MOOI v SECRETARY FOR INLAND REVENUE
34 SATC 1

Division:	Appellate
Judges:	OGILVIE THOMPSON CJ, RUMPFF JA, POTGIETER JA, RABIE JA AND MULLER JA.
Date:	18 November; 2 December 1971
Also cited as:	1972 (1) SA 674

Income tax - Gross income - Option to acquire shares at fixed price granted to employee by company - Option only exercisable at future date on fulfilment of certain conditions - Grantee required to be in employment of company at such date or still contributing to company's project - Date of accrual of benefit arising from grant of option - Fixed by that upon which option exercisable - Value of benefit - Determined by difference between price payable for shares and current market price on date of accrual of benefit - Casual relationship between benefit and services to company - Established by fact of taxpayer's employment at date of accrual - Section 1(xi)(c) Act 58 of 1962.

Appeal from a decision of a Special Court for hearing income tax appeals.

Appellant who at that date held the office of Mine Secretary was on 25 July 1963 offered by the Palabora Mining Co Ltd, which employed him, an option to subscribe for 500 ordinary shares of the company at R1,25 per share, subject to the following conditions:

(1) The option was not to be exercisable until six months after the completion of the company's mine, the date of such completion to be determined by the directors of the company.

(2) The option was only to be exercisable if the holder was at that time in the employment of the company or otherwise, in the opinion of the directors, contributing to the Palabora project.

Appellant accepted the offer of the company on 27 July 1963; the date of the completion of the mine was fixed by the directors of the company as 1 March 1966 and the option granted became exercisable on 1 September 1966.

On 1 October 1966 appellant exercised the option and acquired 500 shares at R1,25 per share; the market value of the shares at 1 September was R6,40. The total of the market value of the shares acquired by the appellant exceeded the price paid by him under the option by R2 575.

In determining the appellant's liability for normal tax for the year of assessment ending 28 February 1967 the Secretary for Inland Revenue included this amount of R2 575 in his gross income for that year as being an amount which had accrued to him in respect of services rendered or to be rendered on the date when the option granted to him became exercisable, that is, 1 September 1966.

To this assessment the appellant took objection and appealed against it to the Transvaal Special Court on the grounds that all that had accrued to him in respect of services whether rendered or to be rendered was the right he acquired on 27 July 1963 to exercise an option at a later date when certain conditions had been fulfilled, the value of which, if any, should be assessed in respect of the year of assessment ended 29 February 1964; the exercise of the option when those conditions had been fulfilled, it was contended, resulted in an accrual arising from the expenditure of the sum paid by the appellant for the shares and could not be said to have accrued in respect of services rendered or to be rendered by him to the company.

The Transvaal Special Court having dismissed his appeal, appellant appealed directly from the decision of that court to the Appellate Division of the Supreme Court.

Held, dismissing the appeal with costs, that the true and real benefit contemplated in the offer made by the company in 1963 was the right, upon the due fulfilment of all the conditions set out therein, to obtain the shares offered at the price of R1,25 and the relevant accrual of that benefit occurred when the option became exercisable upon those conditions being fulfilled, that is, on 1 September 1966;

Held, further, that as at that date appellant was in the service of the company, there existed the necessary causal relationship between the benefit acquired by the appellant and his services to the company to bring the benefit within the statutory definition of 'gross income'.

B L S Franklin SC (with him R H *Peart*), for the appellant: As to the effect and nature of an option, see *Hersch v Nel*

1948(3) SA at 695. On 27 July 1963 there came into existence a binding and enforceable contract of option between the appellant and the company. If thereafter, before the appellant had exercised the option, the company had broken the agreement by disabling itself from fulfilling it or by expressly repudiating it, the company would have been liable in damages to the appellant, *Boyd v Nel* 1922 AD at 421-2. A right to subscribe for shares for less than their market value is an accrual which forms part of the 'gross income' of the person upon whom that right is conferred, *Lace Proprietary Mines Ltd v Commissioner for Inland Revenue* 1938 AD 267.1 If such a right is conferred by a company upon one of its employees in consideration for services which he has already rendered to the company or as an incentive to him to continue in the service of the company, the value of that right, at the time of its grant, forms part of the 'gross income' of the employee, *IT Case* 691 16 SATC 505. There was an accrual of a contractual right on 27 July 1963. On that date, that right could have had a pecuniary value to the appellant. It is true that he could not transfer the right itself to a third party but it is conceivable that a third party would have paid money to the appellant

