G.P.-S.43575—1969-70—2,000 J 219

134/71

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

E. MOOI *Appellant,*

versus

SECRETARY FOR INLAND REVENUE *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Fred S. Webber

Respondent's Attorney / *Prokureur vir Respondent* D.o.T. S.A. (Bmfn)

Appellant's Advocate / *Advokaat vir Appellant*

Respondent's Advocate / *Advokaat vir Respondent*

Set down for hearing on / *Op die rol geplaas vir verhoor op* 18 - 11 - 1971

1 2 3 4

S.I.C.T.

Appeal dismissed with costs, such costs to include fees of two counsel.

REGISTRAR, APPEAL COURT
GRIFFIER, APPÈLHOF.
BLOEMFONTEIN.

Bills Taxed—Kosterekenings Getakseer - 2 -12- 1971

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

E. MOOI ..... Appellant

and

SECRETARY FOR INLAND REVENUE ..... Respondent

CORAM: OGILVIE THOMPSON, C.J., RUMPFF, POTGIETER, RABIE et MULLER, JJ.A.

HEARD: 18.11.1971. DELIVERED: 2.12.1971.

J U D G M E N T

RUMPFF, J.A. :

In this matter I agree with the order made by the learned Chief Justice and with his finding that the agreement in the present case is distinguishable from that in Abbott's case. I might, however, have agreed with the order made, even if the present agreement had not been held to be distinguishable.

Appellant's counsel, after referring to the fact that appellant on 27 July 1963 acquired his contractual right to subscribe for shares, subject to the conditions attached thereto, made the following submission:

It/.....

> "It is submitted, therefore, that there was an accrual of the contractual right on 27th July, 1963. On that date, that right could have had a pecuniary value to the Appellant. It is true that he could not transfer the right itself to a third party; but it is conceivable that a third party would have paid money to the Appellant in consideration of an undertaking by the Appellant not to resign from the employment of the Company for the relevant period and to subscribe for the shares when the time arrived, and then to sell those shares to the third party at an agreed price which the third party estimated would be less than the market value of the shares when the time for subscription arrived. The option was, therefore, 'a right of a kind which could be turned to pecuniary account'."

The example quoted by counsel clearly indicates that the right acquired by the appellant is not sold or ceded (because, due to its nature, it cannot be ceded) and that the right itself is not converted into a money value by the imaginary agreement which the appellant enters into with the third party. The imaginary agreement is one which creates a right in favour of the third party against the appellant. The right of the appellant against the company merely allows the appellant to enter into a contract with the third party

whereby/.....

whereby he undertakes to subscribe for the shares and sell the shares, but which does not turn the right itself to pecuniary account. The position would be exactly the same in the following circumstances: a company, in 1970 enters into an agreement with its manager that, for services rendered and to be rendered to the company, it will pay to the manager at the end of 1973, if he is then still the manager, 10% of the company's nett profit for that year. In terms of this agreement the manager acquires a right against the company. The manager goes to a money-lender, satisfies him that according to expectations, the company will make a nett profit of no less than R100,000 and that his share of that will be at least R10,000. The money-lender is prepared to pay the manager R6,000 on the latter's undertaking to stay on as manager and to pay to the money-lender the amount received by him in 1973 as his share of the profits of the company. (Cf. the example quoted by Lord Denning in Abbott's case at p. 779).

Although the contract in the present case is distinguishable from that in Abbott's case, the heart of

the problem, in my view, remains the same, namely whether the type of right concerned has in itself a money value. In this respect, I would be inclined to agree with the reasons in the minority judgments in Abbott's case. In the Court a quo the President expressed the prima facie view that the decision of the House of Lords in Abbott's case was correct but that the facts of the present case are distinguishable. In this Court, Abbott's case was apparently approached as if it were a binding authority on our Courts. Counsel for appellant argued inter alia that the decision in the House of Lords in Abbott's case is indistinguishable in principle from the present case. Counsel for the respondent did not argue that in respect of the issues before this Court, the majority decision in Abbott's case was wrong. Having regard to the particular branch of the law with which we are concerned, a decision of the House of Lords would certainly be of great persuasive authority. But what does persuasive authority mean? In my view certainly not the mere final order of that Court, but the force and validity of the reasoning upon which

the order is based. In Abbott's case the decision is one of three members of the Court against that of two members, the three members reversing a judgment of the Court of Appeal, consisting of Lord Evershed, M.R., Sellers and Harman, L.JJ., and also overruling a decision of the Court of Session (Lord President Clyde and Lords Carmont and Russell) in Forbes's Executor v. Commissioner of Inland Revenue, 38 Tax Cases 12. The manner in which counsel in the present case approached the majority decision in Abbott's case, leaves one with the impression that it is assumed, perhaps subconsciously, that a decision of the House of Lords is still regarded as binding on our Courts.

