REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Case Number: **IT 46306**

(1) REPORTABLE: **YES** / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: **YES** / ~~NO~~

(3) REVISED.

13 April 2026
DATE

SIGNATURE

In the matter between:

TAXPAYER T **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

J U D G M E N T

NDITA, J:

[1] This is an appeal against the additional income tax assessment issued by the Commissioner for the South African Revenue Services ("SARS") issued against the appellant on 17 September 2021 relating to the 2018 tax year. The transaction central to the determination of the relevant issues herein relates to the appellant's sale of its assets to T Investments in terms of a forward sale agreement ("FSA") concluded on 10 July 2017. SARS regarded the sale to constitute a disposal as defined in the 8th Schedule of the income tax Act 58 of 1962 ("ITA"), with the disposal having occurred in the 2018 tax year of assessment. SARS assessed the appellant on the basis that the disposal was subject to Capital Gains Tax ("CGT"). The appellant appeals against the imposition of the CGT and thus bears the burden of proving that the disposal is not taxable.

[2] During the proceedings, the appellant elected no to lead evidence and thus relies on the contents of the documents relevant to the transaction as well as admissions recorded by the respective parties. SARS also closed its case without leading any evidence but acknowledged that it did bear the burden regarding the reasonableness of the estimates it used to determine the base cost in imposing the Understatement Penalty ("USP") levied on the disposal. The appellant however, conceded that if it is found that SARS was entitled to assess it for CGT, no dispute is raised as to the quantification of the base cost attributed to the assets by SARS.

Factual Background

[3] The factual background relevant for the determination of this appeal is largely common cause and may be summarised thus: The appellant was established and registered in South Africa in 2005, with its main purpose and object being *"investing and transacting in and holding of strategic, global and diversified property investments*". The trust deed concluded in respect of the appellant at the time reflects that Mr. Walkers was the founder. Mr. Walkers ("Walkers") was also listed as a trustee together with Mrs. Walkers and Mr. Daniels. The beneficiaries at that stage were Mr. Walkers, Mrs. Walkers and Mr. Castle. According to the trust deed, the appellant was established for the benefit of Walkers, his spouse and his children, with the stipulated beneficiaries limited to these individuals and the lawful issue *per stirpes* of the children. On 19 September 2011 the Master issued further letters of authority whereby Mr. Hansa was appointed as trustee, replacing Mr. Daniels.

[4] On 15 June 2017 the T Trust, a Namibian resident for tax and exchange control purposes was established. The T Trust has the same beneficiaries as the appellant and itself became the beneficiary of the appellant. The T Trust acquired 100% shares in T Investments (Pty) Ltd, a Namibian company ("T Investments").

[5] On 10 July 2017, the appellant concluded a forward sale agreement ("FSA") with T Investments. In terms of the FSA, the appellant disposed of its entire share portfolio and certain claims to T Investments at their market value, being a total amount of R1873 255 799.31 ('the forward sale price"), with the price to be paid by T Investments to the appellant against delivery of the shares and claims by the appellant. The FSA consists of a standard Agreement with a schedule, as well as confirmation to the FSA setting out the terms and conditions specific to it. In accordance thereof, ownership of the assets would transfer to T Investments on the forward date which would be determined by the latter whereupon it would make payment in terms of the FSA. T Investments was to give notice of the forward date in writing to the appellant, and the appellant was to effect delivery of the applicable share certificate and cessions on payment. The FSA confirmations state that if no notification of forward date was given by T Investments, then the forward sale date would be 10 January 2018. The FSA confirms that the sale was not subject to any suspensive condition.

[6] On 12 July 2017, the appellant submitted its provisional tax returns to SARS for both provisional periods of the 2018 tax year. The appellant declared zero taxable income in both returns.

[7] Pursuant to a meeting of the trustees on 13 July 2017, it was resolved, *inter alia,* that the appellant would from that date be a tax resident in Namibia and would cease to be a tax resident of South Africa. This was because the new Namibian trustees had taken over effective management of the appellant.

[8] The forward date was communicated between the parties to the FSA to be 18 September 2017. Thus, the delivery of the shares and claims and the payment of the forward sale price took place on 18 September 2017. The trustees of the appellant vested the proceeds received in respect of the FSA in its non-residenT Trust beneficiary ("the T Trust") on the forward date. Prior to 13 July 2017, the appellant was a South African tax resident and held a share portfolio consisting of listed and unlisted shares.

[9] On 8 November 2018, the appellant delivered its return for the 2018 tax year to SARS. Subsequent to the receipt of the return on 8 November 2018, SARS issued an original Income Tax audit for the 2018 tax year. The appellant was required to submit material to verify its declaration, and it provided correspondence suggesting that the return covered two years of assessment. The appellant did not declare the disposal as a capital gain. Neither did it declare any deemed disposal of assets as required in section 9H of the ITA in its 2018 Income Tax return.

[10] On or about 5 November 2020, SARS notified the appellant that an Income Tax audit would be conducted in terms of the Tax Administration Act 28 of 2011 ("TAA") regarding the 2018 tax year. The appellant was further informed in correspondence of the scope of the audit, including, *inter alia*, a focus on the taxability of the appellant's gain from the disposal.

[11] Pursuant to an audit conducted in 2021 in relation to the appellant's 2018 income tax period, on 17 September 2021, SARS issued a "finalisation of audit" letter together with an additional income tax assessment. In terms of the additional assessment, acting in terms of the provisions TAA read with the Income Tax 58 of 1962 ("the ITA"), SARS:

11.1 made adjustments to the income of the appellant for the 2018 tax year by including an alleged capital gain on the disposal of the shares and claims in terms of the FSA in the amount of R671 775 964.00, which resulted in applying the inclusion rate, in an alleged taxable capital gain of R537 420 772.00 and gave rise to a tax adjustment of R241 839 347.40;

11.2 imposed a 10% understatement penalty ("USP") for an alleged "substantial understatement" in an amount of R24 183 934.74 in terms of section 222 of the TAA.

11.3 imposed a provisional tax underestimation penalty of R38 694 295.53 under paragraph 20(1) of the Fourth Schedule of the ITA.

11.4 levied interest on the alleged underpayment of provisional tax in terms of section 89*quat* of the ITA in the sum of R79 099 604.48; and

11.5 levied payment interest in term of section 89*quat* of the ITA.

[12] On 17 March 2022, the appellant objected to the additional assessment in accordance with section 104 of the Tax Court rules. After considering the appellant's response to the audit findings, SARS issued a finalisation of audit letter wherein certain adjustments to the appellant's original Income Tax assessment for the 2018 tax year were set out. These adjustments were incorporated into an additional assessment issued with the Finalisation of Audit on 17 September 2021.

[13] Subsequent to the finalisation of the audit, the appellant instituted review proceedings in the High Court seeking the setting aside of the decision by SARS to raise additional assessment. The review was brought in terms of the Promotion of Administrative Justice Act, No.3 of 2000 ("PAJA") and was launched on 16 March 2022. SARS opposed the review and the matter was heard on 3 August 2023 and dismissed with costs on 10 August 2023.

[14] In its finalisation of audit, with reference to the appellant's transaction with T Investments under the FSA, SARS concluded that that every element of a capital gain in the 2018 tax year was present in that:

14.1 The share and claim portfolio constituted an asset of the appellant. (This is common cause between the parties);

14.2 The sale constituted disposal under paragraph 11 of the Eighth Schedule. Under these provisions a disposal is any occurrence which results in the creation, variation, transfer or extinction of an asset. According to SARS, this transaction involved the transfer of ownership of an asset via a sale as specifically catered for under paragraph 11(1)(a).

14.3 The disposal in question occurred on 10 July 2018, as per the conclusion of the FSA and the provisions of paragraph 13(1)(a)(i) & (ii) of the 8th Schedule. The FSA is not subject to any suspensive conditions as admitted by the appellant. Accordingly, the disposal as transfer or change of ownership is deemed to have occurred upon conclusion of the FSA on 10 July 2018;

14.4 The proceeds of the disposal are determinable from the FSA itself, which confirms that T Investments will pay the appellant R1 873 255 799.31 in consideration for the assets. Paragraph 35(1) directs that the proceeds of a disposal are equal to the amount received by or accrued to, or which is treated as having been received by, or accrues to the party making the disposal. The proceeds of this disposal are thus R1 873 255 799, 31.

14.5 The base cost of the share portfolio has been determined by SARS to be an amount of R1 201 479 834.98. SARS states that it was necessary for it to estimate the base cost of certain shares which were components of the portfolio, due to appellant having not disclosed the disposal and thereby having not disclosed the base cost. The estimates were made using information readily available to SARS as provided in Section 95 of the TAA. (The appellant has since admitted that SARS estimates are reasonable and that the base cost is correct).

14.6 The proceeds of the disposal exceed the base cost by an amount of R671 775 965.00. This amount is reflected in the additional assessment as capital gain.

14.7 Application of the relevant inclusion rate to the capital gain, which as per paragraph 10 of the Eighth Schedule is 80% for trusts such as the appellant, results in a taxable capital gain of R537 420 772.00 in respect of the disposal. This amount is included in the taxable income in the additional assessment.

[15] According to SARS, the aforegoing facts set out an acceptable basis for the assessment of CGT.

[16] Against these reasons as espoused in the additional assessment, the appellant objected to the inclusion of the taxable capital gains in the additional assessment in terms of Rule 7 on 17 March 2022, which was disallowed by the respondent on 19 April 2022. Following the respondent's disallowance, the appellant filed its notice and grounds of appeal in line with section 107 TAA read with rule 10 of the Tax Court rules.

