

The *Lategan* case:¹ The accrual principle – then and now

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ABSTRACT

In 1926, the landmark *Lategan* case was the first case to determine the meaning of the words “accrued to or in favour of” in the definition of gross income as defined in section 1 of the Income Tax Act. According to the decision in that case, income generally accrues to a person when that person is entitled to an amount (the timing rule), but the amount to which the taxpayer is entitled to must be valued to determine the value of the accrual to be included in gross income. The valuation of the accrual is determined by discounting the accrual to its present value at year end (and not the face value). The valuation part of the judgment was legislatively nullified in 1990 with retrospective effect to 1962, and the face value of the amount to which the taxpayer is entitled is the amount that has accrued.

The timing rule violates both the canons of equity and of convenience. The timing rule also causes undue hardship to taxpayers by taxing amounts before they have been received. It is submitted that it may be time to test the timing rule constitutionally. It is also submitted that the valuation rule would pass constitutional muster. However, as far as the retrospective legislative amendments in respect of the valuation of the accrual are concerned, it is further submitted that there is little chance of successfully challenging such legislative amendments.

Key words: accrual, canons of taxation, “due and payable”, “entitled to”, Income Tax Act, retrospective amendments, timing rule, valuation rule

Wine maketh merry: but money answereth all things (Ecclesiastes 10:19)²

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1 *W H Lategan v CIR*, 1926 CPD 203, 2 SATC 16.

2 [Online] Available: www.goodreads.com/quotes/tag/wine?page=3. [Accessed: 23 June 2014].

The landmark case of *WH Lategan v Commissioner for Inland Revenue*³ (“*Lategan case*”), decided in 1926, was the first of numerous tax judgments on the interpretation of the meaning of the phrase “accrued to or in favour of” in the definition of gross income as defined in section 1 of the Income Tax Act (now Act 58 of 1962). Willem Hendrik Lategan (the taxpayer and wine farmer) sold wine to De Kooperatiewe Wynbouwen Vereniging van Zuid Africa Beperkt (“KWV”). At the end of the year of assessment, the taxpayer had not received the full amount for the wine sold to KWV. The court was required to rule whether or not amounts due but not yet received by the taxpayer should be included in the taxpayer’s gross income. Furthermore, the court also addressed the valuation of such amounts. The judgment in the *Lategan* case left an indelible mark on South African tax law in that it resulted in both a timing and valuation rule in respect of accruals of income.

In South Africa, normal tax is levied on the taxable income of a taxpayer. The starting point in the calculation of taxable income is to determine the amounts that must be included in “gross income” as defined. The definition of gross income can therefore be seen as the cornerstone of income tax in South Africa. The first Income Tax Act of South Africa, which was passed in 1914, came into effect on 20 July 1914.⁴ The second Income Tax Act⁵ (“the 1917 Act”) of South Africa was promulgated in 1917 and was drafted by Alan Frederick Corbett, who became the Commissioner for Inland Revenue in 1929.⁶ Section 6 of the 1917 Act defined “gross income” as “the total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature, in any year or period assessable under this chapter from any source within the Union or deemed to be within the Union ...”. The core elements of the definition of gross income have remained intact from the 1917 Act until today.

Although the decision in *Lategan* could have been interpreted as having enhanced certainty relating to the accrual of an amount for tax purposes, legal uncertainty and controversy still persisted for decades. Contradictory meanings were attributed to the

3 *WH Lategan v CIR*, 1926 CPD 203, 2 SATC 16.

4 Hattingh, J. 2014. A Century Later, Income Tax Still Rests on a Narrow Base. *Business Day Live*. [Online] Available: www.bdlive.co.za/opinion/2014/05/26/a-century-later-income-tax-still-rests-on-a-narrow-base. [Accessed: 12 February 2015.]

5 Income Tax (Consolidation) Act 41 of 1917.

6 Kahn, E. 1995. *The Quest for Justice: Essays in Honour of Micheal McGregor Corbett Chief Justice of the Supreme Court of South Africa*, Kenwyn: Juta & Co, Ltd, at 8. Alan Corbett was also the father of Micheal McGregor Corbett, who was the Chief Justice of the Supreme Court of South Africa until 1998. Chief Justice M.M. Corbett was one of the other four judges concurring with Hefer JA’s judgment in the case of *CIR v People’s Stores (Walvis Bay) (Pty) Ltd*, 1990 (2) SA 365 (A), 52 SATC 9 (hereafter referred to as the *People’s Stores case*), which finally caused the enactment of the meaning of the accrual principle in 1990.

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words “accrued to or in favour of” by various courts after 1926 and this controversy was only finally resolved (and certainty finally achieved) some 64 years later in 1990.

The key to the continuing importance of the *Lategan* case lies, *inter alia*, in the fact that the specific question before the court was about the meaning to be attributed to the words “accrued to”. The decision (the *ratio decidendi*⁷) as to its meaning established legal precedent. In two later cases⁸ a different meaning was attributed to these words, but the meaning so attributable was regarded merely as *obiter dicta*⁹ and thus did not need to be followed in subsequent cases. The fact that the Supreme Court of Appeal¹⁰ (“the SCA”) in 1990 confirmed the meaning attributable to the words “accrued to” as decided in the *Lategan* case, underlines its continuing importance.

A good tax system is ideally designed on the basis of the canons of taxation in terms of which, *inter alia*, a balance must be struck between the rights of the taxpayer and those of the *fiscus*.¹¹ Adam Smith¹² was the first economist to develop the so-called “canons of taxation” in 1776. These canons have come to be accepted internationally as characteristics or features of a good tax system. In summarised form, the canons of taxation can be stated as equity, certainty, convenience and efficiency.

Although it might be unrealistic to expect every provision in the Income Tax Act 58 of 1962 (“the Act”) to comply with or endorse the canons of taxation, it is submitted that non-adherence to these principles of a good, equitable and just tax system could have a negative impact on tax morality. The legal uncertainty surrounding the meaning of “accrual” existed for decades, thereby, it is submitted, compromising the canon of certainty. In this article, it will be shown that the canons of equity and of convenience have also been compromised by the timing rule established in the *Lategan* case.

