SECRETARY FOR INLAND REVENUE v SILVERGLEN INVESTMENTS(PTY) LTD
30 SATC 199

Division:	Appellate
Judges:	STEYN CJ, OGILVIE THOMPSON JA, RUMPFF JA, HOLMES JA and JANSEN JA
Date:	5 and 28 November 1968
Also cited as:	1969 (1) SA 365(A)

Income tax - Sales of immovable property - Agreements for postponement of purchase price - Provision that such payments be deemed to have accrued to recipient at date of agreement - Application of such provision to exercise by Group Areas Development Board of pre-emptive rights in sales of 'affected' properties - Arrangements made with Board for delayed payment of purchase price in such cases such an agreement - Payment by Board of depreciation contributions - Liability for such payments statutory, not contractual - Arrangements for payment thereof not part of agreement for payment of purchase price - Secretary's powers of assessment of amounts received by or accrued to taxpayer - Not entitled to elect whether to assess in year of accrual or year of receipt - Sections 5(1), 7(1), 21 bis and 24, Act 58 of 1962 - Section 20, Act 69 of 1955.

Appeal on a stated case, by consent direct to the Appellate Division, against a decision of the Transvaal Income Tax Special Court.

The year ended 30th June, 1963, constituted for the respondent company the 'transition period', in terms of section 21*bis*(1) of the Income Tax Act, 58 of 1962, in respect of which the company was entitled to special deductions in terms of subsection(2) of that section in the calculation of its taxable income for that period.

In terms of section 24 of that Act any amount received by a taxpayer in respect of a sale of immovable property in terms of an agreement which provide that transfer of such property shall be passed upon or after the receipt by the seller of the whole or part of the purchase price shall be deemed to have accrued to the seller on the date on which the agreement was entered into.

Respondent company was the owner of certain property which was 'affected' property in terms of the Group Areas Development Act, 69 of 1955, in respect of which the Group Areas Development Board, as constituted by that Act, had certain pre-emptive rights in the event of the property being put up for sale.

On 10th November, 1962, after due notice in terms of the Act had been given to the Group Areas Development Board, the property in question was put up for sale by auction and was sold to one E for the sum of R200,000, and the Board was duly notified of the intended site.

Thereafter, on 10th December, 1962, the Board notified the respondent that it intended to exercise its pre-emptive rights and take over the property at the price at which it had been sold to E. The Board also indicated that certain other payments and adjustments would be made between the Board and the respondent in accordance with the conditions under which the sale had been effected.

Among the additional payments for which the Board would become liable as the result of the exercise by it of its statutory powers would be a depreciation allowance if the price realized by the sale was less than the basic value which had been placed on the property when it was listed as an 'affected' property.

Negotiations in connection with these payments between the Board and the respondent were finally concluded on or about 30th May, 1963, when the Board agreed to pay the purchase price and the additional amounts in terms of the conditions of sale, together with a depreciation contribution, upon registration of transfer. Transfer was effected on 7th August, 1963, and the next day the purchase price with the additional amounts due and the depreciation contribution were paid to the respondent.

Respondent claimed that by virtue of the provision of section 24 of the Income Tax Act, 1962, the amounts received by it on 8th August, 1963, as purchase price and depreciation contribution must be deemed to have accrued to it during the year ended 30th June, 1963, its 'transition period', and that it was entitled to a deduction for that year in respect of these items in terms of section 21*bis*(2) of that Act.

The Secretary for Inland Revenue refused to allow the special deduction claimed on the grounds(a) that the transaction between the respondent and the Board in terms of the Group Areas Development Act did not constitute an 'agreement' in terms of section 24 of the Income Tax Act, 1962, and(b) that as the Income Tax Act levied tax on amounts received by or accrued to a taxpayer in any year of assessment, the Secretary had the

option of assessing an amount either in the year of its receipt or that of its accrual, if they occurred in different years.

The Secretary having assessed the respondent accordingly, the respondent appealed against the assessment to the Special Court for hearing Income Tax appeals. That Court allowed the appeal, holding that section 24 of the Income Tax Act, 1962, did apply and that respondent was entitled to the deduction claimed; in so holding it made no distinction between the amounts due in respect of the purchase and the depreciation contribution. It also rejected the contention of the Secretary that he was entitled to assess an amount in either its year of receipt or year of accrual.