The Grounds of appeal

[17] The appellant challenges the CGT liability on several grounds which in a nutshell may be summarised as follows:

17.1 There was no accrual of proceeds on the conclusion of the FSA. According to the appellant, the time of disposal for CGT purposes was the day the FSA was concluded, since no suspensive conditions were present. However, the consideration only constituted proceeds in the hands of the Taxpayer once each party had performed under the contract, i.e. delivery against payment. Therefore, at the time of disposal no proceeds accrued to the Taxpayer.

17.2 The capital gain, when it arose on the forward date (i.e. 18 September 2017) was taxable only in Namibia. According to the appellant, the disposal for CGT purposes was the date of conclusion of the FSA, but because no proceeds arose in terms of paragraph 35 of the Eight Schedule to the ITA due to the counter performance/reciprocity principle, such accrual only occurs on date of counter-performance. Alternatively, even if a capital gain arose, the appellant was not liable for CGT on the basis that the capital gain is not taxable in its hands, but rather in the hands of the beneficiary in whom the relevant amounts were vested. Put differently, by virtue of section 25B(2) of the ITA, the capital gain is deemed to be an amount which accrued to the T Trust as beneficiary of the appellant in whom the relevant amounts were invested, and not to the appellant.

17.3 The appellant denies that it was liable for the USP on the basis that there was a *bona fide* inadvertent error as its conduct, (although mistaken) was neither fraudulent nor in willful disregard of the law. To this end, so contends the appellant, SARS's disallowance of the objection on this ground is erroneous.

17.4 SARS disallowed the appellant's objection on the basis *"on the grounds that SARS found that there was a deliberate postponement of payment of tax, and thus the penalty should remain"*. The appellant in its fourth ground of appeal reiterates that it is not liable for USP and contends that the USP should be remitted in terms of paragraph 20(2) of the Fourth Schedule of the ITA as its income was *"seriously calculated with due regard to the factors having a bearing thereto"* and was not *"deliberately or negligently understated."*

17.5 The appellant fifth ground of appeal is premised on the fact that it denies liability for interest because even if the amount of tax paid does differ from what has been assessed in the additional assessment, any interest payable in the present circumstances would be due to a new interpretation of settled legal principles, namely the principle of counter-performance/reciprocity, i.e. due to circumstances beyond the control of the appellant and the Commissioner should accordingly direct that no interest should be paid in this matter.

Applicable principles

[18] The applicable principles relating to the application of CGT are restated in *Massmart Holdings v CSARS* (13798;13931 &14294) [2019] ZATC 4 (17 September 2019) at page [60] as follows:

> "Capital gains tax was introduced into this country with effect from the 1st of October 2001 by way of the Eight Schedule of the Act. Reduced to the essentials and with a little simplification in order to assist the narrative, the essential factor to which regard is had is the difference between the amount which a person acquires a capital asset and the amount of the proceeds received subsequent to the disposal. Should such proceeds exceed an amount at which it was acquired, there is a capital gain. Conversely, should the proceeds from the subsequent disposal of the assert be less, there will be a capital loss. The aggregate of capital gains and losses are then taken into account to calculate a net capital gain (this being the difference between the aggregate capital gain of the year and the aggregate capital loss of the previous year) and a percentage then applied to the net capital gain to calculate the taxable capital gain for the year of assessment. In terms of section 26A of the Act, that taxable capital gain then falls to be included in the taxable income of the person concerned."

[19] Section 26A of the ITA states that:

> **"26A. Inclusion of taxable capital gain in taxable income.**—There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year assessment, as determined in the Eight Schedule."

[20] The determination of a taxpayer's capital gain for a year of assessment is regulated by the Eighth Schedule of the ITA, of which Part 3 states:

> "**3. Capital gain.**—A person's capital gain for a year of assessment in respect of disposal of an asset—
>
> (*a*) during that year is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset."

[21] One of the contentious issues in this appeal relates to the disposal of the shares by the appellant to T Investments. Paragraph (11)(1)(a) of the Eight Schedule provides as follows:

> "**11. Disposals**—(1) Subject to paragraph (2) a disposal is any event, act or forbearance or application of law which results in the creation, variation, transfer or extinction of an asset, and excludes –
>
> (*a*) the sale, donation, expropriation conversion, grant, cession, exchange or any other alienation or transfer of ownership of an asset."

[22] It will be recalled that SARS regards the FSA as constituting a disposal as defined in the Eighth Schedule of the ITA. The proceeds of a disposal are described in Part 1 of the Eighth Schedule as the amount to be determined in terms of Part VI of the schedule. I revert to this issue later in this judgment.

[23] One of the issues for determination is whether the appellant is entitled to remission of interest imposed. Section 89*quat*(2) of the ITA states that:

> **"89*quat*. Interest on underpayments and overpayments of provisional tax.—**
>
> (2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds—
>
> (*a*) R20 000 in the case of a company; or
>
> (*b*) R50 000 in the case of any person other than a company,
>
> and normal the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3) be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax."

[24] As to interest on payments, section 89*quat*(3) of the ITA provides that:

> "**89*quat*. Interest on underpayments and overpayments of provisional tax.—**
>
> (3) Where the Commissioner having regard to the circumstances of the case is satisfied that the interest payable in terms of subsection (2) is as a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer."

[25] Paragraph 80(1) of the Eight Schedule to the ITA states that:

> "**80. Capital gain attributed to beneficiary.**—(1) Subject to paragraphs 68, 69 and 71, where a trust vests an asset in a beneficiary of thaT Trust (other than any person contemplated in paragraph 62(a)(e) or a person who acquires that asset as an equity instrument as contemplated in 8C (1) who is a resident, and determines a capital gain in respect of that disposal, if thaT Trust is not a resident, would have determined a capital gain in respect of that disposal had it been resident—
>
> (*a*) that capital gain must be regarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and
>
> (*b*) that capital gain or the amount would have been determined as a capital gain must be taken into account as a capital gain or aggregate loss of the beneficiary to whom that asset was disposed of."

[26] Section 39(A)(1) (came into operation on 24 January 2005) provides that a person must disregard a capital loss arising on disposal of an asset during a year of assessment when all the proceeds from that disposal will not accrue to that person during that year. The primary source for making the determination as to whether all the proceeds have accrued is the agreement of sale.

Issues for determination

[27] As discernible from the summary of the substantial facts, the following issues fail to be determined:

27.1 Whether the appellant has met the burden of proving that SARS was not entitled to assess it for CGT in relation to a disposal of assets which occurred in the 2018 year of assessment.

27.2 Whether the appellant is entitled to a remission of interest imposed in terms of section 89*quat*(2) of the ITA.

27.3 Whether the appellant is entitled to a remission of penalties imposed in terms of paragraph 20 of the Fourth Schedule of the ITA.

27.4 Whether SARS is correct in imposing an understatement penalty (USP) of 10% on the levying of CGT on the disposal in question.

Common cause facts

[28] It is not in dispute that:

28.1 the FSA is not subject to any suspensive condition.

28.2 the disposal of the assets effected by the FSA occurred on 10 July 2017, in accordance with the provisions of paragraph 13(1)(a)(ii) of the Eighth Schedule to the TAA.

28.3 the change of ownership envisaged as the disposal event under paragraph 13(1)(*a*)(ii) is regarded to have occurred on 10 July 2017 for the purposes of the operation of the Eighth Schedule to the ITA.

The parties' submissions

[29] The appellant contended that in terms of 35(1) of the Eighth Schedule, if the consideration in respect of the disposal is received by or accrued to a taxpayer at a later date than the disposal itself, then no proceeds can be said to have accrued to the taxpayer on the date of disposal. Accordingly, in the context of reciprocal obligation of payment against delivery, an unconditional entitlement to the purchase price arises only upon tender of delivery. Consequently, since the appellant was required to make delivery against payment in terms of the FSA, no amount accrued to the appellant until delivery of the shares and claims taken place. Therefore, the sale price did not constitute proceeds until the performance of the reciprocal contractual obligations of payment and delivery.

[30] It was argued on behalf of SARS that the appellant's contention to the effect that the sale price only accrued on 18 September 2017 and not upon conclusion of the FSA on 10 July 2017, is unsustainable. According to SARS this is so because upon conclusion of the FSA on 10 July 2017, the appellant acquired the right to payment of R1 873 255 799.31 from T Investments, on a future date to be determined by T Investments but not later than 10 January 2018. According to SARS, the payment is due at a later stage does not alter the date of the accrual as the physical payment would be determinate of the date of receipt not accrual.

[31] This issue turns on the interpretation of receipt and accrual. In *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 (2 SATC 16), the court explained these concepts thus:

> "…(I)t will 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 receipt seems to be looked to rather than the time when the work is done which earns the receipt, whereas, as far as earnings are 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 receipt.
>
> This seems to be an attempt to combine two fundamentally different conceptions of income, because the sum of money may accrue in one year and received in another, and it could never have been intended that income tax should be paid twice over ….
>
> The definition also seems 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 AD 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 the amount of money, the definition given in the Act would not seem to be wide enough to include "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 or 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 monetary 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 right of action."

[32] At page 20, commenting on the timing of an accrual, the Court in *Lategan* continued:

> "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 right to claim payment of the debt in the future. This right has vested in him, has accrued to him in the year of assessment.

[33] Relying on *Lategan*, SARS contended that the appellant is incorrect in suggesting that the date of receipt should be utilised as the date of accrual, with the outcome that these funds are thereby outside of the South African revenue authorities.

[34] Likewise, in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) PTY LT*D [1990] 4 ALL SA 594 (AD) at page 599, Hefer JA, reaffirmed the *Lategan* principle and stated as follows:

> "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 – 10,
>
>> '… he 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 he could turn into money if he wishes to do so.'

The applicability of section 24(1) of the ITA

[35] SARS further contended that even if the court accepts that the appellant's entitlement to the amount only occurred at a later stage, the implementation of such an approach is prohibited by the provisions of section 24(1) of the ITA which provide that:

> "**Credit agreements and debtors allowance.—**(1) Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any other 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."