Generally, the facts in reported cases (and to a certain extent unreported cases) are limited to the issues in dispute and they do not reveal much about the taxpayer. In an attempt to highlight the story behind the facts in the *Lategan* case, this article first focuses on some interesting historical facts about the taxpayer and the farm on which the wine that was sold was produced. This is followed by an analysis of the factual background on the case and the decisions regarding the meaning of accrual by both

7 Meaning the rationale or reason for the decision which establishes legal precedent.

8 *CIR v Delfos* 1933, (AD) 242, 6 SATC 92 at 111 and *Hersov's Estate v CIR*, 1957 (1) SA 471 (A), 21 SATC 106.

9 Meaning an incidental remark not establishing legal precedent.

10 In the *People's Stores* case.

11 Smith, A. 1776. *An Inquiry into the Nature and Causes of the Wealth of nations*, London: Methuen & Co., Ltd.

12 See Emslie, T.S., Davis, D.M., Hutton, S.J. and Olivier, L. 2001. *Income Tax Cases and Materials*, The Taxpayer, where reference is made to Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of nations* (1776), Book V Ch II.

the lower court and the SCA. The “entitled to” meaning of accrual as established in the *Lategan* case, and the restriction thereof to “unconditionally entitled to” in the cases of *CIR v Ochberg*¹³ and *Mooi v SIR*,¹⁴ are then contrasted with an opposing meaning attributed to it in later case law. The opinions of two Commissions of Inquiry,¹⁵ the generally prevailing practice of Inland Revenue subsequent to the *Lategan* case, and the intervention by the legislature after the *People’s Stores* case, are also discussed to complete the analysis of the meaning of “accrued to”. The impact of the Constitution of the Republic of South Africa, 1996¹⁶ (“the Constitution”), the canons of taxation and the retrospective nature of the amendments to the general definition of “gross income” on both the timing and valuation rules are then considered. The main objective of this article is therefore to establish whether or not the timing and valuation rules as established in the *Lategan* case, on the one hand, and the retrospective amendments by the legislature, on the other, would pass constitutional muster.

The *Lategan* legacy

Johann Hermann Lategan (1711–1786) was born in Germany. He was the first Lategan to arrive in South Africa in August 1735 as a VOC¹⁷ soldier on the ship, PATMOS.¹⁸ He was the owner of the farms De Krakeelhoek (later known as Welvanpas), Het Doolhof and Nabygelegen in the Wagenmakers Valley, Wellington.¹⁹ Willem Hendrik Lategan (1865–1940), the appellant in the *Lategan* case, was the son of Stephanus Petrus Lategan (1830–1901), who was the fourth generation descendant of Johann. Although today the descendants of Willem Hendrik Lategan are no longer producing wine, the seventh and eighth generations of Johann, on the side of Stephanus’ brother Willem Hendrik Lategan (1827–1917), are still farming on the Bergsig Estate in the Breede River Valley, producing some of the finest wines in the Western Cape.

Constantia Uitsig, known until 1940 as Constantia View, was the home of the Lategan family for five generations, with Willem Hendrik Lategan being the fifth

13 *Ochberg v CIR*, 1933 CPD 256, 6 SATC 1 (hereafter referred to as the *Ochberg* case).

14 *Mooi v SIR*, 1972 (1) SA 674, 34 SATC 1 (hereafter referred to as the *Mooi* case).

15 The Commission of Inquiry into the Fiscal and Monetary Policy in South Africa. 1970. *Taxation in South Africa*, Second Report, RP 86/1970; and The Commission of Inquiry into the Tax Structure of the Republic of South Africa. 1987. *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa*, RP 34/1987.

16 Act 108 of 1996.

17 Vereenigde Oostindische Compagnie.

18 Maree, A.J. 2007. *Van Billmerich na Breerivier*. Published privately.

19 Maree, A.J. 2013. *Constansie Lategans*, Unpublished source of research done into the family history of the Lategan family.

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generation.²⁰ Constantia Uitsig had been a portion of Simon van der Stel's original grant of the farm Groot Constantia.²¹ In 1894, Willem Hendrik married Antoinette Bredell of Schoemanshoek, and with her inheritance, he built the present-day homestead of Constantia Uitsig.²² Willem Hendrik Lategan proved himself to be progressive and up to date in his methods, and with hard work and energy, he turned Constantia Uitsig into one of the finest fruit and wine farms in the Colony.²³ He made a special study of the export trade and his trade with England and the continent increased annually. He was also considered an authority on all matters relating to the fruit industry.²⁴ He was a director of the Cape district of the KWV from 1925 until 1940,²⁵ a member of both the Fruit Growers Association of SA and the Western Province Agricultural Association.²⁶ He was also the Chairman of the Constantia Co-operative Association of Farmers, a Landbank valuator, a justice of the peace, and a member of the then Rural Council.²⁷ He was interested in politics and was a prominent member of General Louis Botha's Suid-Afrikaanse Party.²⁸

In 1988, the farm, Constantia Uitsig, was purchased by David and Marlene McCay.²⁹ Together they restored the farm to its former glory, and Constantia Uitsig now boasts award-winning wines, three world-renowned and award-winning restaurants, a private cricket oval, a spa (the only one in South Africa to offer "Les Aromes du Vin", a body treatment based on the aromatic components of fine wines), and a 16-roomed luxury hotel. In 2006, fifty per cent of the wine estate was bought by a consortium. Just 20 minutes away from the heart of the city of Cape Town, Constantia Uitsig is truly Cape Town's own vineyard.

Factual background of the *Lategan* case

In May 1920, the wine farmer, Willem Hendrik Lategan ("Lategan"), entered into an agreement in terms of which he disposed of the wine that he had made during the

20 Home page of Constantia Uitsig. [Online] Available at <http://www.constantia-uitsig.com/pages/wine-estate.php>. [Accessed: 14 May 2013].

21 Supra.

22 Supra.

23 1906. *Men of the Times Old Colonists of the Cape Province and the Orange River Colony*, Johannesburg: The Transvaal Publishing Co.

24 Supra.

25 Van Zyl, D.J. 1918 – 1993, KWV.

26 Maree, A.J. *Constansie Lategans*, Unpublished source of research done into the family history of the Lategan family 2013.

27 Supra.

28 Supra.

29 Home page of Constantia Uitsig. [Online] Available at <http://www.constantia-uitsig.com/pages/wine-estate.php>. [Accessed: 14 May 2013.]

year of assessment, which ended on 30 June 1920, to the KWV for the sum of £5,924. Of this sum, £3,500 was payable and, subject to certain deductions mentioned below, paid prior to 30 June 1920. The balance was payable in instalments after that date.

