's gross income at their face value. They should have been included at no more than the present value of the right to receive those instalments in future.'

Three questions were submitted to the special court for decision. The third one is no longer relevant; the first two read as follows:

'19.1 Ought the value of the instalments not yet payable nor paid to have been included in the taxpayer's gross income?

19.2 If so, at what value ought those instalments to have been included in the gross income? Ought it to have been done at the face value or at the value to the taxpayer or at the market value or at some other value?'

The special court answered the first question in the affirmative and ruled that the outstanding debts had to be valued at their market value. The matter was accordingly remitted to the Commissioner 'for further investigation and assessment in accordance with the principles set out above'. Before us now is an appeal by the Commissioner against the

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special court's ruling on the second question and a cross-appeal by the taxpayer against its decision on the first question.

The special court considered itself bound by the judgment of the full bench of the Cape Provincial Division in *Lategan* v *Commissioner for Inland Revenue* 1926 CPD 203.40 Under consideration in that case was the definition of 'gross income' in s 6 of Act 41 of 1917 in the context of the sale during the year of assessment of wine by a wine farmer in terms of an agreement providing for payment of part of the purchase price in the

succeeding year. 'Gross income' was defined in s 6 as 'the total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature . . .' and the question was whether the part of the purchase price that was payable during the succeeding year could rightly be regarded as having accrued to the taxpayer during the year of assessment. The court held that it could. Watermeyer J, who prepared the judgment, said in this regard at 207-10:41

> '. . . it will be noticed that the definition of "gross income" does not seem to limit receipts of money in the year of assessment to such receipts as are the reward of work done or capital employed in the year of assessment. So far as receipts are concerned, the time of the receipt seems to be looked to rather than the time when the work is done which earns the receipt, whereas as far as earnings which are due but have not been received are concerned, the time when the work is done is looked to, and not the time of the receipt.
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> This seems to be an attempt to combine in the definition two fundamentally different conceptions of income, because the same sum of money may accrue in one year and be received in another, and it could never have been intended that income tax should be paid twice over . . .
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> The definition seems also to contemplate that "gross income" shall . . . always be a sum of money, because it uses the words "total amount", and amount usually means an amount of money. But the word "income" in its ordinary sense does not always consist of money, as was pointed out in *Booysen's* case (1918, A.D. 576).42 'Income', unless it is in some form such as a pension or annuity, is what a man earns by his work or his wits or by the employment of his capital. The rewards which he gets may come to him in the form of cash or of some other kind of corporeal property, or in the form of rights.
>
> Ordinarily speaking, the *value* of these rewards is the man's income. Unless the word "amount" means something more than amount of money, the definition given in the Act would not seem to be wide enough to include the "value" of property or rights earned by the taxpayer . . . The Legislature could hardly, however, have intended such a result, because then it would be open to any taxpayer . . . to receive payment in some form other than money, and thus escape taxation. In my opinion, the word "amount" must be given a wider meaning, and must include not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value . . .
>
> If this view be correct, then the taxpayer's income for taxation purposes includes not only the cash which he has received or which has accrued to him, but the value of every other form of property which he has received or which has accrued to him, including debts and rights of action.
>
> It was argued, on behalf of the appellant, that a debt payable in the future was not an amount of money "accrued to" the taxpayer, and consequently it was not part of his "gross income", and a number of cases were cited on the meaning of the word "accrue". In my opinion, the words in the Act, "has accrued to or in favour of any person", merely mean "to which he has become entitled".
>
> So far as a debt is concerned which is payable in the future and not in the year of assessment, it might be difficult to hold that the *cash amount* of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled to a right to claim payment of the debt in the year of assessment, but he has acquired a right to claim payment of the debt in future.