As indicated, I might prefer the reasoning of the eight judges on the issue referred to in the cases quoted above, to that of the three majority judges. In my view, on the facts in Abbott's case, it might well be argued that the right in that case could not have been turned to pecuniary account in 1954.

RUMPFF, J.A.

POTGIETER, J.A. Concurred.

134/71

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter of:

E. MOOI ..... Appellant,

and

SECRETARY FOR
INLAND REVENUE ..... Respondent.

Coram: OGILVIE THOMPSON, C.J., RUMPFF, POTGIETER, RABIE et MULLER, JJ.A.

Heard: 18th November 1971. Delivered: 2nd December 1971

J U D G M E N T.

OGILVIE THOMPSON, C.J.:

In determining appellant's liability for normal tax under the provisions of the Income Tax Act, 1962 (Act No. 58 of 1962, hereinafter referred to as "the Act") for the year of assessment ending 28th February 1967 respondent included, in the circumstances detailed below, an amount of R2575 as part

of...../

of appellant's gross income for that year. Objection and appeal to the Transvaal Special Court having proved unsuccessful, appellant now - the written consents required in terms of sec. 86 (1) (b) of the Act having been duly filed - appeals direct to this Court.

Appellant is, and has at all material times been, an employee of the Palabora Mining Co. Ltd. - to which I shall refer as "the company" - whose main business is mining for copper at Phalaborwa, Transvaal. In July 1963 the company was engaged in preparatory work establishing this mine. Pursuant to [redacted] resolutions duly passed during June 1963, the company addressed the following letter, dated 25th July 1963, to appellant who then occupied the position of Mine Secretary, viz:

> "We hereby grant to you an option to subscribe at R1-25 per share for 500 Class A ordinary shares of R1 each in the capital of the company on the following conditions:
>
> 1. The option will not be exercisable until six months after the completion of construction of the company's mine at Phalaborwa and will be capable of being exercised during the period of three years reckoned from that date.
>
> 2. The directors of the company will decide when the company's mine at Phalaborwa has been completed for the purpose of paragraph

1...../

1 and the decision of the directors will be final.

3. The option can only be exercised if at the time of exercise you are in the employ of the company or are still contributing to the Palabora Project in some other manner.

4. If at the time you wish to exercise this option you are not in the employ of the company the directors will decide whether you are contributing to the Palabora Project so as to enable you to exercise the option and the decision of the directors will be final.

If you wish to accept the option hereby granted to you, kindly complete the endorsement on the duplicate hereof which is enclosed and return it to the company. If the endorsement is not completed and the duplicate returned to the company by not later than 5 p.m. on 30th July 1963, you will be deemed to have refused the option which will be of no further force and effect".

The endorsement mentioned in this letter was completed and returned to the company by appellant on 27th July 1963. It read:

"I hereby accept the option granted to me in terms of the above letter".

Pursuant to the aforementioned June resolutions, further options, couched in identical terms (save for differentiation regarding the number of shares) with the above, were contemporaneously also granted to other key personnel of the company mentioned in the said resolutions.

It...../

It is common cause that appellant is not a share dealer and that the option granted to him by the above-cited letter of 25th July 1963 was in respect of services rendered, and as an inducement to render future services, to the company. The construction of the company's mine at Phalaborwa was completed on 1st March 1966, and as at 1st September 1966 (being six months after 1st March 1966) the market value of Class A ordinary shares in the company, as quoted on the Johannesburg Stock Exchange, was R6.40 per share. On 1st October 1966 appellant exercised his option to take up the 500 shares. The difference between the aggregate price of the 500 shares calculated at R1-25 per share and their aggregate market value as at 1st September 1966, namely R2575, constitutes the sum in issue in this appeal.

It must at once be mentioned that the present case falls to be decided independently of the provisions of sec. 8 A which were only subsequently inserted in the Act by sec. 11 of Act 89 of 1969. The relevant portion of the definition of "gross income" in sec. 1 (xi) of the Act reads:

"Gross...../

> "'Gross Income', in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely :-
>
> (a) .....
>
> (b) .....
>
> (c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered ....."

