

DEPARTMENT OF FINANCE AND TAX, FACULTY OF COMMERCE,  
UNIVERSITY OF CAPE TOWN

# Disposals of fixed property: timing of accrual and practical issues arising for provisional taxpayers

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[MTFPAU001]

a minor dissertation submitted to the Department of Finance and Tax, University of Cape Town, as part of the requirements for the degree of Master of Commerce in the field of South African taxation.

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## DECLARATION

I, Paul Christiaan Barberton, declare that this dissertation, apart from the referenced and quoted sources, which have been acknowledged, is my original work and that no part of this dissertation is being, or has been, submitted for a degree or any other qualification at any institute of learning apart from this submission for the degree of Master of Commerce to the Department of Finance and Tax at the University of Cape Town.

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## ABSTRACT

When fixed property is disposed of the proceeds are generally received anywhere from three months to a year after the transaction is required to be recognised for income tax purposes. A provisional taxpayer could therefore be required to declare and pay tax prior to the receipt of these proceeds and therefore fund such tax from sources other than the transaction in question. The practical problem resulting from the time of accrual, and the due date of the tax payable in respect of such accrual, occurring prior to the receipt of the proceeds does not appear to have been addressed in the legislation. It is submitted that accrual date could be more closely linked to the date of transfer and receipt of the proceeds to mitigate this issue. The timing of such accruals is examined in the light of the conveyancing process, the relevant sections of the *Income Tax Act*, other taxes relevant in respect of disposals of fixed property, appropriate case law and accounting and SARS practices, in order to ascertain whether amendments to the *Income Tax Act* are justifiable. Particular attention is given to s 24(1) (“Credit agreements and debtors allowance”) following the *ITC 14005* judgement which deemed the accrual to be the date of the agreement whether or not a credit agreement is extant. It is submitted that by making a few changes to the legislation, the risk of inequitable cash flow positions (and potential penalties) could be greatly reduced. While a closer alignment of tax accrual with cash receipt may have a material positive effect on taxpayers’ cash flows, the effect for SARS is arguably minimal.

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## **GLOSSARY AND ABBREVIATIONS**

CIR	Commissioner for Inland Revenue
Commissioner	Commissioner for the South African Revenue Service / Commissioner for Inland Revenue
CSARS	Commissioner for the South African Revenue Service
Deeds office	Deeds Registry
Eighth Schedule	Eighth Schedule of the Income Tax Act (Act No. 58 of 1962)
Fourth Schedule	Fourth Schedule of the Income Tax Act (Act No. 58 of 1962)
IASB	International Accounting Standards Board
IAS 40	IAS 40 – Investment Property
IFRS	International Financial Reporting Standards
IFRS 15	IFRS 15 – Revenue from Contracts with Customers.
Income Tax Act	Income Tax Act (Act No. 58 of 1962)
LUPO	Land Use Planning Ordinance (Ordinance 15 of 1985)
OECD	Organisation for Economic Co-operation and Development
SARS	South African Revenue Service
SIR	Secretary for Inland Revenue
TAA	Tax Administration Act (Act No. 28 of 2011)
TDA	Transfer Duty Act (Act No. 40 of 1949)
UK	United Kingdom
Unconditional date	The date on which the last suspensive condition is fulfilled
VAT Act	Value-Added Tax Act (Act No. 89 of 1991)
VAT	Value-Added Tax

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## CHAPTER 1 INTRODUCTION

### 1.1 Background to the research

Provisional taxpayers are, on occasion, confronted with the unenviable situation of being required to pay income tax on the disposal of fixed property prior to the receipt of the proceeds. This may occur when fixed property is disposed of in one provisional tax period but transfer of ownership and the receipt of the proceeds occurs in a subsequent period. If the taxpayer were unable to source the necessary funds to make the provisional tax payment, a penalty is levied by the Commissioner. If, however, the entire process, including the receipt of the proceeds, is concluded within a single period then the taxpayer should have no issue with the payment of provisional tax. The longer the period between the time of accrual for income tax purposes and the date of the receipt of the proceeds, the more at risk the taxpayer is that the transaction will straddle a financial year end, or the due date of a provisional tax payment.

In the OECD<sup>1</sup> publication, *Taxation of Capital Gains of Individuals*,<sup>2</sup> wherein various countries' approaches to tax policies are discussed, it was recognised that taxpayers may experience difficulties in paying their capital gains tax liabilities prior to their receipt of the proceeds:

*“Realization-based taxation also creates liquidity problems for taxpayers that do not have sufficient cash to cover tax on accrued but unrealized gains, requiring them to borrow or sell assets to pay their tax liability.”*<sup>3</sup>

This would be no different were fixed property disposed of as trading stock. Capital gains occur as prices escalate and, according to FNB's House Price Index, the trend over the

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<sup>1</sup> The Organisation for Economic Co-operation and Development (OECD). “The OECD provides a forum in which governments can work together to share experiences and seek solutions to common problems. We work with governments to understand what drives economic, social and environmental change. We measure productivity and global flows of trade and investment. We analyse and compare data to predict future trends. We set international standards on a wide range of things, from agriculture and tax to the safety of chemicals.” Available: <http://www.oecd.org/about/> [2019/01/13]

<sup>2</sup> OECD (2006), *Taxation of Capital Gains of Individuals: Policy Considerations and Approaches*, OECD Tax Policy Studies, No. 14, OECD Publishing, Paris. Available <https://doi-org.ezproxy.uct.ac.za/10.1787/9789264029507-en> [2018/12/25]

<sup>3</sup> Ibid. at 104.

years 2012 to 2017 was for house prices to increase, significantly in some provinces. These increases in house prices would translate into taxable gains from the disposals thereof:

*“Cumulatively, over the past 5 years, from the 4th quarter of 2012 to the 4th quarter of 2017, the Western Cape’s house price growth has far outpaced the other major regions, rising by 50.4%, with KZN being a distant second recording 31.9%, Eastern Cape 25.6%, Gauteng 21.9% and the 5 Smaller Provinces 17.1%.”<sup>4</sup>*

An approximate chronology of the disposal of fixed property could be as follows: a seller agrees to dispose of fixed property; the agreement reached with the purchaser contains a number of suspensive conditions which the two parties fulfil; the transfer is registered in the deeds office, and the proceeds are received by the seller. In determining the date, deemed or otherwise, on which a disposal takes place, the following require clarification:

- i) does a disposal take place on the date an agreement is entered into, or
- ii) is it once all suspensive conditions are met, or
- iii) are there other requirements or conditions which affect this date, or
- iv) does it take place when the transfer of ownership is registered in the deeds office, or
- v) is it on receipt of any, or all of the proceeds, and
- vi) should the timing of the disposal differ between fixed property held as a capital asset and fixed property held as trading stock?

Once this date of accrual is determined, can the practical issue of a taxpayer being required to pay provisional tax prior to the receipt of the proceeds be justified or mitigated in any way?

### *1.1.1 The conveyancing process*

To understand why there may be a significant delay between the date of accrual and the date of receipt of the proceeds, it is beneficial to consider the conveyancing process in some detail. In terms of the *Deeds Registries Act (Act No. 47 of 1937)*, any change of ownership of fixed

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<sup>4</sup> Loos, J. 2018. *FNB Property Barometer – House Price Indices by Major Province and Major Metro*. Available: <http://ghostdigest.com/resources/19214> [2019/01/08]

property in South Africa requires the conveyancing process to register this change in the deeds office.<sup>5</sup> *Conveyance* (in the case of law) is the “*legal process of transferring property from one owner to another*”<sup>6</sup>, and, again in terms of the aforementioned act, such transfers “*shall be deemed to be registered upon the affixing of the registrar’s signature thereto.*”<sup>7</sup> In the *Alienation of Land Act (Act No. 68 of 1981)* “**owner**” is defined as, “*in relation to land, [owner] means the person in whose name that land is registered in the deeds office concerned, and also any successor in title of such person.*”<sup>8</sup> In *Norman’s Law of Purchase and Sale in South Africa* it is stated that,

*“Delivery is the transfer of the thing sold in accordance with the terms of the contract, into the control and possession of the purchaser. The effect of delivery with the requisite intention to transfer ownership, where the vendor is owner of the thing, is to transfer dominium in it to the purchaser. Prior to delivery the purchaser has no real right in the thing sold. He has only a ius ad rem or a ius in personam against the vendor to compel him to fulfil his obligation. Property sold but not delivered remains the property of the vendor (Harris v Buissine’s Trustees 2 M 105; Van Aardt v Hartley’s Trustees (1845) 2 Menzies 135; Cornelissen NO v Universal Caravan Sales (Pty) Ltd 1971 (3) SA 158 (A) 179B–H.)”*<sup>9</sup> [Emphasis added.]

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<sup>5</sup> *Deeds Registries Act, s 16. How real rights shall be transferred.*—Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar: Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond: Provided further that where the State acquires all the land held under any title deed, whether by way of expropriation or otherwise, or where a local authority by virtue of the provisions of any law acquires all the land held under a title deed by any other such authority, the registrar shall make such alterations and entries in his registers and such endorsements on any such title deed as may be necessary to register transfer to the State or such authority, as the case may be, of the property so acquired free of charge, and that the provisions of subsection (4) (a) of section 31 of this Act shall apply mutatis mutandis in respect of such a transfer by endorsement. [Emphasis added.]

<sup>6</sup> Oxford Dictionaries English, n.d. *conveyance*. Oxford University Press. Available: <https://en.oxforddictionaries.com/definition/conveyance> [2017/10/8]

<sup>7</sup> *Deeds Registries Act, s 13. When registration takes place.* —(1) Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the registrar’s signature thereto, and deeds, documents or powers of attorney lodged for registration shall be deemed to be registered when the deeds registry endorsement in respect of the registration thereof is signed: Provided that no such deed, document or power which is one of a batch of inter-dependent deeds, documents or powers of attorney intended for registration together, shall be deemed to be registered until all the deeds, documents or powers of attorney or the registration endorsements in respect thereof, as the case may be, have been signed by the registrar. [Emphasis added.]

<sup>8</sup> *Alienation of Land Act (Act No. 68 of 1981)*, s 1. **Definitions.**

<sup>9</sup> Zulman, RH and Kairinos G. 2017. *Norman’s Law of Purchase and Sale in South Africa*, Sixth Edition. LexisNexis. at ch 14.2 <https://www.mylexisnexis-co-za.ezproxy.uct.ac.za/Index.aspx?permalink=Q2ggMTQgUGFyYSAxNC4yJDIxODIzODAkNyRMaWJyYXJ5JEpEJExpYnJhcnk> [2019/01/08]

Therefore, in order for the property to be delivered to the purchaser, the conveyancing process must be followed to its conclusion. This process, which West describes in detail, in *Conveyancing Practice Guide*<sup>10</sup>, can be summarised as follows:

Once the conveyancing attorney has received the instruction to transfer a property a file must be opened with the particulars of the transacting parties, the details of the property and any mortgages noted thereon; the attorney acknowledges the instruction and notifies the transacting parties; where commission is due to an agent the necessary authorisations are confirmed or obtained; the sale agreement is examined for any suspensive conditions and the dates they are required to be met; the agreement is also examined to confirm that it has been properly completed, and when the due dates are for the deposit and the securing of the balance of purchase price; if electrical, or other compliance certificates are required, these need to be arranged; the property and seller's information must be verified with the Deeds Registry database, as there may be mortgage bonds and restrictions registered against the property which must be dealt with; proof of the particulars of the parties must be obtained, and if a seller is a non-resident the purchaser must be notified in order that the required percentage of the purchase price be withheld, in terms of s 35A of the *Income Tax Act (Act No. 58 of 1962)*; if there are existing mortgage bonds the title deeds and loan settlement figure must be requested from the bondholder, and the bondholder's attorney, who will be responsible for the cancellation of the bond, needs to be contacted; a rates clearance certificate must be obtained from the local authority; the conveyancer must determine whether or not the transaction is subject to VAT or transfer duty and submit the appropriate declaration to SARS; various transfer documents must be prepared for signature, including the bond documents, power of attorney authorising the conveyancer to transfer the property on behalf of the seller, affidavits confirming particulars and marital status, resolutions authorising a person to sign on behalf of a juristic person as well as the confirmation of the transactions; transfer duty, where applicable, must be paid and the receipt lodged in the Deeds Registry, and where there is no transfer duty applicable, the transfer duty exemption receipt must be lodged instead; the conveyancer's fees need to be communicated to the relevant parties.

Once all documents are ready, the existing title deed, the draft deed of transfer, the power of attorney, the transfer duty receipt/exemption, the rates clearance certificate, and any other required documents, are lodged with the Deeds Registry for transfer; once examined and confirmed in order by the Registrar, the conveyancer ensures all financial aspects are in order

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<sup>10</sup> West, A. 2015. *Conveyancing Practice Guide, 4<sup>th</sup> Edition*

and deals with any minor issues or queries; thereafter, on registration, the conveyancer signs the deed in front of the Registrar who signs it in turn, thereby registering the transfer. Once transfer has occurred, all parties are notified; the guarantees are prepared for payment and payments effected as soon as possible thereafter; statements of account are prepared. Once the title deed is received it is sent to the mortgage attorneys, unless there is no mortgage and then it is sent to the purchaser; a final check that all financial aspects have been dealt with is done, and the file is then closed.<sup>11</sup>

From the perspectives of seller and purchaser, how long is this relatively complex process expected to take, from the time of their initial agreement to the date of registration? SJ Botha Attorneys advise in *How long should a property transfer take?* that,

*“Each and every property transfer is unique and therefore the facts of each transfer first has to be assessed in order to estimate a date for registration. An average transfer can take up to 3 months. There are instances where the property can be registered in 6 weeks and, other instances where it can take up to 6 months.”<sup>12</sup> [Emphasis added.]*

It is submitted, therefore, that if three months is the average period required to complete a transaction, then on average a seller must wait three months in order to receive the proceeds of the sale. Consequently, if a taxpayer wishes to minimise the risk of a provisional tax payment penalty, where insufficient funds are available to settle the tax, arising as a result of the accrual of the proceeds prior to the receipt thereof, agreements should not be concluded within three months of the due date of a provisional tax payment.

### *1.1.2 Delays in the conveyancing process*

While the average period to transfer a fixed property might be three months, the process could take up to six months<sup>13</sup> where external factors (for example, obtaining a rates clearance certificate) delay the process, as Nolan, in *The process of transferring a property*, states,

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<sup>11</sup> West, A. 2015. *Conveyancing Practice Guide. 4<sup>th</sup> Edition*, at 21-45

<sup>12</sup> SJ Botha Attorneys. 2017. <http://www.sjbothaattorneys.co.za/how-long-should-a-property-transfer-take/> [2018/09/22]

<sup>13</sup> Ibid.

*“On average, the process takes around three months from the date of sale until the property is registered in the new owner’s name. However, certain external aspects can delay the process such as waiting for a stipulated condition in the contract to be fulfilled or obtaining a rates clearance certificate.”<sup>14</sup>*

West, previously referenced, gives an example of a possible checklist for conveyancers to follow:

- Acknowledge receipt of instructions and peruse instructions carefully.*
- Obtain and check computer printouts and, where necessary have full Deeds Registry search done.*
- Comply with FICA requirements.*
- Deal with any attachment interdicts, caveats, expropriations or other interdicts reflected on the deeds of this computer printout or endorsed against the holding title.*
- Obtain and verify personal particulars of parties.*
- Confirm agent’s commission.*
- Obtain valuation certificate (where necessary).*
- Obtain rates clearance figures and certificate.*
- Obtain cancellation figures and title deed.*
- Obtain deposit and guarantees, and invest deposit.*
- Arrange signature of documents, and obtain payment of costs.*
- Obtain transfer duty receipt or exemption receipt.*
- Conveyancer to check and “prepare” documents.*
- Check deed of alienation for servitudes or conditions which need to registered or complied with.*
- Obtain electrical certificate of compliance where necessary.*
- Obtain entomologist’s clearance certificate where necessary.*
- Obtain Beetle certificate, where necessary*
- Obtain endangered species/plants certificate, where necessary.”<sup>15</sup>*

A number of participants in the process can be inferred from this checklist, including the seller, buyer, estate agent, conveyancing attorney, mortgage bond attorney, bondholder, local authority, SARS and the Deeds Registry. This makes conveyancing a complex, and

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<sup>14</sup> Nolan, C. 2011. <https://www.privateproperty.co.za/advice/property/articles/the-process-of-transferring-a-property/586> [2018/09/22]

<sup>15</sup> West, A. 2015. *Conveyancing Practice Guide. 4<sup>th</sup> Edition*, at 20.

potentially time-consuming process. It is submitted that a delay in any item in West's checklist by any of the aforementioned parties could potentially delay the transaction as a whole.

Drawing from the diagram provided in Annexure 1, which illustrates where bottlenecks in the process can occur,<sup>16</sup> and the author's experience in property development, as well as discussions with conveyancing attorneys, it is submitted that the following are also examples of circumstances which cause delays in the conveyancing process:

- The municipality's database has not yet been updated with the records from the deeds office after a property has been consolidated or subdivided.
- SARS withholds the transfer duty receipt due to outstanding tax returns.
- The current bondholder has lost the title deed and a new one has to be applied for.
- Either the purchaser or seller resides abroad and experiences difficulties in signing the documents at the South African Embassy.
- The body corporate and the seller are in dispute in respect of certain issues and the body corporate withholds the levy clearance certificate until the matter is resolved.
- The agreement is subject to the sale of the purchaser's property and that transaction is delayed.

These delays need not be caused by either purchaser or seller, and in addition to the above, if the conveyancing attorneys make an error, it can also result in delays. Tshaka prefaces a description of the *Margalit v Standard Bank of SA Ltd*<sup>17</sup> case with the following:

*"Unfortunately, the process can sometimes be delayed for different reasons. For example, sometimes the transfer gets held up because the municipality delays issuing the necessary rates clearance certificate, without which the transfer cannot go through. But, sadly, the delays are sometimes caused by the very people entrusted to ensure that the transfer goes through smoothly: the conveyancing attorneys."*<sup>18</sup> [Emphasis added.]

The crux of the delay in this case is that the conveyancer failed to notice that two bonds were registered over a property and only applied for the cancellation of one. The deeds office rejected the transaction and this resulted in a considerable delay for which the conveyancer was found to be responsible.

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<sup>16</sup> Amadi-Echendu, A. 2013. *An analysis of conveyancing business processes in South Africa*. Figure 6, at 156

<sup>17</sup> *Margalit v Standard Bank of SA Ltd* (883/2011) [2012] ZASCA 208 (3 December 2012)

<sup>18</sup> Tshaka, M. 2012. *Short notes on: Holding your conveyancer accountable*.

<https://www.schoemanlaw.co.za/wp-content/uploads/2012/12/website-article-mzo-tshaka-FINAL-11-12-2012.pdf> [2017/10/15]

It is submitted that apart from the normal period of the conveyancing process, parties to the transaction may have to contend with delays not of their making, but not untypical of a complex process with numerous parties involved. All of this could place strain on a seller, who is required to declare and pay income tax prior to receipt of the proceeds. It is further submitted that it is not practical that a legislated process, such as conveyancing, should mean an automatic imposition of a tax penalty, or indirectly, an interest cost in raising the required provisional tax from sources other than the transaction in question. Further, it would be of great assistance to taxpayers if the deemed date of disposal were set to be either the date of the receipt of the proceeds, or the date of transfer. This will be discussed later in the dissertation.

### *1.1.3 Provisional tax payments*

Following the successful conclusion of a sale of fixed property, the next issue which concerns the taxpayer is the payment of provisional tax. While tax might be an annual event,<sup>19</sup> provisional tax payments occur every six months. The term provisional tax is defined in paras 1 and 17 of the Fourth Schedule of the *Income Tax Act* as follows:

*“Fourth Schedule, para 1 “provisional tax” means any payment in respect of liability for normal tax required to be made in terms of paragraph 17;”*

*“Fourth Schedule, para 17. (1) Every provisional taxpayer shall in the manner provided in this Part make payments (called provisional tax) to the Commissioner in respect of his liability for normal tax in respect of every year of assessment.”* [Emphasis added.]