in consideration of an undertaking by the appellant not to resign from the employment of the company for the relevant period and to subscribe for the shares when the time arrived, and then to sell those shares to the third party at an agreed price which the third party estimated would be less than the market value of the shares when the time for subscription arrived. The option was, therefore, 'a right of a kind which could be turned to pecuniary account', *Abbott v Philbin*(1960) 39 TC at 120-1 [1960] 2 All ER at 769I-770C. Although there does not appear to be any decision in our courts which deals with a situation similar to that in the present case, *Abbott v Philbin*(*supra*) is indistinguishable in principle. See also *Bentley v Evans*(1959) 39 TC at 141. The position is the same in terms of the definition of 'gross income' in our Income Tax Act, subject only to the provisions of the new s 8A, which was introduced in 1969. *Silke on South African Income Tax* 6 ed pp 88-90 para 58, pp 121-3 para 64A (re the new s 8A). With regard to the phrase 'in respect of services rendered or to be rendered' in para(*c*) of the definition of 'gross income', the advantage which arises from the exercise of the option is not received in respect of services rendered or to be rendered in terms of that paragraph; it is an advantage which accrues to the grantee as the holder of a legal right which he had obtained earlier and which he now exercises as option holder against the company. The phrase 'in respect of' in para(*c*) of the definition of 'gross income' connotes that there must be a causal relationship between the 'amount' and the 'services', *De Villiers v Commissioner for Inland Revenue*, 1929 AD at 229;2 *R v Commissioner of Taxes* 1949(2) SA at 636.3 There is such a relationship in the case of the grant of the option. There is not such a relationship in so far as the exercise of the option is concerned. The amount received on such exercise, ie the difference between the current value of the shares and the option price, is received by reason of the expenditure by the grantee of his own money and as a result of exercising his right as the holder of the option. Such current value of the shares would be influenced by numerous factors connected with the prosperity of the company itself as well as by factors wholly independent of the company's business and the services of the employee (eg scarcity of shares, political events, credit restrictions, and the like). In other words, the right to subscribe for the shares is received 'in respect of services rendered or to be rendered' the shares themselves are not so received. Cf *Abbott v Philbin*(*supra*); *Juta's South African Income Tax Service* vol 2(1963) 445 at 446-7 para(iii), vol 3(1964) 723-4, vol 5(1966) 974. Even where the holder of the option is a dealer in shares, the exercise of an option to subscribe for shares is not a realization of an asset giving rise to a taxable profit, *British South Africa Co v Varty*(1965) 42 TC at 426.

The resultant paper profit did not form part of his 'gross income' for the 1966-7 tax year. Cf *De Villiers v Commissioner for Inland Revenue* 1929 AD(*supra*) at 229, 233. *Hersov's Estate v Commissioner for Inland Revenue* 1957(1) SA 4714 is distinguishable. The court below wrongly held that *Abbott v Philbin*(*supra*) was distinguishable.

W S McEwan SC (with him *W P van der Merwe*), for the respondent: Not every grant of an option to buy property at less than its market value gives rise to an accrual of income which is taxable. The mere fact that a taxpayer buys a commodity at a bargain price does not entitle the *fiscus* to demand payment of income tax on the difference between the real value of the commodity and the price paid for it, *Commissioner for Inland Revenue v Hersov* 1952(1) SA at 492E.5 It is common cause, however, that where the grant of an option to acquire shares at less than their market value falls under para(c) of the definition of 'gross income' the difference between the market value and the price paid will give rise to an accrual of income which is taxable. The position is the same if the grant falls under para(i) of the definition. See *Income Tax Case* 691 16 SATC 505. The question of any possible difference between the position at the date of the grant of the option and the date of its exercise does not appear to have been in issue in that case. The proposition is accepted by the textbook writers: See Silke 6 ed para 58 p 89; Meyerowitz and Spiro (permanent volume) para 172 pp 46-8: Wells and Isaacs para 557 p 855. There is English authority for the proposition, eg *Salmon v Weight* [1935] All ER 904, 19 TC 174. The appellant's right to exercise the option was not effective immediately upon the acceptance of the offer. It only became exercisable for the first time six months after the completion of the construction of the company's mine. The respondent did not and does not claim that the right is to be valued or that the appellant's 'profit' is to be valued or that the appellant's 'profit' is to be determined at the date of the exercise of the option, namely 1 October 1966. The issue in the appeal is therefore different from the issue which fell to be decided in *Abbott v Philbin* 39 TC 82(1960) 2 All ER 763(HL). It is accepted that the decision in *Abbott v Philbin* was correct in respect of the issues then before the court and it would apply *mutatis mutandis* if a similar issue arose in this country. Consequently, it is not disputed that, if there was an increase in the value of the