In appealing against this decision the Secretary, while persisting in his claim for a right of election as to the year in which he could assess an amount, claimed further that the arrangement whereby amounts became payable by the Board to the respondent could not properly be called an agreement and that at any rate the amount paid as depreciation contribution was not paid by virtue of an agreement but was a statutory payment and not a contractual obligation.

Held, allowing the appeal in part, with no order as to costs, that the provisions of the Income Tax Act did not justify the Secretary's claim for a right of election between the years of assessment and receipt, as the Act clearly laid upon him the duty of assessing in respect of each year of assessment all amounts received by or accrued to a taxpayer in that year;

Held, further, that the arrangement made between the Board and the respondent, after negotiations as to the payment of the purchase price of the property and the additional amounts payable in terms of the conditions of sale, was clearly an agreement and as such fell within the terms of section 24 of the Act, with the result that the amounts covered by it accrued at the date of agreement, which was prior to 30th May, 1963, and so within the year of assessment ended 30th June, 1963;

Held, further, allowing the appeal in respect of the contribution for depreciation, that that amount was not paid in terms of any agreement, but was a statutory liability of the Board, which did not fall within the terms of section 24 of the Income Tax Act and was not to be deemed to have accrued during the tax year ended 30th June, 1963.

W.S. McEwan, S.C., with him *J.H. Conradie*, for the appellant.

RS. Welsh, Q.C., with him *I. Mohamed*, for the respondent.

Cur. adv. vult.

Postea (28th November).

STEYN CJ: This is an appeal on a stated case, by consent direct to this Court, against the finding by the Transvaal Income Tax Special Court that the respondent is, in respect of the year of assessment ended on 30th June, 1963, entitled to a special deduction in terms of section 21*bis* of the Income Tax Act, 1962 (Act No 58 of 1962). The income in relation to which the special deduction was claimed is income derived by the respondent from a transaction involving a block of stands in the Silverglen Township. These stands were affected properties as defined in section 1 of the Group Areas Development Act, 1955 (Act No 69 of 1955), as amended up to the relevant time. They had on 10th November, 1962, been put up for sale by auction, subject to the pre-emptive right conferred upon the Group Areas Development Board by section 16(1) of the 1955 Act, and were sold to one Ebrahim for R200,000. On the same date, the notice as to the intended sale to Ebrahim, required by section 20(1) of that Act, was duly given by the respondent to the Board. By a letter dated 10th December, 1962, the respondent was informed that the Board had in terms of section 20(2)(a) of the Act decided to exercise its pre-emptive right and to purchase the properties, subject to a number of conditions detailed in the letter, for the abovementioned sum plus additional consideration under section 20(6) for which Ebrahim may have been liable in terms of the auction sale, and from which the Board is not exempt.

Section 20(6) is to the effect that the consideration payable by the Board in pursuance of the exercise of its pre-emptive right, is the selling price of the property plus the monetary value of any of the conditions of sale not onerous to the owner together with certain other charges which may be imposed on the purchaser by law or arise from the conditions of sale. According to section 20(1)(c) the respondent had to state in the notice to the Board, in regard to conditions not onerous to the respondent, the monetary value, if any, of any such condition. In terms of section 20(3), the Board is not bound by any condition of the sale in respect of which no monetary value has been so stated. It does not appear from the stated case whether or not any such value was so stated.

In regard to one of the conditions of the auction sale, it may be inferred that no such value was stated. That was the condition in clause 19 of the agreement relieving the respondent as township owner of any obligation in respect of the supply of water, electricity, gas, sanitary services and any other amenities. Paragraph(k) of the Board's conditions of purchase is to the effect that, by virtue of section 20(3), the Board is not bound by this condition and that the township owner will not be relieved of any such obligation.

The preceding paragraph of the said conditions mentions *inter alia* that:

'(j) should the basic value of the properties hereby purchased be re-determined at an amount in excess of the consideration for which they are sold, the seller will in terms of Section 20(5)(b) be entitled to a depreciation contribution equal to 80% of the difference between the consideration and the basic value, which will be paid in addition to the purchase price after transfer has been effected and all costs have been determined.'

Section 20(5)(b) provides:

'Upon the transfer of any affected property by the person who was or is deemed to have been the owner thereof at the basic date, in pursuance of a disposition, whether to the board or to a person other than the board, under this section, there shall -

(a) . . .

(b) if the consideration for which the property was in fact disposed of is less than the basic value thereof, be payable by the board to the owner a depreciation contribution equal to eighty per cent. of the difference between the basic value and such consideration.'