These provisional tax payments are payable at specific times during the tax year. For provisional taxpayers, other than companies, this is described in para 21(1) of the Fourth Schedule and for provisional taxpayers who are companies, this is described in para 23(1). These payments may be summarised as follows:

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<sup>19</sup> *New Adventure Shelf 122 (Pty) Ltd v CSARS* (310/2016) [2017] ZASCA. “[18] ... Bearing in mind the provisions of the basic scheme under which capital gains tax is levied, the assessment of capital gains tax is, an annual event in the sense that, if any occurrences during a tax year render the provisions of Schedule Eight applicable to an accrual of a taxable capital gain, the amount thereof is to be included in the taxpayer’s taxable income for that year. This is in line with the general principle that income tax is an annual fiscal event so that, as was stated by Botha JA in *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 677H-678A:

‘... events which may have an effect upon a taxpayer's liability to normal tax are relevant only in determining his tax liability in respect of the fiscal year in which they occur, and cannot be relied upon to re-determine such liability in respect of a fiscal year in the past.’” [Emphasis added.]

i) 50% of the estimated tax liability is to be paid within six months of the beginning of the tax year

ii) 100% of the estimated tax liability is to be paid by the final day of the tax year.

The final payment of the actual (i.e. not estimated) tax liability depends on when the Commissioner requires the income tax returns to be submitted by the taxpayers. Section 66 of the *Income Tax Act* requires the Commissioner to determine this due date:

***“66. Notice by Commissioner requiring returns for assessment of normal tax under this Act.—(1) The Commissioner must annually give public notice of the persons who are required by the Commissioner to furnish returns for the assessment of normal tax within the period prescribed in that notice.”***

In terms of the tax calendar on the SARS website,<sup>20</sup> companies are required to submit their returns within 12 months of their financial year ends and individuals who are provisional taxpayers have until the end of January. No distinction is made between normal income and capital gains as, in terms of s 26A of the *Income Tax Act*, capital gains are included in taxable income:

***“26A. Inclusion of taxable capital gain in taxable income.—There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule.”***

This is emphasised in SARS’ *Interpretation Note 1*, “Provisional Tax Estimates”:<sup>21</sup>

*“An estimate must include taxable capital gains made or that are anticipated to be made during the year of assessment. This includes situations where, in the first period, there is a reasonable expectation that a taxable capital gain will be made during the second period.”*

Provisional tax payments at the conclusion of their respective six-month periods are required to be based on the taxpayer’s best estimate of that year’s taxable income. In the event that the Commissioner determines that this estimate is not within 80 or 90 per cent of the tax

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<sup>20</sup> SARS. *Tax Calendar*. <http://www.sars.gov.za/ClientSegments/Individuals/Need-Help/Pages/Calender.aspx> [2018/9/8]

<sup>21</sup> SARS. *Interpretation Note: No. 1 (Issue 2)*

due on the actual taxable income, depending on whether the taxable income is less than or greater than R1 million respectively, underestimation penalties are applied.<sup>22</sup>

In order to see what the impact would be on a taxpayer's cash flow, it would be illustrative to consider an example of how the tax payments relate to the timing of the disposal of fixed property, specifically where the date of the agreement and the date of transfer are in different periods.

*A natural person enters into an agreement on 1 February 2018 to sell some fixed property, but not their primary residence, from which, after the annual exclusion is deducted, a taxable capital gain of R500,000 is to be included in their taxable income for the 2018 tax year. There are no suspensive conditions attached to the sale and eventually transfer takes place on 2 May 2018 and the taxpayer receives the proceeds on 3 May 2018.*

In terms of para 13 of the Eighth Schedule,<sup>23</sup> the time of disposal would be the date on which the agreement was entered into, therefore 1 February. Assuming the person's marginal tax rate is 39%, then the provisional tax payment due in relation to this taxable capital gain is R195,000. This would need to be paid by 28 February 2018. In the event the taxpayer is unable to access funds from elsewhere and is unable to pay the R195,000 timeously, in terms of para 27 of the Fourth Schedule,<sup>24</sup> a 10% penalty must be levied by the Commissioner on the value of the late payment. The taxpayer in this example would have an additional R19,500 to pay once the proceeds are received.

While different sections of the *Income Tax Act* would apply if the fixed property were held as trading stock, the cash flow issues would remain. As discussed, there may well be a delay between the point that the seller is unconditionally entitled to the proceeds and the point at which the cash proceeds are received. However, these cash flow problems are exacerbated if one considers the decision in *ITC 14005*<sup>25</sup>. In that judgment, s 24(1) applied to the disposal

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<sup>22</sup> *Income Tax Act*, para 20(1) of the Fourth Schedule.

<sup>23</sup> *Income Tax Act*, para 13 of the Eighth Schedule. **Time of disposal.**— (1) The time of disposal of an asset by means of—

(a) a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by operation of law is, in the case of—

(i) an agreement subject to a suspensive condition, the date on which the condition is satisfied;

(ii) any agreement which is not subject to a suspensive condition, the date on which the agreement is concluded; [Emphasis added]

<sup>24</sup> *Income Tax Act*, para 27 of the Fourth Schedule, **Penalty On Late Payment Of Provisional Tax**

27. (1) If any provisional taxpayer fails to pay any amount of provisional tax for which he or she is liable within the period allowed for payment thereof in terms of paragraph 21 or 23, or paragraph 25 (1), the Commissioner must, under Chapter 15 of the Tax Administration Act, impose a penalty, which is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, equal to ten per cent of the amount not paid.

<sup>25</sup> *Income Tax Case 14005 of The Tax Court of South Africa, 2017*

of fixed property held as trading stock, and as such, the date of accrual was deemed to be the date the agreement is entered into. The date of the agreement would generally be even earlier than the date the seller becomes unconditionally entitled to the proceeds and it is even less likely that the taxpayer would have received the cash proceeds by the time the provisional tax is due. While s 24(1) appeared only to deem the time of accrual for disposals under credit agreements, this judgement confirmed otherwise.

It is submitted that penalising a taxpayer merely because of the lengthy conveyancing process is less than equitable.

## **1.2 Research objective and outline**

The broad objective of the research is to examine the relationship between the time of accrual in the disposal of fixed property, the provisional tax periods, and the practical issues arising for provisional taxpayers. The time of disposal, as seen through the lens of the conveyancing process, and its intricacies, is considered with reference to the sections of the *Income Tax Act* which deem the times of accrual from such disposals. These times of accrual determine in which provisional tax period they are to be declared and the tax paid. When this is prior to the actual receipt of the proceeds this potentially creates cash flow issues for provisional taxpayers to overcome.

More specifically, a detailed analysis of the time of accrual on the disposal of fixed property is entered into, whether it is held as trading stock or a capital asset. This includes analyses of ss 1 (“gross income”) and 7(1) (“When income is deemed to have accrued”) of the *Income Tax Act*. Owing to the *ITC 14005* judgement, which deemed that s 24(1) (“Credit agreements and debtors allowance”) was applicable to the disposal of all trading stock, even under an agreement not typically described as a credit agreement, the historical development of this section is investigated in considerable detail. Paragraph 13 of the Eighth Schedule (“Time of disposal”) of the *Income Tax Act*, where a capital asset is disposed of is also analysed. These analyses include the consideration of contract law and relevant case law, including the *ITC 14005* judgment.

Through the aforementioned analyses, the dissertation aims to suggest amendments to the *Income Tax Act* which may, in the author’s opinion, lead to more equitable practice in determining the time of accrual, and hence the timing of the liability to pay provisional tax.

The dissertation also aims to highlight alternative approaches to the time of accrual and tax payments, namely: dividends tax, and various withholding taxes found within the *Income Tax Act*; the time of supply within the *Value-Added Tax Act*, and how this was amended to accommodate difficulties experienced specifically by property developers in declaring and paying output VAT on their fixed property disposals; the United Kingdom's ('UK') approach to capital gains tax payments is considered because of the different treatment they have given to the normal tax payments, in contrast to South Africa's approach; and the accounting approach described within the IFRS standards is highlighted. These alternatives are studied as possible justifications for any proposed amendments.

Finally, the dissertation concludes with a summary of the findings and the various recommendations.

### **1.3 Research methodology**

A reform-oriented research<sup>26</sup> method was employed to examine sections of the *Income Tax Act (Act No. 58 of 1962)*. Where, in the author's opinion, their purpose and interpretation create inequitable positions for certain provisional taxpayers when disposing of fixed property, justifications for amendments are sought and discussed. The tools used to analyse this act include statutory interpretation, contract law, case law, the explanatory memoranda to the amendment bills, other taxes and the accounting approach.

### **1.4 Limitation of scope**

This dissertation is concerned only with the timing of accrual in relation to the disposal, by a provisional taxpayer, of fixed property, whether held as trading stock or a capital asset and which involves the conveyancing process. The dissertation is not concerned with the disposal of other assets or shares in property-rich companies, nor the liability of other taxes such as Transfer Duty or VAT, except in the context of comparing the rules for the times of accrual. Multi-year developments by property developers, for example, are also not considered, nor are the disposals by non-provisional taxpayers of their primary residences, although it is envisaged

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<sup>26</sup> West & Roelveld. 2015. FTX4036F Research Methods in Tax 2015. Notes. At section 7.1.3

that any findings or recommendations borne out of this dissertation could be of some relevance to those taxpayers too. Where provisional tax payments are examined in relation to a taxpayer's cash flow, the issues of penalties in relation to the non-submission of returns are not considered. Penalties are only considered in relation to late payments of provisional tax.

## **1.5 Structure of the dissertation**

The dissertation is structured as follows:

*Chapter 1 – Introduction:* this chapter contains justification for the research and background information, including the conveyancing process and provisional tax payments.

*Chapter 2 – Time of accrual of income or proceeds in fixed property disposals:* this chapter contains an overview of the time of accrual, an historical and interpretive analyses of s 24(1) and para 13 of the Eighth Schedule of the *Income Tax Act*, as well as recommendations for potential amendments thereto.

*Chapter 3 – Alternative approaches to time of accrual in respect of fixed property disposals:* this chapter contains certain domestic approaches which mitigate the cash flow issues relating to the payment of taxes, the UK's timing of capital gains tax payments and an accounting approach to the time of accruals.

*Chapter 4 – Conclusions and recommendations:* this chapter contains a summary of the findings and the proposals.

## CHAPTER 2 TIMING OF ACCRUAL OF INCOME OR PROCEEDS IN FIXED PROPERTY DISPOSALS

### 2.1 Introduction

In the judgement in the tax court in *Income Tax Case ('ITC') 14005*<sup>27</sup> discussed below, the deemed time of accrual of the disposal of fixed property held as trading stock was held to be *the date the agreement was concluded* and not the date of the fulfilment of any suspensive conditions.

The definition of “gross income” in s 1<sup>28</sup> of the *Income Tax Act* includes in gross income, any income which has accrued to the taxpayer, and s 7(1)<sup>29</sup> deems income to accrue when it becomes due and payable. The principle of accrual expounded in *Lategan*,<sup>30</sup> is that income accrues when an individual acquires a right to it. It is submitted that until all conditions which suspend the enforceability of an agreement are fulfilled, no right to the income has been acquired by the taxpayer and therefore income could not have accrued. This is the essence of the *Mooi*<sup>31</sup> judgement which deemed the accrual of income on fulfilment of certain conditions. Thus, income should accrue when all suspensive conditions are fulfilled. In the absence of such conditions, the seller acquires the right to the income on the date of the agreement and hence the income would accrue on that date. This is also reflected in para 13 of the Eighth Schedule where the disposals of capital assets are dealt with.

This chapter examines the principle of accrual in general, and then looks at two distinct times of accrual: where fixed property held as trading stock is disposed of, and where fixed property held as a capital asset is disposed of. Owing to the impact of the *ITC 14005* judgement on the disposal of trading stock, the introduction and development of s 24(1) of the *Income Tax Act* is examined as well as the changes to its interpretation in case law, with a particular focus

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<sup>27</sup> *Income Tax Case 14005 of The Tax Court of South Africa*, 2017

<sup>28</sup> *Income Tax Act*, s 1. “**gross income**”, in relation to any year or period of assessment, means— in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or [Emphasis added.]

<sup>29</sup> *Income Tax Act*, s 7. **When income is deemed to have accrued or to have been received.**— (1) Income shall be deemed to have accrued to a person notwithstanding that such income has been invested, accumulated or otherwise capitalized by him or that such income has not been actually paid over to him but remains due and payable to him or has been credited in account or reinvested or accumulated or capitalized or otherwise dealt with in his name or on his behalf, and a complete statement of all such income shall be included by any person in the returns rendered by him under this Act. [Emphasis added.]

<sup>30</sup> *WH Lategan v CIR (1926)* 2 SATC 16, CPD

<sup>31</sup> *Mooi v SIR (1971)* 34 SATC 1, AD

on this judgement. In the case of the disposal of capital assets, para 13 of the Eighth Schedule is examined from its introduction into the *Income Tax Act* to its various interpretations of the deemed time of disposal. Where current interpretation and practice create difficulties for taxpayers in settling their tax liabilities, possible remedies are proposed and discussed.

## 2.2 Time of accrual where held as trading stock

Income included within a year of assessment includes not only income received but also income accrued. The wording of ss 1 and 7 of the *Income Tax Act* make it clear that “gross income ... means, ... the total amount ... received by or accrued to ...”<sup>32</sup> and that “Income shall be deemed to have accrued to a person notwithstanding that such income ... has not been actually paid over to him but remains due and payable to him.”<sup>33</sup> With particular reference to the sale of fixed property, where almost invariably an agreement is concluded well prior to the receipt of the proceeds, the date the income accrues is information critical in the determination of the income tax liabilities for the year of assessment.

Watermeyer J’s elucidation of the principles of accrual in his judgement of the *WH Lategan v CIR* (1926)<sup>34</sup> (*‘Lategan’*) matter, delivered in February 1926, has been quoted with approval by higher courts, in particular the *Brummeria Renaissance* and *People’s Stores* cases,<sup>35</sup> and it is worth including the salient points of the judgement here.

WH Lategan, a wine farmer, sold his wine to a cooperative in May 1920. He received a portion within the same financial year and the balance was paid in instalments at a later date. The Commissioner included the full selling price in his income for the June 1920 financial year against which WH Lategan appealed. Watermeyer J stated the following in his judgement:

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<sup>32</sup> *Income Tax Act*, s 1. “**gross income**”, in relation to any year or period of assessment, means— in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

<sup>33</sup> *Income Tax Act*, s 7. **When income is deemed to have accrued or to have been received.**— (1) Income shall be deemed to have accrued to a person notwithstanding that such income has been invested, accumulated or otherwise capitalized by him or that such income has not been actually paid over to him but remains due and payable to him or has been credited in account or reinvested or accumulated or capitalized or otherwise dealt with in his name or on his behalf, and a complete statement of all such income shall be included by any person in the returns rendered by him under this Act.

<sup>34</sup> *WH Lategan v CIR* (1926) 2 SATC 16, CPD

<sup>35</sup> *CSARS v Brummeria Renaissance (Pty) Ltd and others* (2007) 69 SATC 205 (SCA); *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* (1990) 52 SATC 9 (AD)

*“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 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 vested 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.”<sup>36</sup> [Emphasis added.]*

Watermeyer J’s judgement, that the right to claim future payments accrue to the taxpayer in the present, was confirmed in *CIR v People’s Stores (1990)*<sup>37</sup> where, after explaining that the concept of accrual had been retained through all the changes to legislation, Hefer JA stated,

*“In my view the decision in the *Lategan* case reflects the law correctly. It being common cause that the debts which accrued to the taxpayer in the present case could be turned into money, I am also of the view that the special court’s ruling on the first question was correct.”<sup>38</sup> [Emphasis added.]*

In essence, the *Lategan* judgement affirms that income accrues when an individual has become entitled to it.<sup>39</sup> This judgment greatly assists in the establishment of the actual time of accrual, information required in order that taxable income is reflected in the correct provisional tax period. This is especially relevant in a fixed property transaction where, it might be argued, any one of a number of disparate dates could be seen to be the date of accrual; those dates being the conclusion of the agreement, the fulfilment of all suspensive conditions, registration of the transfer of ownership or receipt of the proceeds.

A further case which dealt with the time of an accrual was *Mooi v SIR (1971)*<sup>40</sup> (*‘Mooi’*) in which Mooi, on 27 July 1963, was granted the option to acquire shares at a future date, subject to certain agreed conditions. The agreement precluded Mooi from exercising this right prior to the fulfilment of the conditions. These conditions were satisfied on 1 September 1966, by which time the value of the shares had appreciated considerably. Mooi exercised this right on 1 October 1966. The Secretary included this income in Mooi’s 1967 year of assessment, to

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<sup>36</sup> *WH Lategan v CIR (1926) 2 SATC 16, CPD, at p.20*

<sup>37</sup> *CIR v People’s Stores (Walvis Bay) (Pty) Ltd (1990) 52 SATC 9, AD*

<sup>38</sup> *Ibid.* at p.24

<sup>39</sup> *WH Lategan v CIR (1926) 2 SATC 16, CPD, at p.20.* ‘In his Lordship’s opinion the words in the Act “has accrued to or in favour of any person” merely meant “to which he has become entitled.”’ [Emphasis added.]

<sup>40</sup> *Mooi v SIR (1971) 34 SATC 1, AD*

which Mooi appealed, arguing that this should have been included in his 1964 assessed income. In his judgement Ogilvie Thompson CJ held that “*the relevant accrual occurred when the option became exercisable on 1 September 1966.*”<sup>41</sup>

Although Mooi had acquired a contingent right in 1963, it was only the fulfilment of the conditions that triggered the accrual. This judgement further narrowed the time of accrual by allowing for the fulfilment of suspensive conditions in determining this accrual date.

In disposing of fixed property held as trading stock, taxpayers typically needed only consider whether or not they were unconditionally entitled to the proceeds in order to determine whether or not income had accrued. However, Binns-Ward JP’s judgement in *ITC 14005*<sup>42</sup> held that s 24(1) applied to all such disposals, and consequently, the accrual occurred on the date of the agreement, whether or not there were conditions precedent. This, therefore, warrants a closer examination of s 24(1).

### 2.2.1 Section 24(1): “Credit agreements and debtors allowance”

In the light of *ITC 14005* discussed below, when fixed property is held as trading stock<sup>43</sup> and is disposed of, the time of disposal is now determined by s 24(1), which then needs to be considered. As can be seen below this section directly effects the time of accrual of such transactions.

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<sup>41</sup> Ibid. at p.20. “In my view, the contingent right which appellant acquired on 27 July 1963, did no more than – to borrow a phrase used by Sellers LJ 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 CPD 25622 at 264, and *Hersov’s case*(supra) at 481-2), but that the relevant accrual occurred when the option became exercisable on 1 September 1966.”

<sup>42</sup> *Income Tax Case 14005 of The Tax Court of South Africa*, 2017

<sup>43</sup> *Income Tax Act, s 1. "trading stock"*

a) includes—

i) anything produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by the taxpayer or on behalf of the taxpayer;

ii) anything the proceeds from the disposal of which forms or will form part of the taxpayer’s gross income, otherwise than—

aa) in terms of paragraph (j) or (m) of the definition of ‘gross income’;

bb) in terms of paragraph 14(1) of the First Schedule; or

cc) as a recovery or recoupment contemplated in section 8(4) which is included in gross income in terms of paragraph (n) of the definition of ‘gross income’; or; or

iii) any consumable stores and spare parts acquired by the taxpayer to be used or consumed in the course of the taxpayer’s trade;

b) but does not include—

i) a foreign currency option contract; or

ii) a forward exchange contract, as defined in section 24I(1);

*“Income Tax Act s 24. Credit agreements and debtors allowance.—(1) Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.” [Emphasis added.]*

It is submitted that a plain reading of this section implies the following three scenarios:

- if a transfer takes place on the *same day* that the taxpayer receives any portion (or all) of the amount payable then the full amount payable is deemed to have accrued on the day the agreement was entered into;
- if a transfer takes place *after* the taxpayer receives any portion (or all) of the amount payable then the full amount payable price is deemed to have accrued on the day the agreement was entered into
- if a transfer takes place *before* the taxpayer received any portion (or all) of the amount payable then this section does not apply.