shares *after* the date when the appellant became entitled to exercise the option (1 September 1966) which led to a corresponding increase in the value of the right of option, the latter increase would give rise to a capital accrual. See *Income Tax Case* 726 18 SATC 90. The respondent's case is briefly: (1) the 'amount' or 'benefit' which accrued to the appellant was not the value of the conditional 'right' granted to him in July 1963; (2) the real and substantial benefit which it was intended to confer upon him was the right to subscribe for shares in the company; (3) that right accrued only when the conditions as to time and the appellant's employment were fulfilled, namely 1 September 1966; (4) the value of the right when it accrued on that date was the difference between the market value of the shares on that date and the amount that the appellant would have had to pay for them, viz R2 575. It is important therefore to determine when the accrual of an 'amount' forming part of the appellant's gross income took place. See *Lategan v Commissioner for Inland Revenue* 1926 CPD at 207.6 An accrual (in terms of the definition of 'gross income') might consist

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of cash or some other form of corporeal property or of rights. In the two latter classes of cases in order to arrive at the 'amount' which accrues to the taxpayer a 'value' has to be placed on the property or right, *Lategan's* case at 208-9; *Commissioner for Inland Revenue v Delfos* 1933 AD at 251;7 *Commissioner for Inland Revenue v Butcher Bros*(*Pty*) *Ltd* 1945 AD at 318.8 For an extreme example of the difficulties encountered in attempting such a valuation see *Commissioner for Inland Revenue v Butcher Bros*(*Pty*) *Ltd*(*supra*) at 322 to 330. Notwithstanding these difficulties *Lategan's* case appears to have set a trend to regard the 'amount' of the income which accrues when a taxpayer becomes entitled to a right as the present value of that right. See eg *Ochberg v Commissioner for Inland Revenue* 1933 CPD9 at 264, 265; *Sacks v Commissioner for Inland Revenue* 1946 AD at 43.10 See also *Hersov's Estate v Commissioner for Inland Revenue* 1957(1) SA11 at 480F to 481H; *Rishworth v Secretary for Inland Revenue* 1964(4) SA12 at 499E; *Secretary for Inland Revenue v Silverglen Investments* 1969(1) SA13 at 372C. And see note by Walter Pollak QC in 1968 *Annual Survey* 415 to 417. It is inappropriate to regard an "amount" as having accrued to a taxpayer when the 'right' granted to him is conditional or it cannot be exercised until he on his side has completed the performance of some obligation resting upon him. Cf *Provident Land Trust Ltd v Union Government* 1911 AD at 627; *Ochberg v Commissioner for Inland Revenue*(*supra*) at 263 and 264; *Income Tax Case* 424 10 SATC at 339; Silke 6 ed para 28 p 22: Meyerowitz and Spiro (permanent volume) para 173 pp 46 to 48. If the grant of a conditional right were to be regarded as giving rise to the accrual of an 'amount' and the condition was in fact never fulfilled, the result would be that the taxpayer would have paid tax on something which in reality never did and could not become part of his income. A distinction should be borne in mind between a case where there are restrictions which reduce the value of an option which is exercisable immediately (such as a condition that the employee may not sell the shares for a number of years after he acquires them or the example given in *Abbott v Philbin*(*supra*) at 770 AD and a case, such as the present, where the option does not come into force at all until certain conditions precedent have been fulfilled. The distinction is clearly illustrated in the examples given in the article in *The Taxpayer* vol 17 part II (November 1968) at 205 (2nd column). Similarly a distinction should be borne in mind between(i) a right which vests immediately but relates to a payment in future (as in *Lategan's* case *supra* and in *Income Tax Case* 689 16 SATC 501); and(ii) a right which does not come into existence at all until a condition has been fulfilled. Cf *Hersov's Estate* case 1957(1) SA(*supra*) at 481H. The distinction which the respondent has drawn between the case of an option to acquire shares which is exercisable immediately upon its grant and one which is exercisable only after the fulfilment of certain conditions is supported by a number of cases. See *Abbott v Philbin*(*supra*) at 772D-E; *Hersov's Estate* case 1957(1) SA