[36] It was submitted on behalf of the appellant, on the other hand that it is clear from the content, context and purpose of section 24(1) that it does not apply to the CGT regime. This, according to this contention, is particularly so because the main body of the ITA (including section 24) regulates income tax arising from revenue (not capital) transactions. Moreover, as regards capital disposals, detailed and integrated provisions of the CGT regime, expressly, anticipate the possibility of the proceeds of a single disposal (including a sale) only accruing in subsequent years, as would be the case in a sale subject to reciprocity. And so further contends the appellant, if the legislature considered it appropriate to ensure that such future payments be considered "upfront" in capital gains, it would have incorporated a provision in the Eighth Schedule and then (to protect the taxpayer against the adverse consequences of such an extra-ordinary measure) make provision for a corresponding allowance. It has chosen not to do so in this context.

[37] Counsel for the appellant further argued that SARS' reliance on section 24(1) to the effect that the sale price under the FSA accrued to the appellant is misplaced on the basis that the main body of the ITA regulates income tax arising from revenue (not capital) transactions. Furthermore, so continued the contention, section 24 is limited to trading transactions involving revenue assets (trading stock) and does not relate to CGT as this is clear from SARS Interpretation Note 48 ("IN") (Issue 3) on section 24 which at paragraph 2 thus:

> "**Section 24 has two main purposes**
>
> First, in the context of a disposal by a taxpayer of trading stock under an instalment credit agreement, section 24(1) provides that the whole amount, excluding finance charges, is deemed to be included in the taxpayer's gross income at the time of entering the agreement. This deemed inclusion prevents any argument that the proceeds under an instalment agreement do not accrue because of a delay in transfer of ownership …
>
> … Secondly, section 24(2) provides the Commissioner with the discretion to grant a debtor's allowance to the taxpayer, the object of which in essence is to subject the profit under the instalment credit agreement to tax on a cash-flow basis."

At paragraph 4.4 the *IN* states that:

> "In the absence of debtor's allowance, section 24(1) could result in adverse cashflow consequences for a taxpayer because the whole amount under the agreement is deemed to accrue up front, while the instalments may be receivable only over an extended period. A taxpayer, therefore, might not have received sufficient cash to settle the normal tax on the gross profit.
>
> > … Once the amount of the debtor's allowance has been determined under section 24, it is deductible under section 11(*x*) …

> … Any debtor's allowance claimed in a year of assessment must be added back to the taxpayer's income in the succeeding year of assessment (excluding finance charges and VAT) and reduced by –
>
> - bad debts under section 11(*i*), and
> - any allowance for doubtful debts under section 11(*j*).
>
> The debtor's allowance is thus arrived by multiplying the amount of the adjusted qualifying outstanding debtors at the end of the year of assessment by the gross profit percentage.
>
> … The gross profit should include other forms of income such as delivery charges, fees for maintenance contract and insurance premiums."

At paragraph 5, the *IN* concludes that:

> "The sale of trading stock under the instalment agreement could be subject to section 24(1) which determines that the whole amount should be deemed to be included in gross income at the time that the agreement was entered into."

[38] I have quoted copiously from the *IN* in order to provide the full context of the appellant's contentions regarding the non-applicability of section 24 to the FSA. I further take note of the comments, albeit *obiter*, made by the court in *Milnerton Estates* to the following effect:

> "As regards the other concern with capital gains, the determination of the amount of any capital gain falling to be included in the taxpayer's taxable income is a matter dealt with in the Eighth Schedule to the Act. It is not apparent to me that the provisions of section 24(1) apply in determining when an accrual occurs for the purpose of paragraph 3 of the Eighth Schedule. There is no reference back to section 24(1) and on its face the Schedule seems to provide a self-contained method for determining whether a capital gain has arisen."

[39] Admittedly, the heading of the section seems to suggest that the section is applicable to credit agreements. However, in *Milnerton Estates v CSARS* (1159/2017) [2018] ZASCA 155 (20 November 2018), the Court expressed a view that these provisions are applicable to all contracts of the sale. At paragraph 14, the Court said that:

> "I am convinced that these agreements, even taken collectively, would suffice to permit a restrictive interpretation of the language of section 24(1) to confine its application to credit agreements, properly so called, as opposed to all sale agreements, where ownership passes from seller to purchaser upon or after receipt by the taxpayer of the whole or certain portion of the purchase price."

[40] Besides the above remarks in *Milnerton Estates*, the issue of applicability of section 24(1) to non-credit agreements also arose in *ITC 1900*, where the Court considered the effect of the deeming provisions of section 24(1) in light of the decision of the Appellate Division in *Secretary for Inland Revenue v Silverglen Investments (Pty) Ltd* 1969 (1) 305 (A) wherein the appellate court remarked thus:

> "However, section 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 the 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, ie, (a) the allowance for doubtful debts in terms of section11(f) and (b) the further allowance that the Secretary may make in respect of moneys deemed to accrue but which have not been received)."

[41] Remarking on the applicability of the aforesaid deeming provisions to that matter, the Court further held that:

> "If section 24 applies, then the above-mentioned accrued to the taxpayer in the 1963 year. It, however, does not apply for the following reasons (1) 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) Even if the arrangement between the taxpayer and the Board is to be regarded an agreement it is not the type of agreement contemplated in the Act."

[42] The appellate court in *Silverglen* in finding section 24(1) applicable stated that:

> "Counsel for the appellant made the further point that section 24 of the Income Tax deals, in relation to immovable property, with an agreement under which transfer is to be passed on or after receipt by the owner the whole or a certain portion of the amount payable to him under the agreement, ie 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.
>
> In my opinion, the Board acquired these affected properties by an agreement such as defined described in sec.24 and consideration payable under the agreement must be deemed to have accrued on or before 30th May 1963 i.e. the tax year ended 30th June 1963."

[43] In *IT 1900*, Binns-Ward J, pointed out that the appellate court carefully considered the applicability of sec, 24 (1) to sale agreements. The learned judge then held that:

> "[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 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 the category of 'agreement under which the passing of ownership is suspended notwithstanding that credit is given to the purchaser, ie notwithstanding that he is given time to pay (ie like a hire-purchase agreement)" It is clear from the 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 that 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 that the heading to the section. This court is bound by the manner in which the appeal court construed and applied the provision in *Silverglen*."

[44] In *Milnerton Estates*, in line with the *Silverglen* decision, the Court found that:

> "The agreements accordingly provided for Milnerton Estates to pass ownership to the purchasers upon or after receipt of the whole of the purchase price in terms of s 24(1). The purchase price was therefore deemed to be received in its entirety in the 2013 tax year, not the 2014 year, when payment was in fact made. That is what was decided in *Silverglen Investments* and it applies equally to the present case."

[45] The Court in *Milnerton Estates* considered itself bound by the *Silverglen* decision, which it found was correctly decided. Accordingly, in my view, there therefore is no merit in the contention that section 24(1) does not apply to the CGT regime. I align myself with the reasoning espoused by the learned judge in *IT 1900*, namely that, the appellate court considered and found that the body and text of the provisions of section 24(1) clearly showed that it does not apply to credit agreements only. Besides, in Milnerton Estates, the Court considered the ambit of section 24(1) in the context of section 24(2) and 24(1) and stated that:

> "Even if that is correct, however, it does not necessarily follow that the effect of section 24(2) is to remove from the ambit of section 24(1) agreements that otherwise fall within its terms. Nonetheless, it is a factor that together with other factors might point in favour of a more restrictive construction of section 24(1) in relation to the range of agreements covered by it."

[46] The bottom line is that Milnerton Estates was decided on the basis of the deeming provisions of section 24(1).

[47] Likewise, I consider the SARS *Interpretation Note* relied on by the appellant as unpersuasive in light of the clear and binding authority in *Silverglen* and *Milnerton Estates*. Neither do the provisions of section 24(2) on any interpretation, in my opinion, alter the tenor of section 24(1) which clearly applies to the present facts. The corollary of this finding is that in terms of section 24(1) the sale price under the FSA accrued to the appellant on 10 July 2017, upon conclusion of the agreement. This is the case whether or not there is reciprocity of obligations in the FSA.

[48] Consequently, it is my judgment that the sale price under the FSA accrued to the appellant at least based on the application of section 24(1) of the ITA.

The ground of appeal relating to the Trust migration to Namibia

[49] I have already indicated that the Trust was a tax resident of South Africa at the time the FSA was concluded, and that it migrated and had taken up tax residency in Namibia by the time the FSA was implemented and the proceeds of the disposal realised. The position adopted by SARS is that the Trust's Namibia tax residence is irrelevant to the present appeal in that, on its interpretation, the full capital gain occurred on 10 July 2017.

[50] Relying on the agreement between the Republic of South Africa and The Republic of Namibia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income in Capital Gains ("DTA"), the appellant reiterated that because it ceased to be a South African Tax resident, and became a Namibian resident on 13 July 2017, the taxing rights in respect of the proceeds of the sale ought to be allocated to Namibia in terms of Article 13 of the DTA which reads thus:

"1) Gains derived by a resident of Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that State.

2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3) Gains from the alienation of ships, aircraft or road transport vehicles operated in international traffic or moveable property pertaining to the operation of such ships, aircraft, or road transport vehicles, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

> 4) Gains from the alienation of any property other than that referred in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is the resident."

[51] Accordingly, in terms of the provisions of Article 13(4), so argued the appellant, its residence should be tested at the time the capital gains arose, i.e. when a counter performance took place on 18 September 2018, at which time, the appellant was a resident of Namibia.