It is worth considering earlier versions of this section and the intention of the legislators in introducing it, as well as the various rulings which have interpreted it, in order to ascertain whether or not these assumptions are correct or reasonable, and whether or not this section has always been applicable to all fixed property transactions. However, before entering into that discussion, the issue of the deposit frequently paid by the prospective purchasers needs to be addressed.

A deposit can create an interesting conundrum owing to the differing treatment it receives in various areas of law. In the *VAT Act*, the time of supply, discussed below, is deemed to be the earlier of the date of registration of transfer in the deeds office or the date payment is received.<sup>44</sup> Although a deposit might have been paid, it is not deemed to have been received by

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<sup>44</sup> *VAT Act*, s 9. **Time of supply** - (3)(d)... where goods consisting of fixed property or any real right therein are supplied under a sale, that supply shall be deemed to take place—  
(ii) where registration of transfer of the goods is effected in a deeds registry, on the date of such registration; or  
(iii) on the date on which any payment is made in respect of the consideration for such supply, whichever date is earlier;

the seller when it is held by a third party, usually an agent or an attorney, and therefore has no effect on the time of supply.<sup>45</sup>

Where a deposit is paid to a third party, such as the conveyancer, has it accrued to the seller in terms of their gross income? In *Royal Anthem Investments 129 v Lau and another*<sup>46</sup> it was adjudged that, despite the agreement of sale including a clause allowing the seller to “keep any other amounts payable”<sup>47</sup> in the event the purchaser was in default, the deposit received by the conveyancer was not deemed to be such an amount.

*“However the deposit was paid to the first defendant in his capacity as the conveyancing attorney, to be held in trust pending registration of transfer, and as transfer never took place it was never paid to the appellant. The deposit appears therefore not to be an amount envisaged by clause 6.”*<sup>48</sup> [Here clause 6 refers to the sale agreement and the phrase “keep any other amounts payable” described above.]

In s 35A of the *Income Tax Act*, discussed below, which requires purchasers to withhold a portion of amounts payable to a non-resident seller of immovable property, and then submit these amounts to SARS, para 14(b) of this section specifically excludes deposits from this requirement until the agreement has become unconditional.<sup>49</sup>

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<sup>45</sup> SARS, VAT 404 Guide for Vendors, 5.2.5. “Similarly, a payment that is held in a trust by an estate agent or attorney does not constitute payment made, as the seller cannot apply the amount against the outstanding debt at that time.”

<sup>46</sup> *Royal Anthem Investments 129 (Pty) Ltd v Lau and another* [2015] JOL 33637 (SCA). “[15] The obvious problem the appellant faces at the outset is the general rule that the failure of the agreement obliges parties to restore each other to the position they were in immediately before the conclusion of the agreement. Thus, a purchaser who has paid a portion of a purchase price as a deposit is generally entitled to be repaid that sum. But of course the duty to restore is not immutable and may be excluded by agreement (eg in the case of a penalty stipulation) and the appellant, relying upon the conditions of clause 6 of the agreement of sale, argued that this was such a case. That clause provided as follows:

“If the [respondents] is in default of this agreement and refuse to rectify the default within 14 (fourteen) days after acceptance of this written notice, the [appellant] will be entitled, without prejudice to any other rights that he may have such as liquidated damages, cancel the agreement and to *keep any other amounts payable*, as rouwkoop or by means of any pending decision by a Court of the real damages suffered or demand specific performance of the conditions of the contract with or without a claim for damages.” (My emphasis)

[16] The immediate problem facing the appellant in relying on this is that the clause relates to amounts it was entitled “to keep”, a phrase that connotes an amount received and being held by the appellant. However the deposit was paid to the first defendant in his capacity as the conveyancing attorney, to be held in trust pending registration of transfer, and as transfer never took place it was never paid to the appellant. The deposit appears therefore not to be an amount envisaged by clause 6.

<sup>47</sup> *Ibid.* at para 15

<sup>48</sup> *Ibid.* at para 16

<sup>49</sup> **35A. Withholding of amounts from payments to non-resident sellers of immovable property.** ... (14) This section does not apply— ... (b) in respect of any deposit paid by a purchaser for purposes of securing the disposal of the immovable property by the seller to that purchaser, until the agreement for that disposal has become

In a slightly different matter, Brooks Lemos Ltd, a food manufacturer, sought to exclude the deposits on glass jars received from its clients from their gross income for the year. Watermeyer CJ, in his appellate court judgement in 1947<sup>50</sup>, dismissed their appeal and their argument that these amounts were held in trust and not received. Had they been held in trust the result might have been different.

*“If such amounts are really received as trust moneys, of which the recipient is not the beneficial owner but merely a trustee, then doubtless Mr Duncan’s contention is correct, but that position does not exist here. The appellant was not a trustee holding the deposits on account of the customers as security for the return of the bottles.”*<sup>51</sup>

In a credit agreement sale, as is covered by s 24(2)<sup>52</sup> of the *Income Tax Act*, where more than 25 per cent of the whole amount is still outstanding 12 months after the conclusion of the agreement, the deposit payable is included within the portion of the selling price received in the first 12 months.<sup>53</sup> However, in such an agreement the time of disposal is deemed to be the conclusion of the agreement and is therefore unaffected by the time of the receipt of the deposit. Nonetheless, s 1 of the *Income Tax Act* might then apply as the definition of “gross income” includes amounts received.<sup>54</sup> A deposit received directly by the seller, rather than by a third party, would be such an amount, particularly if it were received prior to the conclusion of the agreement. It is submitted, therefore, provided the deposit is held in trust by a third party, it ought not to trigger the accrual, but if ever queried by the Commissioner the onus would be on the taxpayer to demonstrate that the deposit should not be included in their gross income.<sup>55</sup>

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unconditional, in which case any amount which would have been required to be withheld from the amount of that deposit, must be withheld from the first following payments made by that purchaser in respect of that disposal.

<sup>50</sup> *Brookes Lemos Ltd v CIR*, 14 SATC 295

<sup>51</sup> *Ibid.* at 299

<sup>52</sup> *Income Tax Act*, s 24(2) In the case of such an agreement in terms of which at least 25 per cent of the said amount payable only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the said agreement, the Commissioner, taking into consideration any allowance he has made under section 11 ( j), may make such further allowance as under the special circumstances of the trade of the taxpayer seems to him reasonable, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer’s accounting period: Provided that any allowance so made shall be included as income in the taxpayer’s returns for the following year of assessment and shall form part of his income.

<sup>53</sup> SARS, Practice Note 48, 4.4. “For this purpose, any deposit payable is regarded as a payment of a portion of the selling price within the first 12 months.

<sup>54</sup> *Income Tax Act*, s 1. “**gross income**”, in relation to any year or period of assessment, means—  
in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or [Emphasis added.]

<sup>55</sup> *Tax Administration Act*. s 102. **Burden of proof.**—(1) A taxpayer bears the burden of proving—  
(a) that an amount, transaction, event or item is exempt or otherwise not taxable;

Prior to the *ITC 14005* judgement, if the seller was not mindful of the consequences and received the deposit directly from the purchaser, this would then automatically trigger s 24(1) as the change of ownership would now be effected *after* the receipt of certain of the proceeds. The seller would then be required to recognise the accrual on the date of the agreement and, in all likelihood, prior to the receipt of this deposit. Following the *ITC 14005* judgement all such disposals are now recognised on the date of the agreement. However, through an analysis of the history of the section, the rules of statutory interpretation and other relevant cases dealing with this section, certain counter arguments to the *ratio decedendi* in the *ITC 14005* case will be considered.

### 2.2.2 Section 24(1): the historic development of the wording and the legislation

Returning to the broad discussion of this section: s 24(1) has been part of South Africa’s income tax legislation since it was introduced as s 22 of the 1941 *Income Tax Act (Act 31 of 1941)*. The reason given for its inclusion was stated in the *Memorandum on the Income Tax Bill, 1941*:

**“NORMAL TAX**

*There are a number of alterations falling under the following types: –*

...

*(f) New provision to deal with the increasing adoption of a hire-purchase system or similar systems of trading (section 22). Just as certain trades, e.g. farming, shipping, insurance and mining, required that a specialized method of assessment be provided, experience has shown that this development in commerce requires special attention from the viewpoint of taxation.”<sup>56</sup>*

[Emphasis added.]

A comparison of the relevant portion of s 22 of the 1941 *Income Tax Act* and s 24 in its current enactment is as follows:

<i>Section 22 of Income Tax Act (Act 31 of 1941)</i> <sup>57</sup>	<i>Section 24 of Income Tax Act (Act 58 of 1962)</i>
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<sup>56</sup> *Memorandum on the Income Tax Bill, 1941*. (see Annexures)

<sup>57</sup> Section 22 of *Income Tax Act (Act 31 of 1941)* (see Annexures)

<b><i>Hire-purchase or other agreements providing for postponement of passing of ownership of property concerned.</i></b>	<b><i>Credit agreements and debtors allowance.</i></b>
	<i>(1) Subject to the provisions of section 24J,</i>
<i>If any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass, or, in the case of immovable property, transfer shall be passed, from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the day on which the agreement was entered into:</i>	<i>if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.</i>
[The above paragraph continues, dealing with provisions for doubtful debts.]	[Paragraph (2) of this section deals with provisions for doubtful debts.]

It can be seen that, apart from the current reference to s 24J and the differing headings, these portions of the respective sections are identical.<sup>58</sup>

As was stated in the extract of the memorandum above, this section was included in the 1941 *Income Tax Act* because of the increase of hire-purchase type transactions. It is submitted that a transaction between two parties for the sale of land or buildings was relatively commonplace in 1941 and that this section was not aimed at regulating the tax in those transactions, as this was already addressed in the *Income Tax Act* of the time. It is further submitted, therefore, that the legislators expressly included this new section for cases where ownership was *deferred* in order to require the seller to include the value of the sale on the date of the agreement, and not to delay the inclusion of the income until the date of change of ownership, which could be some considerable time after the receipt of some or all of the amount.

Since its introduction into the current *Income Tax Act (Act No. 58 of 1962)* several amendments have been made to s 24, and the *Explanatory Memoranda* serve as strong

<sup>58</sup> The section in the current *Income Tax Act* also has four fewer commas, but the meaning is unaltered.

indicators as to the legislators' intents in drafting these variations to the section. Section 16 of *Income Tax Act No. 65 of 1986*<sup>59</sup> amended this section and in the *Explanatory Memorandum on the Income Tax Bill, 1986*, which justified these amendments, the following is stated:

*“Credit agreements: Amendment of section 24 of the principal Act*  
*Section 24 of the principal Act provides that where any agreement for the sale of property is concluded subject to the condition that ownership of the property will not pass until the whole or a portion of the purchase price has been paid, the full purchase price is deemed to accrue to the seller when the agreement is concluded. An allowance is, however, granted to the seller in respect of any portion of the selling price which is still due at the end of the accounting period. In terms of an amendment introduced in 1985, this allowance may be granted only in cases where the passing of ownership of the property is suspended for a period of at least 12 months.”*<sup>60</sup> [Emphasis added.]

It is submitted that this clause in the *Explanatory Memorandum* confirms the original legislators' intentions when this section was introduced in 1941 (as well as the intentions of the legislators involved in this 1986 amendment), which was to create a mechanism to bring agreements which *defer* the change of ownership into the tax net. It appears that this section was not created to provide an alternative method of deeming the date of accrual for a standard agreement where ownership changes on registration of transfer in the deeds registry and the proceeds are received on that date, or shortly thereafter.

It should be noted, as it will be referred to later in the chapter, that an earlier amendment to this section was introduced in 1985<sup>61</sup> because of a loophole discovered by taxpayers. Sellers, who disposed of property through such credit agreements and deferred change of ownership until after some of the proceeds had been received, had been granted an allowance for proceeds not received by the end of the financial year, and some would then artificially delay the receipt of certain proceeds in order to reduce their tax liabilities. The 1985 amendment sought to close this loophole.

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<sup>59</sup> *Income Tax Act No. 65 of 1986*, Government Gazette 10330, 4 July 1986

<sup>60</sup> *Explanatory Memorandum on the Income Tax Bill, 1986*, Clause 16 (see Annexures)

<sup>61</sup> *Explanatory Memorandum on the Income Tax Bill, 1985*, Clause 14 (see Annexures)

### 2.2.3 Section 24(1): the historic development of the case law

The judiciary have also been called upon to interpret this section. Section 24 was referred to by Steyn CJ in his judgement of the *SIR v Silverglen Investments (Pty) Ltd* (1968)<sup>62</sup> ('*Silverglen*') case in November 1968. The case can be summarised as follows:

In November 1962 Silverglen Investments (Pty) Ltd ('Silverglen') entered into an agreement of sale with JHS Ebrahim for R200,000 for certain properties in the Silverglen Township. However, due to the *Group Areas Development Act (Act 69 of 1955)* which affected these particular properties, the Group Areas Development Board exercised its pre-emptive right to purchase the land from Silverglen at the price Ebrahim would have paid, but with certain conditions and some depreciation contributions. An agreement to this effect was entered into "on or about" 30 May 1963.<sup>63</sup>

Transfer of the land to the Board finally took place on 7 August 1963 and the purchase price and depreciation contribution amounts paid to Silverglen the following day, on 8 August.<sup>64</sup> Silverglen declared a profit of R347,603 for the transaction which it included as accrued income in its June 1963 financial year. However, the Secretary of Inland Revenue included the income in Silverglen's June 1964 year. This resulted in Silverglen appealing to the Transvaal Income Tax Special Court, which found in favour of the appellant, and hence the Secretary's appeal to the Appellate division.

In the Appellate judgement Steyn CJ stated the following with regard to the lower court's inclusion of the income in the 1963 year,

*"It is clear from the stated case that neither the purchase price nor the depreciation contributions could have been claimed before the transfers took place on 7th August, 1963. They did not, therefore, become payable during the year ended 30th June, 1963, and cannot, I think, be said to have 'accrued', in the ordinary sense, to the respondent during that year. There is, however, the following provision in section 24 of the Income Tax Act:"*<sup>65</sup> [Emphasis added.]

Steyn CJ then quoted s 24 of the *Income Tax Act* which is the same is the current s 24(1), but without the reference to s 24J. It is submitted that here Steyn CJ considered, that had

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<sup>62</sup> *SIR v Silverglen Investments (Pty) Ltd*, 30 SATC 199

<sup>63</sup> *Ibid.* at p.202, "...and on or about 30th May, 1963, the said Board agreed to pay the purchase price together with the depreciation contributions upon registration of transfer."

<sup>64</sup> It is noted that the proceeds were received by Silverglen the day *after* the date of transfer.

<sup>65</sup> *Ibid.* at p.203

it not been for s 24, the income would not have accrued to the taxpayer “in the ordinary sense”, but that this section created a provision which deemed the accrual.

In the court below the Secretary had argued that s 24 could not apply, as this section dealt with transactions where proceeds were received *before* the transfer of ownership and that the transfer of ownership might be suspended until certain proceeds were first received. In this case the proceeds were received *after* the transfer of ownership. However, the court disagreed with the Secretary. Referring once again to s 24 Steyn CJ continued,

*“Counsel for the appellant made the further point that section 24 of the Income Tax Act deals, in relation to immovable property, with an agreement under which transfer [is] to be passed upon or after receipt by the owner of the whole or a certain portion of the amount payable to him under the agreement, i.e. according to counsel, an agreement under which the passing of ownership is suspended notwithstanding that the purchaser is given time to pay, and the consideration is payable before transfer, whereas in this case no amount is payable until transfer has been effected. There is no substance in this. The meaning of 'amount payable . . . under the agreement' is not limited to an amount payable before transfer and in the case of an immovable it is inappropriate to speak, as in the case of an immovable property delivered under a hire-purchase agreement, of the suspension of the passing of ownership, as ownership could in any case not pass under an agreement before transfer.*

*“In my opinion the Board acquired these affected properties by an agreement such as is described in section 24, and the consideration payable under the agreement must be deemed to have accrued on or before 30th May, 1963, i.e. during the tax year ended 30th June, 1963.”<sup>66</sup>*  
[Emphasis added.]

Here it is clear that although the amounts payable were only received by the taxpayer the day after the transfer took place and a considerable time after the agreement was entered into, Steyn CJ still considered that s 24 applied, as the *rights* to these amounts payable had accrued on or even before the date of the agreement. As set forth in the *Lategan* judgement, these rights had a value.

Towards the end of his judgement Steyn amplified his interpretation of s 24 stating,

*“I may add that the special deeming provision in section 24 is in itself an indication that, in the ordinary course at any rate, amounts payable under agreements described in that section, are*

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<sup>66</sup> Ibid. at p.205

to be taxed in the year in which they are deemed to have accrued, and not in any subsequent year of receipt or actual accrual.”<sup>67</sup> [Emphasis added.]

If one considers SARS’ original *Interpretation Note: No.48*, issued on 28 July 2009 (which was archived on 19 December 2014), there was a different interpretation of s 24(1) to Steyn CJ’s *Silverglen* judgement. It read as follows:

**“4.1 The meaning of “the whole amount”**

Section 24 applies when the passing of ownership in respect of movable property or the transfer of immovable property is deferred until the whole or a certain portion of the selling price is received by the taxpayer. In these circumstances, “the whole of that amount” payable to the taxpayer under the agreement for the disposal of trading stock is deemed to be gross income in the hands of the taxpayer on the day on which the agreement is entered into.”<sup>68</sup> [Emphasis added.]

In this interpretation the section only applied if the passing of ownership is deferred until some later date, whereas Steyn CJ applied the section even though there was no deferment of the passing of ownership, as the rights to the income were deemed to accrue on the date of the agreement. It is worth noting that despite Steyn’s *Silverglen* judgement being delivered in the Appellate Division in 1968, the Commissioner continued to apply this section only in circumstances where the change of ownership was deferred.

Considering the same section, de Koker and Williams, in *Silke on South African Income Tax* (‘*Silke*’) stated the following:

*“It may be seen, then, that the true nature of s 24 is that of an inclusion in income. It seeks to prevent a situation in which a taxpayer could argue that, because ownership of trading stock sold by him under certain types of credit agreement still vests in him, no accrual of the proceeds can have taken place. Instead, it deems the whole of the amount excluding finance charges under such an agreement to have accrued to him on the day on which the agreement was entered into. This, it is submitted, is the primary purpose of s 24, and its application to particular circumstances is a question of law involving no discretionary power.*”

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<sup>67</sup> Ibid. at p.208

<sup>68</sup> SARS: *Interpretation Note: No.48*, issued on 28 July 2009 (archived 19 December 2014)

Section 24 does not apply to an unconditional sale under which transfer of ownership in property is not postponed in any manner, even if the selling price is payable in instalments extending over many years.<sup>69</sup> [Emphasis added.]

It is submitted that this too is a different interpretation of s 24(1) to Steyn CJ's *Silverglen* judgement. The *Silke* text primarily includes the case where some amounts are received *prior* to transfer or change of ownership and which also seems to imply that *Silke* is giving greater weight to the heading of the section and describing a typical hire-purchase or credit agreement.

