IN THE TAX COURT OF SOUTH AFRICA
(CAPE TOWN)

Case No.: 14005

Hearing: 17 and 19 May 2017
Judgment: 30 May 2017

In the matter between:

X ESTATES LIMITED Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

BINNS-WARD J:

[1] The issue in this appeal from the Commissioner's assessment of the taxpayer's gross income for the company's 2013 tax year is whether the amounts of the purchase price consideration in respect of certain stands of immovable property sold by the taxpayer in the course of trade, in terms of deeds of alienation entered into during the 2013 tax year, accrued to the taxpayer in that tax year notwithstanding that the taxpayer received payment against transfer of the properties to the purchasers only in the 2014 tax year. The Commissioner has assessed the taxpayer for income tax on the basis that the amounts accrued in the 2013 tax year on the grounds that the taxpayer became entitled to the proceeds of the sales[1] during the 2013 tax year. In the alternative, the Commissioner contends that the proceeds are, in

[1] It was established in the evidence of the taxpayer's managing director that the proceeds of the sales were shared with a joint venture partner. The detail of this arrangement is not important. This case is concerned only with that part of the proceeds that accrued to the taxpayer.

any event, deemed, in terms of s 24(1) of the Income Tax Act 58 of 1962, to have accrued to the taxpayer during its 2013 tax year.

[2] The taxpayer (which is a 'resident' as defined in para (b) of the definition of the term in s 1 of the Income Tax Act) relies on the established meaning of the phrase 'received by or accrued to' in para (i) of the statutory definition of 'gross income'. It contends that the amounts accrued only when it became entitled to receive payment after transfer of the properties to the purchaser. In each case transfer had been given during the taxpayer's 2014 tax year; that is after 31 March 2013.[2] The taxpayer disputes that s 24(1) of the Act is applicable in respect of the transactions.

[3] The import of the word 'accrued' in the relevant part of the definition of 'gross income' was for a long time contentious. The uncertainty that attended the question arose from the division of opinion in *Commissioner for Inland Revenue v Delfos* 1932 AD 242. The question was eventually authoritatively settled by the Appellate Division in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A). The judgment in *People's Stores* endorsed the so-called '*Lategan* principle' – a term coined from the construction given to the word in *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 (2 SATC 16) – about which the court had, in essence, been divided in *Delfos*.

[4] Mr Lategan was a wine farmer. In May 1920 he sold the wine that he had made during the tax year that ended on 30 June 1920. Just over half of the selling price was payable during the year of assessment (i.e. before 30 June 1920), and the balance in three instalments payable in July, August and

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[2] The pleadings, which had alleged that the taxpayer's tax year end was 28 February, were amended at the hearing to reflect the date as 31 March.

September. The case stated by the Income Tax Special Court for determination by the Supreme Court set out Mr Lategan's contention that the Commissioner had misdirected himself by including the whole of the selling price in the taxpayer's gross income in the year ended 30 June 1920, and that the instalments payable after that date should have been excluded from his gross income in that year.

[5] The Cape Provincial Division of the Supreme Court, (per Watermeyer J, Benjamin and Louwrens JJ concurring) rejected the argument advanced on behalf of the taxpayer in *Lategan* '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*". The court held (at p. 209) that the words '*has accrued to or in favour of any person*' in the equivalent definition in s 6 of the Income Tax (Consolidation) Act 41 of 1917 meant '*to which he has become entitled*'. Watermeyer J explained that, for the purposes of income tax, 'income' includes not only money, but also the value of what has accrued to the taxpayer as earnings from his enterprise during the tax year. 'Income', the court held (at p. 208), 'unless it is in some form such as a pension or annuity, is what a man earns by his work or 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*'.

(Emphasis added)

[6] It is plain, if regard is had to the facts of *Lategan's* case, that an entitlement (i.e. right) to payment can accrue before the payment is payable. In *People's Stores* it was held that in cases in which the right to a future payment had vested in, and therefore accrued, to the taxpayer, the accrued amount for the purposes of the taxpayer's gross income was the present value of the future

payment to which it was entitled.[3] The finding in *People's Stores* that it was the present value of a right to payment in the future that accrued, not the nominal amount that was payable, was promptly negated, however, by the insertion of the following proviso to the definition of 'gross income' in the Income Tax Act:

> Provided that where in any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of such year, that amount shall be deemed to have accrued to the person during such year.