> This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so.
>
> According to what has been stated above, the value of this right must, in my opinion, be included in the taxpayer's gross income for taxation purposes . . .
>
> In my opinion, therefore, the answer to the first question in the special case is that the instalments must be regarded as gross income, but something must be deducted from their face value to allow for the fact that they were not payable at the close of the year of assessment. Assuming that the right to receive the instalments was not converted into money by sale or otherwise during the year of assessment, the value to be fixed (apart from any question whether the debt was good or bad) would be the present worth of the instalments at the end of the year, i.e., 30th June, 1920.'

I have quoted extensively from the judgment because, as will presently be seen, there is a controversy about the correctness of the ruling that the words 'accrued to or in favour of' merely envisage that the person concerned has become entitled to the amount in question, and since the reasoning underlying the ruling must obviously be considered as a whole. It is convenient to say at this stage that, although Act 41 of 1917, which was in force at the time when *Lategan's* case was decided, was replaced by later legislation, the concept of the accrual of income (in contradistinction to the receipt thereof) was retained in all subsequent enactments. The 1917 Act was replaced by Act 40 of 1925 which was in turn replaced by Act 31 of 1941 and the latter by Act 58 of 1962. 'Gross income' was defined in each Act and every definition concluded with a list of amounts that were specifically said to be included in the concept. These amounts were not always the same, but the basic conception that gross income represented the total amount, in cash or otherwise, received by or accrued to or in favour of a person, remained. (See s 7(1) of Act 40 of 1925, s 7 of Act 31 of 1941, s 1 of Act 58 of 1962.)

The precise ambit of the expression 'accrued to or in favour of' has never been defined by this court; on the contrary, the conflicting pronouncements in *Commissioner for Inland Revenue* v *Delfos* 1933 AD 24243 seem

to be the origin of the present controversy about the meaning of the words in question. Five members of the court heard that appeal. Wessels CJ, with whose judgment Curlewis JA mainly agreed, subscribed (at 251)44 to the view expressed in the *Lategan* case, whereas De Villiers JA (at 260)45 and Stratford JA (at 262)46 were of the opinion that an amount only accrues in terms of the definition when it becomes due and payable. The fifth member, Beyers JA, did not commit himself on the definition and the result was that the court was equally divided on its construction.

The divergence in the *Delfos* case was mentioned in later cases such as *Hersov's Estate* v *Commissioner for Inland Revenue* 1957(1) SA 471(A) at 481;47 *Rishworth* v *Secretary for Inland Revenue* 1964(4) SA 493(A) at 499E-F48 and *Mooi* v *Secretary for Inland Revenue* 1972(1) SA 675(A) at 682H-683A,49 but was never resolved. It is nevertheless stated in *Silke on South African Income Tax* 11ed at 2.7 that the so-called *Lategan* principle is accepted in practice as correctly reflecting the law. It is our

task now to consider the position afresh. For convenience I shall do so by stating and considering the validity of the two main propositions in the judgment in *Lategan's* case.

The first and basic proposition is that income, although expressed as an *amount* in the definition, need not be an actual amount of money but may be 'every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value . . . including debts and rights of action' (*per* Watermeyer J at 209).50 This proposition is obviously correct so that very little need be added to what Watermeyer J himself said in support thereof. It is hardly conceivable that the legislature could not have been aware of, or would have turned a blind eye to, the handsome profits often reaped from commercial transactions in which money is not the medium of exchange. Consider e g the many instances of valuable property changing hands, not for money, but for shares in public or private companies; or share-cropping agreements, dividends in the form of bonus shares, or remuneration for services in the form of free or subsidised housing and the use of motor vehicles. These are only a few of the many possible illustrations that readily come to mind and which, as we know, have not been overlooked by the legislature. Nor can the reference in the definition of 'gross income' in the 1962 Act to receipts and accruals 'in cash *or otherwise*', or other provisions of the Act (such as paras(*h*) and(*i*) of the definition, s 26(1) read with the First Schedule and s 11(*i*) and (*j*)) be ignored. There are clear indications in all these provisions of the extended meaning of 'amount'.