The *Silverglen* judgement was referenced by Binns-Ward JP in his judgement on 30 May 2017 in *ITC 14005*.<sup>70</sup> This case dealt with the sale of 25 properties and the determination of the year in which taxpayer was required to declare the income. The sale agreements were entered into during the taxpayer's 2013 financial year but transfer to the purchasers and receipt of the proceeds took place in the 2014 financial year. Unlike the *Silverglen* case, some of the sales were subject to a suspensive condition, and to this end Binns-Ward JP spent a considerable portion of his judgement addressing them before returning to the effects of s 24(1) on the time of accrual. His reasoning regarding suspensive and other conditions are included here as illustrations of the complexity of the conveyancing process and the argument that it is necessary to be cognisant of it. Binns-Ward JP, at para 14 stated,

*"in some cases the agreements included a suspensive condition in respect of the obtaining by the purchaser of mortgage bond finance. Obviously an entitlement to payment in those matters could not vest in the taxpayer before such conditions were fulfilled."*<sup>71</sup> [Emphasis added.]

There were other conditions which the seller had to comply with prior to giving transfer to the purchaser, including satisfying s 31 of the *Land Use Planning Ordinance (Ordinance 15 of 1985)* ('LUPO'), because land units had been subdivided, and receiving rates clearance from the local authority in terms of s 118 of the *Local Government: Municipal Systems Act (Act 32 of 2000)*. Referring to the dates that suspensive conditions were fulfilled and the above clearances received, Binns-Ward JP stated,

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<sup>69</sup> de Koker and Williams, 2017, *Silke on South African Income Tax*, section 17.26

<sup>70</sup> *Income Tax Case 14005 of The Tax Court of South Africa*, 2017

<sup>71</sup> *Ibid.* at para 14

*“that it would be appropriate to treat the dates ... as those upon which the taxpayer’s conveyancers were ready to lodge papers for the transfers at the deeds office as the dates upon which the taxpayer’s entitlement to payment had vested.”*<sup>72</sup>

One of the transactions’ LUPO certificate was obtained later than the others and Binns-Ward JP treated it as follows:

*“It is not in dispute that the s 31 of LUPO certificate in respect of the 25th transaction in issue (the sale of Erf no.6912 to The Sumbawa Investment Trust) was given by the City only in April 2013. The proceeds of that transaction therefore did not actually accrue to the taxpayer before 31 March.”*<sup>73</sup> [Emphasis added.]

It is submitted that by these paragraphs Binns-Ward JP’s understanding was that it was not only the suspensive conditions which required fulfilment before the taxpayer became entitled to the proceeds, but that also the municipality’s clearance certificates were requirements affecting this time of accrual to the taxpayer. Although the appellant argued that the taxpayer only became entitled to the proceeds on transfer of the properties, Binns-Ward JP referred to the *Lategan* principle:

*“The taxpayer’s entitlement to payment vested at the date of the fulfilment (including fictitious fulfilment in a case in which the purchaser frustrated the actual fulfilment of the condition) of any suspensive conditions to which the agreement was subject, or the date upon which the taxpayer obtained (or, acting reasonably, could have obtained) the statutory permissions necessary to enable it to tender transfer, whichever occurred later. In other words, the entitlement to payment vested in the taxpayer as soon as the contract became enforceable at the instance of either party.”* [Emphasis added.]

In the latter part of the judgement Binns-Ward JP considered the Commissioner’s contention that s 24(1)<sup>74</sup> of the *Income Tax Act* applied and that all 25 transactions, whether or

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<sup>72</sup> Ibid. at para 14

<sup>73</sup> Ibid. at para 16

<sup>74</sup> *Income Tax Act*, s 24. **Credit agreements and debtors allowance.**—(1) Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount

not suspensive conditions were extant, or municipal clearances were required, were deemed to accrue on the date on which the agreements were entered into. Unlike para 13 of the Eighth Schedule<sup>75</sup> which deals with the disposal of capital assets, s 24 makes no mention of suspensive conditions, and despite the heading of this section being “Credit agreements and debtors allowance”, as was pointed out by the appellant’s counsel, Binns-Ward JP stated that in Steyn CJ’s *Silverglen* judgement,

*“there was no reference in either the written argument or the judgment to the effect of the heading to the section. This court is bound by the manner in which the appeal court construed and applied the provision in Silverglen. There is therefore no purpose to be served by us entering into the interesting contesting arguments by the parties concerning the extent to which the heading to the section could be taken into account in construing it.”*<sup>76</sup> [Emphasis added.]

In contrast to the earlier paragraphs of the judgement, where much was said regarding the proceeds accruing on fulfilment of the suspensive conditions, Binns-Ward JP, when considering Steyn CJ’s judgement and the effect of s 24(1) on the transaction, found in favour of the Commissioner. The dates of accrual of the proceeds were *deemed* to be the dates on which each agreement was entered into and not the dates the suspensive conditions were satisfied, nor the dates the various municipal clearances were received. The judgement did not exclude the 25<sup>th</sup> transaction, whose s 31 LUPO certificate was received after the 2013 financial year end, so it too was deemed to accrue on the date the transaction was entered into. It was also made clear that the heading of the section, while it may have implied a hire-purchase agreement, carried no weight in the interpretation of the section. (A discussion of the influence of the headings of sections is set out in further detail below.) This decision appears to be in stark contrast to the principles of accrual found in *Lategan* and *Mooi*. These transactions were deemed to accrue prior to the fulfilment of such conditions which suspend the enforcement of the contract.

In the revised SARS *Interpretation Note: No. 48 (Issue 3)*, dated 5 March 2018, the Commissioner endorsed Binns-Ward JP’s interpretation of s 24(1):

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shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into. [Emphasis added.]

<sup>75</sup> Paragraph 13 of the Eighth Schedule and the timing of accrual of capital assets will be discussed further below.

<sup>76</sup> *Case 14005 of The Tax Court of South Africa*, 2017, at para 29

*“the actual date of accrual under the Lategan principle was academic because the court found that the proceeds were deemed to accrue under section 24(1) on the date of entering into the agreements.”*

It is submitted that this change in SARS’ practice is somewhat surprising as the Commissioner had now taken heed of a judgement in the Tax Court, while for years not following the interpretation of Steyn CJ of the Appellate Division. In the light of the *ITC 14005* judgement, it is submitted further that Binns-Ward JP’s pronouncement, as it pertains to the weight given to the heading of s 24(1), and the situation where suspensive conditions remain unfulfilled into the next year of assessment, are worthy of additional discussion and analysis. This analysis is set out in the next two sections below.

#### 2.2.4 *Section 24(1): The significance of the section heading*

Since Binns-Ward JP dismissed the heading of s 24(1) when considering the applicability of the section to the case and because quite different outcomes appear to occur depending on whether one considers s 24(1) in the light of its heading, a question needs to be answered in relation to the interpretation of an act. If a section of an act has a heading, how does this affect the section’s interpretation?

It is not unknown for legislators to give the heading some consideration, as can be seen from this extract from the *Memorandum On The Objects Of Tax Administration Laws Amendment Bill, 2015*:

***“2.5 Income Tax Act, 1962: Amendment of heading of Fourth Schedule***

*The Fourth Schedule only applies to withholding in respect of normal tax and the wording of the heading should reflect that. Section 89bis was repealed by paragraph 6 of Schedule 1 to the Tax Administration Act, 2011, and thus the reference to it is redundant. The Fourth Schedule is directly connected to section 5, which imposes normal tax.”<sup>77</sup> [Emphasis added.]*

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<sup>77</sup> *Memorandum On The Objects Of Tax Administration Laws Amendment Bill, 2015*. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2015-02%20-%20Memorandum%20on%20the%20objects%20of%20TALA%20Bill%20of%20%202015.pdf> [2018/09/13]

In the case of *President of the Republic of South Africa and Another v Hugo* 1997, Goldstone J gave the following explanation of the character of headings in his note 13 in the majority judgement:

*“Headings have, in certain circumstances, been used by our courts as an aid to interpret the sections of an Act which follow them, even though headings are not voted on or passed by Parliament. In Chotabhai v Union Government and Another 1911 AD 13 at 24 Lord de Villiers CJ, referring to an English decision, adopted the literal traditional viewpoint that “the headings of different portions of a Statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading.” In Turffontein Estates Ltd v Mining Commissioner, Johannesburg 1917 AD 419 at 431 Innes CJ, adopting a purposive approach, held that: “[w]e are. . . fully entitled to refer to [the heading] . . . for the elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process . . . Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case.” See also Solomon JA at 437. This position has recently been further endorsed by the Appellate Division in Chidi v Minister of Justice 1992 (4) SA 110 (A) at 115. See further Bhagwan's v Swanepoel 1963 (4) SA 42 (E) at 43D; Du Plessis Interpretation of Statutes (Butterworths, Durban 1986) 126-7.”<sup>78</sup> [Emphasis added.]*

With reference to the emphasised words above it is submitted, therefore, that one would need to test whether or not s 24(1) is ambiguous in any way in order to determine whether or not its heading should be considered in the section's interpretation. The heading of s 24 as it stands today is “Credit agreements and debtors allowance”, while in the original act, gazetted on 29 May 1962, the side note description of s 24 on page 87 was “Hire-purchase or other agreements providing for postponement of passing of property concerned.”<sup>79</sup> This original

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<sup>78</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), note 13

<sup>79</sup> *Income Tax Act*, s 24. **Hire-purchase or other agreements providing for postponement of passing of property concerned.**—If any taxpayer has entered into any agreement with any other person in respect of any property, the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on

heading appears to have influenced SARS' initial *Interpretation Note No.48* which, as was previously stated, was only applied when the change of ownership was deferred in some way. It is unclear whether or not SARS considered the *Memorandum*<sup>80</sup> to the 1941 *Income Tax Act* quoted above, but it too appears to be in accord with this.

In another case, *Executive Council of the Western Cape Legislature v President of the RSA*, held in the Constitutional Court in 1995, Chaskalson P made a number of points pertinent to this discussion:

*“[33] It is necessary to consider section 232(4) of the Constitution in context. It is contained in Chapter 15 which is entitled “General and Transitional Provisions” and the section itself, according to the heading, deals with “Interpretation”. Section 232(4) is not conclusive on the issue of the exact status of the Constitutional Principles in relation to other provisions in the current Constitution. The section is of general application to all the Schedules to the Constitution. It ensures that they are treated for all purposes as if they formed part of the main body of the Constitution, and makes clear that they do not have a lesser status than provisions located elsewhere in the Constitution. Ordinarily, the position with regard to matter contained in a schedule is as set out by Kotze JA in African and European Investment Co. Ltd. v Warren and Others 1924 AD 308 at 360:”*<sup>81</sup> [Emphasis added.]

In light of this paragraph it is submitted that when interpreting a section or schedule of an act, it is necessary to consider it in context and that titles of chapters and sections can be helpful in interpretation.

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which the agreement was entered into: Provided that in the case of such an agreement in terms of which such ownership or transfer shall not so pass or be passed before the receipt by the taxpayer of a portion of the said amount payable, which portion only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the said agreement, the Commissioner, taking into consideration any allowance he has made under section 11 (j), may make such further allowance as under the special circumstances of the trade of the taxpayer seems to him reasonable, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer's accounting period: Provided further that any allowance so made shall be included as income in the taxpayer's returns for the following year of assessment and shall form part of his income.

<sup>80</sup> *Memorandum on the Income Tax Bill, 1941*

<sup>81</sup> *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (10) BCLR 1289 (CC), 1995 (4) SA 877 (CC), at para 33

In 2012 Wallis JA delivered a judgement (described as a “new *locus classicus*<sup>82</sup> on the principles of statutory interpretation” in SAICA’s *Integritax* newsletter<sup>83</sup>) in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>84</sup>, which considered the “proper approach to interpretation”<sup>85</sup>:

*“The sole benefit of expressions such as “the intention of the legislature” or “the intention of the parties” is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the “ordinary grammatical meaning” or “natural meaning” of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other it beguiles judges into seeking out intention free from the constraints of the language in question and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand*

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<sup>82</sup> “A passage considered to be the best known or most authoritative on a particular subject.” Oxford Dictionaries English, n.d. Oxford University Press. Available: [https://en.oxforddictionaries.com/definition/locus\\_classicus](https://en.oxforddictionaries.com/definition/locus_classicus) [2018/10/28]

<sup>83</sup> SAICA (The South African Institute of Chartered Accountants). 2013. Interpretation of Statutes. *Integritax*. Available: [http://www.saica.co.za/integritax/Archive/Integritax\\_January\\_2013\\_Issue\\_160.pdf](http://www.saica.co.za/integritax/Archive/Integritax_January_2013_Issue_160.pdf) [2018/10/23]

<sup>84</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)

<sup>85</sup> *Ibid.* paras 17-26. While these paragraphs are most illuminating, para 18 is particularly apt: “[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.”<sup>86</sup> [Emphasis added.]

It is submitted, therefore, that the heading of s 24(1) is not irrelevant to its interpretation. Its description echoed the legislators’ intentions when it was originally introduced in 1941 and, as can be seen, when the heading was subsequently amended to its current form in 1986<sup>87</sup> it was not without reference to the section. Hence s 24(1)’s jurisdiction should be over transactions where the change of ownership is deferred in relation to the actual receipt of certain proceeds, i.e. *credit agreements*, and not apply under circumstances where proceeds are received after the change of ownership.

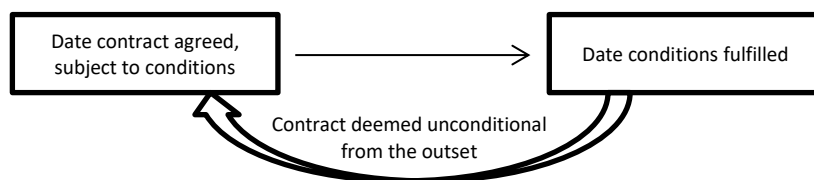
#### 2.2.5 Section 24(1): Contract law considerations

As the current interpretation of s 24(1) disregards suspensive conditions in determining the deemed time of accrual, it may prove instructive to consider the position in contract law. Consider the following from *Christies The law of contract in South Africa*:

***“The effects of fulfilment and non-fulfilment***

*Classically, the effect of fulfilment of a condition precedent is not only that the whole contract, or however much of it is suspended, becomes enforceable, but also that this enforceability operates retrospectively as if the contract had been unconditional from the outset.”*<sup>88</sup>

Superficially, this appears to be the manner in which s 24(1) has recently been interpreted and can be illustrated as follows:

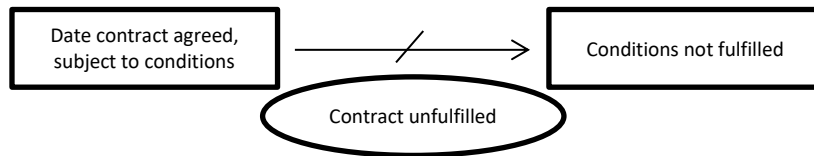


<sup>86</sup> Ibid. para 24.

<sup>87</sup> *Income Tax Act No. 65 of 1986*, Government Gazette 10330, 4 July 1986

<sup>88</sup> Christie, R.H. and Bradfield, G.B. 2011. *Christie’s The law of contract in South Africa, 6th edition*, at p 151

If the conditions are not fulfilled, then the contract lapses:



However, it is submitted that s 24(1) does not specifically allow for the case where a contract lapses, and although, if the entire transaction took place within a particular period this would have no effect on the taxpayer, the question arises again as to its effect in a case where a contract, subject to suspensive conditions, is agreed in one period, but lapses in the following?

The above paragraph from *Christies The law of contract in South Africa* continues:

*“This is not simply a figure of speech, as the dating of the enforceable contract from the time of its making rather than the time of fulfilment of the condition may affect liability for tax but, as can be seen from the cases in footnotes 6–12 at 138 above, this rule is not taken to its logical conclusion. Wessels at paras 1390–1392 considers the conflicting authorities and concludes that, when a conditional sale has been perfected by the fulfilment of the condition, the better view is probably that the fruits produced by the merx in the interim period (for instance apples from a tree) belong to the party in possession of the merx but accruals (for instance the young animals) belong to the buyer. In paras 1396–1402 he concludes that the better view is probably that these rules apply to potestative as well as to casual conditions. The rule that the contract becomes enforceable retrospectively also does not apply if the contract provides otherwise, nor does it affect rights acquired in good faith by third parties during the period of suspension. Non-fulfilment of a condition precedent normally renders the contract void, and there is therefore no question of a party waiving his right to cancel the contract once there has been non-fulfilment although he may waive the entire condition.”<sup>89</sup> [Emphasis added.]*

This interpretation is considerably more nuanced than what s 24(1) allows, and it is submitted that a more reasonable interpretation of s 24(1) might be required or, alternatively, an amendment to this section could be enacted to allow for suspensive conditions, which form such an integral part of an agreement. Following the interpretation that s 24(1) should not apply to disposals of fixed property held as trading stock where there is no deferral of ownership, the time of accrual of the income would then follow the gross income principles of accrual in s 1 or the deeming rule in s 7(1) discussed earlier in this chapter. It is submitted that these

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<sup>89</sup> Christie, R.H. and Bradfield, G.B. 2011. *Christie’s The law of contract in South Africa, 6th edition*, at p.151

considerations represent counter arguments that were not considered in *ITC 14005*, but perhaps they could be raised if the taxpayer in that case decides to appeal this decision.

#### 2.2.6 *Potential amendments to s 24(1) and other sections*

A typical fixed property transaction begins with a sale agreement followed by the parties fulfilling their respective suspensive conditions. Thereafter, depending on the agreement, either transfer is registered and the proceeds are received shortly thereafter, or, in an agreement where there is a deferral of the change of ownership, certain of the proceeds are received prior to registration of the transfer. It is worth reiterating that should the deposit be beneficially received by the seller, instead of being held in trust by a third party, what might have been a normal transaction becomes a credit agreement.

Returning to the three scenarios listed at the beginning of the discussion on s 24(1) where it was submitted that a plain reading of the section leads one to three scenarios, i.e. the section applies when transfer takes place *on* or *after* receipt of any proceeds but not if transfer takes place *before* receipt of the proceeds. Steyn CJ in *Silverglen*, as well as Binns-Ward JP in *ITC 14005* disagree with the final scenario above and, in this case, continue to deem the time of accrual to be the date of the agreement. A further concern is the disregard of the effects of any suspensive conditions. Even a hire-purchase agreement may be subject to suspensive conditions, and unless any of the proceeds are received prior to their fulfilment, it is submitted that those should be considered when determining the time of accrual.

The issue associated with s 24(1) is that it is currently interpreted to deal with agreements which are not typically credit or hire-purchase agreements. If, however, the purpose of this section is to prevent a taxpayer excluding income from a deferred sale but where part of the consideration has already been received, then it is submitted that this would need to be clarified within the section or, alternatively, a higher court needs to rule on the current applicability of the section to all such transactions. This is supported by *Silke*'s<sup>90</sup> interpretation, the *Memoranda* to the 1941 *Income Tax Act*<sup>91</sup> and 1986 *Income Tax Act* amendment<sup>92</sup> as well as SARS original *Interpretation Note, No. 48*,<sup>93</sup> all referenced previously. If this clarification

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<sup>90</sup> de Koker and Williams, 2017, *Silke on South African Income Tax*, at section 17.26

<sup>91</sup> *Memorandum on the Income Tax Bill, 1941*

<sup>92</sup> *Explanatory Memorandum on the Income Tax Bill, 1986*, Clause 16

<sup>93</sup> SARS: *Interpretation Note: No.48*, issued on 28 July 2009 (archived 19 December 2014)

were received, then income from fixed property transactions would accrue according to the normal rules found in ss 1 and 7(1) of the *Income Tax Act*, which sections would allow for the accrual on the date of the fulfilment of the suspensive conditions. While this would be an improvement on the current situation it still does not solve the cash flow issues that are likely to arise for provisional taxpayers which have not received the balance of the cash proceeds by the date the tax thereon is due.