[7] In the current matter the purchase prices were payable in each of the transactions against transfer of the property into the purchasers' names. The right to payment thus vested in the taxpayer, and had a value in its hands, as soon as it was in a position to be able to tender transfer to the purchasers in terms of the agreements.

[8] I do not find it necessary to deal with the transactions involved individually. It suffices for present purposes to mention that in some cases the agreements included a suspensive condition in respect of the obtaining by the purchaser of mortgage bond finance. Obviously an entitlement to payment in those matters could not vest in the taxpayer before such conditions were fulfilled.

[9] Various requirements had to be satisfied after the deeds of alienation had been entered into before the taxpayer was legally able to give transfer. In all cases the conveyancing attorneys appointed by the taxpayer were legally able

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[3] The finding in *People's Stores* that it was the present value of a right to payment in the future that accrued was negated by means of the introduction in 1990 of the following proviso to the definition of 'gross income' in the Income Tax Act:

> *Provided that where in any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of such year, that amount shall be deemed to have accrued to the person during such year.*

to deal with the funds paid by the purchasers in terms of the agreements only after they had been satisfied that there had been compliance with the requirements of the Financial Intelligence Centre Act 38 of 2001 ('FICA'). The purchase price due in terms of the contracts had to be paid to the conveyancing attorneys or adequately secured by guarantees provided by a financial institution, or by way of a cash payment by the purchaser, before lodgement of the transfer documents at the deeds office. As the land units in question were first transfers out of subdivided land, the taxpayer was able to effect transfer of them to a purchaser only after the requirements of s 31 of the Land Use Planning Ordinance 15 of 1985 (Cape) ('LUPO')[4] had been complied with. Furthermore, transfer could not be effected until the local authority had given rates clearance in terms of s 118 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act').[5] I shall refer to the two lastmentioned requirements as the 'legal permissions'. Mr Y SC, who appeared for the taxpayer, characterised all of the

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[4] Section 31(1) of LUPO provided:

> *Before registration by virtue of a subdivision in respect of which an application has been granted under section 25 is effected by the registrar of deeds concerned, the transferor shall furnish proof to the local authority concerned that any condition on which the application for subdivision concerned was granted, has been complied with, and no written authority under section 96(1) of the Municipal Ordinance, 1974 (Ordinance 20 of 1974), or section 96(1) of the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976), shall be issued unless such proof has been furnished*.

(Sections 96(1) of the Municipal and Divisional Councils Ordinances were the statutory predecessors of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000.)

[5] Section 118(1) provides:

> *(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate—*
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> *(a) issued by the municipality or municipalities in which that property is situated; and*
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> *(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.*

(The exception to subsection (1) in terms of subsection (4) has no application on the facts of the current matter.)

aforementioned requirements as 'contingencies' that had to be satisfied before the taxpayer could tender transfer.

[10] Mr Y further contended that the taxpayer only became entitled to payment after it had given transfer. Counsel's argument proceeded on his understanding of the evidence given by an attorney from the firm of attorneys appointed by the taxpayer to attend to the conveyance of the properties. Mr Y understood the import of that evidence to have been that registration and payment were consecutive acts. Registration happening first and payment occurring later, usually later on the same day, when the financial institutions would honour the guarantees that had been furnished.

[11] My understanding of the evidence was different. I understood that payment and registration of transfer occurred *simul et semel*,[6] the guarantees being accepted as notional payment in lieu of cash. The fact that actual payment was, in practice, very occasionally delayed because of some or other mishap in the inner workings of the guarantor-financial institution did not derogate from the conceptual character of the transaction, which was to give effect to the following clause in the deeds of alienation (and, in particular, clause 4.1.2):

> 4.1 The purchase price is payable free of exchange at Cape Town as follows:
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> 4.1.1 on signature by the **PURCHASER**, the deposit in accordance with the **SCHEDULE**. The **PARTIES** irrevocably authorise and instruct the **ATTORNEYS** to invest the deposit and any other amounts paid by the **PURCHASER** on account of the purchase price, with a Bank/Financial Institution (determined in

[6] 'Together and at one time'.

the sole discretion of the **ATTORNEYS**) in terms of Section 78(2) of the Attorneys Act 1979, as amended, pending registration of transfer, the interest thereon accruing to the **SELLER**. If this **AGREEMENT** is cancelled by the **SELLER** as a result of a breach by the **PURCHASER** of his obligations in terms hereof then the **ATTORNEYS** are irrevocably authorised to deal with the deposit together with the interest which has accrued thereon and any other amounts paid by the **PURCHASER** on account of the purchase price, in accordance with the provisions of clause 10 hereof.

