

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

Appellate (Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Est. late A. S. HERSON Appellant,

versus

Commr for Duties Revenue Respondent.

Appellant's Attorney *[Signature]* Respondent's Attorney *[Signature]*
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate *N.S. Rosenberg & C. Morris* Respondent's Advocate *C. Kallhaus & C. B.L.S. Henkel*
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on *Monday, 26th Nov, 1956.*
Op die rol geplaas vir verhoor op

[Handwritten notes and signatures]

Appeal allowed with costs; Commissioner's assessment set aside and he is directed to make a fresh assessment on the basis that the sum of £60,183 did not accrue to Herson during his lifetime.

[Signature]
13/12/56

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

ESTATE HERSOV

Appellant

&

THE COMMISSIONER FOR INLAND REVENUE

Respondent

CORAM : Centlivres C.J., Schreiner, Steyn, Beyers JJ.A.
et Hall A.J.A.

Heard :- 26th November 1956. Delivered : 13. XII. 56

J U D G M E N T

CENTLIVRES C.J. :- The Anglo-Transvaal Consolidated Investment Company Limited was registered as a limited liability company on June 1st, 1933. Its Memorandum of Association provided, inter alia, as follows :-

" Clause 6. (a) Norbert Stephen Erleigh, Abraham Sundel Hersov and Simeon Gordon Menell shall be permanent Director^s of the Company, and each of them shall, hold the Office of Director^s during his life, or until he resigns office.....

(b) Norbert Stephen Erleigh and Abraham Sundel

" Hersov shall further for a minimum period of ten (10) years from the date of registration of the Company be joint Managing Directors of the Company. The remuneration of the said Norbert Stephen Erleigh and Abraham Sundel Hersov as such joint Managing Directors shall be decided by the Board of Directors of the Company but shall not be less than £3000.

(Three thousand pounds) per annum to be divided equally between them. This remuneration.... shall be in addition to any other remuneration and/or payment that the said Norbert Stephen Erleigh, and/or the said Abraham Sundel Hersov may be entitled to receive from the Company.

Clause 7.(a)

The said Norbert Stephen Erleigh, Abraham Sundel Hersov and Simeon Gordon Menell so long as they respectively remain Permanent Directors of the Company, they shall be paid by way of remuneration for their services whenever a distribution of assets is made among the members of the Company by way of

dividend, whether in cash or ~~otherwise~~ otherwise, an amount that may be equivalent to $7\frac{1}{2}\%$ of the cash or other assets so distributed among the members.....

which amount of $7\frac{1}{2}\%$ shall be equally distributed between the said Norbert Stephen Erleigh, Abraham Sundel Hersov and Simeon Gordon Menell.

- (b) In the event of the Company being wound up whilst the said Norbert Stephen Erleigh, Abraham Sundel Hersov and Simeon Gordon Menell or any of them remain a permanent Director they shall be entitled in the distribution of the surplus assets of the Company remaining after the return of the whole of the paid up capital of the Company, to $7\frac{1}{2}\%$ thereof (payable in cash and/or other assets in proportion as the distribution by the Company to the members is payable in cash and/or other assets) which shall likewise be equally distributed between them.

- (c) In the event of any of them, the said Norbert

Stephen Erleigh, Abraham Sundel Hersov
or Simeon Gordon Menell dying whilst he
holds the office of permanent Director, a
balance sheet shall be made out as on the
date of such death,.....

.....

and if it shall appear from such Balance
Sheet that the value of the Company's
assets exceeds the amount of the Company's
debts (including its paid up capital) a
sum equal to 22½% of such surplus assets,
shall be paid to the legal personal re-
presentatives of the said deceased per-
manent Director within two months after
the making ~~of~~ out of such Balance Sheet.

(d) The number of Directors of the Company
shall not, without the consent in writing
of the majority of the permanent Directors
be increased beyond five. One of the per-
manent Directors shall always be Chairman
of the Company and Chairman of the Board
of Directors of the Company. "

Clause 7(e) provided that no resolution of directors or shareholders in respect of certain specified matters "shall be valid unless passed with the approval in writing of the majority of the permanent directors."

