

When proceeds accrue for tax purposes?

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Judgment was delivered in the tax court on 30 May 2017 in the matter of *M v Commissioner for the South African Revenue Service* (case number 14005, as yet unreported). The case dealt with the familiar question of whether proceeds had accrued in a particular year of assessment, even though payment was only received in a subsequent year of assessment.

While the judgment is not by any means ground-breaking, it serves as additional authority for some of the established principles, and touches on some finer points, regarding the suspension of performance.

In this case the taxpayer had sold certain immovable properties during its 2013 year of assessment. It was a term of the agreements of sale that the buyer would only make payment of the purchase consideration against transfer of the relevant immovable property a term that is relatively common. Transfer was only given in the 2014 year of assessment.

The South African Revenue Service (SARS) assessed the taxpayer on the basis that the purchase consideration accrued during the 2013 year of assessment, and should have been included in gross income for that year. It was not in dispute that the accruals were not of a capital nature. Alternatively, SARS argued that the purchase consideration is deemed to have accrued in terms of s24(1) of the Income Tax Act, No 58 of

1962 (Income Tax Act) the application of which we do not consider for present purposes.

The taxpayer disputed SARSs assessments and the matter eventually proceeded to the tax court.

The taxpayer contended that the purchase consideration only accrued when it became entitled to receive payment, which was upon transfer.

We know from the cases of *WH Lategan v CIR* 2 SATC 16 and *CIR v Peoples Stores (Walvis Bay) (Pty) Ltd* 52 SATC 9 that an entitlement to payment constitutes something that can accrue, even though actual payment is only due in future.

We also know that the proviso to the definition of gross income in s1 of the Income Tax Act provides that where a person becomes entitled to any amount payable in the future, the amount is deemed to accrue during the year that the person becomes so entitled to the amount, as opposed to the future date for payment.

In generic terms, a right to performance can accrue, even though performance is only due, or performance can only be claimed or enforced, at a future date.

The court acknowledged that where the actual right to performance is wholly suspended, for example by means of a suspensive condition to the effect that a buyer first obtains a loan, there can be no accrual. In such a situation the seller would not be entitled to anything until such time that the condition is met (ignoring for present purposes the principle of fictitious fulfilment).

However, the taxpayer argued that it only became entitled to payment (ie the right to performance only accrued) after it had given transfer of the immovable property. It would appear that the taxpayers argument was that the entitlement to payment was suspended by the condition that, or contingent

upon, the taxpayer first giving transfer.

The courts view was that the entitlement to payment accrued on the later of the date that all suspensive conditions were fulfilled or any statutory permissions required to give transfer were obtained. Importantly, the entitlement to payment vested in the taxpayer as soon as the contract became enforceable at the instance of either party. At that point the taxpayer could tender transfer, and enforce payment. The buyer could likewise enforce specific performance and tender payment.

On the particular facts, the court found that the date upon which the conveyancers were ready to lodge transfer documents at the deeds office, was the date upon which it can appropriately be said that the taxpayers entitlement to payment vested.

It is interesting to note that the accountant member of the court took a somewhat stricter approach. In her view, the taxpayer became entitled to payment upon the agreements becoming unconditional ie when all suspensive conditions were fulfilled. The obtaining of any statutory permissions was, in her opinion, merely an obligation imposed on the taxpayer in terms of the agreements.

In my view, it may in certain circumstances, and depending on the wording of the particular agreement, be possible to delay an accrual, even where the agreement has become unconditional – for example, where payment is contingent upon the happening of an uncertain future event.

In this regard, there may have been some merit in the taxpayers contentions. However, the flaw in the taxpayers case was that, on the evidence, the agreements created reciprocal obligations, in that the seller had to give transfer and the buyer had to pay the purchase consideration. The entitlement to payment of the purchase consideration was not as such

suspended pending transfer of the immovable properties, even though the taxpayer could not enforce payment without tendering transfer.

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