In terms of the articles of association of the KWV, two amounts, “retention” money and “contribution” money, were deducted from the amount payable to Lategan and retained by the KWV. The “retention” money was applied by the KWV towards its working expenses, but this was later to be paid to the taxpayer, whilst the “contribution” money was in part treated as a contribution to the administrative costs of the KWV. The balance of the contribution money was retained by the KWV as a reserve, with Lategan being entitled to receive shares in the KWV of equivalent value.

Lategan argued that the amount of the debt payable in a future year of assessment had not accrued to him in the current year, and that he was liable to tax in the current year in respect of the £3,500 actually received only. He also claimed both the amounts deducted by the KWV as “retention” money and “contribution” money as expenses incurred in the production of income.

In his assessment of Lategan, the Commissioner for Inland Revenue (“the CIR”) (as he was then known) included the whole amount for which the wine had been sold, namely £5,924, as gross income in the determination of the taxable income for the year of assessment which ended on 30 June 1920. The CIR only allowed that part of the “contribution” money applied towards meeting the administrative costs of the KWV as an expense incurred “in the production of the income”.³⁰

Lower Court findings

On appeal against a rejection of the taxpayer’s objection to his assessment, the Special Court for the Cape Province ruled in favour of Lategan in respect of the disallowance of the deduction in respect of the “retention” money, holding those amounts to be an outgoing incurred in the production of the income. However, the court confirmed the assessment on the amounts not yet paid to Lategan. It also held that the instalment payable after the close of the year of assessment had accrued to Lategan in the year of assessment ending on 30 June 1920, and that the balance of the “contribution” money, in respect of which Lategan had been entitled to receive shares, had rightly been treated as income which had accrued to Lategan and had been capitalised on his behalf.

³⁰ Section 17(1)(a) of the 1917 Act, now equivalent to section 11(a) of the Act.

The Cape Provincial Division of the Supreme Court

Lategan thereupon required a case to be stated to the Cape Provincial Division of the Supreme Court (“CPD”) in terms of section 86 of Act 41 of 1917, submitting for decision on the following questions:

- (a) Should instalments, which in terms of the agreement of sale were not payable during the year of assessment, be regarded as gross income within the meaning of section 6 of the 1917 Act?
- (b) Should the amounts retained by the KWV be regarded as gross income or, alternatively, could this amount be deducted from his income under section 17(1)(a) of the said Act?

Question (a) pertains to the timing of the accrual of income. Flowing from the timing question, the CPD also addressed the valuation of such amounts not received before the end of the year of assessment.

Regarding the timing question, Watermeyer J found that:³¹

- The definition of “gross income” does not seem to limit receipts of money in the year of assessment to such receipts as were the reward of work done or capital employed in the year of assessment. So far as receipts were concerned, the time of the receipt seemed to be looked to rather than the time when the work was done which earned the receipt. So far as earnings which were due but had not been received were concerned, the time when the work was done was looked to and not the time of receipt.
- The taxpayer’s income for taxation purposes included not only the cash that he had received or which had accrued to him, but the value of every other form of property which he had received or which had accrued to him, including debts and rights of action.
- The words in the Act “has accrued to or in favour of any person” merely meant “to which he has become entitled.”

Addressing the valuation aspect of accrual Watermeyer J found the CIR’s inclusion of the face value of the accrual to be wrong and held that:³²

- 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 had

31 *W H Lategan v CIR*, 1926 CPD 203, 2 SATC 16 at 20.

32 *W H Lategan v CIR*, 1926 CPD 203, 2 SATC 16 at 21.

accrued to the taxpayer in the year of assessment. 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 of the debt in future. This right had vested³³ in him, had accrued to him in the year of assessment and it was a valuable right which he could turn into money if he wished to do so.

- The value of this right must be included in the taxpayer's gross income for taxation purposes.
- The instalments had to be regarded as gross income but something had to be deducted from their face value to allow for the fact that they were not payable at the close of the year of assessment.
- Assuming that the right to receive the instalments had not been converted into money by sale or otherwise during the year of assessment, the value to be fixed would be the present value of the instalments at the end of the year (30 June 1920).

The *Lategan* case, in summary, therefore established a timing rule by stating that “accrued to or in favour of” means “to become entitled to”. Amounts in respect of which a taxpayer has obtained a right to claim payment in a future year of assessment have, accordingly, become vested or accrued during that year of assessment. Such accrued amounts must be included in gross income in the year of assessment during which the right was so obtained. It also created a valuation rule by stating that the present value of accruals at year end (and not the face value of the accrual) is the value of the right that has accrued and that this discounted value must be included in gross income. It is submitted that the court, in establishing the valuation rule which discounts the value of accruals, took the time value of money and the economic reality of doing business into account and thereby applied an approach to the interpretation of the words “accrued to” that equates to what is the purposive approach to the interpretation of statutes.

Regarding question (b): whether the amounts retained by the KWV as retention monies should be regarded as gross income, Watermeyer J agreed with the decision of the Special Court that the retention monies constituted part of the accrual. In addition, that part of the “contribution” money retained by the KWV on Lategan's behalf also formed part of the accrual of income since it had been capitalised on

33 Watermeyer JA, in 1940, in the case of *Jewish Colonial Trust Ltd v Estate Nathan*, 1940 AD 163 at 175-6, made it clear that income that accrues to a taxpayer is income to which he has a vested right rather than a contingent right, in the sense that a “vested right” is a right of ownership, including the right of enjoyment, which may, however, be postponed, and that a “contingent right” is a “chance or a possibility of a right”. De Koker, A. and Williams, R.C. 2013. *Silke on South African Income Tax*, Durban: LexisNexis, at para 2.11, submit that an accrued right is a vested right notwithstanding any postponement of the enjoyment of the right.

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Lategan's behalf. It was further not allowable as a deduction under section 17(1)(a) of the 1917 Act.