[52] The appellant placed much reliance on *Commissioner for the South African Revenue Service v Tradehold LTD* (132/11) [2012] ZASCA 61 (8 May 2012) where the Court considered the DTA between South Africa and Luxembourg in the context of section 13 of the Eighth Schedule. In *Tradehold,* the question the Court had to answer is whether the alienation of property by *Tradehold* as envisaged in the DTA, included within its ambit gains arising from a deemed disposal of assets. In finding that Art 13 (4) of the DTA was applicable to capital gains that arise from both actual and deemed disposals of the properties, the Court concluded that when Tradehold relocated its seat, of effective management to Luxembourg, the provisions of the DTA became applicable and that country had exclusive taxing rights in respect of all of *Tradehold'*s capital gains. The real issue revolved around the interpretation of Article 13 of the DMA dealing with "alienation" and "deemed alienation" of assets.

[53] SARS contended that the provisions of the DTA are not applicable as it is common cause that the trustees resolved on 13 July 2017 that the appellant would with effect from that date be a tax resident of Namibia and would cease to be a South African tax resident whereas the capital gain accrued to it on 10 July 2017 whilst it was still a resident of South Africa, and that the disposal of shares is deemed to have occurred upon the conclusion of the FSA, which did not have a suspensive condition.

[54] It is clear from the aforegoing that the applicability of Article 13(4) of the DTA is inextricably linked to the finding this court must make regarding the accrual and disposal of assets. Tied to this issue is the defence raised by the appellant of being merely a conduit for the property to pass onto the T Trust. Therefore, the application of the DTA must be considered after a finding has been made on the date of accrual. In any event, *Tradehold* is distinguishable from the facts in *casu* as therein, the issue of accrual did not arise.

The conduit/entitlement principle

[55] One of the grounds raised by the appellant for denying any tax liability is that it was not a beneficial owner of the amounts arising from the FSA, it only acted as a conduit for the amounts which flowed to the beneficiary, the T Trust, as such, any liability would then lie with the beneficiary. According to the appellant, by virtue of section 25B(2) the capital gain herein

is deemed to be an amount which has accrued to the T Trust as the beneficiary of the appellant in whom the relevant amounts were vested, and not the appellant in light of the fact that it resolved on 18 September 2017 to distribute the entirety of the sale price of the portfolio to its Namibian beneficiary, the T Trust. On its version, it merely was a conduit for the amount and accordingly could not be taxed on it. In short, the appellant invokes the provisions of the conduit principle codified in section 25B(1) and (2) of the ITA which state that:

> "(1) Any amount received by or accrued in favour of a any person during any year of assessment in his or her capacity as a member of the trust shall, subject to the provisions of section 7, to the extent to which that amount has been derived for the for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, be deemed to be an amount which has accrued to that beneficiary, <u>and to the extent to which that amount is not deemed to be an amount which accrued to thaT Trust.</u>

(My underlining)

> (2) Where a beneficiary has acquired a vested right to any amount referred to in subsection (1) in consequence of the exercise by the trustee of a discretion vested in him or her in terms of the relevant deed of trust, agreement, or will of a deceased person , that amount shall for the purposes of that subsection be deemed to have been derived for the benefit of that beneficiary."

[56] To paraphrase the aforegoing provisions, the FSA amount can only be deemed to have accrued to the T Trust, if it is not deemed to have accrued to the appellant, an issue that must still be determined.

[57] SARS's counterargument is that the distribution of capital gains by a trust to a beneficiary and the CGT treatment is specifically regulated by paragraph 80(2) of the Eighth Schedule to the ITA which states that:

> "(2) Subject to paragraphs 64E, 68. 69 and 71 where a trust determines a capital gain (or, if thaT Trust is not a resident, would have determined a capital gain had it been a resident) in respect of the disposal of an asset in a year of assessment during which a beneficiary of thaT Trust (other than any person contemplated in paragraph 62 (a) to (e) who is a resident has a vested right or acquires a vested right (including a right created by the exercise of a discretion) to an amount derived, directly or indirectly, from that capital gain or from the amount that would have been determined on a capital gain had thaT Trust been a resident but nor is the asset disposed of, an amount that is equal to so much of the amount to which that beneficiary of thaT Trust is entitled is in terms of that right as consists of or is derived, directly or indirectly, from—
>
> (*a*) that capital gain must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and

> (*b*) that capital gain or the amount that would have been determined as a capital gain must be taken into account as a capital gain for the purpose of calculating the aggregate capital gain or aggregate capital loss of that beneficiary."

[58] Against this backdrop it was argued on behalf of the appellant that SARS's approach to the question of accrual disregards the wording of the Eight Schedule and gives rise to uncommercial and unrealistic outcomes. Accordingly, the approach that disposal proceeds only become taxable when they accrue on the implementation of the FSA is commercially sensible and is based on consistent and textual interpretation of the ITA and the Eighth Schedule.

[59] Regarding the applicability of section 25B (2) and paragraph 80(2) of the Eighth Schedule, SARS's further contended that the maxim *generalia specialibus non derogant* is applicable. According to this submission this is so because paragraph 80(2), specifically regulates the distribution of capital gains by a trust to a beneficiary who is a resident in South Africa. Accordingly, because the appellant chose a non-resident beneficiary, it is not entitled to the relief.

[60] In *Thistle v CSARS* [2024] ZACC 19 the Constitutional Court considered and pronounced on the issue raised by section 25B(2) and paragraph 80(2) and clarified as follows:

> "[53] However, there are clear indications in the ITA that the application of the conduit principle to the taxation of capital gains in the hands of the trusts and beneficiaries is governed by paragraph 80
>
> …
>
> [55] If the Eight Schedule said nothing about liability for the taxation of capital gains arising out of the disposal of assets by trusts, it would have been arguable that section 25B (as a specific provision addressing the conduit principle to the taxation of capital gains realised by the sale of assets by a trust. However, paragraph 80 addresses itself pertinently to the conduit principle and the liability for taxation on capital gains realised by the sale of assets of a trust. Therefore, it is the specific provision that applies. Paragraph 80 must have been included in the Eight Schedule for some purpose. It cannot be interpreted as though everything that it provides is to be rendered irrelevant because the pre-existing deeming provision in section 25B overrides paragraph 80. Therefore, paragraph 80 governs how the conduit principle is to be applied to establish which taxpayer is liable for taxation on the capital gains realised by the sale of assets by a trust …"

[61] Flowing from the aforegoing, it is plain that the appellant fell foul of paragraph 80(2) as it distributed assets to a foreign beneficiary. I am in agreement with SARS that the appellant's reliance on section 25B(2) notwithstanding the pronouncement in *Thistle*, erodes the purpose of paragraph 80(2) to govern the conduit of amounts related to a capital gain to trust. I therefore hold that paragraph 80(2) is applicable to the appellant's distribution of the FAS to the T Trust, and for this reason SARS correctly levied CGT on the appellant as the conduit principle is only available when the recipient beneficiary is a resident.

[62] SARS further submitted that even if the appellant's contentions were not contrary to the pronouncement of the Constitutional Court in *Thistle*, the appellant would not be able to invoke the provisions of section 25B(2) as the accrual of the sale amount to the T Trust took place in different years of assessment.

[63] To this end, section 9H(2) provides as follows:

> "**9H. Change of residence, ceasing to be controlled foreign company or becoming headquarter company.**—(2) Subject to subsection (4), where a person (other than a company) that is a resident ceases during any year of assessment that person to be a resident—
>
> (*a*) that person must be treated as having—
>
> (i) disposed of each of that person's assets to a person that is a resident on the date immediately before the day on which that person ceases to be a resident for an amount of received or accrued equal to the market value of the asset on that date; and
>
> (ii) required each of those assets on the day on which that person ceases to be a resident at an expenditure equal to the market value contemplated in subparagraph (i);
>
> (*b*) that year of assessment must be deemed to have ended on the date immediately before the day on which that person so ceases to be a resident; and
>
> (*c*) the next succeeding year of assessment of that person must be deemed to have commenced on the day on which that person so ceases to be a resident."

[64] It is common cause that the appellant ceased to be a resident of South Africa on 13 July 2017. Applying section 9H above, its 2018 year of assessment ended on 12 July 2017, and the next year of assessment commenced on 13 July 2017. Additionally, for the conduit principle to apply under section 25B, the ascertained beneficiary must have a vested right to the amount in question in the same year of assessment that the amount accrued to the trust. I have found that the FSA is deemed to have accrued to the appellant on conclusion of the FSA on 10 July 2017, i.e., in the 2018 year of assessment. For the conduit principle to apply

as alleged by the appellant under section 25B, the ascertained beneficiary must have had a vested right to the amount in question in the same year of assessment that the amount accrued to the trust. The T Trust had no vested right to these amounts in that year of assessment. According to the provisions of section 9H(2) above, the date falls under the next year of assessment as the resolution to vest the FSA amounts in the T Trust was taken on 18 September 2017. On this further basis, section 25B is not applicable.

The applicability of paragraph 35(1) of the Eighth Schedule

[65] The appellant contended that no CGT liability exists in the 2018 tax year if regard is had to the proper interpretation of paragraph 35 (1) as the appellant had not received any proceeds flowing from the FSA, as a result, there also could not have been a tax gain on the day the agreement was signed – nor on any other in that year of assessment. Thus, the additional assessment is flawed because it assumes that there was an immediate accrual of proceeds. Moreover, the word “accrue” requires an absolute right to the amount in question in the sense that there should be no need to perform a reciprocal obligation. This is articulated in the Notice of Appeal in the following manner:

> “The disposal for CGT purposes was the day the FSA was concluded, since no suspensive conditions were present. However, the consideration only constituted proceeds in the hands of the Taxpayer once each party had performed under the contract, i.e., delivery against payment. Therefore at the time of disposal, no proceeds accrued to the Taxpayer.”