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(*supra*) at 479H, 480A, and 481H, 482A; *Sacks v Commissioner for Inland Revenue* 1946 AD(*supra*) at p 43; *Ochberg v Commissioner for Inland Revenue* 1933 CPD(*supra*) at 263, 264. While it is true that the grant of the conditional right to the appellant was in respect of services rendered or to be rendered, it was conditional upon his continuing to perform those services for the company or the Palabora project up to the date when the option became exercisable. The grant could properly be regarded therefore as being in respect of services rendered in the year of assessment in which the option was exercisable, and therefore to have accrued in that year. Cf *Bridges v Hewitt*; *Bridges v Bearsley* [1957] 2 All ER at 294E-295D, 304H. The option could not be exercised until the obligation to render services for the period stipulated had been fully performed. The appellant had a contractual right to claim the option at the end of that period. In the meantime nothing accrued to him *de die in diem*. Cf *Sacks v Commissioner for Inland Revenue*(*supra*) at 41. At the end of the period the necessary causal relationship between the appellant's services and the accrual of the right to the option was established. Cf. *De Villiers v Commissioner for Inland Revenue* 1929 AD at 229;14 *R v Commissioner of Taxes* 1949(2) SA 636.15 *Commissioner for Inland Revenue v Cowley* 1960(2) SA 7016 helps to make clear the distinction which the respondent is attempting to draw. Until the appellant had performed those services he did not become 'entitled to' any right of option, nor was anything 'due and payable' to him. Therefore whether the interpretation of 'accrued' adopted in *Lategan's* case or that adopted in the case of *Hersov's Estate* is accepted, there was no accrual to the appellant until the conditions were fulfilled.

It is not disputed that the offer and acceptance in 1963 of a conditional right gave rise immediately to a 'definite contractual relationship' between the appellant and the company. Cf *Corondimas v Badat* 1946 AD at 551, 558. The relationship between the appellant and the company could only ripen into a contract of option in the sense defined in *Hersch v Nel* 1948(3) SA at 695, if and when the conditions were fulfilled. The fact that the contractual relationship between the appellant and the company which was established on 27 July 1963 gave the appellant a 'proprietary

right in the contract' (*Hersov's Estate* case(*supra*) 1957(1) SA at 479H) which may have entitled him to have 'taken legal proceedings against the company to protect his rights in the contract' (cf *Hersov's Estate* case 1952(4) SA 55917 at 565B-C) does not mean that his right in the option itself accrued before 1 September 1966 or formed part of his 'gross income' before that date. *Hersov's Estate* case 1957(1) SA 471 at 479H, 480A. There is very little difference in principle between the circumstances of this case and the ordinary case of a taxpayer who is in receipt of a salary payable in arrear. See generally the remarks by Lord Denning in *Abbott v Philbin*(*supra*) at 778B and 779B-F. The appellant's contention to the effect that the increase in value of the appellant's right between 27 July 1963 and 1 September 1966, was an increase in value of a capital asset is incorrect.

Franklin SC in reply.
Cur adv vult.
Postea (2 December).

OGILVIE THOMPSON CJ: In determining appellant's liability for normal tax under the provisions of the Income Tax Act 58 of 1962 (hereinafter referred to as 'the Act') for the year of assessment ending 28 February 1967, respondent included, in the circumstances detailed below an amount of R2 575 as part of the appellant's gross income for that year. Objection and appeal to the Transvaal Special Court having proved unsuccessful, appellant now - the written consents required in terms of s 86(1)(b) of the Act having been duly filed - appeals direct to this court.