Case law on the meaning of accrual subsequent to the *Lategan* case

In the *Ochberg* case, Watermeyer J effectively restricted the principle of “entitled to” as established in the *Lategan* case.³⁴ He held that, as soon as an unconditional sale had been concluded, the taxpayer's right to claim the purchase price in defined instalments at defined future dates vested in him or accrued to him. In other words, accrual takes place when the taxpayer is *unconditionally entitled* (author's emphasis) to claim payment of the instalments. The Appellate Division confirmed this principle in the *Mooi* case and held that a distinction should be borne in mind between a right which vests immediately but relates to a payment in future and a right which does not come into existence at all until a condition has been fulfilled.³⁵ It was further held that it is inappropriate to regard an “amount” as having accrued to a taxpayer when the right granted to him is conditional or it cannot be exercised until he, on his side, has completed the performance of some obligation resting upon him.³⁶ De Koker and Williams³⁷ submit that this principle would not apply if the conditions related merely to a postponement of the date on which the taxpayer could enjoy the right. It is therefore clear that the judiciary restricted the meaning of “accrual” by only including vested rights, as opposed to contingent rights, in gross income and it is therefore important not to confuse a condition in an agreement that postpones the accrual with a term of payment or the granting of credit that is not a condition.

The Supreme Court of Appeal in both *CIR v Delfos*³⁸ and *Hersov's Estate v CIR*³⁹ presented another school of thought regarding the meaning of “accrual” by remarking that “accrued to or in favour of” means that “the amount is due and payable” notwithstanding vested rights. This gave rise to the controversy which persisted for decades. The issue of whether an amount accrues when the taxpayer is “entitled to” it (in other words, when the amount is merely due) – Watermeyer's view – or when the amount is “due and payable” (in other words, at the time for payment stipulated in the agreement) – the Supreme Court of Appeal's view – remained unanswered for several years.

34 *Ochberg v CIR*, 1933 CPD 256, 6 SATC 1.

35 *Mooi v SIR*, 1972 (1) SA 674, 34 SATC 1.

36 *Supra*.

37 De Koker, A. and Williams, R.C. 2013. *Silke on South African Income Tax*, Durban: LexisNexis, at para 2.11.

38 *CIR v Delfos*, 1933 (AD) 242, 6 SATC 92 at 111.

39 *Hersov's Estate v CIR*, 1957 (1) SA 471 (A), 21 SATC 106.

The practice of the CIR after the *Lategan* decision

In terms of the principle of legal precedence, the CIR and all subordinate courts are bound by decisions of the SCA.⁴⁰ The CIR is not bound by the decisions of the Provincial Divisions of the High Court and, although a specific Provincial Division is bound by the decisions of the SCA as well as by its own decisions, Provincial Divisions are not bound by the decisions of other Provincial Divisions.⁴¹ Since the *Lategan* case was a CPD decision and not a SCA decision, it only created legal precedence for the CPD and other subordinate courts. The CIR was only bound to follow the decision for that specific case. It was not bound to follow the SCA opinions (about “due and payable”) as they were regarded as *obiter dicta*, and although of great persuasive power, they did not create precedent.

In practice, the CIR, however, applied the timing rule stated in the *Lategan* case (accrual means “entitled to”) as the generally prevailing practice regarding the meaning of “accrual” (and not the “due and payable” meaning). The CIR did not, however, permit⁴² any deduction in order to discount to its present value an amount that had accrued but would be received only in the future.⁴³ The valuation rule decided in the *Lategan* case was not applied in practice by the CIR, and it was only after the *People’s Stores* case that possible reasons for following that route were advanced.

Commissions of inquiry after the *Lategan* decision

Two commissions of inquiry addressed the controversy relating to the accrual principle. In 1970, the Commission of Inquiry into the Fiscal and Monetary Policy in South Africa,⁴⁴ also known as the Margo Commission, appeared to be in favour of the “entitled to” principle as envisaged in the *Lategan* case. The Margo Commission stated that the judgment in *Lategan* “represents the current law” and that no legislative resolution of the meaning of the word “accrued” was necessary.

40 Stiglingh, M., Koekemoer, A.D., van Schalkwyk, L., Wilcocks, J.S. & De Swart, R. 2014. *Silke: South African Income Tax*, Durban: LexisNexis, at 9.

41 *Supra*.

42 For an exception in this regard, see *ITC 437 (1939) 10 SATC 456* where the Commissioner has applied the valuation rule. Instead of allowing a spread over for the payment of the purchase price in instalments, he has discounted the value of the instalments to be received in the future to bring them to present-day value, and taxed everything as accruing in one year.

43 De Koker, A. and Williams, R.C. 2013. *Silke on South African Income Tax*, Durban: LexisNexis, at para 2.9.

44 The Commission of Inquiry into the Fiscal and Monetary Policy in South Africa. 1970. *Taxation in South Africa*, Second Report, RP 86/1970 at para 32.

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In 1987, the Commission of Inquiry into the Tax Structure of the Republic of South Africa⁴⁵ clearly preferred the “entitled to” meaning above the “due and payable” meaning. It recommended that:⁴⁶

... Income should be recognized when all events have occurred which fix the right to receive it and the amount thereof can be determined with reasonable accuracy; but due allowance should be made for the futurity of the right beyond twelve months.

Although this recommendation in effect supported the valuation rule established in the *Lategan* case in respect of rights to receive money beyond 12 months, no amendments to the Act or the general prevailing practice of the CIR regarding the valuation rule were made.

The final word: The *People’s Stores* case⁴⁷

The case that finally provoked the legislative resolution of the controversy⁴⁸ surrounding both the timing rule and the valuation rule regarding accruals of income was the SCA case of *People’s Stores*. The taxpayer, a subsidiary in the Edgars group of companies, was a retailer which provided finance under a six-month, revolving-credit scheme. It claimed that instalments not yet payable under the scheme as at the end of the year of assessment should either not be included in gross income because they had not yet accrued, or, if included, should be discounted to their present value before inclusion. From the facts of the *People’s Stores* case it is clear that the right to receive the future instalments was a vested right and that no conditions applied. The taxpayer was therefore unconditionally entitled to the instalments (as per the *Mooi* case).

A unanimous decision was given by the SCA in favour of both the timing rule (“accrued to or in favour of” means “to become entitled to”) and the valuation rule (the present value of accruals, and not the face value thereof, is the value of the right that has accrued) established in the *Lategan* case. This meant that the outstanding instalments were included in gross income since the taxpayer was (unconditionally) entitled to receive the amounts. However, the amount had to be discounted to its present value and the discounted value had to be included in gross income in the year of the accrual.

45 The Commission of Inquiry into the Tax Structure of the Republic of South Africa. 1987. *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa*, RP 34/1987 at paras 9.9 and 9.10.

46 *Supra* 1987: 170.