Prior to December 13th, 1938, Erleigh resigned his office as a permanent director and joint managing director of the Company.

On February 20th, 1939, a contract entered into on December 13th, 1938, by the Company with Hersov and Menell was confirmed by the Company. The contract contained, inter alia, the following provisions :-

"

1.

Abraham Sundel Hersov and Simeon Gordon Menell do hereby resign from office as Permanent Directors of the Company, and do hereby renounce all rights, benefits and privileges to which they are entitled under and by virtue of clauses 6(a) and 7(a), (b), (c), (d) and (e) of the Company's Memorandum of Association.

2.

As consideration for this agreement the Company does hereby undertake and agree :-

(a) To pay Abraham Sundel Hersov and Simeon Gordon Menell

" during their lifetime, or to the survivor in the event of the death of either of them, and whenever a distribution of cash or other assets is made among the holders of ordinary shares of the Company by way of dividend, bonus or otherwise howsoever, an amount that will be equivalent to $7\frac{1}{2}\%$ (Seven and one-half per centum) of the cash or other assets so distributed among the holders of ordinary shares of the Company, which shall be payable in cash and/or other assets in proportion as the distribution by the Company to the holders of such ordinary shares is payable in cash and/or other assets.

- (b) In the event of the Company being wound up during the lifetime of either or both of the Permanent Directors to pay to each of them if they both be living at the time, or to that one of them who shall be living at the time, $3\frac{3}{4}\%$ (three and threequarters per centum) of the surplus assets of the Company ~~after first~~ ^{remaining for} distribution among the members of the Company after first having made provision for the return to members of the whole of the paid-up share capital of the Company, plus premium, the ~~premium~~ if any, payable on liquidation of the Company, in respect of any of its share capital which shall be payable in cash and /or other assets in

" proportion as the distribution by the Company to its members shall be payable in cash and/or other assets ;

- (c) In the event of the death of either or both of the Permanent Directors before the winding up of the Company, a balance sheet shall be made out as on the date of such demise,.....
- and if it shall appear from such balance sheet that the value of the Company's assets exceeds the amount of its liabilities (including its paid-up share capital, plus the premiums, if any, as aforesaid) a sum equal to $2\frac{1}{2}\%$ (two and one half per centum) of the value of such surplus assets shall be paid to the Estate or legal representative of the deceased Permanent Director or Permanent Directors within 2 (two) months after the making of such balance sheet.....

3.

The Company does hereby appoint Simeon Gordon Menell and Abraham Sundel Hersov Directors of the Company, and they shall not be subject to retirement by rotation, but they shall in every other respect be on the same footing as any other director of the Company, except that they shall be called Permanent Directors. "

Clause 5 provided for payment to the two permanent directors "of a fixed remuneration^s at the rate of £5,000 per annum" which could be increased after November 1st, 1941. Clause 5 continued as follows :-

" Any remuneration payable in terms of this clause shall be in addition to any other payments which may be or become due or payable to the Permanent Directors, or either of them, under or in terms of any of the other provisions contained in this agreement. "

In 1945 a further agreement was entered into between the Company on the one side and Hersov and Menell on the other side. The object of the 1945 agreement appears from the following clause in the preamble thereto :-

" It is considered in the interest of the Company and its shareholders that the Preference shares and Class "A" ordinary shares should be quoted on the Johannesburg Stock Exchange, but the Company has been notified that a quotation will not be granted for such shares by the Johannesburg Stock Exchange unless its Articles of Association are amended in certain respects, including the deletion of those Regulations conferring any right to permanent Directorship on Hersov and Menell. "

The 1945 agreement referred to the previous agreement as the "Principal Agreement" and the following are its relevant clauses :-

1.