Appellant is, and has at all material times been, an employee of the Palabora Mining Co Ltd - to which I shall refer as 'the company' - whose main business is mining for copper at Phalaborwa, Transvaal. In July 1963 the company was engaged in preparatory work establishing this mine. Pursuant to resolutions duly passed during June 1963, the company addressed the following letter, dated 25 July 1963, to appellant who then occupied the position of mine secretary, viz:

'We hereby grant to you an option to subscribe at R1,25 per share for 500 Class A ordinary shares of R1 each in the capital of the company on the following conditions:

1. The option will not be exercisable until six months after the completion of construction of the company's mine at Phalaborwa and will be capable of being exercised during the period of three years reckoned from that date.

2. The directors of the company will decide when the company's mine at Phalaborwa has been completed for the purpose of para 1 and the decision of the directors will be final.

3. The option can only be exercised if at the time of the exercise you are in the employ of the company or are still contributing to the Palabora project in some other manner.

4. If at the time you wish to exercise this option you are not in the employ of the company the directors will decide whether you are contributing to the Palabora project so as to enable you to exercise the option and the decision of the directors will be final.

If you wish to accept the option hereby granted to you, kindly complete the endorsement on the duplicate hereof which is enclosed and return it to the company. If the endorsement is not completed and the duplicate returned to the company by not later than 5 p.m. on 30 July 1963, you will be deemed to have refused the option which will be of no further force and effect.'

The endorsement mentioned in this letter was completed and returned to the company by appellant on 27 July 1963. It read:

'I hereby accept the option granted to me in terms of the above letter.'

Pursuant to the aforementioned June resolutions, further options, couched in identical terms (save for differentiation regarding the number of shares) with the above, were contemporaneously also granted to other key personnel of the company mentioned in the said resolutions.

It is common cause that appellant is not a share dealer and that the option granted to him by the above-cited letter of 25 July 1963, was in respect of services rendered, and as an inducement to render future

services, to the company. The construction of the company's mine at Phalaborwa was completed on 1 March 1966, and as at 1 September 1966 (being six months after 1 March 1966) the market value of Class A ordinary shares in the company, as quoted on the Johannesburg Stock Exchange, was R6,40 per share. On 1 October 1966 appellant exercised his option to take up the 500 shares. The difference between the aggregate price of the 500 shares calculated at R1,25 per share and their aggregate market value as at 1 September 1966, namely R2 575, constitutes the sum in issue in this appeal.

It must at once be mentioned that the present case falls to be decided independently of the provisions of s 8A which were only subsequently inserted in the Act by s 11 of Act 89 of 1969. The relevant portion of the definition of

'gross income' in s 1(xi) of the Act reads:

> ' "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, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely:
>
> (a) . . .
>
> (b) . . .
>
> (c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered . . ."

In order to determine the 'amount' comprehended by this definition it is necessary, in the case of a right, to establish the value of that right (*Lategan v Commissioner for Inland Revenue* 1926 CPD 203[18] at 208-9; *Commissioner for Inland Revenue v Delfos* 1933 AD 242[19] at 251). The main contention advanced on behalf of appellant is that in the premises the only taxable accrual in respect of services rendered or to be rendered by him to the company was the value - if any - of the legal right which appellant acquired upon accepting the above-mentioned option on 27 July 1963. An alternative contention is that if, contrary to the above-mentioned contention, any accrual whatever occurred during the tax year ended 28 February 1967, such accrual cannot be said to have been in respect of services rendered or to be rendered to the company by appellant.

Upon appellant's acceptance, on 27 July 1963, of the company's offer as set out in its letter of 25 July 1963, a contractual relationship was established between appellant and the company binding the latter, upon due fulfilment of the conditions stated in its aforementioned letter, to allot the 500 shares to appellant at R1,25 per share (*Hersch v Nel* 1948(3) SA 686(AD) at 695). It is the value of the right thus acquired by appellant on 27 July 1963, which is now submitted by counsel for appellant to be the only relevant accrual. That right, so the argument runs, was capable of being turned to pecuniary account, and thus had a value - yet to be determined - which formed portion of appellant's gross income in the tax year ending 28 February 1964. The argument thus advanced is primarily founded upon the decision in *Abbott v*

Philbin (*Inspector of Taxes*) [1960] 2 All ER 763(HL), which, although decided upon a different statute, was submitted by counsel for appellant to be in principle decisive of the present case and to have been wrongly distinguished by the Special Court.