47 *CIR v People’s Stores (Walvis Bay) (Pty) Ltd*, 1990 (2) SA 353 (A), 52 SATC 9.

48 De Koker, A. and Williams, R.C. 2013. *Silke on South African Income Tax*, Durban: LexisNexis, at para 2.9.

Intervention by the Legislator

Shortly after the landmark ruling in *People's Stores*, the legislature intervened and amended the Act by introducing two provisos to the general definition of "gross income" and thereby eliminating the discounting principle as provided for in the judgment. These two provisos were promulgated in 1990 with retrospective effect to transactions entered into on or after 1 July 1962. De Koker and Williams⁴⁹ explain that the then Deputy Minister of Finance, Dr G. Marais, recommended the retrospective effect of the amendment in the light of the long-established practice by the CIR not to discount the value of accruals and this recommendation had been accepted by the legislature.

The *Lategan* interpretation of the words "accrued to or in favour of" was confirmed and legislated for by the first part of the first proviso, which provides "where during any year of assessment the taxpayer *has become entitled to* (author's emphasis) an amount which is payable on a date or dates falling after the last day of such year ...". De Koker and Williams⁵⁰ conclude that it is now settled law that there is an accrual when a seller is entitled to an amount because he or she has an unconditional right to claim payment of a debt (and the purchaser has an absolute and unqualified legal liability to pay the purchase price) and it is a valuable right which the seller can turn into money if he or she wishes to.⁵¹

The second part of the first proviso states that if the taxpayer has, on or before 23 May 1990, submitted a return of income drawn on the basis that the present value of such an amount has accrued to him or her during such year, the present value of such amount must be included in gross income. In terms of the second proviso, the difference between the amount received in any subsequent year and the present value included in the first year must, however, be included in gross income in the subsequent year. The effect is therefore that the taxpayer will be taxed on the full face value (as on the date of accrual) of the amount that has accrued, albeit over two different years of assessment. The second proviso further states that in all other cases (if a return is submitted after 23 May 1990), the amount (the face value and not the present value) must be included in gross income. The effect of the second part of the first proviso to the definition of "gross income", read together with the second proviso, is to overturn the judgment of the SCA by nullifying the valuation rule with retrospective effect from 1 July 1962.

49 De Koker, A. and Williams, R.C. 2013. *Silke on South African Income Tax*, Durban: LexisNexis, at par 2.6 footnote 16.

50 *Supra* at par 2.6 footnote 16 referring to the *Lategan* case as well as *ITC 1557 (1992) 55 SATC 218* and *ITC 1824 (2008) 70 SATC 27*.

51 The authors combined the entitled to principle of the *Lategan* case and the fact that the entitlement must be unconditional as established in the *Ochberg* case in their conclusion.

Jiyane⁵² submits that these amendments to the definition of “gross income” did not bring any clarity to the meaning of the term “accrued to”, but instead they distorted even further the little harmony that existed between the income tax system and commercial and economic reality. He stated that the amendments equate in value for tax purposes the cash payment and an amount receivable in the near future, and that this does not make any economic and business sense.⁵³

Van Schalkwyk,⁵⁴ the present author, has previously submitted that the cut-off date, namely the submission of a return on or before 23 May 1990 is, from the viewpoint of a taxpayer, arbitrary and unfair. She further opined that the back-dated commencement date of 1 July 1962 nullifies all tax planning done by taxpayers, and that the time value of money and the difference between cash transactions and transactions on credit are completely ignored for tax purposes. She also stated that overlooking the judgment of the SCA in the *People's Stores* case could lead to disrespect for the Act and could reduce the tax morality of taxpayers.

The Taxation Laws Amendment Act 31 of 2013 replaced the first proviso and deleted the second proviso in its entirety. These amendments came into operation on 12 December 2013. The only explanation for these amendments in the Clause by Clause Explanation of the Draft Taxation Laws Amendment Bill, 2013 is that “the amendment updates wording and deletes obsolete wordings”. The first proviso now only confirms that if a person has, during a year of assessment, become entitled to an amount which is payable on a date after the last day of that year of assessment, that amount shall be deemed to accrue to him or her during such year of assessment. As discussed above, the effect of the retrospective enactment of the (now deleted) second part of the first proviso read together with the second proviso was to nullify the valuation rule. Accruals of income have therefore been included in gross income at face value since 23 May 1990, and the deletion of the second proviso consequently has no practical impact. While it is true that the date of 23 May 1990 in paragraph (a) of the previous first proviso was obsolete, it is unfortunate that these deletions now completely remove the history of the valuation rule from the Act. It also raises the question whether the constitutionality of the retrospective nature of the nullification of the valuation rule can still be challenged now that it has been deleted from the Act.

52 Jiyane, G.N. “Received by” and “accrued to”. 2008. Durban: University of KwaZulu-Natal, at 10.

53 *Supra*.

54 Van Schalkwyk, L. 1990. *Die betekenis van die toevallingsbegrip in die Inkomstebelastingwet 58 van 1962*. Pretoria: Universiteit van Pretoria, at 106–107.

Legal interpretation and the Constitution

The judgments on the issue of accrual were all delivered prior to the current constitutional regime. As the Constitution is the supreme law of South Africa,⁵⁵ every Act of Parliament is subject to the provisions of the Constitution. Furthermore, any Act found to be inconsistent with the Bill of Rights contained in Chapter 2 of the Constitution is unlawful.⁵⁶ In the interpretation of statutes, the spirit, purport and objects of the Bill of Rights must be promoted.⁵⁷

Before the 1993 Constitution, the approach to the interpretation of statutes in South Africa was in a transitional phase from the literal approach⁵⁸ to the contextual or purposive approach.⁵⁹ Goldswain⁶⁰ states that, since the advent of the Constitution, the arguments against the continued application of the strict and literal rule have gained momentum, and many commentators, including the judiciary, have suggested that the purposive approach should be followed, which will promote the democratic values enshrined in the Constitution.

Goldswain further suggests that, with the judiciary virtually forced by the Constitution to follow the purposive approach, a realistic opportunity exists for a taxpayer to question and even have unjust interpretation decisions of the past reversed in the appropriate circumstances.⁶¹ In the light of the fact that the canons of taxation accord with the democratic values enshrined in the Constitution, it is submitted that they can assist with the purposive approach to the interpretation of statutes and are accordingly taken into account in the discussion below.