If the date of accrual were deemed to be the date of the receipt of the proceeds, thereby eliminating cash flow issues in the payment of provisional tax, it is not inconceivable that a taxpayer might want to arrange the date of the receipt of the proceeds in order delay income tax liabilities further. This situation is what the 1985 amendment to s 24(1) sort to address (described above).<sup>94</sup> Therefore, it is submitted that an amendment to this section, as well as to ss 1 and 7(1), deeming the date of accrual to be the earlier of the date of registration or receipt of the proceeds would be less of an incentive to shift tax liabilities into the future. In a fixed property transaction made via a loan account, where no funds flow between parties, the date of accrual should be the date of registration. In a large proportion of transactions this would eliminate cash flow issues and the potential penalties on underpayment of provisional tax. In the few cases where a sale is registered close to the last day of the provisional tax period and funds are received in the new period a taxpayer could potentially have tax penalty issues. If there were such a delay in the receipt of the proceeds after the date of registration, then perhaps there could be a standard appeal mechanism available to the taxpayer in order to have such penalties remitted.

Were such an amendment implemented, then from the Commissioner's perspective there would be an initial, and short-term reduction in the receipt of provisional tax payments as certain transactions, which attracted an income tax liability in one six-month provisional tax period, could fall into the subsequent period if their transfers had not concluded by the close of the initial period. Over the period of a tax year, i.e. two provisional tax periods, this proportion of incomplete transactions now shifting into the following tax year, would be significantly smaller, as it is uncommon for conveyancing to experience such delays. The following and subsequent years' tax collections would be indistinguishable from the years prior to the change.

### **2.3 Time of accrual where held as capital assets**

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<sup>94</sup> *Explanatory Memorandum on the Income Tax Bill, 1985*, Clause 14 (see Annexures)

When fixed property held as a capital asset is disposed of, the time of disposal, as defined in the Eighth Schedule of the *Income Tax Act*, is effectively the date on which all suspensive conditions have been met. The initial part of para 13 of the Eighth Schedule confirms this as follows:

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

In SARS’ *Comprehensive Guide to Capital Gains Tax*<sup>95</sup> the underlying principles of the time of disposal are explained in section 6.3.5 *Impact of time of disposal on time of accrual or incurral*. The opening paragraph states the following:

*“A contract of sale not subject to any suspensive conditions in which the transfer of ownership occurs after the conclusion of the agreement of sale involves two disposals, namely,  
• The disposal of a personal right to the buyer, being the right to claim transfer or delivery;  
and  
• The transfer or delivery of the thing sold.”*

The SARS publication quotes Professor Gerard Swart’s article published in *Acta Juridica* in 2002 on the imposition of capital gains tax on trusts. In his article he goes into great detail on the principles of capital gains tax. In the section *“(2) The concept of a ‘disposal’ as applied to trusts,”* he explains that the concept of the right to claim delivery coinciding with the actual date of delivery is “one of the fundamental principles of the Eighth Schedule.”<sup>96</sup> Much emphasis is placed on the change in value of the asset between the date all suspensive conditions are fulfilled and the date of delivery. Because the purchaser first acquires the right to claim delivery at the purchase price of the asset, and because the asset may very well appreciate in the time between the date the suspensive conditions are fulfilled and the date of

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<sup>95</sup> SARS. *Comprehensive Guide to Capital Gains Tax, Issue 7*, at p.175

<sup>96</sup> Swart, G. 2002. The Taxation of Trusts – superimposing new rules on old principles. *Acta Juridica*. at pp.102-135.

delivery, on this delivery date the right to claim delivery would also have appreciated, but the purchase price remains fixed. Therefore, on the delivery date the purchaser disposes of their right to claim delivery at a market value higher than the purchase price and this would create a capital gain. From the point of view of the seller, the right to claim the purchase price remains fixed between the date the suspensive conditions are fulfilled and delivery dates, while the asset appreciates, so a capital loss would be created on the delivery date. The solution to this was to deem the delivery date to be the date the suspensive conditions are fulfilled, as is echoed by Swart's statement, and to treat the process of registration in the deeds office as merely an administrative function.

In the matter of *New Adventure Shelf 122 (Pty) Ltd v CSARS*<sup>97</sup> held in the Western Cape Division of the High Court, Binns-Ward J, while making no reference Swart's arguments above, affirmed that paras 13(1) and 35(4) of the Eighth Schedule deem the accrual to be the date of the conclusion of the contract. In this case there were no suspensive conditions.<sup>98</sup>

*"It was ultimately common cause between the parties that on the facts of the current case the relevant provisions of the Eighth Schedule deem the date of the disposal to have been the date upon which the contract was concluded [reference to para 13(1)(a)(ii) of the Eighth Schedule] and that the proceeds are deemed to have accrued to the taxpayer and fall to be accounted for income tax purposes in the year in which the disposal occurs, even if the proceeds actually fall to be received after that year.[reference to para 35(4) of the Eighth Schedule]"*<sup>99</sup>

Paragraph 35(4) of the Eighth Schedule is not dissimilar to the principle expounded by Watermeyer J in the *Lategan* case described previously, where income accrues when an individual acquires a right to it. The paragraph states,

*"Paragraph 35(4) Where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of that year, that amount must be treated as having accrued to that person during that year."*

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<sup>97</sup> *New Adventure Shelf 122 (Pty) Ltd v CSARS* (2016) (High Court, Western Cape) Case 7007/2015, 78 SATC 190

<sup>98</sup> From Binns-Ward J's footnote (2) "... The issue of the date of disposal ceased to be contentious when the taxpayer abandoned its initially advanced contention that the contract had been subject to suspensive conditions."

<sup>99</sup> *New Adventure Shelf 122 (Pty) Ltd v CSARS*, at para 1

When the counsel for the taxpayer attempted to distinguish between income tax and capital gains tax Binns-Ward J dismissed the argument by referring to s 26A of the *Income Tax Act* which brings a taxpayer's taxable capital gains into their taxable income.

*"While I accept that there are valid bases to distinguish the nature of income tax and capital gains tax, there is no getting away from the fact that s 26A of the income tax draws them together in requiring the taxable capital gain of that person for that year of assessment to be included in the taxable income of a person for a year of assessment."*<sup>100</sup> [Binns-Ward J's emphasis]

However, this view, and Swart's above, of the deemed time of accrual, is not a view held by Haupt, who in *Notes on South African Income Tax*, stated that SARS's occasionally held view that para 13 sets the date of accrual at the time of disposal, is incorrect and that the "time of accrual is in terms of the normal rules and has been well established in the case law over the last 93 years."<sup>101</sup> His view is echoed by Wilcocks and Strydom in their paper, "The concept of 'disposal' for the purposes of capital gains tax in South Africa,"<sup>102</sup> wherein a number of points salient to this topic are made. Their recommendation is that the interpretation of para 13(1) should follow common law principles and that the legislatures' "*attempts to deem a transfer of ownership to be effected upon the causae occurring and not upon the fulfilment of the common law requirements for the transfer of ownership*", creates confusion.<sup>103</sup> They deem that transfer of ownership should not be equated with the conclusion of an agreement<sup>104</sup> and

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<sup>100</sup> *New Adventure Shelf 122 (Pty) Ltd v CSARS*, at para 40

<sup>101</sup> Haupt, P. 2017. *Notes on South Africa Income Tax 2018*, at p.686. "There have been occasions where SARS has treated the accrual as taking place at the time of the disposal, because the view was taken that paragraph 13 also sets the date of accrual. This is incorrect. The time of accrual is in terms of the normal rules and has been well established in the case law over the last 93 years."

<sup>102</sup> Wilcocks, J.S. and Strydom, J.J. 2002. The concept of 'disposal' for the purposes of capital gains tax in South Africa. *Meditari Accountancy Research*, Vol. 10 Issue: 1, pp.311-325.

<sup>103</sup> Ibid. at 316. "Although this paragraph intends to regulate the time of a disposal, the first impression is that the legislature intends a disposal to be effected only upon the change or transfer of an asset. However, the reference to the various causae for the transfer of ownership in subparagraphs 13(1)(a) to (g) creates confusion and it appears as if the legislature attempts to deem a transfer of ownership to be effected upon the causae occurring and not upon the fulfilment of the common law requirements for the transfer of ownership."

<sup>104</sup> Ibid. at 320. "It is clear from the above-mentioned requirements that the transfer of ownership in an asset is a definite and separate legal act, namely a real relationship or contract as opposed to a personal contract, which is the agreement itself (Van der Merwe 1989). If one of these requirements is absent, no transfer of ownership can be effected, although a perfectly legal agreement may have been concluded. The mere conclusion of an agreement does not result in the transfer of ownership (Van der Merwe 1989). In *Lendlease Finance v Corpor Mercedes Agricola* (1976), the court held that "according to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone. There must, in addition, be at least a proper delivery to the purchaser of the contract goods"."

that the definition of *disposal* in the Eighth Schedule be amended to refer to the actual transfer of the asset in order to simplify its application.<sup>105</sup> Taking their argument a step further, if the time of disposal were to follow common law principles, then para 13 becomes an unnecessary complication and can be deleted:

*“Paragraph 13 of the Eighth Schedule, which stipulates the various times for disposal, should be deleted, because the legal concept of transferring ownership (i.e. the common law principles) would automatically determine the time of the disposal. This deletion would result in a clear determination of when a disposal occurs and consequently when the liability for capital gains tax arises, namely only upon the transfer or loss of ownership. Any proceeds received or accrued prior to the transfer or loss of ownership should only be accounted for, from the point of view of capital gains tax, in the year of assessment in which ownership was transferred or lost. To do otherwise would only result in anomalies and uncertainty.”*<sup>106</sup>  
[Emphasis added.]

By way of elucidation, the transfer of ownership of fixed property is required to be done by registration of this transfer of ownership in the Deeds Registry through the conveyancing process, as described in Chapter 1. It is submitted that these arguments, that the date of disposal, or the time of accrual to the taxpayer should coincide with these common law principles<sup>107</sup> and be set at the date of registration in the deeds office,<sup>108</sup> would be a straightforward solution which could apply to any fixed property disposals, whether they are held as capital or trading stock assets. The principles of accrual described in the *Lategan* and *Mooi* cases, although they

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<sup>105</sup> Ibid. at 323. “It is recommended that the legislature should amend the definition of a disposal in the Eighth Schedule to merely refer to the disposal of an asset (other than a personal-use asset) as the transfer of ownership of an asset from one person to another or the loss of ownership of an asset. Because the common law (that has been established over decades) has clear principles regarding how ownership is transferred in various classes of assets, no confusion would arise regarding whether or when a disposal has occurred. This clarity would also obviate confusion that could result from the inclusion of the causes or consequences of an event. Such an amendment of the definition of disposal would simplify the application of the concept of a disposal, which is to be recommended in the already complicated capital gains tax legislation.”

<sup>106</sup> Ibid. at 323

<sup>107</sup> *Deeds Registries Act, s 16. How real rights shall be transferred.*—Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar...” [Emphasis added.]

<sup>108</sup> Wilcocks, J.S. and Strydom, J.J. 2002. The concept of ‘disposal’ for the purposes of capital gains tax in South Africa. *Meditari Accountancy Research*, Vol. 10 Issue: 1. “The transfer of ownership in immovable property is effected by means of registration (section 16 of the Deeds Registries Act 47 of 1937; Van der Merwe 1989; Van Jaarsveld et al 1992). The procedure for the registration of the transfer of ownership is a fairly complex process that is regulated by the Deeds Registries Act 47 of 1937. It is often a time-consuming process (Jones 1985; Van der Merwe 1989) that is only completed a considerable time after the deed of sale was concluded. Consequently, the transfer of ownership in immovable property cannot occur simultaneously with the conclusion of the contract of sale.”

may have dealt with trading assets, are certainly applicable to such disposals, as can be inferred from Haupt's and Wilcocks and Strydom's arguments.

By way of illustration, in the absence of para 13, a sale of a fixed asset would accrue when it is delivered, i.e. when the purchaser has full control and can make full use of the asset. While the date the sale becomes unconditional is a critical date to legally enforce the sale, without the registration of the asset in the purchaser's name the purchaser would have difficulty in leveraging the asset. A financial institution is unlikely to disburse any funds against the asset without the security of the registration of a bond over the asset. As was described in the initial chapter, given that the conveyancing process can be disrupted or delayed by errors or an oversight by the parties involved, it is submitted that this caution is not misplaced.

### *2.3.1 Potential amendments to the Eighth Schedule*

In light of the cash flow issues which may be experienced by provisional taxpayers who dispose of fixed property held as capital assets, coupled with the issues identified in the preceding subsection regarding the application of para 13 to such disposals, this section of the paper proposes possible amendments to the Eighth Schedule to address these issues.

It is submitted that the time of disposal of fixed property in para 13 could be deemed to be the earlier of the date on which the proceeds of the transaction are received or the date on which the transaction is registered. If the date of disposal were the date of the receipt of the proceeds, which would also eliminate the cash flow issues experienced by the seller, there is the risk that taxpayers could arrange for a delay in the receipt of certain proceeds in order to delay their tax liabilities, as was found in the discussion of the historical development of s 24. If the date of disposal is deemed to be the date of registration, in a large proportion of transactions this would eliminate cash flow issues and potential penalties on underpayment of provisional tax. This approach closely follows Haupt's and Wilcocks and Strydom's arguments of accrual above and it may be more logical, therefore, to remove the paragraph in its entirety.

As described in the possible amendments to s 24(1) et al. above, in the few cases where the transfer of ownership is registered on, or very close to, the last day of a period and the funds only received in the subsequent period, i.e. after the due date of the provisional tax payment, then it is submitted that there could be an appeal mechanism for the taxpayer in order to have the penalties remitted. In the event that some, or all, of the proceeds are received prior to the date of transfer, then the time of disposal should be deemed to be this earlier date.

In addition to this proposed change, para 35(4) of the Eighth Schedule would need to be amended in order that it not conflict with the earlier paragraph, or to its deletion. Paragraph 35(4) provides as follows:

*“Paragraph 35(4): Where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of that year, that amount must be treated as having accrued to that person during that year.”*

If amended, it would need to be stipulated that fixed property transactions are deemed to accrue on the earlier of the receipt of the proceeds or the date of registration of transfer.

As with the amendment submitted for s 24(1) the effect on the Commissioner’s tax collections would be short-term and recover in the subsequent year.

## **2.4 Concluding remarks**

The principle of accrual has long been a part of the income tax landscape. Watermeyer J’s judgement in *Lategan*, which took place in 1926, affirmed that a right to future income accrues to the taxpayer in the present, while Ogilvie Thompson CJ’s judgement in *Mooi* delayed the accrual until the fulfilment of suspensive conditions. From an examination of contract law, agreements subject to suspensive conditions would normally require their fulfilment before the contract becomes enforceable, therefore the right to the proceeds, in terms of the case law principles, accrues at that same point in time.

When s 22 *“Hire-purchase or other agreements providing for postponement of passing of ownership of property concerned”* was introduced into the *Income Tax Act (Act No. 31 of 1941)* it was designed to bring the full proceeds of a sale into the taxpayers taxable income, even though delivery of the goods was to be deferred until some later date. The *Income Tax Act* already had sections dealing with income which accrued in the usual way and this section was not introduced to replace that. In the current *Income Tax Act (Act No. 58 of 1962)* this has now become s 24, together with an alteration to the title, *“Credit agreements and debtors allowance.”* Despite this, in Steyn CJ’s 1968 judgement in *Silverglen*, it was held that the proceeds from the sale of trading stock accrued on the date of the agreement, even in cases where there was no deferral of change of ownership. In the more recent judgement in *ITC*

14005 Binns-Ward JP held that s 24(1) deemed the date of accrual to be the date of the agreement, whether or not suspensive conditions were extant.

Paragraph 13 of the Eighth Schedule of the *Income Tax Act* deems the time of disposal of a capital asset to be the date of the agreement, unless there are suspensive conditions, and then it is the date those are fulfilled. There were conflicting opinions as to whether this time of disposal equated with the time of accrual. Haupt's view, as well as the views of Wilcocks and Strijdom, is that the time of accrual is the time that the transfer of the asset is completed.

Returning to the challenge faced by provisional taxpayers in settling their income tax liabilities prior to the receipt of the proceeds: if ss 1, 7(1), 24(1) and para 13 of the Eighth Schedule deemed the time of accrual to be the date the fixed property is transferred to the purchaser, or the date of the receipt of the proceeds, if that is earlier, then the vast majority of these cash flow issues would be resolved. In the relatively few remaining cases where transfer occurs on the provisional tax payment date, but the proceeds are received a day or two later, there could be a mechanism where any penalties for late payment could be remitted. The onus is on the taxpayer to demonstrate that the proceeds were indeed only received after the date the provisional tax payment was due.

While there would be an initial effect on the quantum of the Commissioner's tax collections in the period in which a change such as this would be introduced, thereafter collections would increase again and continue as previously.

## CHAPTER 3 ALTERNATIVE APPROACHES TO TIME OF ACCRUAL IN RESPECT OF FIXED PROPERTY DISPOSALS

### 3.1 Introduction

When would it make sense for tax legislation to deviate from the well-established principles of accrual? There are in fact a number of taxes that have payment dates linked to the date of receipt where major assets are disposed of. It is submitted that this indicates the legislators' preparedness to consider alternative timing approaches.

In this chapter it is discussed how the *Value-Added Tax Act (Act No. 89 of 1991)* has undergone numerous amendments to sections relating to fixed property transactions. As a result of these amendments, the *VAT Act* currently allows for the declaration of output VAT in the period, or periods, in which the proceeds are received, as opposed to when they accrued. The manner in which the *VAT Act* deals with the time of supply and the period in which a vendor declares the output VAT speaks to the consideration given to the time-frames involved in the conveyancing processes, as well as to the cases where these time frames are extended further, owing to the actual construction of the buildings forming part of an agreement of sale.

Section 35A of the *Income Tax Act* directs the purchaser, when buying fixed property from a non-resident, to withhold a percentage of the proceeds and to pay this directly to the Commissioner. In a similar manner, the remuneration paid to foreign performers and to sportsmen and women has a percentage withheld by the payer for the same purpose. Furthermore, the trigger for the date that dividends tax is due is either the date that the dividend is paid or the date it becomes due and payable. In these cases, the amount withheld and then paid to the Commissioner is generally more closely aligned with the date that the taxpayer should have the requisite funds to settle the liability.

In addition, the United Kingdom, whose approach to the time of disposal for capital gains purposes is similar to South Africa's, has a markedly different approach to the eventual payment of the capital gains tax and this is contrasted below. The principles of accrual within the standards issued by the IFRS Foundation are also compared.

## 3.2 Other domestic approaches to the cash flow issue

### 3.2.1 Value-Added Tax: the time of supply

If one considers s 9 of the VAT Act, para 1 reads as follows, as it did when it was first gazetted in 1991:

*“s 9(1) For the purposes of this Act a supply of goods or services shall, except as otherwise provided in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier.” [Emphasis added.]*

This paragraph deems the supply to be the earlier of either the time of the invoice or the time the first portion of the consideration is received. For example, if a supplier issues an invoice on 23 April then that is the date on which the income is to be recognised. Alternatively, if the supplier received some of the consideration on 20 April, i.e. before the invoice is issued, then the income is to be recognised on 20 April.