In *Abbott v Philbin*(*supra*) the issue was whether the option there under consideration, which had during the 1954-5 tax year been granted to Abbott, a company employee, to purchase shares in the employer company and which Abbott had exercised in the 1955-6 tax year, was a 'perquisite of office or employment' so as to attract tax under Schedule E of the Income Tax Act of 1952 and, if so, in which of the above-mentioned tax years. The progress of the case through three courts revealed a considerable divergence of judicial opinion, with the taxpayer ultimately succeeding in the House of Lords by a majority of three to two. The substantial dispute centred around the respective ability to attract tax of the date of grant of the option and of the date of its exercise. The option in issue, although not transferable and expiring upon the termination of Abbott's service with the company or the lapse of a period of ten years (whichever should first occur), was upon acceptance by Abbott immediately exercisable by him (*vide* [1959] 3 All ER 1952 and [1960] 2 All ER at 765). That was, in my opinion, a vitally important feature of the option, which latter the majority of the House of Lords held to be a perquisite of the taxpayer's employment which, although not assignable and in fact only exercised in a later tax year, was assessable to tax in the year in which it was granted.

Although not specifically so expressed, it would seem, and appeared to be common cause during the argument, that the option conferred upon appellant was not assignable. Unlike *Abbott v Philbin*(*supra*) in the in the present case the disputed dates for attracting tax are respectively the date of acceptance of the option (27 July 1963) and the date when the option became exercisable, namely 1 September 1966. Moreover, the terms of the option acquired by appellant on 27 July 1963, are materially different from those of the option in *Abbott v Philbin*(*supra*). The latter would appear to have been granted in respect of past services, whereas appellant's option was plainly - and it is indeed common cause-granted in consideration of services rendered and as an inducement to render future services. In particular, however, appellant's option - unlike the option in *Abbott's* case and the option considered in *Case* 691 16 SATC 505 - was not immediately exercisable. It was only exercisable(i) six months after the completion of the construction of the company's mine and(ii) provided that, at the time of the exercise, appellant was in the employ of the company or, by decision of the directors, was 'still contributing to the Palabora project in some other manner'. In the events that have happened, the option became exercisable on 1 September 1966, and accordingly remained exercisable for a period of three years from that date. Having regard to the various considerations I have mentioned, I am of the opinion that *Abbott v Philbin*(*supra*) was rightly distinguished by the Special Court, and that it cannot be regarded as in any way decisive of this appeal, which is of course governed by the definition of 'gross income' contained in the Act.

Appellant's contention vitally depends upon the assumption that the word 'accrued' in the above-cited definition

of 'gross income' means, as was in effect decided in *Lategan's* case(*supra*) and in serveral subsequent decisions, an amount of which the taxpayer has become entitled. For if, as was suggested, although not decided, in *Hersov's Estate v Commissioner for Inland Revenue* 1957(1) SA 471(AD)20 at 480-1, the correct meaning to be assigned to 'accrued' is 'became due and payable', the foundation for the appellant's main contention largely falls away. This controversial question was not fully debated before us, and as I am, for the reasons which follow, of opinion that, even on the basis of the view expressed in *Lategan's* case(*supra*) appellant's contentions are unsound, I do not propose to attempt in this case to resolve the above-mentioned controversy.

In the first place, there appear to me to be grave practical objections in acceding to the argument of appellant's counsel. It is basic to that argument that the right acquired by appellant on 23 July 1963, had a monetary value. The record, however, contains no evidence to support the contention that such right as appellant did acquire on 27 July 1963 had a value in the sense of being capable of being then turned to pecuniary account. No doubt speculative buyers can sometimes be found who are willing to purchase a mere *spes*; but having regard to the terms of appellant's option, it would seem to be safe to assume that no buyer would have purchased appellant's option-right without further undertakings by appellant(i) to remain in the service of the company until the option became exercisable and for three years thereafter; and(ii) to exercise the option upon demand and thereafter deliver the shares. The buyer would thus in reality be purchasing a congeries of rights rendering it well-nigh impossible to assign a value to the option-right itself. Counsel for appellant sought to dismiss these considerations by relying upon the views expressed by the majority of the House of Lords in *Abbott's* case and, in the alternative, by submitting that, if the value of the right which appellant acquired on 27 July 1963 could not be ascertained this merely meant that no determinable accrual supervened. These submissions do not greatly impress me. As already emphasized, the option in *Abbott's* case was materially different from the option in the present case. In the former case, Lord Reid expressed the view that the legal position as he found it there to be might well have been different if 'the taxpayer had still to earn his perquisite' by further service (vide [1960] 2 All ER at 772E, and cf Viscount Simon's observations at 707D-F). In the present case, it is common cause that appellant still had to 'earn his perquisite', namely, to become vested with the right to exercise the option. However, I shall assume in favour of appellant that, notwithstanding the considerations I have mentioned, the contingent right he acquired on 27 July 1963 had some monetary value, and I proceed upon that assumption.