This court has, in any event, adopted and acted upon the principle that income in a form other than money may be taxable. In *Lace Proprietary Mines Ltd* v *Commissioner for Inland Revenue* 1938 AD 26751 e g an assessment based on the value of shares in a company which had been allotted to the taxpayer as consideration for the 'sale' of mineral rights, was unanimously upheld. In *Ochberg* v *Commissioner for Inland Revenue* 1931 AD 21552 the value of shares allotted to the taxpayer as remuneration for services rendered was held to be taxable. And *Mooi* v *Secretary for Inland Revenue*(*supra*) was decided on the basis that a *right* (*in casu* an option to purchase shares) may indeed constitute an 'amount . . . accrued to' the taxpayer. At 68453 Ogilvie Thompson CJ said:

> 'The object of para(*c*) of the definition is of course to bring into the category of "gross income" all "amounts", whether of a capital nature or not, accrued in respect of services. Linguistically inappropriate though the word "amount" may be in this context, when a taxpayer becomes entitled to a right "in respect of services" a money value must be assigned to that right in order to determine the relevant "amount" to be incorporated as "gross income" '

It must be emphasised that income in a form other than money must, in order to qualify for inclusion in the 'gross income', be of such a nature that a value can be attached to it in money. As Wessels CJ said in the *Delfos* case(*supra*) at 251,54

> 'The tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money's worth or cannot be turned into money, it is not to be regarded as income.'

(See also *Mooi* v *Secretary for Inland Revenue*(*supra*) at 683A-F.)55 On the other hand, the fact that the valuation may sometimes be a matter of considerable complexity (cf the *Lace Proprietary Mines* case(*supra*) at 279-81)56 does not detract from the principle that all income having a money value must be included. How the valuation is to be done depends, of course, entirely on the nature of the income and the circumstances of the case.

The second proposition - that no more is required for an accrual in terms of the definition of 'gross income' than that the person concerned has become entitled to the 'amount' in question - is a practical application of the first one. The pith of the supporting reasoning is that any right (of a non-capital nature) acquired by the taxpayer during the year of assessment and to which a money value can be attached, forms part of the 'gross income' irrespective of whether it is immediately enforceable or not, but that its value is affected if it is not immediately enforceable.
According to Watermeyer J at 209-10,57

> '. . . he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to

him in the year of assessment, and it is a valuable right which he could turn into money if he wishes to do so.'

There is no logical answer to this reasoning. That *Lategan* acquired a right during the year of assessment is beyond dispute and, provided that a money value could be attached to it, then, on the premise of the first proposition, the right formed part of his 'gross income'. It is worth noting that neither De Villiers JA nor Stratford JA in the *Delfos* case(*supra*) could find any fault with the logic in Watermeyer J's reasoning and that they rejected his conclusion in the light of what they regarded as indications in the provisions of Act 40 of 1925 that a debt only accrues to the taxpayer when it becomes payable. Watermeyer J's judgment was criticised in Ingram's *The Law of Income Tax of South Africa* at 32 and 33 on the same grounds. The first point made by Ingram is that there was no justification in Act 40 of 1925 for a reduction in the face value of a debt apart from an allowance in respect of bad or doubtful debts. This was said in view of Watermeyer J's ruling that a debt payable in the future must be included in the 'gross income' at its present value. There is no merit in this point. It is correct that the only permissible deductions in terms of Act 40 of 1925 were those provided for in s 11 but the *Lategan* principle does not purport to allow the taxpayer an additional deduction; it merely defines the extent of the 'gross income' from which the permissible deductions are to be made. The right that *Lategan* had acquired had to be valued for inclusion in his 'gross income' and the fact that it was not immediately enforceable obviously affected its value.