[66] Part VI begins with paragraph 35(1) which provides thus:

> “**35. Proceeds from disposal** – (1) Subject to subparagraph (2), (3) and (4) proceeds from the disposal of an asset by a person are equal to the amount received or accrued to, or which is treated as having been received by, or accrued to, or which is being treated as having been received by, or accrued to or in favour of that person in respect of that disposal, and includes—
>
> (*a*) The amount by which any debt owed by that person has been reduced or discharged; and
>
> (*b*) Any amount received by or accrued to a lessee of property for improvements effected to that property.”

“Proceeds” is defined in paragraph 1 as the amount to be determined in terms of Part VI.

[67] Counsel for the appellant argued that Part VI commencing with paragraph 35 states that proceeds, are inter *alia “equal to the amount received or accrued by or accrued to … that person in respect of that disposal.”* For this reason, *“proceeds*” cannot exist unless there are amounts which have been received or accrued. Accordingly, the context of paragraph 35 must be read with the definitions of *“disposal*” and “*proceeds*”.

[68] Part 3 of the Eight Schedule states as follows:

> **"3 Capital gain**.—A person's capital gain for a year of assessment, in respect of disposal of an asset—
>
> (*a*) during that year, is equal to the amounts of the proceeds received or accrued in respect of that disposal exceed the base cost of that asset;"

[69] According to the argument advanced on behalf of the appellant, on a proper interpretation of paragraph 35(1), no CGT liability existed in the 2018 tax year. To recap, paragraph 35(1) states that proceeds from the disposal of an asset by a person are equal to the amount received or accrued to, or which is treated as having been received by, or accrued to, or which is being treated as having been received by, or accrued to or in favour of that person in respect of that disposal. According to the appellant, the accrual must coincide with the period of the disposal for the gain to be taxable in that period. In considering this contention, it is necessary to interpret the provisions of Part 35(1).

[70] SARS disputed that the interpretation of paragraph 35(1) requires that the accrual must coincide with the period of disposal for the gain to be taxable in that period. The time of disposal is regulated inter alia under paragraph 13(1)(a) & ii of the Eighth Schedule, which states:

> "**13. Time of disposal.**—(1) The time of disposal of an asset, by means of—
>
> (*a*) a change of ownership effected or to be effected from one person to another because of an event, act or forbearance or by operation of law is, in the case of—
>
> (i) An agreement subject to a suspensive condition, the date on which the condition is satisfied.
>
> (ii) Any agreement which is not subject to a suspensive condition, the date on which the agreement is concluded."

[71] As earlier pointed out earlier in this judgment, the appellant concedes that the FSA is not subject to any suspensive condition. Applying the ordinary meaning of paragraph 13, above, the change of ownership of the portfolio to be effected is regarded to have occurred on the date the FSA was concluded, namely, 10 July 2017.

[72] Regarding the appellant's contention that accrual ought to have occurred contemporaneously with the disposal or within the same tax period for the proceeds to be considered as a capital gain in the year of assessment, it necessary to examine the provisions of paragraph 35. The approach to statutory interpretation is restated in *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (16 March 2012) as follows:

> "[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document, Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[73] The appellant's contention implies that the date of accrual rather than the deemed date of disposal determines which period a capital gain falls under, the result of which is to render Paragraphs 3, 11, and 13 inoperable. As correctly submitted by Counsel for SARS, the interpretation contended for by the appellant would encroach upon the operation of Paragraphs 2, 11 and 13 which direct respectively that:

11.1 A taxpayer's gain for a year of assessment is determined on disposals during that year, not when the consideration for the disposal purportedly flows (Paragraph 3);

11.2 A disposal by means of a sale is being described as a transfer of ownership (Paragraph 11);

11.3 The change of ownership envisaged in a sale under a contract that is not subject to a suspensive condition is regarded as having occurred upon conclusion of the contract. (Paragraph 13)

[74] In *United Manganese of Kalahari (PTY) Ltd v Commissioner for the South African Revenue Service and Related Matters* 2025 (5) BCLR 530 CC, the Constitutional Court pronounced as follows with regard to reading in implications in a statute:

> "Words cannot be read into a statute by implication unless the implication "is a necessary one in the sense that without it effect cannot be given to the statute as it stands" or "is necessary in order to realise the ostensible legislative intention or to make the [statute] workable". Section 105 is workable and effect can be given to it without adopting a heightened exceptional circumstances test. The purpose of section 105 can likewise be achieved without that test …."

[75] There is a yet further basis which renders the appellant's interpretation of paragraph 35 unsustainable. It is that it cannot be implemented with reference to a capital gain as the approach is prohibited by paragraph 35(4) of the Eighth Schedule which provides thus:

> "(4) Where during a 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 that year, that amount must be treated as having accrued to that person during that year."

The upshot of the aforegoing, is that the appellant's ground of appeal alleging that there was no accrual of proceeds in terms of paragraph 35(1) on the conclusion of the FSA has no merit.

[76] It remains to be said that the appellant raised an issue with the words "accrued to" in paragraph 35 (1). This issue is dealt with in the section dealing with reciprocity of obligations, below.

[77] In my judgment, when regard is had to the aforegoing established principle, read with the deeming provisions of the ITA, there is no doubt that the interpretation proffered by the appellant is untenable. Furthermore, I reiterate that in the matter at hand, there was no suspensive condition to fulfil, thus the appellant's entitlement accrued on the day the FSA was entered into. Thus, in casu, the CGT liability arose on the conclusion of the FSA.

Accrual and the reciprocity of principle

[78] The central theme that runs through all of the defences raised by the appellant, in line with the "*entitlement principle*", is that there was no capital gain on the conclusion of the FSA because of reciprocity of obligations of the parties to the FSA. The established principle is that an amount can only form part of the taxpayer's gross income, if it has been received by accrued to the taxpayer. For an amount of proceeds to accrue, there must be unconditional entitlement to such proceeds. Thus, the primary question is whether at the conclusion of the FSA, the appellant can be said to have acquired an unconditional and non-contingent right to the proceeds from the disposal of the shares to T Investments. According to the appellant, the relevant common law principles relating to contracts of sale and reciprocal obligations created thereunder apply.

[79] The principles to be applied where reciprocal performance is involved were set out in *ESE Financial Services (PTY) LTD v Cramer* 1973 (2) SA 805 (C) at 808 H to 809 A as follows:

> "In a bilateral contract certain obligation may be reciprocal in the sense that the performance of one may be conditional upon the performance or tender of the other. This reciprocity itself may be bilateral in the sense that the performance, or tender of performance of them represent concurrent conditions, that is each is conditional upon the other. A ready example of this would be delivery of the *res vendita* and payment of the purchase price under a cash sale. Alternatively, reciprocity may be one-sided in that the complete performance of his contractual obligations by one party may be a condition precedent to the performance of his reciprocal obligations by the other party. In other words, the obligations, although interdependent, fall to be confirmed consecutively…. Reciprocity of obligations does not depend, however, merely upon the time fixed for the performance thereof. Thus, the mere fact that the contract specifies that the parties intended them to be reciprocal (see *Strydom v van Rensburg* 1949 (3) SA 465 (T) at p 467). For reciprocity to exist there must be such a relationship between the obligation by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, vice versa (see de Wet and Yeats, *Kontraktereg,* p. 138; *Myburg v Central Motor Works* 1968 (4) SA 864 (T) at p. 865; *Anastopoloulos v Gelderblom* 1970 (2) SA 631 (N) at p.636."

(Footnotes omitted)

[80] With reference to aforegoing judgment, Counsel for the appellant further contended that on a proper interpretation of the FSA, the Trust's performance is due prior to, or simultaneous with that of the performance claimed from the appellant. In line with this contention, should the T Trust fail to perform in terms of the agreement, appellant may raise the *exceptio non adimpleti* defence. In addition, the reciprocity principle applies directly to the FSA because the appellant was required to make delivery of the shares and claims before it was entitled to payment in terms of the FSA and on ordinary income tax principles no amount accrued to the trust for the purposes of the ITA until 18 September 2017, when the Trust acquired an unconditional and absolute right to payment. Therefore, so continued the argument, on 10 July 2017, the FSA consideration did not accrue to the Trust. Any proceeds only arose or accrued on 18 September 2017, at a time when South Africa had no taxing right to them. Thus, there can be no capital gain without proceeds.

[81] The appellant further contended that an agreement containing reciprocal obligations, as is the case with the FSA, presupposes that the right of one party to payment is conditional upon that party performing its reciprocal obligations and a party can only claim counter performance if they have already either performed or tendered performance of their obligations. Thus, although a reciprocal obligation of payment against delivery does not suspend the operation of an agreement (as a suspensive condition would), an unconditional

entitlement (and accordingly an accrual for tax purposes) does not arise where there is a reciprocal obligation to fulfil, as there was in terms of the FSA, i.e. delivery of the sold assets against payment.

[82] Reliance for this contention is placed on *Cactus Investments (Pty) Ltd v CSARS* 1991 (1) SA 315 SCA where the following was stated:

> "It is trite that reciprocity of obligations under synallagmatic agreements entails that neither party is entitled to demand performance from the other until he has performed himself. Thus, if a moneylender has not made money available to the borrower a demand for interest will be met by the *exceptio non adimpleti contractus.* But if he does make the money available and demands interest before due date, his claim will be defeated not by the exception but by the simple fact that the time of repayment has not arrived I agree with the court a quo that ; the respondent's right to claim interest was not subject any further performance of any obligation by the respondent. It was simply subject to s time provision (tydsbepaling'). […]
>
> As I have indicated, the expression 'accrued to' and definition of "gross income" has been interpreted in the Peoples Store case to mean "has become entitled to". Neither, Wunsh J in the court a quo, nor Mr Solomon in this Court has suggested any other meaning. I have also indicated that at common law, unless the parties otherwise agree, a tender of, only becomes entitled to the right to receive interest as soon as the funds are made available to the borrower. This is the plain effect of the Act as it stands and we cannot on equitable grounds apply it in any another manner.'"