Later, within the same section of the VAT Act, para (3)(d) deals specifically with fixed property, thereby clearly differentiating fixed property from other goods or services. In the original version of the VAT Act,<sup>109</sup> gazetted in 1991, this paragraph (which was subsequently amended) read as follows:

*“s 9(3) Notwithstanding anything in subsection (1) or (2) of this section –*

*...*

*(d) where goods consisting of fixed property or any real right therein are supplied under a sale, that supply shall be deemed to take place—*

*(i) on the date occurring at the end of the period of six months reckoned from the date on which such sale is entered into: Provided that where the recipient acquires such goods by the exercise of an option to purchase or a right of pre-emption, the date on which the sale is entered into shall be deemed to be the date on which the option or right of pre-emption was exercised; or*

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<sup>109</sup> Value-Added Tax Act (Act No. 89 of 1991). Government Gazette. No.13307. Available: <https://discover-sabinet-co-za.ezproxy.uct.ac.za/webx/access/loadrgazettes/1991/Gov/processed/gg13307.pdf> [2017/04/18]

*(ii) where registration of transfer of the goods is effected in a deeds registry, on the date of such registration; or*  
*(iii) on the date on which any payment is made in respect of the consideration for such supply,*  
*whichever date is earliest;”<sup>110</sup> [Emphasis added.]*

In this paragraph it was deemed that the time of supply in relation to fixed property was the earliest of three dates specified in the description: either six months after the date the agreement was entered into, or the date the transfer was registered, or the date any of the proceeds were received. However, as previously discussed, the deposit which a purchaser lodges with the conveyancing attorney is not considered by the Commissioner to be a payment to the seller. Section 4.3 of the SARS publication, *VAT 409 – Guide for Fixed Property and Construction*,<sup>111</sup> confirms this as follows:

*“Unless and until the funds are actually at the disposal of the seller and applied as consideration received which reduces or discharges the obligation under the contract of sale for the property, no “payment” has occurred. Consequently, there is no liability to declare output tax, or right to deduct input tax until the funds have been released as “payment” to the seller.”*

Returning to s 9(3) of the original *VAT Act*, it was therefore recognised that due to the duration of the conveyancing process a period of time should be allowed in order for the proceeds to be received and the VAT paid to the Commissioner. While a period of six months is reasonable for a transfer to be registered it can take place over a shorter period, hence the inclusion of subparagraph (ii) which linked the VAT to the date of registration of transfer in the deeds office. It is also conceivable that part of the proceeds could be received prior to the transfer date, hence the inclusion of subparagraph (iii) which deems the date of supply to be the date these proceeds are received.

In 1993, Clause 25 of the *Taxation Laws Amendment Act*<sup>112</sup> removed s 9(3)(d)(i) as it was recognised that property developers frequently had projects which extended past the six-

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<sup>110</sup> Ibid. at s 9(3)

<sup>111</sup> SARS. *VAT 409 – Guide for Fixed Property and Construction*, Chapter 4.3, at p.28

<sup>112</sup> *Taxation Laws Amendment Act, 1993*. In 1993 subsec 9(3)(d)(i) was deleted and ‘earliest’ was replaced with ‘earlier’. (See Annexures.)

month time period. The *Explanatory Memorandum* to the corresponding bill stated the following with respect to this deletion:

*“The practical problem often experienced by property developers involved in development projects lasting longer than six months from the date of signing the sale agreement, resulted in this amendment. As the six months period often elapses before transfer of the property in a deeds registry or any payment is made, the reference to the six months period in section 9(3)(d) of the principal Act is deleted by this subclause.”*<sup>113</sup> [Emphasis added.]

The effect of this amendment was that a VAT vendor with a fixed property transaction extending beyond a six-month period, would no longer be required to fund the output VAT via their cash flow and could rely entirely on declaring and paying the output VAT on the receipt of the proceeds.

In the event that the VAT rate is increased or decreased, the property will be deemed to be delivered on the date when registration is effected, as described in s 67A(3):

*“67A. Application of increased or reduced tax rate. (3) For the purposes of subsections (1) and (2) goods shall be deemed to be provided by the supplier thereof when such goods are delivered to the recipient and goods supplied under a rental agreement shall be deemed to be provided to the recipient when he takes possession or occupation thereof: Provided that where goods consist of fixed property supplied by way of a sale and transfer thereof is effected by registration in a deeds registry, that property shall for the purposes of this subsection be deemed to be delivered to the recipient when such registration is effected.”* [Emphasis added]

In this case, in the event the proceeds are received *prior* to registration, the date of delivery will still be the date of registration, and therefore the rate of the tax will be the rate which is in place on the date of registration. Once again, the date of registration in the deeds office is a key factor in this paragraph.

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<sup>113</sup> *Explanatory Memorandum on the Taxation Laws Amendments Bill, 1993*, Clause 25 at p.11. (See Annexures.)

As an aside, the next subsection gives some relief to purchasers and sellers of residential property where, in the event of an increase in the VAT rate, the rate is set at the time the agreement was concluded.<sup>114</sup>

### 3.2.2 *Value-Added Tax: the calculation of tax payable*

There are cases, however, where the proceeds could be received *after* transfer and s 16 of the VAT Act makes provision for such circumstances. Specifically, it provides for the manner in which a taxpayer should calculate the tax payable and the period in which it should be declared. This section has been amended on numerous occasions since its original enactment. One of the changes was to para 4, which, in the current version, refers to s 9(3)(d) discussed above, i.e. to fixed property, but initially had made no such reference. This read as follows in the original VAT Act:

*s 16(4) “For the purposes of subsection (3), output tax in relation to a supply made by a vendor shall be attributable to a tax period—*  
*(a) in the case of a vendor who is in terms of section 15 required to account for tax payable on an invoice basis, where a supply is deemed to be made by him during the tax period; or”*

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<sup>114</sup> *Value-Added Tax Act*, s 67A(4) Subject to the provisions of section 78 (9), where, before the date on which an increase in the rate of tax leviable in terms of section 7 (1) (a) becomes effective, a written agreement is concluded for—

- (a) the sale of fixed property consisting of any dwelling together with land on which it is erected, or of any real right conferring a right of occupation of a dwelling or of any unit as defined in section 1 of the Sectional Titles Act, 1986 (Act No. 95 of 1986), such unit being a dwelling, or of any share in a share block company which confers a right to or an interest in the use of a dwelling; or
  - (b) the sale of fixed property consisting of land, or of any real right conferring a right of occupation of land for the sole or principal purpose of the erection by or for the purchaser of a dwelling or dwellings on the land, as confirmed by the purchaser in writing; or
  - (c) the construction by any vendor carrying on a construction enterprise of any new dwelling, and—
    - (i) the price in respect of the sale or construction in question was determined and stated in the said agreement, as in force before the said date, and that agreement was signed by the parties thereto before the said date; and
    - (ii) the supply of such fixed property or services under the said agreement is in terms of section 9 deemed to take place on or after the said date,
- the rate at which tax is in terms of the said section 7 (1) (a) leviable in respect of that supply, shall be the rate at which tax would have been levied had the supply taken place on the date on which such agreement was concluded.

This initial piece of legislation meant that the output tax declaration and payment was required to be made on the date of the supply and not once the consideration was received. When this paragraph was amended by the 1996 *Taxation Laws Amendment Act*,<sup>115</sup> the *Explanatory Memorandum* to the bill stated that:

*“These amendments are necessary in view of the fact that fixed property is often acquired with only a small deposit being paid and the remainder of the purchase price being paid over an extended period. In the absence of this amendment, suppliers of fixed property can experience severe cash flow problems.”*<sup>116</sup> [Emphasis added.]

The legislators recognised the issues experienced by the vendors and this motivated the change to the *VAT Act* to allow for a staggered declaration of the output VAT. Further clarification of the cash flow issues a vendor trading in fixed property might experience is found in FNB’s House Price Index of the average house prices in South Africa. This index is based on deeds office data around South Africa, and the average house prices were as follows in the first quarter of 2018:

*“The 5 indices are the Luxury Area House Price Index (Average Price = R2.358 million), the Upper Income Area House Price Index (Average Price = R1.251 million), the Middle Income Area House Price Index (Average Price = R895,089), the Lower Middle Income Area House Price Index (Average Price = R577,587), and the Low Income Area House Price Index (Average Price = R364,937).”*<sup>117</sup>

Given these prices a vendor trading in fixed property would be required to account for output VAT over a wide range of values. For example, a house sold for R2,300,000 would include VAT of R300,000. These amendments to s 16(4)(a) now make allowances for property developers in such instances where proceeds are received after the transfer of the fixed property to the purchaser. As it now stands, this section reads as follows:

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<sup>115</sup> *Taxation Laws Amendment Act (Act 37 of 1996)*. Clause 23(1)(f)

<sup>116</sup> *Explanatory Memorandum to the Taxation Laws Amendment Bill, 1996*. Clause 23, at p.12

<sup>117</sup> Loos, J. 2018. *FNB Property Barometer – FNB Area Value Band House Price Indices*. Available: [http://www.saiv.org.za/resource/collection/B70457DF-B11F-442D-94B2-8B1BF7C28C2F/FNB\\_Property\\_Barometer\\_Metro\\_Area\\_Value\\_Band\\_Price\\_Indices\\_3\\_May\\_2018.pdf](http://www.saiv.org.za/resource/collection/B70457DF-B11F-442D-94B2-8B1BF7C28C2F/FNB_Property_Barometer_Metro_Area_Value_Band_Price_Indices_3_May_2018.pdf) [2019/01/12]

s 16(4) “For the purposes of subsection (3), output tax in relation to a supply made by a vendor shall be attributable to a tax period—

(a) in the case of a vendor who is in terms of section 15 required to account for tax payable on an invoice basis—

(i) subject to the provisions of subparagraph (ii), where a supply is made or is deemed to be made by him during that tax period;

(ii) where a supply is made under a sale concluded on or after 6 June 1996 in respect of which the provisions of section 9 (3) (d) apply (other than a supply in respect of which the provisions of section 10 (4) apply), to the extent that payment of any consideration which has the effect of reducing or discharging any obligation (whether an existing obligation or an obligation which will arise in the future) relating to the purchase price for that supply has been made during that tax period; or” [Emphasis added.]

The effect of this section is that the vendor declares the output VAT in the period in which the actual proceeds are received. In addition, if the vendor receives only a portion of the consideration, just that portion of the consideration is declared and the corresponding output VAT paid. For example, if the transfer of a property is registered on 1 January and there is an agreement that the purchaser pays the consideration in instalments over the subsequent five months, then in each of those five months the VAT vendor declares the respective instalments of the consideration.

Read together, these two sections of the *VAT Act*, ss 9(3)(d) and 16(4)(a), make the time of supply the earlier of the registration in the deeds office and the receipt of the payment, but for calculating the VAT payable the vendor declares the receipts in the period in which they are received, and if the proceeds are received in instalments, then the VAT declarations follow suit. The declaration of the deposit would follow its receipt by the seller from the conveyancer.

It is submitted that one could consider whether a similar practice would be practicable within the *Income Tax Act*. The reasoning stated in the *Explanatory Memoranda* could be used in justifying a different interpretation, or even an amendment to the *Income Tax Act* in relation to either the time of the disposal, and hence the period in which the proceeds are to be included in the taxpayer’s income, or when the actual income tax is required to be paid. It is also submitted that the specific mention, in ss 9(3)(d)(ii) and 67A of the *VAT Act*, of the “deeds registry” is also an indication that the actual conveyancing process is an important element in determining the time of the receipt.

### 3.2.3 Section 35A and other withholding taxes on non-residents

When foreign persons are paid from a South African source, such as for royalties<sup>118</sup>, interest<sup>119</sup> and amounts paid to performers and sportspeople<sup>120</sup>, generally a percentage is withheld by the resident at the time these payments are made. These percentages are then submitted to the Commissioner on behalf of the foreign persons. Similarly, when a non-resident disposes of fixed property, in terms of s 35A of the *Income Tax Act*, the purchaser is required to withhold a percentage of the any amounts paid to the seller and submit these to the Commissioner within a specified period of time.

*“35A. Withholding of amounts from payments to non-resident sellers of immovable property.—(1) Any person (hereinafter referred to as “the purchaser”) who must pay any amount to any other person who is not a resident (hereinafter referred to as “the seller”), or to any other person for or on behalf of that seller, in respect of the disposal by that seller of any immovable property in the Republic must, subject to subsection (2), withhold from the amount which that person must so pay, an amount equal to—”* [Emphasis added.]

While the purpose of the withholding taxes in relation to non-residents may be to minimise the risk to the Commissioner of being unable to collect tax from such persons or entities, they do illustrate that not all taxes are payable on the accrual of the income. With specific reference to the tax withheld on the sale of immovable property by non-residents, this tax, in terms of subsection (3)(a), is an early payment against the seller’s tax liability for the year.

*“(3)(a) The amount withheld from any payment to the seller in terms of subsection (1) is an advance in respect of that seller’s liability for normal tax for the year of assessment during which that property is disposed of by that seller.”* [Emphasis added.]

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<sup>118</sup> *Income Tax Act*, s 49B. **Levy of withholding tax on royalties.**—(1)(a) There must be levied for the benefit of the National Revenue Fund a tax, to be known as the withholding tax on royalties, calculated— ...

<sup>119</sup> *Income Tax Act*, s 50B. **Levy of withholding tax on interest.**—(1)(a) There must be levied for the benefit of the National Revenue Fund a tax, to be known as the withholding tax on interest, calculated— ...

<sup>120</sup> *Income Tax Act*, s 47B. **Imposition of tax.**—(1) Subject to subsection (3), there must be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the tax on foreign entertainers and sportspersons, in respect of any amount received by or accrued to any person who is not a resident (in this Part referred to as the “taxpayer”) in respect of any specified activity exercised or to be exercised by that person or any other person who is not a resident. ...

This mechanism, it is submitted, might be considered as a way to alleviate the challenges of payments of provisional tax by resident taxpayers by following the precepts of s 35A to require a payment of tax at the end of the month following registration or receipt of the funds. This would mean either extending s 35A to include residents or adding an entirely new section. The Fourth Schedule would also require an adjustment to allow for this additional payment. A possible disadvantage is that a fixed percentage of the proceeds paid to the Commissioner after transfer might be quite different to the percentage profits for the year of assessment and so might not be the most equitable procedure, unless the section allowed for an appropriate estimate of the tax, as opposed to a fixed percentage. This proposal would need some careful consideration to ensure it does not inadvertently create further hardship.

#### 3.2.4 Dividends Tax

Dividends Tax is a further example of a tax more closely following the time of payment as opposed to the time of accrual. In terms of s 64G<sup>121</sup> of the *Income Tax Act* this tax is withheld by the company which declare and pays the dividend. This tax must then be paid to the Commissioner, in terms of s 64K,<sup>122</sup> by the last day of the month following the month in which the dividend, was paid, or was due and payable, in terms of s 64E(2) and (3)<sup>123</sup>. Were the

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<sup>121</sup> *Income Tax Act*, s 64G. **Withholding of dividends tax by companies declaring and paying dividends.**—

(1) Subject to subsections (2) and (3), a company that declares and pays a dividend must withhold an amount of dividends tax from that payment calculated as contemplated in section 64E except to the extent that—

<sup>122</sup> *Income Tax Act*, s 64K. **Payment and recovery of tax.**—(1) ... (c) If, in terms of this Part, a person is required to withhold any amount of dividends tax in respect of a dividend, that person must pay that amount, less any amount refundable in terms of section 64L or 64M, to the Commissioner by the last day of the month following the month during which that dividend is paid by that person as contemplated in section 64G or 64H.

<sup>123</sup> *Income Tax Act*, s 64E. **Levy of tax.** — ... (2) For the purposes of this Part, a dividend must, to the extent that the dividend—

(a) does not consist of a distribution of an asset in specie and is declared by a company that is—

(i) a listed company, be deemed to be paid on the date on which the dividend is paid; or

(ii) not a listed company, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable; or

(b) consists of a distribution of an asset in specie, be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable.

(3) Where a company declares and pays a dividend and that dividend consists of a distribution of an asset in specie, the amount of the dividend must, for the purposes of subsection (1), be deemed—

(a) in the case of an asset which is a financial instrument listed on a recognised exchange as defined in paragraph 1 of the Eighth Schedule and for which a price was quoted on that exchange, to be equal to the ruling price of that financial instrument on that recognised exchange at close of business on the last business day before the date that the dividend is, in terms of subsection (2), deemed to be paid; or

(b) in the case of an asset which is not an asset contemplated in paragraph (a), to be equal to the market value of the asset on the date that the dividend is, in terms of subsection (2), deemed to be paid. [Emphasis added.]

beneficial owner responsible for the payment of the tax on the accrual date, this tax would need to be sourced from funds other than the dividends themselves, placing strain on the taxpayer's cash flow. This is not unlike the current predicament provisional taxpayers have the potential of finding themselves in when disposing of fixed property.

While this serves as an illustration of a tax payment not following the time of accrual, the disposal of fixed property is significantly more complex and, as described above, any amendment would require careful consideration if it were to follow the lines of a withholding tax.

### 3.3 The United Kingdom's approach to the cash flow issue

The reason in selecting the United Kingdom as a contrast to the South African approach is because of the manner in which it has addressed the timing of accrual in relation to the provisional tax cash flow issue. The UK has an alternative approach to the payments of tax, where the tax on capital gains is not paid with their payments on account, the UK's equivalent of South Africa's provisional tax payments. However, their times of disposal still equate with South Africa's.

Briefly looking at the disposal of capital assets, the *Taxation of Chargeable Gains Act*<sup>124</sup> treats the time of disposal as follows:

***“28 Time of disposal and acquisition where asset disposed of under contract***

*(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).*

*(2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.*” [Emphasis added.]

This is equivalent to the para 13 of the Eighth Schedule of the *Income Tax Act* where a disposal occurs on the date the contract is made if there are no suspensive conditions, otherwise on the date on which those conditions are satisfied.

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<sup>124</sup> *Taxation of Chargeable Gains Act of 1992*

With specific reference to a capital gain, under the *Taxation of Chargeable Gains Act, Time for payment of tax*, it is stated that,

“7. Capital gains tax assessed on any person in respect of gains accruing in any year shall be payable by that person on or before 1st December following the end of that year, or at the expiration of a period of 30 days beginning with the date of the issue of the notice of assessment, whichever is the later.” [Emphasis added.]

This date was subsequently amended but illustrates the tax on capital gains accruing in a particular year are not required to be paid within that same year. Continuing with the actual payment of taxes, in terms of ss 59A and 59B of the *Taxes Management Act of 1970*,<sup>125</sup> as amended by the *Finance Act 1994*<sup>126</sup>, the following table summarises the schedule of payments required for the UK tax year (which runs from 6 April to 5 April the following year):

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<sup>125</sup> *Taxes Management Act of 1970*, s 59A, **Payments on account of income tax**, and s 59B, **Payment of income tax and capital gains tax**

<sup>126</sup> *Finance Act 1994*, s 192 **Payments on account of income tax** – 59A(2) Subject to subsection (3) below, the taxpayer shall make two payments on account of his liability to income tax for the year of assessment—

(a) the first on or before the 31<sup>st</sup> January in that year, and  
(b) the second on or before the next following 31<sup>st</sup> July;

and, subject to subsection (4) below, each of those payments on account shall be of an amount equal to 50 per cent. of the relevant amount.

Section 193 *Payment of income tax and capital gains tax* – 59B(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source, shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below.

...

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31<sup>st</sup> October next following that year, the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31<sup>st</sup> January next following the year of assessment.

<b>Due date</b>	<b>Payments on account (these exclude capital gains tax payments)</b>	<b>Balancing payment (and capital gains tax payments)</b>
31 January	50% of the value of the prior year's tax paid to be paid towards the current year's tax bill	
31 July	50% of the value of the prior year's tax paid to be paid towards the current year's tax bill	
Next year 31 January	Deadline for income tax return submission	Remainder of 5 April tax bill and the payment of the capital gains.

Here the distinction in the types of taxes payable in the UK's payments on account is visible. The payments on account exclude any capital gains tax payments which are payable on 31 January in the year following the 5 April tax year end. In the case of fixed property sales, this gives the UK taxpayer almost ten months from the financial year end to allow the conveyancing process to conclude and for the proceeds to be received.

For a limited company, their Corporation Tax must be paid nine months and one day after the end of their financial year if their profits are up to £1.5 million.<sup>127</sup> If their profits are expected to be more than £1.5 million it must be paid in four instalments, which, in terms of Regulation 5(3)<sup>128</sup> of *The Corporation Tax (Instalment Payments) Regulations 1998*, must be paid by the following dates:

- “6 months and 13 days after the first day of the accounting period
- 3 months after the first instalment
- 3 months after the second instalment (14 days after the last day of the accounting period)
- 3 months and 14 days after the last day of the accounting period”<sup>129</sup>

<sup>127</sup> Gov.Uk. *Pay your Corporation Tax bill*. <https://www.gov.uk/pay-corporation-tax> [2017/09/03]

<sup>128</sup> UK. *The Corporation Tax (Instalment Payments) Regulations 1998*.