4.1.2 the balance of the purchase price ("balance") in cash against registration of transfer of the **PROPERTY** in the name of the **PURCHASER**.

[12] But even if Mr Y's understanding is right, the timing of the transfers and actual making of the payments, and the order in which they happen do not, in my judgment, determine when the taxpayer became 'entitled to payment' within the meaning of the *Lategan* principle. The taxpayer's entitlement to payment vested at the date of the fulfilment (including fictitious fulfilment in a case in which the purchaser frustrated the actual fulfilment of the condition) of any suspensive conditions to which the agreement was subject, or the date upon which the taxpayer obtained (or, acting reasonably, could have obtained) the statutory permissions necessary to enable it to tender transfer, whichever occurred later. In other words, the entitlement to payment vested in the taxpayer as soon as the contract became enforceable at the instance of either party.

[13] The relevant dates concerning the fulfilment of suspensive conditions – where applicable – and clearance in terms of s 31 of LUPO and s 118 of the

Systems Act, respectively, were summarised in a schedule compiled by the taxpayer's conveyancing attorneys in respect of 24 of the 25 transactions concerned. The schedule was put in evidence as Exhibit A. The schedule also set out, in respect of each transaction, the dates on which the purchasers had complied with FICA, paid the deposits stipulated in terms of the contracts and secured payment of the balance of the purchase price. I do not regard the second of the aforementioned categories of dates as relevant to the dates upon which the seller's entitlement to payment vested. Once any suspensive conditions had been fulfilled, and the legal permissions that the seller needed to obtain in order to give transfer had been obtained, the seller was in a position to enforce compliance by the purchasers with the contracts and tender transfer of the properties.

[14] It was not suggested in respect of any of the transactions that the purchasers had wilfully delayed the fulfilment of any suspensive conditions, or that the seller had been responsible for any delays in obtaining the required legal permissions. In the circumstances it seems to me that it would be appropriate to treat the dates reflected on Exhibit A as those upon which the taxpayer's conveyancers were ready to lodge papers for the transfers at the deeds office as the dates upon which the taxpayer's entitlement to payment had vested.

[15] On that approach the taxpayer became entitled to payment under the contracts in respect of transactions 1, 2, 3, 6, 8, 9, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23 and 24 described in exhibit A before 31 March 2013. In accordance with the *Lategan* principle the proceeds of the sales in those transactions therefore *actually* accrued to the taxpayer as part of its gross income for the 2013 tax year. (The accountant member of the court of the court is of the opinion that the taxpayer became entitled to the payments, in

the sense understood in terms of the *Lategan* principle, upon the dates upon which the respective agreements were concluded where the contracts were not subject to suspensive conditions, and upon fulfilment of the suspensive conditions in those matters in which the agreements were subject to such conditions. Her reasoning is that the obtaining by the taxpayer of the legal permissions were obligations imposed upon it in terms of the agreements, the incidence of which did not delay the occurrence of the actual accrual in accordance with the *Lategan* principle. On that approach, the proceeds of the sales in all 25 transactions actually accrued as part of the taxpayer's gross income in the 2013 tax year.)

[16] It is not in dispute that the s 31 of LUPO certificate in respect of the 25th transaction in issue (the sale of Erf no.6912 to The Sumbawa Investment Trust) was given by the City only in April 2013. The proceeds of that transaction therefore did not actually accrue to the taxpayer before 31 March.

[17] The Commissioner contends, however, that the proceeds of all 25 transactions are *deemed to have* accrued to the taxpayer by virtue of s 24(1) of the Income Tax Act. If that contention is well-founded, the conclusion stated in the preceding two paragraphs of this judgment, and the reasoning in support of it, would be academic. (On the approach of the accountant member, described above, it would be unnecessary on the facts of the current case to consider the question of a deemed accrual.)

[18] Section 24(1) of the Income Tax Act provides:

> Subject to the provisions of section 24J, 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 the 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.

The heading to the section is 'Credit agreements and debtors allowance'.

[19] Mr Y submitted that s 24(1) was applicable only in respect of 'credit agreements'. He contended that it was of no application in the current matter because the transactions in issue had not involved 'credit agreements'. He invoked the heading to the section and its place within the overall structure of the Income Tax Act in support of his argument. (It was plain that by 'credit agreement' counsel meant an agreement such as (in respect of movables) would be a hire-purchase or sale on instalments contract,[7] for a sale on credit at common law entails the passing of ownership on delivery of the *res vendita* to the purchaser, notwithstanding that payment of part or the whole of purchase price is deferred till later; whereas in a cash sale ownership passes only when the purchase price is paid, payment and delivery being reciprocal obligations.)