Ingram's second point of criticism is that 'section 8 seems to emphasise that the test of accrual is whether or not the amount though not paid over "remains due and payable'' ". There is no merit in this point either. Section 8 of Act 40 of 1925 was in terms identical to the present s 7(1) (on which counsel for the taxpayer in the present case relied in support of the very point made by Ingram). It is not readily ascertainable what the

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purpose of s 8 was and what the purpose of the present s 7(1) is. Both sections merely list a number of situations in which the accrual of income is deemed not to be affected. But it seems to be clear, by virtue of the definition of 'gross income', that there would in these situations be an accrual in any event. Be that as it may, however, the legislature plainly dealt in both sections with postulated factual situations, one of which is where income is not paid over to the taxpayer but remains due and payable to him. This does not justify the conclusion that the test of an accrual is that the income in question is due and payable.

In the *Delfos* case(*supra*) De Villiers and Stratford JJA relied on s 8 and two other provisions of Act 40 of 1925. At 26058 De Villiers JA referred to s 7(*b*) in terms of which 'any amount so received or accrued in respect of services rendered, whether due and payable *under a contract of service or not*' was included in 'gross income'. This section, he said, 'to all intents and purposes defines an amount accrued as an amount "due and payable'' '. The present legislation contains no similar provision but, although it is accordingly not strictly necessary to do so, I may say that I find it difficult to accord s 7(*b*) the weight that De Villiers JA accorded to it since its real import seems to lie in the words that I emphasised. Stratford JA (at 262)59 added a reference to s 11(2)(*g*) where provision was made for a deduction in respect of bad debts (cf s 11(*j*) of the present Act), and said: 'A bad debt cannot, generally speaking, be estimated as bad until it has become payable'. This view is, with respect, quite unrealistic.

Counsel for the taxpayer, albeit in a different manner, also relied on the provisions of the Act relating to bad or doubtful debts. Section 11(*j*) and (*j*) respectively provided for a deduction in respect of bad and doubtful 'debts due to the taxpayer'. If the *Lategan* principle were to be applied, so the argument went, the anomalous result would be that debts due to the taxpayer would be subject to the deduction for bad or doubtful debts, whereas debts *owing* to him but not due would have to be included in his 'gross income' without the benefit of such a deduction. The problem that I have with this submission is that it presupposes that the word 'due' in s 11(*j*) and (*j*) means 'due and payable', which is by no means clear. Admittedly, 'due' often means 'due and payable' when it is said e g that a debt is *due* or when one speaks of the *due* date of a debt. But I am not convinced that the word was used in that sense here. 'Due and payable' is actually used at least twice in the Act (in ss 7(1) and 91(3)) and in s 7A(2) mention is even made of a salary or pension which 'has become payable'. Taking account also of the Afrikaans version of s 11(*j*) and (*j*) ('skulde aan die belastingpligtige *verskuldig*') it appears to me rather that 'due' was intended to mean 'owing' and no more.

Counsel for the taxpayer did not refer us to, nor could I find, any other provision of the Act that supports his contention that a debt can only be said to have accrued if it is payable during the year of assessment. He submitted, however, that the result of the application of the *Lategan* principle could be that a taxpayer is taxed twice in successive years on the same income - in the first year on the accrual of the debt and in the

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second on the amount received when the debt is paid. I do not agree. The possibility of double taxation in the sense just mentioned arises, not from the application of the *Lategan* principle, but from the essential principle on which South African income tax is based, *viz* that receipts and accruals both form part of the 'gross income'. (Cf *Secretary for Inland Revenue* v *Silverglen Investments*(*Pty*) *Ltd* 1969(1) SA 365(A) at 377A-C.)60 That this is so is demonstrated by the fact that there is a possibility of the same income being taxed twice even in cases where a debt, payable during one year, is paid during the next or a later one. The real answer to the submission is, however, that the possibility of double taxation is more imaginary than real since

there is, what has been referred to as, a 'necessary implication' 'that an amount which has been taxed as an accrual or receipt, cannot again be taxed when it is received or accrued' (Meyerowitz & Spiro, *Income Tax in South Africa* B 35 para 134. See also *Silke on South African Income Tax* 11ed 2-3 para 2.3, 2-4, 25-6 para 25.3.) This is borne out by the remarks of some of the judges in the *Delfos* case(*supra*) at 254-5,61 259,62 26163 and by Watermeyer CJ's judgment in *Isaacs* v *Commissioner for Inland Revenue* 1949(4) SA 561(A).64 At 567-865 the learned Chief Justice said:

> 'I think, bearing in mind that an income tax is fundamentally a tax upon a man's annual profits or gains, that the Income Tax Act should not be read as imposing normal tax or super tax upon a taxpayer twice in respect of the
> same profits or gains unless the language of the Statute makes it clear that such a result was intended.'