- (a) Hersov and Menell do hereby waive and abandon all rights which they have under paragraph 3 of the Principal Agreement and the Articles of Association of the Company to be Permanent Directors of the Company, and agree that from the date on which this Agreement becomes binding they will hold office as Directors of the Company and be subject to retirement by rotation on the same footing as the other Directors of the Company.
- (b) Hersov and Menell do hereby undertake that they will vote as shareholders of the Company in favour of Special Resolutions.....
- (c) As consideration for the waiver and undertaking

" contained in subsections (a) and (b) of this paragraph the Company agreed to pay to Hersov and Menell the sum of £6,250 (Six Thousand two Hundred and Fifty Pounds) on the date on which this Agreement will become binding as hereinafter provided. "

Clause 2 cancelled clause 5 of the previous agreement.

" 3. NOTWITHSTANDING anything herein contained, paragraph 2 of the Principal Agreement and the various sub-sections thereof, shall be and remain of full force, virtue and effect, and Hersov and Menell (and their legal representatives, in the event of their death) will continue to be entitled to receive and the Company will continue to be obliged to make all payments and distributions as therein provided. "

Clause 5 obliged the Company to enter into a contract with Hersov and Menell appointing them as managing directors of the Company for a period not exceeding five years at a remuneration of not less than £5,000 per annum each, the contract being renewable from time to time.

From the date of the formation of the Company until Hersov's death both Hersov and Menell were directors of the Company.

From 1938 Hersov was Chairman of the board of directors and held that position at the time of his death on January 15th, 1949.

... in accordance with the provisions of the Charter of the Company...
... of the Board of Directors...
... on the part of the Company...
... as provided in the Charter.

Clause 2 cancelled clause 2 of the Charter of the Company...
... of the Charter...
... shall be and remain in full force, effect and...
... and their legal representatives...
... in the event of their death...
... shall be entitled to receive and the Company will continue to be ob-
... to make all payments and distributions as therein

provided.

Clause 2 obliged the Company to enter into a contract with...
... and himself appointing them as members of the...
... for a period not exceeding five years at a remuneration...
... of not less than \$2,000 per annum each, the contract being re-
... from time to time.

... the date of the formation of the Company until Herov's...
... death both Herov and himself were directors of the Company.
... From 1938 Herov was Chairman of the Board of Directors and held...
... the position of the time of his death on January 15th, 1942.

Upon Hersov's death the Company, in terms of Clause 2(c) of the 1939⁸ agreement, paid £90,275 to his estate. The estate benefited to the extent of £60,183, Hersov having during his lifetime alienated one third of this right conferred ~~on~~ by Clause 2(c).

The Commissioner in his determination of Hersov's taxable income and income subject to super tax for the period from July 1st, 1948, to the date of Hersov's death added to Hersov's income for that period the sum of £60,183 and on this basis issued assessments for normal tax and super tax upon the person representing the estate as representative tax payer. An objection was lodged against these assessments on the grounds, inter alia, that :-

- (1) the sum of £60,183 was a payment of a capital nature.
- (2) Hersov did not receive nor was he entitled to receive that sum and no right to receive it accrued to him.
- (3) alternatively, if that sum constituted income, the right giving rise thereto accrued to Hersov not at the date of his death but on February 20th, 1939, when the Company ratified the 1938 agreement and that the matter should be remitted to the Commissioner to raise an assessment for the year of assessment ended on June 30th, 1939 on the basis of the then value of that right. ✓

The objections having been disallowed, Hersov's estate unsuccessfully appealed to the Special Court for hearing income tax appeals. Hence the present appeal, the ~~parties~~ ^{parties} having

From the date of the death of the decedent, the estate of the decedent (S) of the 1938 agreement, to the extent of \$20,000, is hereby assigned to the estate of the decedent.

(c) The estate of the decedent is hereby assigned to the estate of the decedent.

The Commission in its report on the estate of the decedent, dated July 1, 1938, has recommended that the estate of the decedent be assigned to the estate of the decedent.

The estate of the decedent is hereby assigned to the estate of the decedent.