Section 33(1) of the Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. Brynard⁶² states that the expectations in terms of the Constitution include, *inter alia*, that public officials remain within their lawful authority and act reasonably and fairly. The intention is to create a system of justice that attempts to ensure that lawful and

55 Stiglingh et al. 2014. *Silke: South African Income Tax*, Durban: LexisNexis, at 8.

56 *Supra*.

57 Section 39(2) of the Constitution.

58 *Supra* at 9. In applying the literal approach or so-called “golden rule of interpretation”, the interpreter primarily concentrates on the literal meaning of the words of the provisions which must be interpreted to determine the intention of the legislator.

59 *Supra* at 10. In the contextual or purposive approach of the European law, the purpose of the legislation is determined by taking into account all surrounding circumstances and resources.

60 Goldswain, G.K. 2008. The Purposive Approach to the Interpretation of Fiscal Legislation: The Winds of Change, *Meditari Accounting Research*, Vol.16 No. 2, 107–121 at 114.

61 *Supra* at 119. Explaining that the new *novus actus interveniens* or new intervening factor, the Constitution demands fairness and equity in judicial matters, he states that to consider the economic realities when deciding a case is a prerequisite for fairness and equity and accords with the spirit and purport of the Constitution.

62 Brynard, D.J. The Constitution and Administrative Justice. [Online] Available at <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11619>. [Accessed: 24 May 2014].

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reasonable decisions are made by following fair procedures.⁶³ Brynard explains that, because a reasonable decision is one based on reason (which means that all the jurisdictional facts must be considered), this implies that the decision must be capable of objective substantiation. In an effort to justify their actions, public officials therefore have to take their decisions with care in order to adhere to the standards of rationality and logic.⁶⁴

Hoexter⁶⁵ explains that the right to procedural fairness entitles a person to “the principles and procedures . . . which in [the] particular situation or set of circumstances are right and just and fair”. He also expresses the view that for administrative action to be “reasonable”, it must be rational,⁶⁶ and Croome⁶⁷ states that this means that the decision must be justifiable in light of the information known to the administrator and the reasons supplied for that decision. Hoexter⁶⁸ further explains that for an administrative action to be reasonable, it must be proportional and in this regard explains that the purpose thereof is to avoid an imbalance between the adverse and beneficial effects of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish a desired end.

While keeping the aforementioned principles of reasonable decisions, the standards of rationality and logic and the possible use of less oppressive means to accomplish the desired end in mind, the impact of the Constitution and the canons of taxation on the timing and valuation rules are now scrutinised.

The impact of the Constitution and the canons of taxation on the timing and valuation rules

The timing rule

Watermeyer J, in the *Lategan* case, did not give any explanation for his opinion that the words “accrued to or in favour of” merely mean “to which a person has become entitled”. The dictionary meaning of the word “accrued” is:

63 Supra.

64 Supra.

65 Hoexter, C. 2002. *The New Constitutional and Administrative Law Volume Two Administrative Law*, Juta & Co, Ltd, par 5.1.

66 Hoexter, C. 2007. *Administrative Law in South Africa*, Juta & Co, Ltd, 307.

67 Croome, B. 2010. *Taxpayer's Rights in South Africa*, Kenwyn: Juta & Co, Ltd, 25.

68 Hoexter, C. 2007. *Administrative Law in South Africa*, Juta & Co, Ltd, 309–310.

- To come into existence as a claim that is legally enforceable.⁶⁹
- To become a present and enforceable right or demand.⁷⁰
- An amount earned in the current accounting period, but which will be received in a subsequent period.⁷¹

Comparing the meaning Watermeyer J attributed to the words and the corresponding dictionary meanings of the word “accrued”, it seems possible that a strict and literal interpretational approach was followed in order to hold that an enforceable claim or right would mean that a person is entitled to the amount which is the subject of the claim or right. The question must be considered whether a court today, in following a purposive approach and taking into account the economic reality of taxing an amount of income before it is received, the canons of equity and of convenience, as well as the principles around just administrative action, would rule differently.

The canon of equity aims at providing economic and social justice to the people.⁷² Goldswain⁷³ links the principle of equity to the purposive approach to interpretation⁷⁴ by stating that this approach was favoured by the Roman-Dutch writers because it included the principle of equity, a principle embodied in natural law. He further refers to a remark by Corbett CJ⁷⁵ (well known for his strict and formalistic approach to the interpretation of fiscal legislation) that, even though it has been said that “there is no equity about a tax”, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and the point of view of the *fiscus*.

According to the equity principle, every person should pay to the government in proportion to his or her ability to pay. It is submitted that it is not equitable to expect that a taxpayer must be able to pay the tax on amounts which accrued to him or her

69 The Free Dictionary by Farlex. [Online] Available at <http://www.thefreedictionary.com/accrued>. [Accessed: 14 May 2013].

70 Dictionary.com. [Online] Available at <http://dictionary.reference.com/browse/accrued>. [Accessed: 14 May 2013].

71 Business Dictionary. [Online] Available at <http://www.businessdictionary.com/definition/accrued-income.html>. [Accessed: 14 May 2013]. Note that business dictionaries generally provide a subject-specific definition. In the interpretation of statutes, the ordinary dictionary meaning must be applied – in other words, the meaning as used by the ordinary person on the street. However, in light of the relevance of this definition to the facts of the Lategan case, this definition has value and is therefore included.

72 Kalyan City Life. *What is Tax – Definition – Adam Smith's Canons of Taxation*. [Online] Available at <http://kalyan-city.blogspot.com/2010/12/what-is-tax-definition-adam-smith.html>. [Accessed: 14 May 2013].

73 Goldswain, G.K. 2008. The Purposive Approach to the Interpretation of Fiscal Legislation: the Winds of Change, *Meditari Accounting Research*, Vol.16 No. 2, 107-121 at 115.

74 *Supra* at 111, stating that, in brief, the purposive approach seeks to ascertain the intention of Parliament by reading the Act as a whole and placing in context the ends that sought to be achieved and the relationship between the individual provisions of the Act.

75 *Made in CIR v Nemojim (Pty) Ltd*, 1983 (4) SA 935 (AD), 45 SATC 241 T at 267, some ten years prior to the adoption of the Constitution.

but which have not yet been received by him or her. Accordingly, the taxpayer must fund the tax so payable from another source of income or by having to realise his or her capital.⁷⁶ It is therefore submitted that the timing rule is not equitable.

