THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA Case No: 425/96

In the matter between

NISSAN SA (PTY) LTD

Appellant

and

COMMISSIONER FOR INLAND REVENUE Respondent

CORAM: Mahomed CJ, Eksteen, Marais, Zulman JA et Farlam AJA

DATE HEARD: 8 May 1998

DELIVERED: 2 September 1998

JUDGMENT

MARAIS JA

MARAIS JA:

This is an appeal against a decision of the Special Income Tax Court for Gauteng presided over by Eloff JP. The taxpayer is a private company which carries on business as a manufacturer, distributor and exporter of motor vehicles. In 1972, for reasons with which it is unnecessary to burden this judgment further than becomes essential, an exemption from liability to normal tax on certain income was created. It underwent a series of subsequent metamorphoses by way of amendments. The changes in the legislation loomed large in the arguments of counsel and it is necessary to list them chronologically.

1972

Sec 10(1) (zA) of the Income Tax Act, 58 of 1962 was introduced by sec 7 (1) (f) of Act 90 of 1972 on 16 June 1972. It was deemed (sec 7 (2) (c)) to have taken effect as from the commencement of years of assessment ending on or

after 1 October 1970. It read:

> "There shall be exempt from tax -
> any amount by way of a rebate or other assistance in respect of the financing of the export of goods from the Republic, which is received by or accrues to or in favour of any person from the State under a scheme for the payment of such amounts to exporters, if the Minister of Finance has directed that the amounts payable under that scheme by way of such rebates or other assistance shall be exempt from normal tax."

1974

On 11 November 1974 it was replaced by sec 10 (1) (n) of Act 85 of 1974.

The replacement was deemed (sec 10 (2) (c)) to have taken effect from the commencement of years of assessment ending on or after 28 March 1973. The new provision read:

> "There shall be exempt from tax -
> Any amount by way of a rebate or other assistance received by or accrued to or in favour of any exporter (as defined in section 11 bis (1)) under any scheme for the promotion or financing of exports which is for the purposes of this paragraph approved by the Minister of Economic Affairs in consultation with the Minister of

Finance."

1990

On 28 June 1990 another version was introduced by section 10 (1) (q) of Act 101 of 1990. It was deemed (sec 10 (2) (e)) to have come into operation as from the commencement of years of assessment ended or ending on or after 1 April 1990. It read:

> "There shall be exempt from tax -
> any amount (other than interest) which is on or after 1 April 1990 paid by the State under any scheme for the promotion or financing of exports: Provided that where the person entitled to claim such amount from the State has, under an agreement directly connected with the export trade carried on by him, agreed to pay the whole or any portion of such amount to any other person, the exemption under this paragraph shall also apply to the whole or such portion of such amount received by or accrued to such other person under the said agreement."

1991

It is this version of the provision which is applicable in this case. On 27 June

1991 the words preceding the proviso were amended by sec 12 (1) (m) of Act

129 of 1991. Again the amended provision was deemed (sec 12 (2) (f)) to have come into operation as from the commencement of years of assessment ended or ending on or after 1 April 1990. The provision now read:

> "There shall be exempt from tax -
> any amount by way of rebate or other assistance received by or accrued to or in favour of any exporter (as defined in section 11 bis (1)) under any scheme for the promotion or financing of exports which is for the purposes of this paragraph approved by the Minister of Trade and Industry and Tourism with the concurrence of the Minister of Finance, as well as any amount (including any interest paid in terms of the General Export Incentive Scheme introduced with effect from 1 April 1990 and which is calculated in respect of any period falling after 1 April 1991) which is paid by the State, on or after 1 April 1990, under any such scheme: Provided that where the person entitled to claim such amount from the State has, under an agreement directly connected with the export trade carried on by him, agreed to pay the whole or any portion of such amount to any other person, the exemption under this paragraph shall also apply to the whole or such portion of such amount received by or accrued to such other person under the said agreement."

1994

On 16 November 1994 the provision was amended yet again by sec 9 (1) (g) of Act 21 of 1994. The subsection as amended came into operation (sec 9 (2) (c)) on 1 March 1995 and applied, and continues to apply, to

"(i) any amount determined in terms of the General Export Incentive Scheme in respect of export sales (as contemplated in the guidelines for the General Export Incentive Scheme) which take place on or after that date; and

(ii) any amount received by or accrued to or in favour of any person on or after that date under any other scheme."