Although the company became bound by appellant's acceptance of the option on 27 July 1963, the right which appellant thus acquired - ie to which he then became entitled - was a contingent one conditioned

in the material respects already mentioned. Those conditions did not solely relate to postponement of delivery of the shares, or merely constitute a restriction upon their sale for a certain period. On the contrary and as already emphasized, the option was only exercisable at a materially later date, and then only provided that, at the time of such exercise, appellant was in the employ of the company, or 'still contributing to the Palabora project'. In my opinion the right acquired by appellant on 27 July 1963 lacked any inherent attribute of income and, but for the provisions of para(*c*) of the definition of 'gross income', would appropriately be regarded as a right of a capital nature (cf *Sacks v Commissioner for Inland Revenue* 1946 AD 3121 at 43). 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'. Bearing all this in mind, it nevertheless appears to me that what para(c) of the definition of 'gross income' envisages as required to be incorporated into the taxpayer's gross income is the real or true benefit accruing to him 'in respect of services'.

In the present case, as already emphasized, services still had to be rendered by appellant after July 1963, and there can be no doubt that the true and real benefit contemplated by the letter of 25 July 1963, was the true and real benefit contemplated by the letter of 25 July 1963, was the right, upon due fulfilment of all the conditions stated in that letter, to obtain the shares at the price of R1,25 per share. These realities of the situation are disregarded by appellant's main contention, which substitutes therefor the artificial concept of valuing appellant's contingent option-right as at its initial, inchoate, stage, namely 27 July 1963. On the facts of the present case, that concept is, in my judgment, not in conformity with the true intention of the Act as reflected in para(c) of the definition of 'gross income'. In my view, the contingent right which appellant acquired on 27 July 1963, did no more than - to borrow a phrase used by Sellers LJ in the court of appeal in *Abbott's* case and subsequently adopted by Lord Keith in the House of Lords-'set up the machinery for creating a benefit', which said benefit only accrued when the option became exercisable. Accordingly, I am of opinion that no accrual within the meaning of the definition of 'gross income' occurred in July 1963 (cf *Ochberg v Commissioner for Inland Revenue* 1933 CPD 25622 at 264, and *Hersov's* case(*supra*) at 481-2), but that the relevant accrual occurred when the option became exercisable on 1 September 1966. The real benefit conferred upon appellant which was at all material times in the contemplation of all concerned, was the right to apply for the shares at R1,25 per share, and that right arose when, upon fulfilment of the conditions of the option, the latter became exercisable.

On the facts, the measure of the aforementioned benefit - ie the 'amount' to be incorporated in appellant's gross income - as at 1

September 1966 was R2 575, and as at that date there existed, in my view, the necessary causal relationship (*vide De Villiers v Commissioner for Inland Revenue* 1929 AD 227)[23] between the benefit acquired by appellant and his services to the company. I accordingly come to the conclusion that both the respondent's assessment and the decision of the Special Court were correct.

The appeal is dismissed with costs, such costs to include fees of two counsel.

Potgieter JA, Rabie JA, Muller JA concurred in the above judgement.

RUMPFF JA: In this matter I agree with the order made by the learned Chief Justice and with his finding that the agreement in the present case is distinguishable from that in *Abbott's* case. I might, however, have agreed with the order made, even if the present agreement had not been held to be distinguishable.