As a counter-argument, it might be reasoned that including both the receipts and accruals of a taxpayer in gross income is fair and equitable in the sense that a taxpayer is also allowed deductions (in terms of section 11(a) of the Act) for amounts actually incurred⁷⁷ and not only for amounts actually paid. The accrual principle, however, gives rise to a cash-flow disadvantage; while the incurral principle creates a cash-flow advantage, and it cannot be argued that the latter is inequitable in respect of the taxpayer. However, from the perspective of the *ficus*, the incurral principle equates to less revenue.

In terms of the canon of convenience, the mode and timing of a tax payment should be, as far as possible, convenient to taxpayers. It is difficult to perceive how having to pay tax on an amount before it is received, can ever be convenient to a taxpayer. It is therefore submitted that the canon of convenience is also compromised by the timing rule. That said, paying taxes is generally perceived (although possibly in jest) as an inconvenience.

Croome,⁷⁸ after discussing whether the power of the state to impose tax is a violation of the right to property in that tax amounts to an unlawful deprivation of property, concludes that, in principle, taxation could not amount to a deprivation. He, however, refers to the Irish High Court decision in *Daly v the Revenue Commissioners*⁷⁹ where Costello J held that if a particular provision fails the proportionality test because it produced results that were unfair to taxpayers in that they caused taxpayers hardship, a taxpayer will succeed to show that his or her rights have been subject to “an unjust attack”.⁸⁰ Croome argues, based on *Daly*, that if South Africa were to introduce a taxing measure that would cause undue hardship to taxpayers, it would not pass muster under section 25 of the Constitution and a court should strike such measure down.⁸¹

Regarding the timing rule, it is finally submitted that if courts today take the principle of just administrative action and all external aids into account when

76 Wessels JA, in a minority view in the *Ochberg* case, argued that the principle underlying the Act is that a taxpayer pays his or her tax not from capital but from his or her earnings. He concluded that if a taxpayer is obliged to realise his or her capital in order to pay income tax, it is contrary to the whole tenor of the Act.

77 Which, as held in *Caltex Oil (SA) Ltd v SIR*, 1971 (1) SA 665 (AD), 37 SATC 1, does not merely mean “paid” but means all expenditure for which a liability has been incurred during the year, whether the liability has been discharged or not.

78 Croome, B. 2010. *Taxpayer’s Rights in South Africa*, Kenwyn: Juta & Co, Ltd. at 19 and 20.

79 [1995] 3 IR 1.

80 *Daly* supra at 8.

81 *Daly* supra at 9.

following the purposive approach, the “due and payable” meaning (an amount is taxed at the time for payment stipulated in the agreement) would render an equitable alternative. This is because the “due and payable” meaning accords with the canons of equity and convenience since both the problem of funding the resulting tax liability and the disadvantage regarding paying tax on an amount before it is received are then eliminated. Further, no valuation of the accrual to be taxed needs to take place. It accords with the purposive approach to the interpretation of statutes by taking reasonableness, rationality and logic into account by using less oppressive means to accomplish the desirable end (*viz.* to tax accruals) and thus also adheres to the values enshrined in the Constitution. It is submitted that it might be time to test the timing rule constitutionally.

The valuation rule

As previously submitted, the court, in establishing the valuation rule which discounts the value of accruals, took the time value of money and the economic reality of doing business into account and thereby applied an approach to the interpretation of the words “accrued to” that equates to what is the purposive approach to the interpretation of statutes. It is therefore submitted that the valuation rule would pass constitutional muster.

The valuation rule as determined in both the *Lategan* and the *People’s Stores* cases⁸² was, however, never applied in practice by the CIR. After the SCA had confirmed the valuation rule in the *People’s Stores* case, the CIR was, however, bound to follow it in terms of legal precedence. As already mentioned, the legislature intervened and negated the valuation rule through the enactment of two provisos to the general definition of “gross income”.

The then Deputy Minister of Finance, Dr G. Marais, issued a press release⁸³ after the *People’s Stores* case in which he, *inter alia*, suggested that the generally prevailing practice of Inland Revenue of not discounting accrual amounts was founded upon the “practical problems in determining the value of amounts payable in the future”. He also referred to other problems with the discounting of accruals, to the “subjective factors” upon which discounting is dependent, the fact that discounting makes the “requirement of certainty” unattainable (it is unclear on what grounds this statement was made) and the possibility that the difference between a subsequent payment and

82 *W H Lategan v CIR*, 1926 CPD 203, 2 SATC 16; and *CIR v People’s Stores (Walvis Bay) (Pty) Ltd*, 1990 (2) SA 365 (A), 52 SATC 9.

83 GG 12503 dated 23 May 1990.

the original discounted accrual might not be taxable at all. It is suggested that an Interpretation Note explaining the factors to be taken into account when a debt is valued in order to arrive at an amount that can reasonably be obtained for the debt in the open market could have assisted in eliminating any such “practical problems in determining the value of amounts payable in the future”.

It is difficult to understand how the decision to overturn a SCA judgment based on perceived problems with the discounting of accruals by enacting a retrospective amendment taking effect 28 years earlier can be capable of objective substantiation, or how it can be shown that this decision adheres to the standards of rationality and logic. In agreement with Goldswain,⁸⁴ it is submitted that equity and fairness should never be allowed to make way for administrative expediency.

Section 3(1) of the Promotion of Administrative Justice Act⁸⁵ requires that administrative action which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair. A detailed study of the meaning of “procedurally fair” falls beyond the scope of this study, but it is submitted that the past practice of SARS not to permit the valuation of accruals was unreasonable and not procedurally fair. If the Constitution (and PAJA) had been in place before this practice was turned into legislation by enacting the two provisos to the general definition of “gross income”, such practice could, it is submitted, have been challenged successfully in terms of the right to just administrative justice contained in section 33(1) of the Constitution read together with section 3(1) of the PAJA.

The two provisos to the definition of “gross income” which legislatively nullified the valuation rule were promulgated with retrospective effect almost immediately after the SCA’s ruling in the *Peoples’ Stores* case. It is questionable whether the retroactive nature of this legislative intervention is in accord with the canon of certainty and the requirements of the Constitution.