“(3) The first instalment payment shall be treated as becoming due and payable on the date which is six months and thirteen days from the start of the accounting period.

The final instalment payment shall be treated as becoming due and payable on the date which is three months and fourteen days from the end of the accounting period.

An additional instalment payment or additional instalment payments shall, where the length of the accounting period so allows, each be treated as becoming due and payable on the date which is three months after the date of the immediately preceding instalment payment.”

<sup>129</sup> Gov.Uk. *Pay Corporation Tax in instalments*. <https://www.gov.uk/guidance/corporation-tax-paying-in-instalments> [2017/09/03]

In this case, a company might very well have an issue funding the tax on profits from a large development. This places large UK firms in a similar position to South African firms while smaller firms have the benefit of the nine-month period to settle their tax bills.

Another difference is that UK corporations and individuals are not charged a penalty on late payments, although they are charged interest.<sup>130</sup> On the face of it this appears to be an equitable solution, as in the event a taxpayer's cash flow inhibits the timely payment of tax owing to a delay in the receipt of proceeds from a fixed property disposal, the additional cost to the taxpayer is relatively small. However, this approach does not seem to have worked and the HMRC (Her Majesty's Revenue and Customs) have put forward an amendment to introduce penalties on late payments.<sup>131</sup>

While the UK legislation does not specifically refer to the conveyancing process or the registration of transfer, the extension of time to pay the capital gains is indicative that disposals of fixed property were considered to be more time-consuming than the sale of other items. It is submitted that this is also a practice which could be considered in South Africa as a partial solution to the cash flow problem. The advantage to the taxpayer is that most transactions would be concluded by the final tax payment date. Only a small proportion of transactions would not be affected by an amendment such as this. Penalties associated with underpayment relating to such transactions would be eliminated to a large degree.

If such an amendment were considered it would entail a change to the Fourth Schedule to differentiate between normal taxable income and taxable capital gains specifically from fixed property transactions and which could then be deemed to be excluded from the provisional tax estimates. However, it may be simpler to amend para 13 of the Eighth Schedule and ss 1, 7(1) and 24(1) by deeming the accrual date of any such transaction to be the earlier of date of receipt of the proceeds or the registration date of the transaction.

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<sup>130</sup> Gov.uk, *Corporation tax: interest charges*. <https://www.gov.uk/guidance/corporation-tax-interest-charges> and *If you cannot pay your tax bill on time*. <https://www.gov.uk/difficulties-paying-hmrc/youve-missed-the-payment-deadline> [2018/09/16]

<sup>131</sup> TaxJournal.com, *New draft penalties for late payment of corporation tax*, 1 August 2018. <https://www.taxjournal.com/articles/new-draft-penalties-late-payment-corporation-tax-01082018>

### 3.4 Accounting approach to the cash flow issue

It is recognised that tax law need not follow accounting principles in any way, but it is nevertheless of interest to see whether the accounting approach takes cash flow considerations into account in recognising fixed property sales.

The International Financial Reporting Standards ('IFRS') Foundation and the International Accounting Standards Board ('IASB') develop, what they describe as “globally accepted accounting standards”<sup>132</sup> whose purpose is to standardise financial reporting by companies worldwide. According to their media release, 144 of the 166 jurisdictions they surveyed use the IFRS Standards.<sup>133</sup> It would be worth considering their recommendations, particularly if their approach differs from the South African legislators' approach. The two standards considered here are IFRS 15 – *Revenue from Contracts with Customers* and IAS 40 – *Investment Property*.

#### 3.4.1 IFRS 15 – Revenue from Contracts with Customers

The IFRS 15 standard deals with the recognition of revenue in an entity for a transaction between the entity and a *customer*. (Capital receipts are excluded. They are dealt with in IAS 40 below.) A *customer* is defined as,

*“A party that has contracted with an entity to obtain goods or services that are an output of the entity's ordinary activities in exchange for consideration.”*<sup>134</sup>

In terms of paras 9 to 16, a number of criteria need to be met in order for a contract to be recognised, and subsequently for revenue to be recognised. Paragraph 9 identifies whether or not there is a contract or a sale:

*“[9] An entity shall account for a contract with a customer that is within the scope of this Standard only when all of the following criteria are met:*

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<sup>132</sup> IFRS Foundation. *Who we are*. <https://www.ifrs.org/about-us/who-we-are/#tab1> [2018/8/20]

<sup>133</sup> IFRS Foundation. *Who we are and what we do*. <https://www.ifrs.org/-/media/feature/about-us/who-we-are/who-we-are-english-2018-final.pdf> [2018/8/20]

<sup>134</sup> IFRS Foundation. *IFRS 15 – Appendix A – Defined terms*

- a. the parties to the contract have approved the contract (in writing, orally or in accordance with other customary business practices) and are committed to perform their respective obligations;
- b. the entity can identify each party's rights regarding the goods or services to be transferred;
- c. the entity can identify the payment terms for the goods or services to be transferred;
- d. the contract has commercial substance (ie the risk, timing or amount of the entity's future cash flows is expected to change as a result of the contract); and
- e. it is probable that the entity will collect the consideration to which it will be entitled in exchange for the goods or services that will be transferred to the customer. In evaluating whether collectability of an amount of consideration is probable, an entity shall consider only the customer's ability and intention to pay that amount of consideration when it is due. The amount of consideration to which the entity will be entitled may be less than the price stated in the contract if the consideration is variable because the entity may offer the customer a price concession (see paragraph 52).” [Emphasis added.]

This paragraph describes what is typically contained within an agreement of sale between two parties: a) the parties have a contract where a price has been agreed; b) the parties each have certain rights and obligations, such as the purchaser agrees to pay the stated amounts and possibly is given time to obtain finance for the transaction and the seller has to supply goods in a certain condition; c) the seller usually would receive payment on transfer of ownership to the purchaser; d) and e) one hopes that the entity’s cash flow would change and that it would expect to collect the consideration.

Paragraph 31 requires the entity to transfer the goods to the customer:

*“An entity shall recognise revenue when (or as) the entity satisfies a performance obligation by transferring a promised good or service (ie an asset) to a customer. An asset is transferred when (or as) the customer obtains control of that asset.”* [Emphasis added.]

The date at which the revenue should then be recognised is the date when purchaser obtains control of the asset. In para 33 this is expanded on as follows:

*“[33] Goods and services are assets, even if only momentarily, when they are received and used (as in the case of many services). Control of an asset refers to the ability to direct the use of, and obtain substantially all of the remaining benefits from, the asset. Control includes the ability to prevent other entities from directing the use of, and obtaining the benefits from, an*

*asset. The benefits of an asset are the potential cash flows (inflows or savings in outflows) that can be obtained directly or indirectly in many ways, such as by:*

- a. using the asset to produce goods or provide services (including public services);*
- b. using the asset to enhance the value of other assets;*
- c. using the asset to settle liabilities or reduce expenses;*
- d. selling or exchanging the asset;*
- e. pledging the asset to secure a loan; and*
- f. holding the asset.” [Emphasis added.]*

With reference to these paragraphs, if an agreement is entered into for the sale of fixed property and the purchaser is given a fixed time to obtain finance for the purchase, when would the revenue be recognised? In this case the seller cannot recognise the revenue prior to the purchaser securing the finance for the purchase, otherwise, in terms of paragraph 9 e) above, it is unlikely the consideration would be collected. Once the purchaser’s funding has been secured it would appear there are no further obligations on either party other than following the conveyancing process to completion. It would seem, therefore, that the revenue would be then recognised on the date the purchaser’s obligations were fulfilled, or the date on which the suspensive conditions were met. In terms of para 33, however, when *have* the majority of the benefits and control of the asset been transferred to the purchaser? It seems fair to assume that there is nothing stopping the purchaser from making use of the asset, although, it is submitted, one wonders whether the agreement would in fact allow the purchaser to take possession and bear all risks prior to the date of transfer, or to pledge the asset as security for a loan.

Comparing this to the *Lategan* and *Mooi* cases previously discussed (i.e. that income accrues when the individual is unconditionally entitled to it), there is much similarity. The presence of para 33, however, adds a layer of complexity and seems to be moving the time of accrual to the date of the transfer of ownership.

### 3.4.2 IAS 40 – Investment Property

The income tax consequences of fixed property held as a capital asset and then disposed of, are contrasted with the IAS 40 standard, which deals with *investment property*. *Investment property* is defined in para 5 of IAS 40 as follows:

*“Investment property is property (land or a building-or part of a building-or both) held (by the owner or by the lessee as a right-of-use asset) to earn rentals or for capital appreciation or both, rather than for:*

- a. use in the production or supply of goods or services or for administrative purposes; or*
- b. sale in the ordinary course of business.”*<sup>135</sup> [Note: sub-paragraph a) of the above is effectively the definition of an *owner-occupied property*.<sup>136</sup>]

In order to determine when an asset should be recognised, para 16 requires the following:

***“Recognition***

*16 An owned investment property shall be recognised as an asset when, and only when:*

- a. it is probable that the future economic benefits that are associated with the investment property will flow to the entity; and*
- b. the cost of the investment property can be measured reliably.”*

From this paragraph it seems clear that, in a transaction with suspensive conditions, the asset is recognised when those conditions are met, otherwise the economic benefits described in para 16 a) are unlikely to flow to the purchaser as the sale could be cancelled. For transactions without suspensive conditions it would appear that the date of the agreement would be the date on which the asset is recognised.

In para 24 of this standard it is stated that,

*“[24] If payment for an investment property is deferred, its cost is the cash price equivalent. The difference between this amount and the total payments is recognised as interest expense over the period of credit.”*<sup>137</sup>

This allows the full value of the asset to be determined despite the delayed receipt or payment of the consideration, by excluding the finance costs due on the credit portion of the transaction.

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<sup>135</sup> IFRS Foundation. *IAS 40*, Definitions, para 5

<sup>136</sup> IFRS Foundation. *IAS 40*, Definitions, para 5 – *Owner-occupied property* is property held (by the owner or by the lessee as a right-of-use asset) for use in the production or supply of goods or services or for administrative purposes.

<sup>137</sup> IFRS Foundation. *IAS 40*, Measurement of recognition, para 24

When considering the date of the disposal of an asset, para 67, under the section titled “Disposals”, states:

*“[67] The disposal of an investment property may be achieved by sale or by entering into a finance lease. The date of disposal for investment property that is sold is the date the recipient obtains control of the investment property in accordance with the requirements for determining when a performance obligation is satisfied in IFRS 15. IFRS 16 applies to a disposal effected by entering into a finance lease and to a sale and leaseback.”<sup>138</sup> [Emphasis added.]*

Once again, the date on which the recipient obtains control of the asset is the requirement to be met in order to determine the date of disposal. It is submitted that this would at least be the date on which all suspensive conditions are met, which is also the requirement of para 13 of the Eighth Schedule. However, the reference to IFRS 15 requires that para 33 of that standard is also in effect, which then appears to bring the disposal to the date of registration of transfer.

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Although the IFRS Standards are not legislation and merely a guideline to the accounting practices of companies worldwide, it treats fixed property transactions, whether capital or revenue in nature, in a similar manner: the recipient needs to have substantial control of the asset for the disposal to be recognised by the seller. This is in contrast to para 13 of the Eighth Schedule, where a disposal is recognised once suspensive conditions are met, or where there are none, on the date on which the agreement is entered into. It is also at odds with s 24(1), which deems the date of the agreement to be the time of accrual for revenue transactions.

### **3.5 Concluding remarks**

It is noteworthy that the *VAT Act* specifically accommodates the registration of fixed property transactions in the deeds registry and even goes so far as to accommodate receipts in instalments. This is as a result of the understanding that the proceeds, apart from the deposits usually held by a third party, are closely linked to the date of transfer. VAT, which is levied on the actual value of the supply and, as was illustrated, can be relatively large, could be a challenge to pay prior to the receipt of the consideration. It is submitted that the amendments

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<sup>138</sup> IFRS Foundation. *IAS 40*. Disposals, para 67

made in the *VAT Act* to the definitions of the time of supply and to the calculation of tax payable, address the cash flow issues a property developer, or any VAT vendor trading in fixed property, might experience in a fixed property transaction in the payment of output VAT. The *Income Tax Act* has not benefitted from similar amendments despite the fact that provisional taxpayers experience corresponding cash flow issues, as discussed in the Chapter 1. Therefore, it is also submitted that, if one follows the reasoning stated in the *Explanatory Memoranda* on the 1993 and 1996 *Taxation Laws Amendment Bills* included above, similar consideration could be given to the payment of provisional tax. This would result in an easing of the provisional tax burden payable prior to the receipt of the proceeds in those cases where a sale is concluded in periods prior to the period of the transfer of ownership.

The withholding taxes on foreign persons and non-residents disposing of fixed property serve the practical purpose of retaining potential taxes within the borders of South Africa before the sums are repatriated and then difficult to obtain. Tax on dividends is not paid when the decision to issue dividends is made but when dividends are actually paid (or are due and payable). These taxes also illustrate a willingness for legislators to move beyond the strict confines of the principles of accrual and, where necessary, allow for a pragmatic approach to tax collection.

The United Kingdom allows for a delayed payment of capital gains tax (with the exception of limited companies), so while the income on the sale of a capital asset accrues in a manner similar to the Eighth Schedule, a taxpayer is given approximately nine months to allow for the conclusion of the conveyancing process and receipt of the proceeds. If South Africa were to follow this approach it would require a differentiation between normal taxable income and capital gains and, while it would assist taxpayers disposing of capital assets, a provisional taxpayer trading in fixed property would receive no relief without further changes to the *Income Tax Act*.

The accounting approach found within the IFRS Standards is weighted in favour of following the date of registration of transfer in the deeds office as the time of disposal or accrual, and it is submitted that this approach, and the approach found within the *VAT Act*, would be a practicable solution to the provisional taxpayer's cash flow issues.

## CHAPTER 4 CONCLUSIONS AND RECOMMENDATIONS

### 4.1 A summary of the findings

It is submitted that the timing of accrual when disposing of fixed property should not be overly burdensome for provisional taxpayers who are obliged to make provisional tax payments timeously and accurately with regard to income accrued for the particular period.<sup>139</sup> The times of the provisional tax payments are fixed, therefore it is the time of the accrual for income tax purposes which is to be determined and which, to minimise cash flow difficulties for the taxpayer, should be as close to the actual receipt of the proceeds as possible. In the attempt to ascertain the time of accrual six questions were posed in Chapter 1 regarding the time of disposal of fixed property:

- i) does a disposal take place on the date an agreement is entered into, or
- ii) is it once all suspensive conditions are met, or
- iii) are there other requirements or conditions which affect this date, or
- iv) does it take place when the transfer of ownership is registered in the deeds office, or
- v) is it on receipt of any or all of the proceeds, and
- vi) should the timing of the disposal differ between fixed property held as a capital asset and fixed property held as trading stock?

In terms of the areas of the *Income Tax Act* which were discussed, s 24(1) may deem the time of accrual to the date of the agreement and it is unaffected by suspensive conditions or the receipt of the proceeds, while para 13 of the Eighth Schedule deems to the time of disposal to be the fulfilment of the suspensive conditions. Sections 1 and 7(1) require the inclusion of income, whether received or accrued. Generally the deposit held by a third party does not constitute a receipt,<sup>140</sup> although the taxpayer could be required to demonstrate this.<sup>141</sup>

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<sup>139</sup> *Income Tax Act*, Fourth Schedule, paras 20(1) and 27.

<sup>140</sup> *Royal Anthem Investments 129 (Pty) Ltd v Lau and another*, [2015] JOL 33637 (SCA). “[16] However the deposit was paid to the first defendant in his capacity as the conveyancing attorney, to be held in trust pending registration of transfer, and as transfer never took place it was never paid to the appellant. The deposit appears therefore not to be an amount envisaged by clause 6.” [Here clause 6 refers to the sale agreement and the phrase “keep any other amounts payable”]

<sup>141</sup> *Tax Administration Act*, s 102. **Burden of proof.**—(1) A taxpayer bears the burden of proving—  
(a) that an amount, transaction, event or item is exempt or otherwise not taxable;

This difference in the times of disposal or accrual between s 24(1) and para 13 of the Eighth Schedule means that two identical assets held by the same taxpayer would have different times of disposal if one were held as a capital asset, while the other as trading stock.

In Binns-Ward JP's judgement in *ITC 14005* he recognised that procedures within the conveyancing process, such as s 31 LUPO certificates and rates clearances, together with the fulfilment of suspensive conditions all delayed the right to the proceeds accruing to the seller.<sup>142</sup> Had he not been required to consider s 24(1) it appears he would have deemed the time of accrual to be on the fulfilment of these requirements. The examination of contract law found that suspensive conditions cannot be dismissed out of hand, as appears to be the case if s 24(1) is applicable. In addition, the application of s 24(1) appears to have altered since its introduction in the 1941 *Income Tax Act* where it brought transactions allowing for a deferment of transfer of ownership into the tax net. The current application is to apply it to any sale of trading stock.

Wilcocks and Strijdom recommended that para 13 of the Eighth Schedule's time of disposal be removed entirely, and that the proceeds should accrue to the taxpayer on registration of transfer of ownership by the Deeds Registry.<sup>143</sup> This accords with the *Deeds Registries Act*, which requires all changes in ownership in fixed property be registered in the deeds office,<sup>144</sup> and accords with the *Alienation of Land Act*, which defines ownership in land as the person in whose name the land is registered in the deeds office.<sup>145</sup> This is also the accounting approach found within the IFRS Standards where, for both revenue from contracts and investment property disposals, the purchaser needs to have substantial control and use of the asset. In the majority of instances this requires the registration of transfer of the asset.<sup>146</sup>

It was submitted that a taxpayer should not be at the mercy of one legislated process in order to comply with another. The lengthy process of conveyancing is required to be followed, and the conclusion of such process is invariably the time of the receipt of the proceeds.

In building an argument for an amendment to the time of accrual for fixed property transactions, whether held as trading stock or capital assets, the *Value-Added Tax Act* was examined. As was stated in the *Explanatory Memorandum on the Taxation Laws Amendments Bill, 1993*, the definition of "time of supply" in respect of fixed property in the *VAT Act* was amended specifically to accommodate the construction period of property developments and

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<sup>142</sup> *Income Tax Case 14005 of The Tax Court of South Africa*, 2017, at paras 14-16

<sup>143</sup> Wilcocks, J.S. and Strydom, J.J. 2002. The concept of 'disposal' for the purposes of capital gains tax in South Africa. *Meditari Accountancy Research*, Vol. 10 Issue: 1, pp.311-325.

<sup>144</sup> *Deeds Registries Act*, s 16. **How real rights shall be transferred.**

<sup>145</sup> *Alienation of Land Act (Act No. 68 of 1981)*, s 1. **Definitions.**

<sup>146</sup> IFRS 15 – *Revenue from Contracts with Customers* and IAS 40 – *Investment Property*, discussed in Chapter 3

that the time of supply would be deemed to be the earlier of the date of registration of transfer in the deeds office or the receipt of the proceeds,<sup>147</sup> excluding any deposit held by a third party. VAT declarations are also allowed to follow proceeds received in instalments.<sup>148</sup> While, within the *Income Tax Act*, dividends withholding tax<sup>149</sup> and taxes withheld on non-residents or foreign performers and sportspeople<sup>150,151,152,153</sup> are examples of taxes where, although income might have accrued, the due dates of the liabilities are closely aligned to the cash receipt. The United Kingdom’s approach to the disposal of capital assets does not change the time of accrual but allows an extended time to settle the capital gains tax<sup>154</sup> which in effect allows the conveyancing process to reach its conclusion.

