IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

COMMISSIONER FOR INLAND REVENUE — APPELLANT

and

PEOPLE'S STORES (WALVIS BAY)
(PTY) LIMITED — RESPONDENT

CORAM : CORBETT CJ, JOUBERT, HEFER, NESTADT JJA et NICHOLAS AJA.

HEARD : 14 NOVEMBER 1989.

DELIVERED : 22 FEBRUARY 1990.

JUDGMENT BY J J F HEFER

HEFER JA :

This is an appeal in terms of sec 86 A (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 sec 1 of the Act which provides that -

> " '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 emphasized 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 6-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 sec 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 218,00 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 s1, 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 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 C P D 203. Under consideration in that case was the definition of "gross income" in sec 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 sec 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 207-210 :

> " ..... 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.
>
> 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 ....

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). '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 taxpayers .....

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 sec 7(1) of Act 40 of 1925, sec 7 of Act 31 of 1941, sec 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 A D 242 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) to the view expressed in the Lategan case, whereas DE VILLIERS JA (at 260) and STRATFORD JA (at 262) 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) S A 471 (A) at 481; Rishworth v Secretary for Inland Revenue 1964(4) S A 493 (A) at 499 E-F and Mooi v Secretary for Inland Revenue 1972(1) S A 675 (A) at 682 H-683 A, but

was never resolved. It is nevertheless stated in Silke on South African Income Tax, 11th ed 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).

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 eg 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 paragraphs (h) and (i) of the definition, sec 26(1) read with the First Schedule and sec 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 A D 267 eg 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 A D 215 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 684 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 emphasized 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,

> "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 683 A-F). 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 279-281) 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 209-210,

> ".....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 propo-

sition, 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 criticized in Ingram's The Law of Income Tax of South Africa at 32 on 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 sec 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.

Ingrams'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 sec 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 purpose of sec 8 was and what the purpose of the present sec 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

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 section 8 and two other provisions of Act 40 of 1925. At 260 DE VILLIERS JA referred to sec 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 pay-

able' ". 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 sec 7(b) the weight that DE VILLIERS JA accorded to it since its real import seems to lie in the words that I emphasized. STRATFORD JA (at 262) added a reference to sec 11(2)(g) where provision was made for a deduction in respect of bad debts (cf sec 11(i) 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. Sec 11(i) and (j) respectively provide 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 sec 11(i) and (j) means "due and payable", which is by no means clear. Admittedly, "due" often means "due and payable" when it is said eg 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 secs 7(1) and 91(3)) and in sec 7 A (2) mention is even made of a salary or pension which "has become payable". Taking account also of the Afrikaans version of sec 11(i) 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 assess-

ment. 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 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) S A 365 (A) at 377 A-C). 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 par 134. See also Silke on South African Income Tax 11th ed 2-3 par 2.3, 2-4, 25-6 par 25.3). This is borne out by the remarks of some of the judges in the Delfos case (supra) at

254-255, 259, 261 and by WATERMEYER CJ's judgment in Isaacs v Commissioner for Inland Revenue 1949(4) S A 561 (A). At 567-568 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.

J J F HEFER JA.

CORBETT CJ)
JOUBERT JA)
NESTADT JA) CONCUR.
NICHOLAS AJA)