The basic value, as defined in the Act, of affected properties, is determined by valuators under section 19 and may, in specified circumstances, be redetermined under section 18. In terms of section 18(b) and section 19(8), however, a value agreed upon between the Board and the owner, or between the Board and the owner and all mortgages, respectively, is the basic value of the property, and a determination by valuators is then not necessary.

The stated case does not disclose at what amounts the basic values of these properties had originally been determined or whether they have been redetermined as held in prospect in paragraph(j) mentioned above.

According to paragraph 2(6) of the stated case, the Board's conditions of purchase led to 'certain disputes' between the respondent and the Department of Community Development. One of them concerned the statement in paragraph(k) of these conditions that the Board is not bound by clause 19 of the auction sale agreement. The others are unspecified. The next sub-paragraph of the stated case is the following:

'(7) The appellant eventually agreed to release the Group Areas Development Board from the obligations stipulated in clause 19 of the Deed of Sale between the appellant and J.H.S. Ebrahim and on or about 30th May, 1963, the said Board agreed to pay the purchase price together with the depreciation contributions upon registration of transfer.'

The 'appellant' here means the respondent. Although paragraph 2 of the stated case commences with the statement 'At the hearing (no evidence having been given) the following facts were admitted', it is not apparent what occasion there could have been for a release of the Board

from the obligations mentioned or for any dispute in regard to these obligations. As indicated above, the Board's reliance upon section 20(3) for its claim that it was not bound by clause 19, leads to the inference that it was not a condition of the auction sale in respect of which a monetary value had been stated. If that inference is correct, there would hardly be room for a dispute and there could be no question of a release of the Board from these obligations.

Eventually the transfers were effected on 7th August, 1963, and the next day the purchase price and the depreciation contributions were paid to the respondent. The amount of the contributions is not revealed. Apart from the purchase price of R200,000, the only relevant figure given is R347,603, being the profit made by the respondent on the sale. The respondent returned this amount as income accrued to it during the tax year ended on 30th June, 1963, but the appellant excluded it from the respondent's gross income for that year, and included it in its gross income for that year, and included it in its gross income for the next year. The court below held that he erred in doing so, that the amount should have been taxed in the first mentioned year, and that the respondent was accordingly entitled to the special deduction under section 21 *bis* of the Income Tax Act.

It is clear from the stated case that neither the purchase price nor the depreciation contributions could have been claimed before the transfers took place on 7th August, 1963. They did not, therefore, become payable during the year ended 30th June, 1963, and cannot, I think, be said to have 'accrued', in the ordinary sense, to the respondent during that year. There is, however, the following provision in section 24 of the Income Tax Act:

'If any taxpayer has entered into any agreement with any other person in respect of any property, the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.'

In the court below it was contended on behalf of the respondent that the agreement between the Board and the respondent is an agreement within the terms of this provision, that it was entered into on 10th December, 1962, i.e. the date of the letter informing the respondent that the Board had decided to exercise its pre-emptive right, and that the whole of the amount payable must accordingly be deemed to have accrued to the respondent during the year ended 30th June, 1963. The appellant contended that the agreement is not the kind of agreement contemplated in section 24, and that in any case, inasmuch as the words 'received or accrued' in the definition of

'gross income' are used disjunctively, he could tax the amount in question either in the year when it accrued or in the year when it was received. The court below accepted that section 24 does apply, found against the appellant on the last-mentioned contention, and held that the respondent is entitled to the deduction claimed. In doing so it drew no distinction between the purchase price and the depreciation contributions. In this Court the appellant, whilst persisting in his right of election in respect of the

two years of assessment, raised the further contentions that the arrangement whereby an amount became payable by the Board to the respondent cannot properly be described as an agreement, despite the fact that it is referred to as such in the stated case, and that at any rate the amount paid by way of depreciation contributions cannot be regarded as having been paid by virtue of an agreement, because the liability for that amount is imposed by section 20(5) of the 1955 Act, with the result that it is a statutory and not a contractual obligation.