On the date of the death of the decedent, the estate of the decedent is hereby assigned to the estate of the decedent.

For the period of the estate of the decedent, the estate of the decedent is hereby assigned to the estate of the decedent.

Assessments for the year of the death of the decedent, the estate of the decedent is hereby assigned to the estate of the decedent.

By the estate of the decedent, the estate of the decedent is hereby assigned to the estate of the decedent.

It is the policy of the estate of the decedent to assign the estate of the decedent to the estate of the decedent.

That is:

(1) The estate of the decedent is hereby assigned to the estate of the decedent.

(2) The estate of the decedent is hereby assigned to the estate of the decedent.

(3) The estate of the decedent is hereby assigned to the estate of the decedent.

giving rise to the estate of the decedent, the estate of the decedent is hereby assigned to the estate of the decedent.

of his death on February 20, 1938, the estate of the decedent is hereby assigned to the estate of the decedent.

very ratified the 1938 agreement and that the estate of the decedent is hereby assigned to the estate of the decedent.

should be referred to the Commission to value an assessment for the year of the death of the decedent on June 1, 1938.

1938 on the basis of the then value of that right. The estate of the decedent is hereby assigned to the estate of the decedent.

The objections having been disposed of, the estate of the decedent is hereby assigned to the estate of the decedent.

necessarily applied to the Special Court for hearing these tax appeals. Hence the present appeal, the estate of the decedent is hereby assigned to the estate of the decedent.

agreed in terms of Sec. 81(1)(b) of Act 31 of 1941 to appeal direct to the Appellate Division.

It is, in my opinion, obvious that the amount payable under clause 7(c) of the memorandum to Hersov's estate in the event of his dying while holding the office of permanent director constitutes a receipt of a non-capital nature and is therefore "gross income" within the meaning of that term as defined by Sec. 7 of the Act. The fact that the amount is payable only when the person concerned dies "whilst he holds the office of "permanent director" is a strong indication that that amount is payable by way of remuneration for services rendered. I do not think that it is open to dispute that "remuneration for services "may take, in part, the form of a payment at the end of the "employment, and a payment does not necessarily cease to be "remuneration for services because it is payable when the "services come to an end." (Per Lord Macmillan in Hunter v Dewhurst 16 Tax Cases 605 at p. 653.)

The 1938 agreement must now be considered. It was contended on behalf of the appellant that the consideration mentioned in clause 2 of the agreement was for a ^{renunciation} remuneration of the privileged position held by Hersov and Menell under the memorandum and that the payments due under that clause were therefore

not by way of remuneration for services rendered to the Company.

I do not agree with this contention. The resemblance between clause 2(a), (b) and (c) of the agreement and clause 7(a), (b) and (c) of the memorandum is striking and in ~~substance~~ ^{substance} the two clauses have the same effect. The obligation imposed on the Company remained the same, Erleigh's share under clause 7(a) and (b) of the memorandum having accrued to Hersov and Menell. I do not think that there can be any doubt that clause 2(a), (b) and (c) of the 1938 agreement was intended to take the place of clause 7(a), (b) and (c) of the memorandum - a clause which, as I have already stated, makes provision for the remuneration of the permanent directors. The amounts receivable under clause 2(a), (b) and (c) of the agreement unquestionably take the place of the remuneration previously provided for and in my opinion those amounts ~~must~~ ^{must} be regarded as having the same character as the amounts which were receivable under clause 7(a), (b) and (c) of the memorandum.

I have not overlooked the fact that there are some differences in wording between the two provisions. In clause 7(a) of the memorandum the words "so long as they respectively remain permanent directors of the Company" and "by way of remuneration" appear ; those words do not appear in clause 2(a) of the 1938 agreement but, in my opinion, the mere omission of those words is not sufficient to warrant the conclusion that

the moneys payable under clause 2(a) are not for services rendered. Regard must be had to the fact that clause 2(a) of the 1938 agreement replaced clause 7(a) of the memorandum and in regard is had to that fact then it is clear that the moneys payable under clause 2(a) of the agreement were payable for services rendered. This was the conclusion reached by the Special Court for hearing income tax appeals in 1948 and by Clayden J. in the Transvaal Provincial Division in 1951 on appeal from the Special Court. I agree with that conclusion.