[83] The question that must first be answered is whether the FSA a contract in which the principles of reciprocity apply, and if so what impact would that have on the date of accrual? It is trite that in synallagmatic contracts, i.e. where one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless that party has performed or is ready to perform its own obligations. Put in the context of the present matter, the entitlement or accrual was not absolute as it still depended on the payment of the purchase. In other words, the entitlement can only be truly effective when both parties had fully performed. According to the appellant, an incomplete contract does not give rise to an accrual or to a right that has accrued as the T Investments had no definitely vested right to the payments as either party could raise *exceptio non adimpleti* defence.

[84] The basis of the *exceptio non adimpleti* defence is set out in *BK Tooling v Scope Precision Engineering* 1979 (1) SA 391 (A) as the recognition of the fact that in the case of certain contracts, which give rise to mutual obligations, what is envisaged is an exchange of performances, having, *inter alia*, the result that the one party is not obliged to perform before the other party has made his/her counter-performance. In other words, the seller need not deliver before the buyer has paid, nor the buyer need to pay before the seller has delivered,

this being suggestive of simultaneous performances. The applicable principles may be summarised thus:

84.1 In contracts wherein reciprocal obligations are created, it is basically a matter of interpretation whether the obligations are so closely linked that reciprocity applies.

84.2 This depends on the contractual obligations, the sequence of performances and the suspension of obligations.

[85] It is so that the principle of reciprocity normally applies to a contract of sale such as the FSA, it being a bilateral agreement. Put in another way, as the FSA is a bilateral agreement, obligations on the two sides are *prima facie* reciprocal. (*Grand Mines v Giddey* 1999 (1) SA 960 at 971. To determine whether the obligations in *casu* are indeed reciprocal, a closer examination of the contract as a whole is necessary.

[86] Juta's Practice Collection/Income Tax, commenting on this aspect with reference to *ITC 1444* states that:

> "The question arises whether a condition that payment is subject to delivery makes the agreement conditional. In ITC 1444 51 SATC 35 (T), it was held that where the purchase price is payable against the receipt of the bills of lading and invoices the purchase price has not been unconditionally incurred. See notes on section 11(a) actually incurred. Where the seller claims payment prior to the delivery, the purchaser may deny payment on the basis of the *exceptio non adimpleti contractus*. See BK Tooling v Scope Precision Engineering 1979 (1) SA 391 (A)."

[87] In terms of the FSA, T Investments was obliged to pay the purchase price at the agreed time and only thereafter would the appellant deliver the shares. The delivery of the shares was obviously dependent upon T Investments' performance of its obligations, namely, payment of the purchase price. This is so because the FSA specifically provides that *"ownership in respect of the shares and claims will pass to the Buyer on the Forward date*". In particular, the FSA provides that "*The delivery or payment of obligations is not subject to any suspensive condition*." The 10th of January 2018 is the date on which the buyer would pay or discharge the obligation to pay the Forward Price for the shares in the Basket and the Forward Price for the Claims.

[88] Upon construing the FSA, it is clear that there is such a relationship between the obligation that was to be performed by the appellant and that due by T Investments to indicate that it was undertaken in exchange for the performance of the other. (*ESE Financial Services*, supra, at 809 D-E). Thus, the obligations of the parties to the FSA were reciprocal. Whether or not there was an accrual of the proceeds for the purposes of the CGT remains to be considered in line with the *Lategan* and *People's Stores* judgments. (See also *Commissioner*

for South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others 69 SATC 205 (SCA); *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue* 61 SATC 43 (SCA).

A review of cases on reciprocity of obligations in the context of CGT

[89] Counsel for the appellant contended that in cases of reciprocity of obligations, there is no "entitlement" in the first year of assessment, precisely because the taxpayer still needs to tender reciprocal performance to gain such entitlement. According to this argument, the *Lategan* principle does not cover those kinds of cases. This is in direct contrast to SARS's contention that the FSA gave rise to an accrual upfront because the appellant obtained the right to payment by no later than 10 January 2018 and that *"no requirements … must be met not any future events … must occur failing which the exchange would not take place"*. According to the appellant, this contention is wrong because the establishment of a "backdrop" contractual date for the exchange does not mean that T Investments would be entitled to receive payment on that date without tendering and delivering the assets. In light of these contentions, it is necessary to review the cases referred to the appellant in support of its contentions.

[90] At the centre of the determination of whether there was a capital gain on the conclusion of the FSA, Counsel for the appellant referred to a list of cases which, it was argued demonstrate the reciprocity principle in the context of contracts of sale and the accrual of amounts thereunder.

[91] In *ITC 316* (1934), the taxpayer cultivated plantations of gum trees. In one year of assessment, he sold portions of these plantations for felling by purchasers, while retaining ownership of the ground on which the plantations stood. The sale agreement required a lump sum to be paid to the taxpayer once the purchaser's rights were secured, with the balance of the price being paid in instalments over a period of six years. The taxpayer retained a number of obligations to protect the plantations in the interim. The taxpayer included the lump sum in his taxable income for the year of assessment but excluded the instalments payable to him in subsequent years. However, the Commissioner included the instalments on the basis that they had accrued to the taxpayer on the completion of the agreement.

[92] In *ITC 316*, the court stated the following:

> "It seems, therefore, that all we have to concern ourselves with in the present case is whether these instalments can be said either (1), to be presently due and payable; or (2), were definitely fixed and stipulated for: that even if the time of payment arrives only in the future, how can they be said to be unconditionally due? It is, therefore, not necessary for us to suggest a doubt as to correctness of the definition given by Mr Justice WATERMEYER, as Mr Horwood invited us to do. If the right is not enforceable or has not plainly vested in the year of assessment, then it

seems difficult that the sum payable in respect of that right has accrued to the taxpayer within the year of assessment."

The court continued:

> "We are not, therefore, concerned with the question whether the definition of "accrual" as laid down by WATERMEYER.J., and subsequently approved by WESSELS, C.J., was correctly applied in *Lategan*'s case. It seems to us, with respect, that adopting that definition, the annual sums in the present case had not accrued to the appellant in terms of section 7(1) of the Act. The Commissioner appears to have confused a right to receive or demand payment of a thing which is definitely vested in the taxpayer with a stipulation for the arising or creation of such a right in the future. In the present case, all that the deed of sale provides for is that in payment for the trees which are to be felled or cut down by the purchaser, the seller, that is the present appellant, shall be entitled from time to time, in the future, at fixed sums of money. It does not appear to us, accepting the definition of "accrual" in L*ategan*'s case as being correct for the purpose of the present decision, that there has been any accrual to the appellant of the sums of money falling due after the expiry of the tax year in question. All that the appellant did was to stipulate for these payments in the future, but the mere stipulation does not appear to us to amount to an enforceable right to receive money in the present."

The court made the following further comments:

> "It seems to us, further, that to adopt the view of the Commissioner would be to create what would practically amount to a revolution so far as commercial practice is concerned. In all cases where deliveries of produce or merchandise were stipulated for over a period of years and payments were to be made accordingly, the sellers or recipients would be taxable in the year when the contracts for such payments had first been made. This would certainly come as startling intelligence to the commercial community. It has furthermore to be borne in mind that there is no definitely vested right to these payments. The purchaser can defeat them or object to them on the grounds that the seller has not carried out his obligations, some of which were very onerous, such as the continued maintenance during the ten years of the firebreaks, etc., and the result may be that the appellant has now to pay tax on the full sum of instalments assumed to be absolutely due in the future, whereas it may very well turn out that the instalments may be avoided on various grounds, and in such cases as the appellant, who had already paid his tax in advance, would be without remedy."

[93] In contending that the appellant had not accrued an entitlement in the first year of assessment, reliance was also placed on *ITC 424* (1938) 10 SATC 338 where a taxpayer had leased his business premises. On 7 June 1937 he entered into a written agreement selling his right of tenancy together with the business licence, furniture and stock in trade. The agreement was subject to (i) the cession of the right to tenancy to the purchaser with the consent in writing of the lessor of the premises and (ii) the transfer of the licence to the purchaser's nominee. The purchase consideration was to be paid in cash upon fulfilment of these requirements and

delivery of possession of the business assets. Delivery and payment took place on 1 July 1937. The taxpayer's year of assessment ended on 30 June 1937.

[94] In *ITC 424*, the question for consideration was whether the sale of proceeds had to be brought to account for tax purposes in the year that ended on 30 June 1937 or in the following tax year. The court stated as follows:

> "Clearly, the amount in question was not payable within the tax year ended 30 June 1936; but, did it accrue to the appellant within that year? The term "accrued" has been defined in *Lategan v Commissioner for Inland Revenue* (2 SATC 16) by WATERMEYER, J., at p.20. where it said: 'The words in the Act 'has accrued to or in favour of any person "merely mean to which he has become entitled".' The learned Judge then went on to say: 'So far as a debt was concerned which was 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 had acquired a right to claim payment of the debt in the future, This right had vested in him. Had accrued into money if he wished to do so."

[95] In summarising the pertinent facts in *ITC 424* in light of the above pronouncement the court stated thus:

> "In the present case, it is provided that the purchase consideration shall be payable in cash upon delivery of possession by the seller to the purchaser of the business and the assets purchased. It is common cause in the present case that such delivery of possession of business and assets took place on or after 1st July 1937. It seems to us therefore, on the plain construction of the agreement that the seller was not entitled to payment of the purchase price, or any part thereof, until such delivery or possession."