As to the first of these further contentions, the submission is that the arrangement between the Board and the respondent had been incorrectly described as an agreement in the stated case because the Board's pre-emptive right does not arise from any contract with the respondent. In support of this submission, it was argued that section 20(1) of the Act compelled the respondent to notify the Board of the auction sale and of its terms, that the Board was not bound by any of the conditions of that sale in respect of which no monetary value had been stated in the notice, and that the consideration to be paid is prescribed by the Act. I am not persuaded by these submissions. An acquisition of property in pursuance of a testamentary pre-emptive right to buy the property at a stated price would be an acquisition by an agreement of purchase and sale, despite the fact that the right is not a contractual one and the price is predetermined by the testator. The compulsory notice to the Board is, I consider, properly to be regarded as incidental to the pre-emptive right, and amounts to no more than an obligatory offer to the Board to enable it to exercise that right. One of the terms of the intended auction sale was that it would be subject to that right. The respondent knew that, in putting up the property for auction on the conditions determined by itself, the Board would be a potential buyer with the right to supplant the highest bidder and that the exercise of that right would in terms of the Act entail certain modifications in those conditions. Under the Act, it was left to the respondent to state the monetary value of any condition not onerous to itself, and in terms of section 20(6) the monetary value of such a condition is to be added to the selling price. Although the Board was not bound by any other conditions of the auction sale, it had no power to impose further conditions not acceptable to the respondent. Some, at any rate, of the conditions of purchase mentioned in its letter to the respondent of 10th December, 1962, find no counterpart in the conditions of the auction sale, and the respondent was not bound to agree to them. As indicated above, the Board's conditions led to disputes. These must have been settled, presumably by negotiation, by 30th May, 1963, when the Board is said to have agreed to pay the purchase price together with the depreciation contributions upon registration of transfer. While, therefore, the respondent had *nolens volens* to accept certain modifications in the terms of the auction sale, it cannot be said that it had no say at all as to the ultimate arrangement between itself and the Board. The mere fact that the terms of a transaction which comes about by agreement are in fact prescribed by statute, is no ground for holding that it is not an agreement. If the acquisition of affected property by the Board under the Act is not an acquisition by purchase and sale, the use of the phrase 'pre-emptive

right' in sections 16, 20 and 22 would be singularly inept. A right of pre-emption postulates a purchase as the result of its exercise. Section 20(5), moreover, speaks of the disposition ('van-die-hand-sitting') under that section by the owner to the Board or to a person other than the Board. A disposition to a person other than the Board would clearly be a disposition by agreement. I can find no basis in the Act for regarding a disposition to the Board as something different. Section 20(7)*bis* refers to the 'alienation' of affected property to the Board. That also pre-supposes an agreement. For these reasons the arrangement between the Board and the respondent has not, in my view, been incorrectly described in the stated case as an agreement. In substance it was arrived at by offer and acceptance, after the conclusion of negotiations.

Counsel for the appellant made the further point that section 24 of the Income Tax Act deals, in relation to immovable property, with an agreement under which transfer it to be passed upon or after receipt by the owner of the whole or a certain portion of the amount payable to him under the agreement, i.e. according to counsel, an agreement under which the passing of ownership is suspended notwithstanding that the purchaser is given time to pay, and the consideration is payable before transfer, whereas in this case no amount is payable until transfer has been effected. There is no substance in this. The meaning of 'amount payable . . . under the agreement' is not limited to an amount payable before transfer and in the case of an immovable it is inappropriate to speak, as in the case of an immovable property delivered under a hire-purchase agreement, of the suspension of the passing of ownership, as ownership could in any case not pass under an agreement before transfer.

In my opinion the Board acquired these affected properties by an agreement such as is described in section 24, and the consideration payable under the agreement must be deemed to have accrued on or before 30th May, 1963, i.e. during the tax year ended 30th June, 1963.

As to the second further contention, i.e. that the amount paid by way of depreciation contributions cannot, for the purposes of section 24, be regarded as having been paid under an agreement, the appellant is on better ground. The Board's liability for that amount is imposed by section 20(5) of the 1955 Act, and depreciation contributions,

although possibly in a larger amount, would, it would seem, have been payable also if the Board had decided not to exercise its pre-emptive right and the properties had been sold to Ebrahim. It was not the agreement of sale which gave rise to this liability. In paragraph(j) of its conditions of purchase, quoted above, the Board itself intimated that the seller would, in the circumstances there stated, be entitled to a depreciation contribution 'in terms of Section 20(5)(b)'. By including this 'condition', it was not making an offer to undertake an additional and altogether superfluous contractual liability. Assuming this 'condition' to have been retained in the agreement as finally concluded - a matter upon which there is no information - its presence in the agreement would merely serve to confirm the statutory obligation, without adding anything to it or detracting anything from it. It may be that the redetermination mentioned in that paragraph did not take place because the Board and the respondent arrived at an agreement under section 18(5) or 19(8) as to