Clause 2(c) of the 1938 agreement also seems to me to provide for remuneration for services. It replaces clause 7(c) of the memorandum which, in the view I have expressed above, provides for remuneration for services rendered. Here again there is some difference between the wording of the two clauses : the words "whilst he holds the office of permanent director" in clause 7(c) of the memorandum do not appear in clause 2(c) but for the reasons which I have already given in relation to clause 2(a) I do not think that the absence of those words affects the matter in issue.

Counsel for the appellant contended that as remuneration was separately provided for in clause 5 of the 1938 agreement, clause 2(c) should not be construed as referring to remuneration. I do not think that there is any substance in this contention, for

the last sentence of clause 5 which I have quoted above is against that contention. That sentence read in its context indicates that there are other provisions in the agreement which provide for remuneration for services rendered. The only other provisions which do so provide are to be found in clause 2(a), (b) and (c).

The 1945 agreement in terms of clause 3 thereof left clause 2(a), (b) and (c) of the 1938 agreement intact. The facts that (1) under clause 1 of the 1945 agreement Hersov and Menell ceased to be permanent directors and (2) clause 3 may be construed as giving Hersov and Menell's deceased estates title to claim under clause 2(c) of the 1938 agreement whether or not they are directors at the time of their death do not, in my opinion, affect the proper construction to be placed on clause 2(c) of the 1938 agreement. For even on the possible construction of clause 3 of the 1945 agreement which I have suggested amounts payable under clause 2(c) of the 1938 agreement would still be for past services rendered to the Company by Hersov and Menell. When the 1945 agreement was entered into they had already served the Company for 12 years : they had earned remuneration up to 1938 under clause 7(c) of the memorandum and from 1938 up to 1945 under clause ²~~7~~(c) of the 1938 agreement. Under

neither of the agreements had they renounced the remuneration which they had already earned. After 1945 Hersov continued to serve the Company and no dispute arose between the Company and Hersov's estate as to the Company's liability to pay the estate ~~xx~~ the amount payable in terms of clause 2(c) of the 1938 agreement. In all these circumstances that amount cannot, in my opinion, be regarded as a receipt of a capital nature.

I shall now proceed to consider the second objection which the appellant lodged against the assessment viz: that Hersov did not receive nor was he entitled to receive the amount of £60,183 or any portion thereof and no right to receive that amount accrued to him.

In Commissioner for Inland Revenue v Estate Hersov (1952

(4) S.A. 559) this Court held that Hersov during his lifetime had a proprietary right in the contract between the Company and itself and that such right passed on his death to his estate. The right which Hersov possessed during his lifetime was not, however, a right to receive the amount payable under clause 2(c) ^{of} and the 1938 agreement : Hersov could during his lifetime have disposed of his right (in fact he did dispose of one-third) and he could have entered into a contract with the Company whereby it could have made him a cash payment in consideration for

cancelling, as far as he and his estate were concerned, the provisions of clause 2(c). Immediately before his death Hersov had a two-thirds interest in his proprietary right to receive the amount payable under clause 2(c) less one third thereof. That proprietary right did not constitute any part of Hersov's "gross income". It was a right of a capital nature. See Sachs v Commissioner for Inland Revenue (1946 A.D. 31 at p. 43)

Under Sec. 69(e) of the Act "representative taxpayer" means "in respect of the income of any person who dies during any year of assessment..... the executor or administrator of the estate of such person. "

Section 70(1) of the Act is as follows :- "every representative taxpayer, as regards the income to which he is entitled in his representative capacity, or of which in such capacity he has the management, receipt, disposal, remittance, payment or control, shall be subject in all respects to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially and shall be liable to assessment in his own name in respect of that income, but any such assessment shall be deemed to be made upon him in his representative capacity only. "