Appellant's counsel, after referring to the fact that appellant on 27 July 1963, acquired his contractual right to subscribe for shares, subject to the conditions attached thereto, made the following submission:

> 'It is submitted, therefore, that there was an accrual of the contractual right on 27 July 1963. On that date, that right could have had a pecuniary value to the appellant. It is true that he could not transfer the right itself to a third party; but it is conceivable that a third party would have paid money to the appellant in consideration of an undertaking by the appellant not to resign from the employment of the company for the relevant period and to subscribe for the shares when the time arrived, and then to sell those shares to the third party at an agreed price which the third party estimated would be less than the market value of the shares when the time for subscription arrived. The option was, therefore, "a right of a kind which could be turned to pecuniary account".'

The example quoted by counsel clearly indicates that the right acquired by the appellant is not sold or ceded (because, due to its nature, it cannot be ceded) and that the right itself is not converted into a money value by the imaginary agreement which the appellant enters into with the third party. The imaginary agreement is one which creates a right in favour of the third party against the appellant. The right of the appellant against the company merely allows the appellant to enter into a contract with the third party whereby he undertakes to subscribe for the shares and sell the shares, but which does not turn the right itself to pecuniary account. The position would be exactly the same in the following circumstances: a company in 1970 enters into an agreement with its manager that, for services rendered and to be rendered to the company, it will pay to the manager at the end of 1973 if he is then still the manager, 10 per cent of the company's net profit for that year. In terms of this agreement the manager acquires a right against the company. The manager goes to a money-lender, satisfies him that according to expectations, the company will make a nett profit of not less than R100 000 and that his share of that will be at least R10 000. The money-lender is prepared to pay the manager R6 000 on the latter's undertaking to stay on as manager and to pay to the

money-lender the amount received by him in 1973 as his share of the profits of the company. (Cf the example quoted by Lord Denning in *Abbott's* case at 779.)

Although the contract in the present case is distinguishable from that in *Abbott's* case, the heart of the problem, in my view, remains the same, namely whether the type of right concerned has in itself a money value. In this respect, I would be inclined to agree with the reasons in the minority judgments in *Abbott's* case. In the court *a quo* the president expressed the prima facie view that the decision of the House of Lords in *Abbott's* case was correct but that the facts of the present case are distinguishable. In this court, *Abbott's* case was apparently approached as if it were a binding authority on our courts. Counsel for appellant argued *inter alia* that the decision in the House of Lords in *Abbott's* case is indistinguishable in principle from the present case. Counsel for the respondent did not argue that in respect of the issues before this court, the majority decision in *Abbott's* case was wrong. Having regard to the particular branch of the law with which we are concerned, a decision of the House of Lords would certainly be of a great persuasive authority. But what does persuasive authority mean? In my view certainly not the mere final order of that court, but the force and validity of the reasoning upon which the order is based. In *Abbott's* case the decision is one of three members of the court against that of two members, the three members reversing a judgment of the court of appeal, consisting of Lord Evershed MR, Sellers and Harman L JJ, and also overruling a decision of the Court of Session (Lord President Clyde and Lords Carmont and Russell) in *Forbes's Executor v Commissioner of Inland Revenue* 38 Tax Cases 12. The manner in which counsel in the present case approached the majority decision in *Abbott's* case, leaves one with the impression that it is assumed, perhaps subconsciously, that a decision of the House of Lords is still regarded as binding on our courts.

As indicated, I might prefer the reasoning of the eight judges on the issue referred to in the cases quoted above, to that of the three majority judges. In my view, on the facts in *Abbott's* case, it might well be argued that the right in that case could not have been turned to pecuniary account in 1954.

Potgieter JA concurred in the judgment of RUMPFF JA.

Footnotes

1 9 SATC 349.
2 4 SATC 86.
3 16 SATC 151.
4 21 SATC 106.
5 18 SATC 20.
6 2 SATC 16.
7 6 SATC 92.
8 13 SATC 21.
9 6 SATC 1.
10 13 SATC 343.
11 21 SATC 106.
12 26 SATC 275.
13 30 SATC 199.
14 4 SATC 86.
15 16 SATC 151.
16 23 SATC 276.
17 18 SATC 261.
18 2 SATC 16.
19 6 SATC 92.
20 21 SATC 106.
21 13 SATC 343.
22 6 SATC 1.
23 4 SATC 86.