the basic value of the properties, but such an agreement as to one of the factors in the calculation to be made, would not transform the statutory obligation into a debt under a contract. Although in terms of section 20(5) the contributions were payable on transfer, they were payable under that section and not under an agreement described in section 24 of the Income Tax Act. In this Court counsel for the respondent relied, in this connection, not so much on an agreement allegedly entered into on 10th December, 1962, as on the statement in paragraph 2(7) of the stated case that on or about 30th May, 1963, the Board 'agreed to pay the purchase price together with the depreciation contributions upon registration of transfer'. This statement does not purport to reflect all the terms of the agreement of purchase and sale, but in all probability it nevertheless refers to the final conclusion of that agreement and not to a separate transaction outside that agreement. The very first of the Board's conditions of purchase set out in the letter of 10th December, 1962, is the following:

> '(a) the purchase price shall be paid against delivery of transfer of the properties duly registered in the name of the Board according to survey, free from all leases, encumbrances, reservations and servitudes, other than those servitudes already registered in the current title deed of the properties, but excluding servitudes of usufruct or of usus, if any, which must be cancelled at the expense of the seller.'

Whatever may have happened in respect of the survey, leases or other matters mentioned in this condition, it is difficult to conceive of any dispute arising as to the payment of the purchase price against transfer, and it may safely be assumed that a stipulation to that effect would not have disappeared from the agreement. As to the payability of depreciation contributions on transfer, as mentioned in paragraph(j) of the conditions, the position is much the same. Even if there had been a dispute as to the basic values of these properties, there is no reason to suppose that the reference, in relation to what was agreed on 30th May, 1963, to 'the depreciation contributions', is not a reference, as in paragraph(j) of the conditions, to the depreciation contributions as calculated and payable in accordance with section 20(5)(b) of the 1955 Act. It might be that this paragraph was omitted from the ultimate agreement as redundant or because the basic values had in the meantime been settled, but that would, as pointed out above, have made no difference to the payability of the contributions on transfer. There would, therefore, obviously have been no need for special and separate contractual stipulations in addition to the agreement of sale, in regard to the payment of the purchase price and depreciation contributions on transfer. If the agreement of 30th May, 1963, was in fact another agreement, it would, whether entered into before or after the final conclusion of the agreement of sale, in a legal sense, have been a fatuous transaction; and whether or not it was another agreement, the Board could hardly, familiar as it clearly was with the statutory obligation, have given an undertaking, *animo contrahendi*, to pay the contributions on transfer. I cannot accept that for no reason or purpose detectable on the stated case, it intended, by the agreement of sale or such other agreement to superimpose upon that obligation an additional contractual liability. Accepting that it did on 30th May, 1963, agree as stated,

the agreement must, I consider, whether or not it related to the purchase as finally concluded, as far as the contributions are concerned, to be taken to amount to no more than an affirmation of the liability under the Act. It follows that the contributions did not, when they became payable in August, 1963, accrue to the respondent under an agreement, but under the 1955 Act, and that they cannot under section 24 of the Income Tax Act be deemed to have accrued during the tax year ended on 30th June, 1963.

As to the appellant's right to select the one or the other of the tax years in question, I can find little in the Income Tax Act to support such a right. The definition of 'gross income', which is basic to the whole procedure of assessment, refers to 'the total amount' in cash or otherwise, received by or accrued to or in favour of 'the taxpayer during a year or period of assessment. I understand this to be a reference to the total amount of both receipts and accruals. It is true that in *Commissioner for Inland Revenue v Delfos*, 1933 A.D. 2421 at 254, Wessels C.J. remarked:

> 'It was for the Legislature to say how it wished to determine the taxable income of the citizen, and we cannot say that where in a definition it said "received by", it did not mean to include everything that the taxpayer received in the year of assessment (not being something of a capital nature): nor can we say that when the Legislature said disjunctively "received by *or* accrued to" it meant "received by and accrued to".'