In order to determine the "amount" comprehended by this definition it is necessary, in the case of a right, to establish the value of that right (Lategan v. Commissioner for Inland Revenue, 1926 C.P.D. 203 at 208 - 209; Commissioner for Inland Revenue v. Delfos, 1933 A.D. 242 at 251). The main contention advanced on behalf of appellant is that in the premises the only taxable accrual in respect of services rendered or to be rendered by him to the company was the value - if any - of the legal right which appellant acquired upon accepting the abovementioned option on 27th July 1963. An alternative contention is that if, contrary to the abovementioned contention, any accrual whatever occurred during the tax year ended 28th February 1967, such accrual cannot be said to have been in respect of ser-

Upon appellant's acceptance, on 27th July 1963, of the company's offer as set out in its letter of 25th July 1963, a contractual relationship was established between appellant and the company binding the latter, upon due fulfilment of the conditions stated in its aforementioned letter, to allot the 500 shares to appellant at R1-25 per share (Hersch v. Nel, 1948 (3) S.A. 686 (A.D.) at 695). It is the value of the right thus acquired by appellant on 27th July 1963 which is now submitted by counsel for appellant to be the only relevant accrual. That right, so the argument runs, was capable of being turned to pecuniary account, and thus had a value - yet to be determined - which formed portion of appellant's gross income in the tax year ending 28th February 1964. The argument thus advanced is primarily founded upon the decision in Abbott v. Philbin (Inspector of Taxes), 1960 (2) All E.R. 763 (H.L.) which, although decided upon a different Statute, was submitted by counsel for appellant to be in principle decisive of the present case and to have been wrongly distinguished by the Special Court.

In Abbott v. Philbin (supra) the issue was whether the option there under consideration, which had during the 1954/1955 tax year been granted to Abbott, a company employee, to purchase shares in the employer company and which Abbott had exercised in the 1955/1956 tax year, was a "perquisite of office or employment" so as to attract tax under Schedule E of the Income Tax Act of 1952 and, if so, in which of the abovementioned tax years. The progress of the case through three courts revealed a considerable divergence of judicial opinion, with the taxpayer ultimately succeeding in the House of Lords by a majority of three to two. The substantial dispute centred around the respective ability to attract tax of the date of grant of the option and of the date of its exercise. The option in issue, although not transferable and expiring upon the termination of Abbott's service with the company or the lapse of a period of 10 years (whichever should first occur), was upon acceptance by Abbott immediately exercisable by him (vide 1959 (3) All E.R. 1592, and 1960 (2) All E.R. at 765). That was, in my opinion, a vitally important feature of the

option,...../

option, which latter the majority of the House of Lords held to be a perquisite of the taxpayer's employment which, although not assignable and in fact only exercised in a later tax year, was assessable to tax in the year in which it was granted.

Although not specifically so expressed, it would seem, and appeared to be common cause during the argument, that the option conferred upon appellant was not assignable. Unlike Abbott v. Philbin (supra), in the present case the disputed dates for attracting tax are respectively the date of acceptance of the option (27th July 1963) and the date when the option became exercisable, namely 1st September 1966. Moreover, the terms of the option acquired by appellant on 27th July 1963 are materially different from those of the option in Abbott v. Philbin (supra). The latter would appear to have been granted in respect of past services, whereas appellant's option was plainly - and it is indeed common cause - granted in consideration of services rendered and as an inducement to render future services. In particular however, appellant's option -

unlike...../

unlike the option in Abbott's case and the option considered in Case No. 691: 16 S.A.T.C. 505 - was not immediately exercisable. It was only exercisable (i) six months after the completion of the construction of the company's mine and (ii) provided that, at the time of the exercise, appellant was in the employ of the company or, by decision of the directors, was "still contributing to the Palabora Project in some other manner". In the events that have happened, the option became exercisable on 1st September 1966, and accordingly remained exercisable for a period of three years from that date. Having regard to the various considerations I have mentioned, I am of opinion that Abbott v. Philbin (supra) was rightly distinguished by the Special Court, and that it cannot be regarded as in any way decisive of this appeal, which is of course governed by the definition of "gross income" contained in the Act.

Appellant's contention vitally depends upon the assumption that the word "accrued" in the above-cited definition of "gross income" means, as was in effect decided in Lategan's case (supra) and in several subsequent decisions, an amount to which the taxpayer has become entitled. For if, as was

suggested, although not decided, in Hersov's Estate v. Commissioner for Inland Revenue, 1957 (1) S.A. 471 (A.D.) at pp. 480 - 481, the correct meaning to be assigned to "accrued" is "became due and payable", the foundation for appellant's main contention largely falls away. This controversial question was not fully debated before us, and as I am, for the reasons which follow, of opinion that, even on the basis of the view expressed in Lategan's case (supra), appellant's contentions are unsound, I do not propose to attempt in this case to resolve the abovementioned controversy.