As far as I am aware this is the first occasion on which this Court has been called on to decide whether income earned should or should not be included in the income earned by a deceased taxpayer prior to his death. On principle it seems to me to be necessary to enquire whether any particular income accrued to a deceased taxpayer during his lifetime. It is clear that the Commissioner is not entitled to include in his assessment of the income of a deceased person income which did not accrue to him. Supposing, for instance, a taxpayer holds shares in a company and the company declares a dividend on those shares after his death, the dividend having been declared during the year of assessment in which the taxpayer died. Such a dividend would be income of the taxpayer's deceased estate but not of the taxpayer himself during his lifetime, for a dividend cannot accrue to a shareholder before it is declared.

Hersov was assessed by the Commissioner on the basis that a right to receive £60,183 had accrued to him prior to or at his death. In my opinion this was not the correct basis. In my view there was no accrual of any right to Hersov to receive that amount; the accrual was in favour of his estate and that accrual did not take place before the death of Hersov. It may be that the accrual

only took place when the amount became due and payable i.e. after two months after the making of the balance sheet required by clause 2(c) of the 1938 agreement. See the concluding words of that clause. I am aware of the fact that this suggested date of accrual conflicts with the decision in Lategan v Commissioner for Inland Revenue (1926 C.P.D. 203).

In that case Watermeyer J. with whom Benjamin and Louwrens JJ. concurred, held that, where a taxpayer in the course of his trade sold goods and agreed that part of the purchase price was payable in one tax year and the remaining part in the next tax year, he could be assessed on the basis that the whole of the purchase price had accrued to him in the first tax year but that a deduction should be made from the face value of the instalment of the purchase price which was payable in the next tax year, the value being the present worth of that instalment at the end of the first tax year. On p. 209 Watermeyer J. said : " In my opinion, the words "in the Act (Sec. 6 of Act 41 of 1917) 'has accrued to or 'in favour of any person' merely mean 'to which he has become entitled.' " In effect the learned Judge held that those words did not mean "has become due and payable. "

Prima Facie there seems to me to be a sound reason why the Legislature in the definition of "gross income" in Sec. 6

of Act 41 of 1917 used the words "received by or accrued" : it seems to have intended that the "gross income" should consist not only of amounts actually received by a taxpayer but also of amounts due and payable in the year of assessment but not actually paid in that year. If only the word "received" had been used there would have been no need for a taxpayer to include in his "gross income" amounts not received but due and payable nor would there have been any necessity to make provision for the deduction of bad debts. Hence the provision in Sec. 21(2)(e) of the 1917 Act for the deduction of such debts "as are proved to the satisfaction of the Commissioner "to be bad or doubtful, deductions for doubtful debts being "made according to a value estimated by the Commissioner."

A reasoned criticism of the decision in Lategan's case will be found in Ingram's Income Tax Act at pp. 32 and 33.

Commissioner for Inland Revenue v Delfos (1933 A.D. 242) was a case under Act 40 of 1925 which in so far as the present enquiry is concerned was almost identical with Act 31 of 1941 as it was worded at the time of Hersov's death.

Nessels C.J. at p. 251 apparently accepted Lategan's case (supra). De Villiers J.A. at p. 260 held that "an amount "accrues under Sec. 7 at the moment when it becomes due and

"payable, irrespectively of the financial position of the debtor."