## 4.2 The proposals and their effects

Potential amendments to s 24(1)<sup>155</sup> as well as to the principle of accrual contained within ss 1<sup>156</sup> and 7(1)<sup>157</sup> were suggested in Chapter 2 and are summarised as follows:

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<sup>147</sup> *VAT Act*, s 9 (3)(d)

<sup>148</sup> *VAT Act*, s 16(4)(a)(ii)

<sup>149</sup> *Income Tax Act*, s 64G

<sup>150</sup> *Income Tax Act*, s 35A. **Withholding of amounts from payments to non-resident sellers of immovable property.**—(1) Any person (hereinafter referred to as “the purchaser”) who must pay any amount to any other person who is not a resident (hereinafter referred to as “the seller”), or to any other person for or on behalf of that seller, in respect of the disposal by that seller of any immovable property in the Republic must, subject to subsection (2), withhold from the amount which that person must so pay, an amount equal to—”

<sup>151</sup> *Income Tax Act*, s 49B. **Levy of withholding tax on royalties.**—(1)(a) There must be levied for the benefit of the National Revenue Fund a tax, to be known as the withholding tax on royalties, calculated— ...

<sup>152</sup> *Income Tax Act*, s 50B. **Levy of withholding tax on interest.**—(1)(a) There must be levied for the benefit of the National Revenue Fund a tax, to be known as the withholding tax on interest, calculated— ...

<sup>153</sup> *Income Tax Act*, s 47B. **Imposition of tax.**—(1) Subject to subsection (3), there must be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the tax on foreign entertainers and sportspersons, in respect of any amount received by or accrued to any person who is not a resident (in this Part referred to as the “taxpayer”) in respect of any specified activity exercised or to be exercised by that person or any other person who is not a resident. ...

<sup>154</sup> *Taxes Management Act of 1970*, s 59A, **Payments on account of income tax**, and s 59B, **Payment of income tax and capital gains tax**

<sup>155</sup> *Income Tax Act*, s 24. **Credit agreements and debtors allowance.**—(1) Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into. [Emphasis added.]

<sup>156</sup> *Income Tax Act*, s 1. **“gross income”**, in relation to any year or period of assessment, means— in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or [Emphasis added.]

<sup>157</sup> *Income Tax Act*, s 7. **When income is deemed to have accrued or to have been received.**— (1) Income shall be deemed to have accrued to a person notwithstanding that such income has been invested, accumulated

- Section 24(1) should apply only in the case of deferred transfer of ownership;
- in this case the time of accrual should be the earlier of any receipt of the proceeds, or the time of the conclusion of the agreement, however, suspensive conditions should be recognised as delaying the conclusion of the agreement until their fulfilment.
- Were s 24(1) only applicable to such transactions then disposals of fixed property should accrue on the date of registration of transfer in the deeds office, which would require some clarification or possibly amendments to ss 1 and 7(1).

The potential amendments submitted with respect to para 13 of the Eighth Schedule<sup>158</sup> were that the time of accrual in disposing of fixed property should be the earlier of the date of registration in the deeds office and the receipt of any of the proceeds. Wilcocks and Strydom argued that the removal of this paragraph would have just this effect.<sup>159</sup> Were this amendment implemented, then para 35(4) of the Eighth Schedule<sup>160</sup> would also require an amendment to deem fixed property disposals to accrue on this registration of transfer.

A further proposal was that for transactions, whether disposals of capital or trading stock, where registration takes place close to the last day of the period and the proceeds received shortly after the beginning of the subsequent period an appeal mechanism could be allowed, where, if a taxpayer can demonstrate that this was the cause of a late provisional tax payment, they could have their penalties remitted.

In either type of disposal the times of accrual would be the same, as would be expected if a taxpayer were to dispose, simultaneously, of two similar properties, one held as a capital asset and one as trading stock. If amendments such as these were effected, the number of transactions which might result in automatic penalties on the late payment of provisional tax would be vastly reduced, as well as the necessity to obtain bridging finance to pay the requisite

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or otherwise capitalized by him or that such income has not been actually paid over to him but remains due and payable to him or has been credited in account or reinvested or accumulated or capitalized or otherwise dealt with in his name or on his behalf, and a complete statement of all such income shall be included by any person in the returns rendered by him under this Act. [Emphasis added.]

<sup>158</sup> *Income Tax Act*, para 13 of the Eighth Schedule. **Time of disposal.**—(1) The time of disposal of an asset by means of—

(a) a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by operation of law is, in the case of—

(i) an agreement subject to a suspensive condition, the date on which the condition is satisfied;

(ii) any agreement which is not subject to a suspensive condition, the date on which the agreement is concluded;

<sup>159</sup> Wilcocks, J.S. and Strydom, J.J. 2002. The concept of ‘disposal’ for the purposes of capital gains tax in South Africa. *Meditari Accountancy Research*, Vol. 10 Issue: 1, at 323

<sup>160</sup> *Income Tax Act*, para 35(4): Where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of that year, that amount must be treated as having accrued to that person during that year.

taxes, if that were required. There would be no long-term effect on Commissioner's tax collections. In the period in which these changes are implemented there would be reduction of collections, but this would be rectified in the subsequent periods.

### **4.3 Final remark**

It is hoped that this dissertation will be added to the arguments for a different approach to the deemed time of accrual in relation to fixed property transactions, and that legislators could be petitioned to implement such changes on the strength of the arguments contained herein. This would, in the author's opinion, make income tax collections more equitable to provisional taxpayers in such instances.

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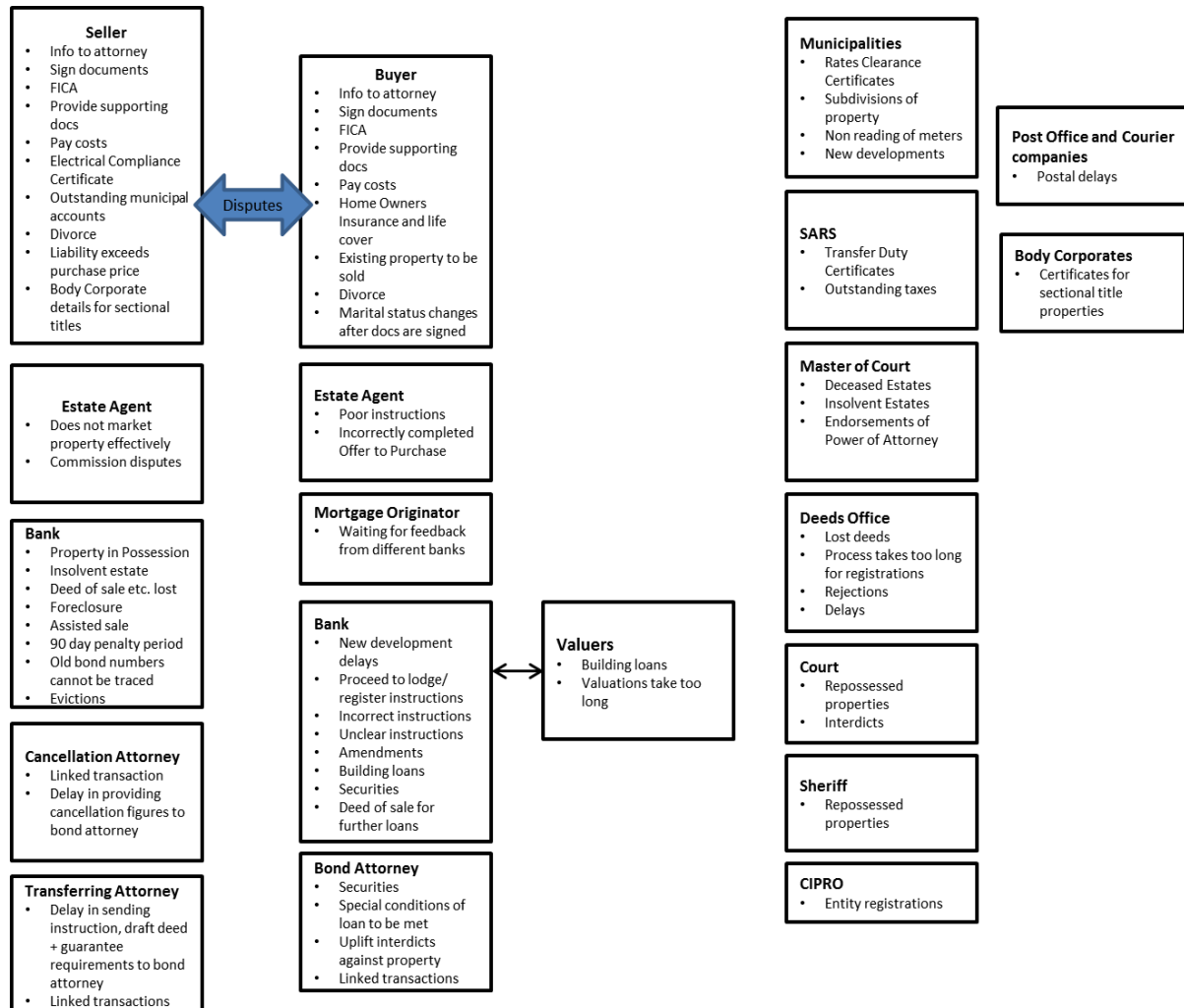
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- SIR v Silverglen Investments (Pty) Ltd*, 1969 (1) SA 365(A) 30 SATC 199
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# ANNEXURES

## 1. Bottlenecks in the SA conveyancing processes



Amadi-Echendu, A. 2013. *An analysis of conveyancing business processes in South Africa*. Masters thesis. University of South Africa. Available: [http://uir.unisa.ac.za/bitstream/handle/10500/14148/dissertation\\_amadai-echendu\\_a.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/14148/dissertation_amadai-echendu_a.pdf?sequence=1), at 156 [2017/10/08]

2. Explanatory Memorandum on the Taxation Laws Amendments Bill, 1993, Clause 25  
Amending s 9 of the VAT Act. Available: <http://www.osall.org.za/docs/2011/02/1993-Taxation-Laws-Amendment-Bill.pdf> [2017/05/01]

CLAUSE 25

*Time of supply: Amendments to section 9 of the Value-Added Tax Act, 1991*

*Subclause (a):* The practical problem often experienced by property developers involved in development projects lasting longer than six months from the date of signing the sale agreement, resulted in this amendment. As the six months period often elapses before transfer of the property in a deeds registry is effected or any payment is made, the reference to the six months period in section 9(3)(d) of the principal Act is deleted by this subclause.

*Subclause (b):* This amendment is of a textual nature.

3. Taxation Laws Amendment Act, 1993 Clause 25  
Amending s 9 of the VAT Act. Available:  
<https://www.gov.za/sites/default/files/Act97of1993.pdf> [2017/04/18]

**Amendment of section 9 of Act 89 of 1991, as amended by section 25 of Act 136 of 1991**

- 25. Section 9 of the principal Act is hereby amended—** 35
- (a) by the deletion in subsection (3) of subparagraph (i) of paragraph (d);  
and
  - (b) by the substitution in subsection (3) for the words following upon subparagraph (iii) of paragraph (d) of the following words: 40  
“whichever date is **[earliest] earlier**”.

4. Explanatory Memorandum on the Taxation Laws Amendment Bill, 1996. Clause 23 Amending s 16 of the VAT Act. Available: <http://www.osall.org.za/docs/2011/02/1996-Taxation-Laws-Amendment-Bill.pdf> [2018/09/09]

### CLAUSE 23

*Calculation of tax payable: Amendment of section 16 of the Value-Added Tax Act, 1991*

*Subclause (1)(a)* amends section 16(3)(a)(i) to limit the input tax deduction in the case of fixed property supplied after 6 June 1996.

*Subclause (1)(b)*: This amendment is of a textual nature.

*Subclause (1)(c)*: Section 16(3)(a) has been amended by the addition of subparagraph (iiA) to provide that in the case of the taxable supply of fixed property, the input tax deduction may be claimed only to the extent of any consideration actually paid by the recipient.

*Subclause (1)(d)*: This amendment is consequential upon the amendment introduced by *clause 25*.

*Subclause (1)(e)*: This amendment is of a textual nature.

*Subclause (1)(f)*: Section 16(4)(a) has also been amended by the addition of subparagraph (ii) to require a vendor who accounts for tax on the invoice basis to account for output tax on the supply of fixed property only to the extent payment of consideration for that supply has been received by him.

*Subclause (1)(g)*: This amendment is of a textual nature.

These amendments are necessary in view of the fact that fixed property is often acquired with only a small deposit being paid and the remainder of the purchase price being paid over an extended period. In the absence of this amendment, suppliers of fixed property can experience severe cash flow problems. The amendments are also aimed at preventing abuses.

The amendments introduced by *subclause (1)(a), (c) and (f)* shall be deemed to have come into operation on 6 June 1996.

5. Income Tax Act (Act 31 of 1941), S 22 Hire-purchase or other agreements...

Government Gazette. No. 2906, 8 May 1941. Available: <https://discover-sabinet-co-za.ezproxy.uct.ac.za/webx/access/loadrgazettes/1941/Gov/processed/gg2906.pdf>

[2018/10/12]

**Hire-purchase or other agreements providing for postponement of passing of ownership of property concerned.**

**22.** If any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass, or, in the case of immovable property, transfer shall be passed, from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the day on which the agreement was entered into: Provided that the Commissioner, taking into consideration any allowance he has made under paragraph (h) of sub-section (2) of section *eleven*, may make such further allowance, as under the special circumstances of the trade of the taxpayer seems to him reasonable, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer's accounting period: Provided, further, that any allowance so made shall be included as income in his returns for the following year of assessment and shall form part of the income of the said taxpayer.

6. Memorandum on the Income Tax Bill, 1941

(Annexure 597 – 1940-'41), Union of South Africa. [from the Parliamentary Library, Cape Town]

**UNION OF SOUTH AFRICA.**

**MEMORANDUM ON THE INCOME TAX BILL, 1941.**

**ADMINISTRATIVE PROVISIONS.**

Requires no comment, as the provisions are practically identical with those of the 1925 Act, save for minor changes in the definitions. Chapter I, Sections 1-4.

**NORMAL TAX.**

- There are a number of alterations falling under the following types:— Chapter II, Part I, Sections 5-22.
- (a) Those consequential to the new system of Rates which has been fully explained (cf. section 6).
  - (b) Those necessitated by and merely consequential to the new system of dealing with private companies.
  - (c) Those which are mainly textual, clarifying certain existing ambiguities.
  - (d) Certain new provisions to prevent tax avoidance (cf. section 9 (4), (5), (6) and (8)—wrong use made of trusts or allowances), or to limit scope of exemptions re interest or dividends received by non-residents from South African Trusts and Estates (cf. proviso (iv) to section 10), and to provide a modification to prevent avoidance of tax by restricting the right of a private company to set off losses against apportioned income (section 11 (3) (iii)).
  - (e) System of deduction of tax—allowances instead of abatements from taxable income (section 13).
  - (f) New provision to deal with the increasing adoption of a hire-purchase system or similar systems of trading (section 22). Just as certain trades, e.g. farming, shipping, insurance and mining, required that a specialized method of assessment be provided, experience has shown that this development in commerce requires special attention from the viewpoint of taxation.

**SUPER TAX.**

7. Explanatory Memorandum on the Income Tax Bill, 1985, Clause 14

Amending s 24 of the *Income Tax Act*. Available:

<http://www.osall.org.za/docs/2011/02/1985-IT-Bill.pdf> [2018/10/14]

#### CLAUSE 14

*Hire-purchase or other agreements providing for postponement of passing of property concerned: Amendment of section 24 of the principal Act*

Section 24 provides that if any taxpayer has entered into an agreement in respect of any property (movable or immovable) the effect of which is that ownership passes to the purchaser on or after the receipt by the taxpayer of the whole or a certain portion payable in terms of the agreement, then the whole amount is deemed to have accrued to the taxpayer on the date on which the contract is concluded. A deduction may, however, be allowed to the seller in respect of any portion of the sale price which has not been received by him at the close of his financial year. The allowance is intended to apply only to long-term agreements, but it has been found that many short-term credit transactions are being entered into in such a way that the seller is being enabled to postpone his tax liability to an unnecessary extent. The amendment introduced by this clause is intended to limit the deduction to amounts owing in respect of agreements having a minimum term of 12 months.

8. Explanatory Memorandum on the Income Tax Bill, 1986, Clause 16.

Amending s 24 of the *Income Tax Act*. Available:

<http://www.osall.org.za/docs/2011/02/1986-IT-Bill.pdf> [2018/10/14]

## CLAUSE 16

### *Credit agreements: Amendment of section 24 of the principal Act*

Section 24 of the principal Act provides that where any agreement for the sale of property is concluded subject to the condition that ownership of the property will not pass until the whole or a portion of the purchase price has been paid, the full purchase price is deemed to accrue to the seller when the agreement is concluded. An allowance is, however, granted to the seller in respect of any portion of the selling price which is still due at the end of his accounting period. In terms of an amendment introduced in 1985, this allowance may be granted only in cases where the passing of ownership of the property is suspended for a period of at least 12 months.

It is considered, however, that the allowance should be dependent on the credit period rather than the period in which passing of ownership is suspended, and an amendment is proposed in terms of which the allowance may be granted where at least 25 per cent of the purchase price under the agreement is payable at least 12 months after conclusion of the agreement.


A measure of relief is also proposed for taxpayers who previously qualified for the allowance under section 24, but do not so qualify under the amended provision. It is accordingly proposed that any allowance which was in accordance with generally prevailing practice granted in the taxpayer's last year of assessment ended before 1 January 1986 may be phased out over the succeeding four years. The amount which may be allowed under the phasing-out provisions in any year is a specified portion of the lesser of the allowance to which the taxpayer was entitled in his last year of assessment ended before 1 January 1986 and the allowance to which he would have been entitled in the relevant year had section 24 not been amended.

## 9. SARS Tax Calendar

Available: <http://www.sars.gov.za/ClientSegments/Individuals/Need-Help/Pages/Calender.aspx> [2018/09/08]

10/25/2018 Calendar

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Individuals ▾ Businesses and Employers ▾ Tax Practitioners ▾

SARS Home > Client Segments > Individuals > I need help with my tax > Calendar

### TAX CALENDAR

This basic Tax Calendar has been developed to provide a guide to taxpayers about the key deadlines for the main segments of taxpayers.

#### Individuals

- Tax Season – Tax Season for individuals normally runs from July to November (for non-provisional taxpayers), with provisional taxpayers having until end January to file via eFiling. If you have forgotten your password, [visit our page](#) and call our call centre to simply reset.
- Provisional Tax - The filing and payment by individuals of provisional tax (IRP6's) is 31 August (1st period), 28 February (2nd period) and 30 September (3rd period)

#### Employers (PAYE)

All businesses that are required to register for PAYE, must follow the schedule below:

- Monthly – the EMP201 must be submitted monthly – by the 7th of the following month or the Friday\* before that day if the 7th falls on a weekend or public holiday.
- Interim (for period 1 March to 31 August) – the Interim Employers Tax Season for EMP501 reconciliations runs from 1 September to 31 October
- Annual (for period 1 March to 28 February) – the annual Employers Tax Season runs from 1 April to 31 May.

#### Companies

- Tax Season - Companies, including CC's, Co-operatives and Body Corporates, are required to submit a Return of Income: Companies and Close Corporations (IT14) within 12 months from the date on which their financial year ends.
- Provisional Tax- The filing and payment by companies of provisional tax (IRP6's) is 6 months after year end (1st period), At financial year end (2nd period) and Six months after financial year end (3rd period)

#### Vendors

##### VAT

- Manual – submission of the VAT201 and payment must be done by the 25th of the month. It should be noted that each vendor may be on a different VAT cycle
- Electronic (eFiling) – submission and payment of the VAT201 must be done by the last business day of the month

#### Small business

Small businesses which fall into one of the categories above (CC, Co-operatives) must follow the schedule outlined above.

- Turnover tax  
Small businesses which are registered for Turnover Tax must follow the schedule below:  
Turnover tax will be levied annually on a year of assessment that runs from the beginning of March of the one year to the end of February of the following year. It will include two six-monthly interim (provisional) payments.

**Please Note**  
\*Please note if the day identified is on a weekend or public holiday, the applicable date to fulfil your obligation is the last business day prior to that date.

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