In the first place, there appear to me to be grave practical objections to acceding to the argument of appellant's counsel. It is basic to that argument that the right acquired by appellant on 23rd July 1963 had a monetary value. The record, however, contains no evidence to support the contention that such right as appellant did acquire on 27th July 1963 had a value in the sense of being capable of being then turned to pecuniary account. No doubt speculative buyers can sometimes be found who are willing to purchase a mere spes; but having regard to the terms of appellant's option, it would seem to be safe to assume

that.../

that no buyer would have purchased appellant's option-right without further undertakings by appellant (i) to remain in the service of the company until the option became exercisable and for three years thereafter; and (ii) to exercise the option upon demand and thereafter deliver the shares. The buyer would thus in reality be purchasing a congeries of rights rendering it well-nigh impossible to assign a value to the option-right itself. Counsel for appellant sought to dismiss these considerations by relying upon the views expressed by the majority of the House of Lords in Abbott's case and, in the alternative, by submitting that if the value of the right which appellant acquired on 27th July 1963 could not be ascertained, this merely meant that no determinable accrual supervened. These submissions do not greatly impress me. As already emphasised, the option in Abbott's case was materially different from the option in the present case. In the former case, Lord Reid expressed the view that the legal position as he found it there to be might well have been different if "the taxpayer had still to earn his perquisite" by further service (vide 1960 (2) All E.R.

at...../

at 772 (E) and cf. Viscount Simon's observations at p. 707 D - F). In the present case, it is common cause that appellant still had to "earn his perquisite", namely, to become vested with the right to exercise the option. However, I shall assume in favour of appellant that, notwithstanding the considerations I have mentioned, the contingent right he acquired on 27th July 1963 had some monetary value, and I proceed upon that assumption.

Although the company became bound by appellant's acceptance of the option on 27th July 1963, the right which appellant thus acquired - i.e. to which he then became entitled - was a contingent one conditioned in the material respects already mentioned. Those conditions did not solely relate to postponement of delivery of the shares, or merely constitute a restriction upon their sale for a certain period. On the contrary and as already emphasised, the option was only exercisable at a materially later date, and then only provided that, at the time of such exercise, appellant was in the employ of the company, or "still contributing to the Palabora Project". In my opinion the right acquired by appellant on 27th July 1963 lacked any inherent attribute of income and, but for the provisions of

par. (c).../

par (c) of the definition of "gross income", would appropriately be regarded as a right of a capital nature (cf. Sachs v. Commissioner of Inland Revenue, 1946 A.D. 31 at 43). The object of paragraph (c) of the definition is of course to bring into the category of "gross income" all "amounts", whether of a capital nature or not, accrued in respect of services. Linguistically inappropriate though the word "amount" may be in this context, when a taxpayer becomes entitled to a right "in respect of services" a money value must be assigned to that right in order to determine the relevant "amount" to be incorporated as "gross income". Bearing all this in mind, it nevertheless appears to me that what paragraph (c) of the definition of "gross income" envisages as required to be incorporated into the taxpayer's gross income is the real or true benefit accruing to him "in respect of services".

In the present case, as already emphasised, services still had to be rendered by appellant after July 1963, and there can be no doubt that the true and real benefit contemplated by the letter of 25th July 1963 was the right, upon due fulfillment of all the conditions stated in that letter, to obtain the shares at the price of R1-25 per share. These realities of the situation are disregarded by appellant's main contention, which substitutes therefor the artificial concept of valuing

appellant's contingent option-right as at its initial, inchoate, stage, namely 27th July 1963. On the facts of the present case, that concept is, in my judgment, not in conformity with the true intention of the Act as reflected in paragraph (c) of the definition of "gross income". In my view, the contingent right which appellant acquired on 27th July 1963, did no more than - to borrow a phrase used by Sellers, L.J., in the Court of Appeal in Abbott's case and subsequently adopted by Lord Keith in the House of Lords - "set up the machinery for creating a benefit", which said benefit only accrued when the option became exercisable. Accordingly, I am of opinion that no accrual within the meaning of the definition of "gross income" occurred in July 1963 (cf. Ochberg v. Commissioner for Inland Revenue, 1933 C.P.D. 256 at 264 and Hersov's case (supra) 481 - 482), but that the relevant accrual occurred when the option became exercisable on 1st September 1966. The real benefit conferred upon appellant, which was at all material times in the contemplation of all concerned, was the right to apply for the shares at R1-25 per share, and that right arose when, upon fulfillment of the conditions of the option, the latter became exercisable.

On...../

On the facts, the measure of the aforementioned benefit - i.e., the "amount" to be incorporated in appellant's gross income - as at 1st September 1966 was R2575, and as at that date there existed, in my view, the necessary causal relationship (vide De Villiers, v. Commissioner for Inland Revenue, 1929 A.D. 227) between the benefit acquired by appellant and his services to the company. I accordingly come to the conclusion that both the respondent's assessment and the decision of the Special Court were correct.

The appeal is dismissed with costs, such costs to include fees of two counsel.

N. Vivier Thompson

[redacted], J.A.)
POTGIETER, J.A.)
RABIE, J.A.) CONCUR.
MULLER, J.A.)