In my view the decision in the *Lategan* case reflects the law correctly. It being common cause that the debts which accrued to the taxpayer in the present case could be turned into money, I am also of the view that the special court's ruling on the first question was correct. This conclusion disposes of the cross-appeal.

Very little need be said about the Commissioner's appeal. His contention is that the debts have to be reflected as part of the 'gross income', not at their present value as the special court found, but at their full or face value. This is plainly not so. The argument on the Commissioner's behalf followed the same lines as Ingram's first point of criticism described and rejected earlier. All that need be added, is that Watermeyer J's ruling on the value of accrued rights is inseparably linked to the rest of the principle. It is the right to receive payment *in the future* that accrued to the taxpayer; it is that right that has to be valued and, as stated before, its value is obviously affected by its lack of immediate enforceability.

The result is that the appeal and the cross-appeal are both dismissed with costs which will include, in the case of the appeal, the costs of two counsel.

Corbett CJ, Joubert JA, Nestadt JA and Nicholas AJA concurred.

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Footnotes

1 2 SATC 16. 2 6 SATC 92 at 112. 3 6 SATC 1. 4 Ibid, at 6. 5 21 SATC 106. 6 6 SATC(*supra*) at 103. 7 2 SATC 16. 8 6 SATC 1. 9 34 SATC 1 at 10-11. 10 2 SATC(*supra*) at 19. 11 Ibid, at 20. 12 Ibid, at 20. 13 Ibid, at 21. 14 Ibid, at 21. 15 6 SATC 1. 16 6 SATC 92. 17 Ibid, at 99-100. 18 Ibid, at 103. 19 Ibid, at 111. 20 Ibid, at 108. 21 12 SATC 11 at 15. 22 13 SATC 21 at 34. 23 13 SATC 121. 24 13 SATC 343 at 352-3. 25 21 SATC 106. 26 Ibid, at 119. 27 Ibid, at 120. 28 26 SATC 275. 29 Ibid, at 281-2. 30 30 SATC 199. 31 Ibid, at 207. 32 34 SATC

1. 33 Ibid, at 10.
34 8 SATC 203 at 213.
35 37 SATC 319 at 334. 36 2 SATC(*supra*) at 20. 37 9 SATC 349.
38 37 SATC 1.
39 Although there is a discrepancy between this figure and the amount of R341 281 used by Hefer JA, it is impossible to verify which of the two is the correct one - but nothing turns on this discrepancy - eds.
40 2 SATC 16.
41 Ibid, at 18-21.
42 *Commissioner of Taxes v Booysen's Estates, Ltd* 1918 AD 576 32 SATC 10. 43 6 SATC 92.
44 Ibid, at 99-100. 45 Ibid, at 111.
46 Ibid, at 108.
47 21 SATC 106 at 119.
48 26 SATC 275 at 281-2. 49 34 SATC 1 at 10.
50 2 SATC(*supra*) at 19 and 20. 51 9 SATC 349.
52 5 SATC 93.
53 34 SATC(*supra*) at 11. 54 6 SATC(*supra*) at 99. 55 34 SATC(*supra*) at 10.
56 9 SATC(*supra*) at 361-3.
57 2 SATC(*supra*) at 20.
58 6 SATC(*supra*) at 111.
59 Ibid, at 108.
60 30 SATC 199 at 208.
61 6 SATC(*supra*) at 102-3.
62 Ibid, at 107-8.
63 Ibid, at 112.
64 16 SATC 258.
65 Ibid, at 266.