[20] Ms A SC, who (together Mr Z) appeared for the Commissioner, argued, however, that the contention advanced by the taxpayer's counsel ran against the plain language of the provision, and that in the absence of ambiguity it was not appropriate to use the heading to the section as an aid to construction. More pertinently, the Commissioner's counsel submitted that the import of the subsection contended for by Mr Y was inconsistent with the construction of the provision applied by the Appellate Division in *Secretary for*

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[7] Counsel's use of the term was consistent in that sense with that employed in the National Credit Act 34 of 2005.

Inland Revenue v Silverglen Investments (Pty) Ltd 1969 (1) SA 365 (A). Any determination by the appeal court of the meaning of s 24(1) is, of course, binding on this court, whatever merit we might otherwise have been inclined to find in Mr Y's argument.

[21] Two questions presented for determination in *Silverglen*. The first required the court to determine in which tax year (1963 or 1964) the proceeds of the alienation of the taxpayer's immovable property had accrued as part of the taxpayer's gross income. And the second required it to decide in which tax year the taxpayer was entitled to claim, as a special deduction in terms of s 21*bis* of the Income Tax Act as it then read, the deemed depreciation in the value of the property, to which it had become entitled in terms of s 20(5)(*b*) of the Group Areas Development Act, 69 of 1955, as amended up to the relevant time.

[22] The facts in *Silverglen* were as follows. The taxpayer (Silverglen) had sold its immovable property in November 1962 to one Ebrahim. The transaction was subject to a statutory right of pre-emption in favour of the Group Areas Board. The Board gave notice of its exercise of the right of pre-emption in December 1962. The purchase price payable upon the exercise of the right of pre-emption was the selling price in terms of the contract of sale with Mr Ebrahim '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'. Transfer of the property to the Board, pursuant to the exercise by it of the statutory right of pre-emption, was effected on 7 August 1963, more than a month after the ending of Silverglen's 1963 tax year on 30 June 1963.

[23] Section 20(5)(*b*) of the Group Areas Development Act, in terms of Silverglen's right to claim a deduction arose, provided:

> 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—
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> (*a*) .....
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> (*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 80 per cent of the difference between the basic value and such consideration.'

[24] The Appellate Division (per Steyn CJ) made the following observation at p. 372C-E of its judgment in *Silverglen*:

> 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.[8] There is, however, the following provision in sec. 24 of the Income Tax Act:

[The learned chief justice then quoted the provisions of s 24(1) of the Income Tax Act, which read then as they do now, apart from the subsequent insertion of the qualification '*Subject to the provisions of section 24J*'.]

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[8] As pointed out by Mr Y, it is evident from that observation that the learned chief justice's approach to the matter of actual accrual was inconsistent with the *Lategan* principle, but that was of no relevance to the court's application of s 24.

[25] The court then considered the effect of s 24(1) on the given facts, which included its finding (adversely to the principal argument of the Secretary's counsel) that the exercise of the Board's right of pre-emption had given rise to an 'agreement' within the meaning of s 24(1). The court held on the facts that the relevant agreement had been concluded on or before 30 May 1963. The court's consideration occurred in the context of the argument advanced on behalf of the Secretary in that case that s 24 was of no application, and that, contrary to the *Lategan* principle, the proceeds of the resultant alienation of the property to the Board had accrued to *Silverglen* upon transfer of the property on 7 August 1963, during the company's 1964 tax year.

[26] The report of the judgment in the South African Law Reports includes counsel's written argument. What I consider to have been the parts of the written argument advanced on the Secretary for Inland Revenue's behalf in that matter that are relevant in respect of the import of s 24 are reported as follows (I have broken it up into paragraphs to make for easier reading):

> The Secretary contends: (1) that sec. 24 does not apply and that consequently the accrual took place in the 1964 year, alternatively, (2) he is entitled under the Act to decide whether to tax on an 'accruals' or a 'receipts' basis and has exercised that right legitimately by taxing the receipt which occurred in the 1964 year.
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> The taxpayer became entitled to payment of the amounts payable by the Board only if and when it passed transfer of the properties with a 'clean' title. Until then no sum of money could become due and payable to the taxpayer. Whether, therefore, the words 'accrued to or in favour of any person' used in the definition of 'gross income' in sec. 1(xi) of the Act mean 'to which he has become entitled' as suggested by Watermeyer J, in *Lategan v Commissioner for Inland Revenue,* 1926 CPD 209, or mean 'due and payable in the year of

assessment but not actually paid in that year' as suggested by Centlivres CJ, in *Hersov's Estate v C.I.R.*, 1957 (1) SA at p. 481, the profit mentioned above would not ordinarily have accrued to the taxpayer until transfer had been passed, which took place only in the 1964 year. No right to claim payment, even in the future, vested in the taxpayer in the year of assessment. Such right would only vest in him if and when he passed transfer.