The Court was there dealing with income accrued in previous years, which had been deducted as bad debts from the income during those years, and which was received in a subsequent year. It would seem that the mention of

disjunctiveness was merely intended to make it clear, in that context, that 'received by or accrued to' does not mean that the income must both have accrued and have been received in the same year of assessment. The amounts in issue in that case having been received in the subsequent year, could be taxed in that year notwithstanding that they had accrued in previous years. Indeed, in a preceding passage (at 251) the learned Chief Justice had explained that in ascertaining the gross income of the taxpayer, the total amount of both receipts and accruals has to be determined and concluded: 'It seems therefore clear that whatever has accrued to the taxpayer during the year of assessment is part of his gross income.' At p. 261, De Villiers J.A. pointed out that gross income is defined on two bases, viz. receipts and accruals, and indicated that these bases were independent of each other, but added the explanation: 'that is to say, the Commissioner can claim to regard as gross income all amounts actually received during a tax-year, whenever they may have originally accrued, and also all amounts accruing during a tax-year.' This case decided no more than that accrued amounts deducted as bad debts in previous years, are taxable as receipts in the year in which they are paid to the taxpayer. It is 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.

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In terms of section 7(1) of the Act, income is deemed to have accrued to a person *inter alia* notwithstanding that it has not been actually paid over but remains due and payable to him, and he is required to include in his return a complete statement of such income. The requirement to include accrued amounts is repeated in a number of other provisions. (Cf. sections 66(13)*bis* and(13)*ter*, 68, 69 and 72.) Under section 75(1)(a), (c) and(d), a taxpayer would commit an offence if he should fail to furnish a return as required by or under the Act, or to show in his return or in a return rendered on behalf of any other person any portion of the gross income received by or accrued to or in favour of himself or such other person; and under section 76(1)(b) he is liable to additional tax, if he omits from his return any amount which ought to have been included therein. In terms of section 5(1), income tax is levied in respect of the taxable income received by or accrued to or in favour of the taxpayer. The returns are, of course, to be made in respect of each year or period of assessment. The requirement that receipts as well as accruals must be disclosed, with the provision for a penalty and additional taxation, and the levy of the tax on both receipts and accruals, clearly indicate that Parliament contemplated an assessment of the tax in every year also on accruals during that year; and if that is what Parliament contemplated, I know of no ground on which the Secretary could as of general right postpone the assessment of disclosed accruals to a subsequent tax year when it may be more advantageous to the Treasury to tax them as receipts in respect of that year. It may be that where an accrual has not been disclosed in the return for the year of accrual, the Secretary could under section 76(2) forgo the additional tax payable under that section and include the amount in the gross income of the taxpayer for the year in which it is received; or that by arrangement with the taxpayer, tacit or otherwise, he could assess on the basis of receipts only. (Cf. *Marais v C.I.R.*, 1943 C.P.D. 150.)[2] These are matters upon which I express no opinion. But this is not such a case. The respondent did in fact disclose the amount of the purchase price of these properties as having accrued in the year ended 30th June, 1963, and there is no suggestion of any such arrangement. In these circumstances it was entitled, I consider, to have that amount included in its gross income for that year, as contemplated by the Act, and the Secretary could not ignore it in making his assessment for that year. I may add that the special deeming provision in section 24 is in itself an indication that, in the ordinary course at any rate, amounts payable under agreements described in that section, are to be taxed in the year in which they are deemed to have accrued, and not in any subsequent year of receipt or actual accrual.

In the result, the appeal succeeds in so far as the depreciation contributions are concerned. As to the costs, there is no indication in the stated case to what extent the appellant's success on this issue will increase the tax payable by the respondent, but it may be assumed that it will be substantial. On the other hand, this issue was raised for the first time in this Court, argument on the other issues occupied about two-thirds of the time, and it may well be that, if it had been debated in the court

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below, the amount of the contributions would not have been included in the respondent's gross income for the year in question. If in that event the appellant would nevertheless have appealed to this Court on the other issues - as is not at all unlikely - he would have had to pay the costs of an unsuccessful appeal. In these circumstances the more equitable course will, I think, be not to grant the appellant any costs. (Cf. *Commissioner of Inland Revenue v Niko*, 1940 A.D. 416[3] at 431.)

The judgment of the court *a quo* is altered to allow the appeal against the exclusion of the purchase price of the properties in question from the respondent's gross income for the tax year ended 30th June, 1963, to dismiss the appeal against the exclusion from such income of the depreciation contributions, and to refer the matter to the Secretary for an assessment on that basis. There is no order as to the costs of appeal to this Court.

Ogilvie Thompson J.A., Rumpff J.A., Holmes J.A. and Jansen J.A. concurred.

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Footnotes

1 6 SATC 92.
2 12 SATC 190.
3 11 SATC 124.