Stratford J.A. at p. 262 agreed with the view taken by de Villiers J.A. Curlewis J.A. at p. 255 said that he agreed in the main on the grounds set out in the judgment of Wessels C.J. ~~Wessels~~ Beyers J.A. at pp. 267/8 seems to indicate that he agreed with de Villiers J.A. Bearing in mind the differences of opinion and in view of the fact that there does not seem to be a majority view in favour of the decision in Lategan's case I do not think that it can be said that Lategan's case was accepted by this Court in Delfos's case as correctly laying down the law. In Commissioner for Inland Revenue v Butcher Brothers (Pty.) Ltd. (1945 A.D. ~~supra~~ 301 at p. 318) Lategan's case was quoted only for the proposition that the word "amount" as used in par. (d) of Sec. 7(1) of the 1925 Act means an amount having an ascertainable money value. In Pyott Limited v Commissioner for Inland Revenue (1945 A.D. 128 at p. 135) and in Sachs' case (supra at p. 43) Lategan's case was quoted only for the purpose of being distinguished. If on the proper interpretation of the word "accrued" in the definition of "gross income" in Sec. 7 of Act 31 of 1941 that word means "became due and payable" then it is clear that there was no accrual of the amount paid under clause 2(c) of the 1938 agreement until some time after Hersov's death.

It is, however, not necessary to arrive at a definite conclusion that this is so, because in my opinion it is clear that there was no accrual in favour of Hersov during his lifetime. I may also point out that in Lategan's case the accrual that was there held to have taken place was not subject to any condition. In the present case the accrual was subject to the condition that Hersov's death took place before the winding up of the Company. Until Hersov's death it was not certain whether anything would accrue to anybody under ~~section~~ ^{clause} 2(c), for if before his death the Company had been wound up that clause would/have ~~have~~ ^{not} come into operation.

It was contended on behalf of the Commissioner that there was an accrual in favour of Hersov in articulo mortis and in support of this contention reference was made to Henry v Foster (16 T.C. 625 at p. 632) and Allen v Trehearne (1938 (2) K.B. at pp. 474 and 479) Neither of those cases supports the contention. In Henry v Foster the income in issue was received by the taxpayer during his lifetime. In Allen v Trehearne the taxpayer had died and under an agreement of service between the taxpayer and the company which employed him it had been agreed that a terminal sum of £10,000 should be payable to the personal representative of the taxpayer upon

the final determination of his service. It was held that under Sec. 45(6) of the Finance Act 1927 the taxpayer's estate was liable to pay income tax on the £10,000. That case turned on the proper construction of the ~~the~~ relevant legislation and is no authority for the proposition that there was an accrual in favour of the taxpayer in articulo mortis.

It may be that a deceased estate is a taxpayer under Sec. 70(1) of Act 31 of 1941 read with Sec. 69(e) of that Act. No argument was addressed to us as to the precise meaning of Sec. 70(1) but the case of Commissioner of Taxation (N.W.S.) v Lawford (Executrix of the estate of Late C.M. Lawford) (4 A.T.D. 253) was referred to. In that case the relevant statute provided that a trustee "shall be answerable as taxpayer for "the doing of all such things as are required to be done by "virtue of this Act in respect of the income derived by him "in his representative capacity..... and the payment of "income tax thereon. " Dixon J. at p. 256 said that "those "words" (income derived by him in his representative capacity) "do not, in my opinion, cover the receipt or recovery of a "debt by an executor to which in his lifetime a deceased "person has become entitled as a result of his personal exertion. In such a case the money if received by the deceased "would or might have formed part of his assessable income."

"But it is not part of the assessable income of the executor
 "He has not derived it as income. It is a mere debt form-
 "ing part of the assets which devolve upon him. "

The wording of our Act is different from that of the
 statutory provision which was construed in Lawford's case
 and may lead to a different result.

As I hold that there was no accrual to Hersov during
 his lifetime in respect of the sum of £60,183 and that the
 Commissioner is not entitled to regard that sum as having
 accrued to Hersov during his lifetime there is no need to
 deal with the alternative contention that there was an
 accrual to Hersov in 1939 when the Company ratified the
 1938 agreement.

In my opinion the appeal should be allowed with
 costs : the Commissioner's assessment should be set aside,
 and he should be directed to make a fresh assessment on
 the basis that the sum of £60,183 did not accrue to Hersov
 during his lifetime.

Am. Skelton

Schreiner J.A.
 Steyn J.A.
 Beyers J.A.
 Hall A.J.A.

} concur.