However, sec. 24 of the Act is a deeming section whereby, if the taxpayer had entered into an agreement with another person in respect of immovable property, the effect of which is that transfer is to be passed 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 is deemed to have accrued to the taxpayer on the day on which the agreement was entered into (subject to the possible allowances referred to in the proviso, i.e. (a) the allowance for doubtful debts in terms of sec. 11(*j*); and (b) the further allowance that the Secretary may make in respect of moneys deemed to accrue but which have not been received).

If sec. 24 applies, then the above-mentioned profit accrued to the taxpayer in the 1963 year. It, however, does not apply for the following reasons: (i) the arrangements whereby an amount became payable by the Board to the taxpayer cannot properly be described as an 'agreement', despite the fact that it is referred to as an 'agreement of sale'. (ii) The right of pre-emption by virtue of which the Board became entitled to acquire the properties was not a right which it had by virtue of any contract with the taxpayer, but was a statutory right. (iii) …

(At pp. 366F-367D.)

Even if the arrangement between the taxpayer and the Board is to be regarded as an agreement it is not the type of agreement contemplated by sec. 24 of the Act.

> That section contemplates an agreement under which the passing of ownership is suspended notwithstanding that credit is given to the purchaser, i.e. notwithstanding that he is given time to pay. Ownership is to pass only when the whole or part of the purchase price has been paid. The purchase price, however, is 'payable' from the time when the agreement is made. The arrangement with the Board was different. The Board stipulated that there would be no payment until transfer was passed.

(At p. 368A-C.)

Silverglen's counsel are reported to have contented themselves with the following response in their written argument:

> There is nothing in sec. 24 which supports the construction which the appellant seeks to place upon it.

(At p. 369 *fin*.)

[27] The appeal court found that the taxpayer's right to the special deduction in terms of s 21bis of the Income Tax Act fell to be claimed in the 1964 tax year. It based that conclusion on the plain meaning of the introductory wording of s 20(5)(*b*) of the Group Areas Development Act (quoted in paragraph [23] above). It found, however, that the proceeds of the alienation had accrued to Silverglen in its 1963 tax year. It did so on the basis of its conclusion that s 24 was applicable. The relevant passage of the court's judgment went as follows:

> Counsel for the appellant made the further point that sec. 24 of the Income Tax Act deals, in relation to immovable property, with an agreement under which transfer is 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 moveable 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.
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> In my opinion the Board acquired these affected properties by an agreement such as is described in sec. 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.

(At p. 374B-E.)

[28] Mr Y submitted that it had not been argued in *Silverglen* that s 24(1) was limited to 'credit agreements'. I do not agree. In my view it is clear from the second passage from the appellant's counsel's written argument quoted above that it was argued on behalf of the appellant in that case that the provision did not apply according to the ordinary tenor of its wording, but only to a category of 'agreement under which the passing of ownership is suspended notwithstanding that credit is given to the purchaser, i.e. notwithstanding that he is given time to pay (i.e. like a hire-purchase agreement)'. It is clear from the court's determination of the first question before it that that argument was rejected, and that the court proceeded on an application of the wording of the provision according to its ordinary tenor unaffected by the heading. In the result it applied the provision to a cash sale, in which transfer of the property occurred against payment of the purchase price, as in the current matter.

[29] I think it is of no moment in the circumstances that there was no reference in either the written argument or the judgment to the effect of the heading to the

section. This court is bound by the manner in which the appeal court construed and applied the provision in *Silverglen*. There is therefore no purpose to be served by us entering into the interesting contesting arguments by the parties concerning the extent to which the heading to the section could be taken into account in construing it.

[30] The other members of the court are in agreement with me that the appeal must be dismissed. It is so ordered. There is no order in respect of costs.[9]

BINNS-WARD, J
President

[9] See s 130 of the Tax Administration Act