[96] Turning to the application of the principle enunciated in *Lategan* in relation to the facts in *ITC 424* the court said the following:

> "This does not seem to us to fall within the words in the judgment previously referred to, viz,: He had not become entitled to a right to claim payment of the debt in the year of assessment but he had acquired a right to claim payment in future. That seems to refer to a definite right in praesenti to claim payment in future, but where there is yet no delivery the right to claim payment does not arise until the delivery is made. The provision in the agreement now under consideration is simply a stipulation for a right to arise to claim payment on or after the day when delivery is made."

[97] In finding in favour of the taxpayer, the court in *ITC 424* held as follows:

> "According to this interpretation therefore, of the words 'accrual' and 'accrued' there was no accrual in this case until 1st July 1937. The test is-had the seller, i.e. the appellant, had an enforceable right to this sum before 1st July 1937? It seems clear that, in terms of the agreement, his right was not enforceable before the delivery of the possession which did not

> take place until on or after 1st July 1937. The right to the purchase consideration, which was in fact paid after 30 June 1937, did not therefore accrue within the tax year ended 30th June 1937."

[98] Countering SARS's contentions to the effect that there was an accrual of proceeds at the time the FSA was entered into, Counsel for the appellant further submitted that the facts in the present case are distinguishable from *Lategan* and the cases that followed in that, therein, the taxpayer already had an unconditional entitlement to a future payment and it was merely the time of payment that was delayed to a subsequent year of assessment. Furthermore, the Court in those cases accepted that an amount accrued when the entitlement arose but took the view that the value of the accrual when the entitlement arose may be lower than face value owing to the fact that payment was not immediately claimable (e.g. because of the time value of money). Thus, a party who is under a reciprocal obligation, rather than merely a time stipulation does not immediately acquire unconditional entitlement to claim payment, since their entitlement to do so is dependent upon that party's counter performance. Furthermore, it has been recognised in our law that the reciprocity principle applies for income tax purposes.

[99] It must be acknowledged that in *ITC* 1444, in applying the reciprocity principle in the claiming of an income tax deduction, the Court confirmed SARS disallowance of a deduction on the basis that the expenditure was not actually incurred. The facts are briefly that in its return for the year assessment that ended 31 December 1983 the appellant taxpayer, a manufacturer of certain productions deducted an amount described as "*commitment for production materials"*. However, this amount was not reflected in a schedule annexed to the accounts supporting the appellant's return of income. It found that where the purchase price of the production materials forming the subject matter of the contracts was payable only against receipt of the bills of lading and invoices, the purchase price had not been unconditionally incurred. The Court stated that a contract of sale is a bilateral contract with reciprocal obligations. The Court relied on *ESE Finance Services (Pty) Ltd v Cramer* 1973(2) SA 805 (C) where the following was said:

> 'In a bilateral contract certain obligation may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance of the other.
>
> The reciprocity itself may be bilateral in the sense that the performance or tender of them represent concurrent conditions; that is each is conditional upon the other."

McCreath J, then concluded thus;

> "It is in my view clear from the documents and other evidence before the court that the liability of the taxpayer to effect payment of the purchase price under each of the relevant contracts was conditional upon the performance or tender of performance by the seller. The condition the seller was required to fulfil before an absolute and unqualified liability to pay the purchase price

arose, was the delivery of the bills of laden and invoices in respect of the supplies of the production materials under the said contracts."

[100] Accordingly, the appellant's liability to pay the purchase price was held to be conditional upon the performance or tender of performance by the seller and the appellant had not incurred an absolute and unqualified liability. Therefore, expenditure could not be said to have actually occurred.

[101] Counsel for the appellant further referred to comments by Emslie & Davis Commenting on the judgment in ITC 1444, in "*Income Tax Cases and Materials"* (2001) state as follows:

> "In the case of [a contract entered into between the taxpayer and a supplier of goods and services where the latter still has to perform and payment has not been made] … should the supplier attempt to institute an action prematurely, i.e. prior to tender of performance by him, his claim could be met by the *exceptio non adimpleti contractus*. The effect of the exceptio is to suspend such a claim by a supplier until he has performed under the contract."

[102] Regarding the nature of the obligations under an unconditional reciprocal contract, the learned authors note the following:

> "It has been argued (*De Wet and Yeats Kontraktereg en Handelsreg* at 100) that where a person on whom fulfilment or non-fulfilment depends, has bound himself contractually to the other party to perform, one is dealing not with a condition but a counter-performance due in of the contract which can be enforced (see Design & Planning Service v Kruger 1974 (1) SA 689 (T). If this is correct the issue of future performance does not create a conditional contractual liability where all the other elements are unconditional."

[103] Referring to the effect of *ITC 1444*, the learned authors proceed to state that:

> "The effect of the finding in ITC 1444, however, is that where a liability to pay arises only when the other party to a contract performs or tenders to perform, this amounts to a condition resulting in the conclusion that no expense has been 'actually incurred'. The 'condition' referred to here is not an express suspensive or resolutive condition which suspends or resolves the exigible context of the contract. The conditionality referred to by McCreath J relates to sequence of performance or tender of performance in relation to an absolute and unconditional liability to pay: the contract, as was the case in ITC 1444, remains fully binding and enforceable, but the time when liability to pay arises has not arrived.
>
> If ITC 1444 is correct, which it is respectfully considered it is, the requirements of an unconditional liability to pay before the expenditure can be said to have been 'actually incurred' in any year of assessment denotes not only the absence of a suspensive or resolute condition but also the arrival, before the end of the year, of the time when the (binding) contractual liability to pay has ripened into an unconditional (i.e indefeasible) to pay, whenever payment is actually required to be made."

[104] Based on the above decisions, the appellants submitted that the application of the principle of reciprocity in the context of ITA has a sound rational basis; a taxpayer should not be entitled to claim a deduction of expenditure if that taxpayer does not have a definitive obligation in relation to that expenditure, and correspondingly should not be obliged to include an amount on its gross income and be subject to tac on it if the taxpayer does not have a definite right to the income. Additionally, to allow a taxpayer to deduct expenditure if that taxpayer did not have a definite and absolute obligation to pay the expenditure, and to include an amount in the gross income of a taxpayer if that taxpayer did not have a definite and absolute right to the income, would have undesirable consequences (including the need to reverse the tax treatment in a subsequent year when the reciprocal event does not occur) and would not accord with the purpose of the relevant provisions of the ITA.

[105] According to the appellant, a review of the cases referred supports its contention that a party who is under a reciprocal obligation does not immediately acquire unconditional entitlement to claim payment, since their entitlement to do so is dependent upon its counter performance. However, an analysis of the cases does not reveal an established principle that supports the appellant's contentions. What can be discerned from the cases is that our courts have steadfastly upheld the principles set out in the *People's Stores*. For example, in *Cactus Investments*, *supra,* at 323 C-D, the SCA, confirming the decision of the court a quo, where the majority specifically acknowledged that:

> "As I have indicated, the expression 'accrued to' in section 5(1) has been interpreted in the People's Stores case to mean 'has become entitled to'. Neither Wunsh J in the Court a quo nor Mr Solomon in this court has suggested any other meaning. I agree, a lender of money becomes entitled to the right to receive interest on the stipulated future date, as soon as he has made funds available to the borrower. This is the plain effect of the Act as it stands and cannot on equitable grounds apply it in any other manner."

[106] Whilst it is indeed so that Hefer JA in *Cactus Investments* remarked that if a moneylender has not made money available, to the borrower, a demand for interest will be met by the *exceptio non adimpleti contractus*, I do not consider the remark as assisting the appellant's case. Although reference to reciprocal obligations is made, the actual reason for the judgment is premised on the authority of the *People's Store*.

[107] For the sake of completion, I mention that the court *a quo*, in *Commissioner of Inland Revenue v Cactus Investments (PTY) Ltd* 1991 (1) SA 264 (TPD), considered the impact of the reciprocity of obligations of the parties at 278 E- F, where it stated at 280 E that:

> "Where a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation (or, in cases where they are consecutive, the tender of such performance) is a necessary prerequisite of his right to sue and should be pleaded by him.

> Conversely, the defendant in such a case may raise in his defence, known as the exceptio non adimpleti contractus …"

At 280E, the majority judgment found that:

> "The right to claim interest in terms of the agreement therefore vested in the respondent on the day when each investment was made and therefore accrued to the respondent on that day as gross income in terms of section 1 of the Act …"

The minority judgment of Wunsh J, although dissenting in respect of certain aspects, concurred that interest vested only when the investments matured but that it was deemed to have accrued to Cactus Investments in terms of section 7(1) of the Act.

[108] Similarly, in *Milnerton Estates*, *supra*, the appellant had contended that at the end of the 2013 tax year, its entitlement remained conditional on its performance of the remaining tasks necessary to effect transfer of the stands into the names of the purchaser. Although the court decided the issue of accrual on the basis of the deeming provisions of section 24(1), referring to the decision in *People's Stores* it acknowledged that:

> "This Court has held that 'accrued to' means that the taxpayer has become entitled to the amount in question, even though its right thereto may not be immediately enforceable."

[109] There is a logical and compelling force to the interpretation proffered by SARS to the effect that the FSA amount accrued to the appellant on the date the FSA was signed. This is so because the state of our law is as set out in *Lategan, People's Stores* and *Cactus Investments*. Furthermore, the issue of reciprocity of obligations does not introduce any new dimension to income tax law because the contracts or agreements in the above cases are bilateral, and thus prima facie the obligations are reciprocal. As is evident from the review of the cases, reciprocity of obligations has been considered in the interpretation of accrual of proceeds for the purpose of CGT, it thus is not a novel concept. In my view, the principle of reciprocity does not have the effect of changing the established principles affirmed in *People Stores* and the litany of subsequent cases.