According to Adam Smith,⁸⁶ the tax an individual has to pay should be certain, not arbitrary. Taxpayers should know in advance how much tax is to be paid to the government, at what time the tax is to be paid, and in what form. Certainty can, *inter alia*, be brought about by a clearly worded Income Tax Act. It is submitted that the retrospective effect of the provisos introduced into the Act infringed the canon of certainty and that retrospective amendments to fiscal legislation should be made only

84 Goldswain, G.K. 2008. The Purposive Approach to the Interpretation of Fiscal Legislation: The Winds of Change, *Meditari Accounting Research*, Vol.16 No. 2, 107–121 at 119.

85 Act 3 of 2000 (hereafter referred to as PAJA).

86 Kalyan City Life. *What is tax – Definition – Adam Smith’s Canons of Taxation*. [Online] Available at <http://kalyan-city.blogspot.com/2010/12/what-is-tax-definition-adam-smith.html>. [Accessed: 14 May 2013].

when justifiable. Bentley⁸⁷ indicates that the introduction of retrospective legislation is justifiable when it corrects wrongs done to taxpayers, confers benefits that do not prejudice taxpayers and rectifies errors in legislation. It is clear that the retrospective nullification of the valuation rule does not fall into one of these categories and the constitutionality thereof might therefore be questionable.

Croome⁸⁸ contends that the introduction of fiscal legislation with retrospective effect constitutes a deprivation of property as envisaged in section 25 of the Constitution. He states further that, ideally, a change in taxing measures should relate to future events, because if it relates to past events it constitutes the confiscation of property held by the taxpayer before the measure's enactment.⁸⁹

However, Croome also points out that the Constitution contains no specific prohibition against the introduction of tax amendments with retrospective effect, and that the introduction thereof must therefore be weighed against the existing provisions of the Constitution.⁹⁰ He continues by stating that the Revenue Laws Amendment Act is a law of general application and that it would be difficult to set aside the enacted amendments in the light of the limitation of rights provision contained in section 36 of the Constitution.⁹¹ Section 36 specifically refers to "less restrictive means to achieve the purpose" and Croome states that it is clearly preferable and more equitable for an amendment to take effect prospectively so that it applies to years of assessment commencing on or after a specific date.⁹²

The court, in *Robertson & another v City of Cape Town & another; Truman-Baker v City of Cape Town*,⁹³ adopted the following approach in regard to the constitutionality of retrospective legislation:

- Although far more pronounced in the area of criminal law, retroactive legislation poses difficulties for the rule of law, but the Constitution of the Republic of South Africa, 1996, does not contain any express provisions prohibiting retrospective legislation.

87 Bentley, D. 1998. *Taxpayer's Rights: An International Perspective*, Revenue Law Journal, Queensland: Bond University, at 38.

88 Croome, B. 2010. *Taxpayer's Rights in South Africa*, Kenwyn: Juta & Co, Ltd. at 66.

89 Supra. In footnote 250 he gives the example of when the legislature decided to introduce CGT the legislation was drafted to ensure that CGT did not arise on capital gains attributed to the period prior to 1 October 2001, that is, the date on which CGT came into force.

90 Croome, B. 2010. *Taxpayer's Rights in South Africa*, Kenwyn: Juta & Co, Ltd. at 66–67.

91 Supra at 68.

92 Supra.

93 2004 (5) SA 412 (C).

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- Retroactive legislation may be unconstitutional to the extent that it contravenes the rule of law when it unreasonably or unfairly impairs the ability of those bound by the law to regulate their conduct in accordance therewith.
- The enactment of retroactive legislation in other constitutional democracies (such as the United States, Canada and India) has been held not to be unconstitutional.

It therefore seems that the last word has not yet been spoken regarding the constitutionality of retrospective legislation. It is, however, submitted that the deletion of the two provisos which retrospectively negated the valuation rule complicated any possible constitutional challenge in this regard and possibly rendered the constitutionality of the retrospective nature of those amendments historically irrelevant.

Conclusion

The words “accrued to or in favour of” in the definition of “gross income” have not been amended since they were first introduced in that definition in 1917. Uncertainty about the meaning has, however, generated voluminous litigation over the 64 years since the first case on the matter in 1926. The SCA,⁹⁴ in 1990, confirmed both the timing rule and the valuation rule established in the *Lategan* case.

The timing rule established in the *Lategan* case was taken into legislation and it is now settled law that there is an accrual when a seller is entitled to an amount because he or she has an unconditional right to claim payment of a debt (and the purchaser has an absolute and unqualified legal liability to pay the purchase price) and if it is a valuable right which can be turned into money. It is submitted that the timing rule is not equitable or convenient and causes undue hardship to taxpayers because amounts are taxed before they have been received.

It is also submitted that the “due and payable” meaning (an amount is taxed at the time for payment stipulated in the agreement) of “accrual” as originally postulated by the SCA⁹⁵ complies with the canons of equity and convenience as both the problem of funding the resulting tax liability and the disadvantage regarding paying tax on an amount before it is received are then eliminated. Furthermore, no valuation of the accrual is necessary. It is finally submitted that if courts today take the principle of just administrative action and all external aids into account when following the purposive approach to the interpretation of statutes, the “due and payable” meaning

94 In *CIR v People's Stores (Walvis Bay) (Pty) Ltd*, 1990 (2) SA 365 (A), 52 SATC 9.

95 Established in *CIR v Delfos*, 1933 (AD) 242, 6 SATC 92; and *Hersov's Estate v CIR*, 1957 (1) SA 471 (A), 21 SATC 106.

would render an equitable alternative and that it might be time to test the timing rule constitutionally.

The valuation rule stated in both the *Lategan* and *People's Stores* cases⁹⁶ that only the present value of accruals of income at year end (and not the face value) must be included in gross income. It is submitted that the valuation rule would pass constitutional muster. The legislature, however, has negated the valuation rule, thereby ensuring that the actual face value of accruals of income must be included in gross income. The retroactive nature of this legislative intervention infringed on the canon of certainty. The constitutionality of retrospective amendments is an unresolved issue, but it is submitted that the deletion of the two provisos which retrospectively negated the valuation rule complicated any possible constitutional challenge in this regard and possibly rendered the constitutionality of the retrospective nature of those amendments historically irrelevant.

It is submitted that an application of the purposive approach to interpretation would have had a major impact on the decision in a seminal case like the *Lategan* case, and would probably have resulted in a decision more in line with the “due and payable” meaning. It remains to be seen whether the accrual principle enacted through the timing rule will ever be challenged on constitutional grounds.

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