[110] I am also further fortified in this conclusion by the more recent decision in *ITC No 1900 79 SATC 341*, wherein the Court considered whether the amounts of the purchase consideration in respect of certain stands of immovable property which were sold by the taxpayer in the course of trade in terms of deeds of alienation entered into during the 2013 tax year, had accrued to the appellant in that tax year notwithstanding that the appellant had received payment against the transfer of the properties to the purchase price in the year 2014. Binns-Ward J, held:

> "(i) That the import of the word 'accrued' in the relevant part of the definition of 'gross income' in section 1 was for a long time contentious and the question was eventually authoritatively settled

by the Appellate Division in *CIR v People's Store (Walvis Bay) (Pty) Ltd* 52 SATC 9 where it endorsed the so-called *Lategan* principle – a term coined from the construction given to the word *in Lategan v CIR* 2 SATC 16, i.e., that the words 'accrued to' meant 'to which he has become entitled and hence it was 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 and 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.

. . .

(v) the timing of the transfers and actual making of payments, and the order in which they happen do not determine when the appellant became 'entitled to payment' within the meaning of the *Lategan* principle. The appellant's entitlement to payment vested at the date of 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 appellant 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."

[111] A review of the aforegoing authorities does not reveal a general principle that whenever there is reciprocity of obligations in an agreement involving the question of CGT. Rather, each case is considered on its own merits, taking into account the well-established principles. Even if there was such a principle, this was not such an agreement as there was no suspensive or contingent condition to it. In my judgment, the appellant acquired a right to claim payment of the purchase price on the ordained date of 18 January 2018. However, the right vested in it accrued on the day the FSA was entered into.

Conclusion

[112] I have in this judgment held that the appellant is liable for CGT by virtue of the application of the deeming provision in section 24(1) of the ITA. Put in another way, I have held that the sale price under the FSA is deemed to have accrued to the appellant based on the provisions of section 24(1) of the ITA. I have also found that notwithstanding the reciprocity of the obligations of the parties in terms of the FSA, and applying the principles in *Lategan, People's Stores* and subsequent judgments, the appellant became unconditionally entitled to the sum of R1 873 255 799.31 in terms of the FSA which accrued on 10 July 2017 upon conclusion of the FSA, notwithstanding the fact that payment was received on 18 January 2018 as payment was not contingent upon any future event. In light of this finding, it follows that it could not have accrued to the T Trust in terms of section 25(B)(2). In the circumstances, DTA, is not applicable. The appellant therefore failed to prove that the amounts in question were not taxable.

Understatement Penalty (USP)

[113] It is common cause that SARS regarded the matter an instance of substantial understatement and imposed USP of 10% under sections 222 and 223 of the TAA. The TTA defines understatement thus:

> "substantial understatement means a case where the prejudice to SARS or the fiscus exceed the greater of five percent of the amount of 'tax' property chargeable or refundable under a tax Act for the relevant period, or R1 000 000;"

[114] To satisfy the burden on it SARS prove the facts upon which the imposition of the USP was based. To this end, section 223(3) of the TTA states that:

> "(3) SARS must remit a 'penalty' imposed for 'a substantial understatement' if SARS is satisfied that the taxpayer—
>
> (*a*) Made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date the relevant return was due; and
>
> (*b*) Was in possession of an opinion by an independent registered tax practitioner that—
>
> (i) Was issued no later than the date the relevant return was due;
>
> (ii) Was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over the form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and
>
> (iii) Confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court."

[115] I have already found that the appellant is liable for CGT as assessed by SARS. That being the case, it was contended on SARS' behalf that the appellant's non-declaration of the capital gain in its tax return constitutes an omission of income. This has not been placed in dispute by the appellant. SARS further contended that:

115.1 SARS also regards the shortfall and the prejudice to the fiscus to be the tax amount on the included capital gain, which would not have been assessed on the appellant's declaration. It has been placed on record that the appellant does not dispute the quantum of the CGT.

115.2 The prejudice exceeds the statutory threshold for substantial understatement of R1million and is an amount of R241 839 347.40;

115.3 The appellant has not satisfied the requirements of section 223(3) of the TAA entitling it to a remission of the penalty.

[116] Based on the aforegoing, SARS claimed that it has met the factual burden with regard to the imposition of USP and correctly imposed 10% USP in the amount of R24 183 934.74.

[117] The appellant alleged that the USP should be remitted as the understatement was as a result of a bona fide inadvertent error. However, no evidence of such error was presented to support this allegation. In *Purlish Holdings (Proprietary) Limited v Commissioner for the South African Revenue Services* [2019] JOL 41208 (SCA) it was held that a taxpayer alleging a bona fide or inadvertent error must present evidence of same. The Court said that:

> "I am unable to find that the understatements were as a result of a bona fide or inadvertent error as the appellant did not adduce any evidence to that effect. There is nothing in the evidence that suggests an error of that nature. It follows that the Tax Court correctly found that SARS had discharged its onus of proving the appellant's "understatement" of its CIT and VAT within the contemplation of section 221 of the TTA."

[118] SARS submitted that the actions of the appellant were neither inadvertent nor bona fide, but rather the understatement was the result of multiple coordinated and synchronized actions to facilitate the outcome the appellant sought. However, I find that on the basis that no evidence was led to substantiate the evidence of a bona fide of inadvertent error, the USP of 10% must therefore be confirmed.

Penalty in terms of paragraph 20 of the Fourth Schedule of the ITA

[119] The facts establish that the appellant, as a provisional taxpayer, delivered two provisional tax returns for the 2018 tax year on 12 July 2017, wherein it estimated a taxable income to be zero. As set out in the additional assessment, SARS has determined the appellant's taxable income for the 2018 tax year to be R537 420 772.00. Because the appellant estimated its taxable income to be zero, SARS imposed a penalty in terms of paragraph 20(1)(*a*) of the Fourth Schedule of the TAA. Paragraph 20(2) of the Fourth Schedule of the TAA provides that:

> "(2) Where the Commissioner is satisfied that the amount of any estimate referred to in subparagraph (1) was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated, or if the Commissioner is partly so satisfied, the Commissioner may in his or her discretion remit the penalty or part thereof."

[120] The appellant has not presented any evidence of the zero estimate being seriously calculated with due regard to factors thereon. In the circumstances, the penalty must be confirmed.

Interest section 89quat(2) of the ITA

[121] Interest on underpayments and overpayments of provisional tax is governed by section 89*quat*(2) of the ITA which provides as follows:

> **"89*quat*. Interest on underpayments and overpayments of provisional tax.—**
>
> (2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds—
>
> (*a*) R20 000 in the case of a company; or
>
> (*b*) R50 000 in the case of any person other than a company,
>
> and the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection(3), be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest shall be calculated from the effective date in relation to the said year until the date of assessment of such normal tax."

[122] I have already indicated that the appellant delivered provisional tax returns for the period in question on 12 July 2017, declaring that zero taxable income, and thus paying zero provisional tax.

[123] Section 89*quat*(3) of the ITA provides as follows:

> **"83*quat*. Interest on underpayments and overpayments of provisional tax.—**
>
> (3) Where the Commissioner having regard to the circumstances of the case is satisfied that the interest payable in terms of subsection (2) is a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer."

Similar to the provisions of the tax penalty above, the appellant has not presented any evidence of the interest being the result of circumstances beyond its control, in either to SARS in the audit or in these proceedings. However, in the Rule 32 Statement, the appellant refers to an alleged new interpretation of settled legal principles which it could not have known would be adopted, in relation to accrual.

[124] SARS argued that it is the appellant who abandoned established principles, particularly that of *Lategan* with reference to accrual, and to *Thistle Trust* with reference to the application of paragraph 80(2).

[125] It is my judgment that the appellant has not met the burden under section 102 of the TAA to prove that it qualifies for a reduction under section 89*quat*(3), and the interest imposed by SARS must therefore be confirmed.

Costs

[126] With regard to costs section 130(1) of the TAA provides that:

> "**130 Order for costs by the tax court.—**(1) **T**he tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party grant an order in favour of the party if—
>
> (*a*) the SARS grounds of assessment or 'decision' are held to be unreasonable;
>
> (*b*) the appellant's grounds of appeal are held to be unreasonable;
>
> (*c*) the board's decision is substantially confirmed;
>
> (*d*) the hearing of the appeal is postponed at the request of the other party; or
>
> (e) The appeal is withdrawn or conceded by the other party after the 'registrar' allocates a hearing date."

[127] In the present matter, it was contended on behalf of SARS that costs should be awarded in the latter's favour as each of the appellant's grounds of appeal are unreasonable on the following basis:

127.1 the appellant's application of the concept of accrual is contrary to established precedent. Furthermore, even if the appellant's basis had been correct in alleging that the sale price had not accrued upon conclusion of the FSA, the appellant had disregarded certain deeming provisions of the ITA highlighted by SARS which direct that accrual had occurred on 10 July 2017.

127.2 the appellant persists with its interpretation and application of section 25B of the ITA despite its approach having been rejected by the Constitutional Court.

127.3 the appellant has not presented any evidence to support its grounds of appeal in respect of the USP and provisional tax penalties and interest.

[128] SARS is of the opinion that its grounds of assessment for CGT are in accordance with the ITA and further submits that the appellant has admitted the requirements for a CGT assessment are met. Furthermore, the appellant's defence rests on the particularities of its own conduct, which does not detract from the reasonableness of its approach.

[129] I am of the view that the appellant must pay costs as none of the grounds of appeal have been found to be meritorious.

ORDER

[130] The other members of the court are in agreement with me that the appeal must be dismissed. Thus, flowing from the findings made herein, the following order is issued:

130.1 The appeal is dismissed.

130.2 The additional Income Tax Assessment for 2018 dated 17 September 2021 is confirmed.

130.3 The appellant is ordered is to pay costs in terms of section 130 of the TAA.

NDITA, J
JUDGE OF THE HIGH COURT