It now reads:

> "There shall be exempt from tax -
>
> any amount by way of rebate or other assistance received by or accrued to or in favour of any exporter (as defined in section 11 bis (1)) under any scheme for the promotion or financing of exports which is for the purposes of this paragraph approved by the Minister of Trade and Industry with the concurrence of the Minister of Finance: Provided that where the person entitled to claim such amount from the State has, under an agreement directly connected with the export trade carried on by him, agreed to pay the whole or any portion of such amount to any other person, the exemption under this paragraph shall also apply to the whole or

such portion of such amount received by or accrued to such other person under the said agreement."

Relying upon the exemption afforded by sec 10 (1) (zA) of the Income Tax Act 58 of 1962 (the Act) in its 1991 incarnation, the taxpayer sought to exclude from its taxable income amounts of R12 769 627, R38 944 544, R30 787 827 and R34 411 903 (R116 913 933 in all) in respect of the 1990 to 1994 tax years respectively. The Commissioner refused to accept that the taxpayer was entitled to the exemption claimed. The taxpayer's appeal to the Special Court failed but leave was granted by the President to appeal to this court.

The background against which this provision evolved was explained in evidence in the Special Court. Stripped of complicating detail it was this. South Africa's foreign currency reserves were in need of preservation and strengthening. To that end various schemes to promote and/or finance

exports were evolved in collaboration with the relevant departments of State. Motor industry manufacturers in particular were large consumers of foreign currency. The State set about encouraging them to reduce their foreign currency usage by using locally made components and to export vehicles and locally made components so as to earn foreign currency. This it did by providing incentives. The question which arises in this case is whether income received by the taxpayer under a State sponsored scheme known as Phase VI of the local content programme for motor vehicles is exempt from tax. It is now common cause that the scheme was not approved by the two ministers referred to in sec 10(1) (zA) and it is also common cause that the 1991 version of the provision is the relevant version in this case.

The first issue is a narrow one. In order to qualify for the exemption from liability to tax must the scheme under which payments by the State have been made be one which is for the promotion or financing of exports

and which has been approved by the two ministers concerned or does it suffice

that the scheme is one for the promotion or financing of exports? This is purely

a question of construction of the relevant provision. It is unnecessary to repeat

yet again the guidelines which have been laid down so many times by the courts

over the years as aids to interpretation. What is beyond cavil is that one cannot

come to the task with a priori assumptions as to what the legislature is likely to

have intended and that the primary and most important indication of its intention

is the language which it has chosen to express it. Nor of course should one be

astute to conjure up fanciful or overly subtle hypothetical considerations in

order to create ambiguity where none really exists.

The relevant section has two legs. The first reference to any scheme occurs in the first leg and it is accompanied by a description of what kind of scheme it is. It is "any scheme for the promotion or financing of exports

which is for the purposes of this paragraph approved by" the two ministers. It

0 is therefore not any scheme for the promotion or financing of exports which-

qualifies as a scheme of the kind contemplated by the legislature in the first leg of the provision, but only a ministerially approved scheme. So much admits of no argument.

However, it does not necessarily follow that for the purposes of the second leg of the provision which extends the exemption to any amount "which is paid by the State under any such scheme", a taxpayer claiming the exemption would have to show that the scheme under which such payment was made was also approved by the relevant ministers. Whether or not it does depends upon the outcome of an analysis of the further elements of the provision and its consequences.

The second reference to a scheme which one finds in the provision is in the second leg. It is a reference to "the General Export Incentive Scheme introduced with effect from 1 April 1990". I shall refer to that scheme hereafter

as "GEIS". Unlike the generic class of scheme (of which there could be many individual species) referred to in the first leg, this is a reference to one particular scheme only. It is pertinently identified by its name and the date upon which it was introduced. The third and last reference to any scheme is a scheme under which any amount (including the interest paid in terms of GEIS in respect of any period falling after 1 April 1991) is paid by the State on or after 1 April 1990, but that alone does not serve to identify what kind of scheme it is the legislature had in mind for there is additional descriptive language of which account must be taken, namely, "any <u>such</u> (my emphasis) scheme". That is incontestably a reference to a scheme which had been described or defined earlier in the provision. The first question is, "What scheme"?

It cannot be a reference to GEIS. If it had been, the words "any such" would have been quite inappropriate. The words "that Scheme" would have been the obvious language to use, and the word "scheme" would have been

spelt with a capital S as it was when reference was made earlier to "the General Export Incentive Scheme". Moreover, if it were a reference to GEIS it would limit the operation of the second leg of the provision which commences with the words "as well as" to a single particular scheme (GEIS), when it seems abundantly clear that the existence of more than one scheme was contemplated and catered for. The reference can therefore only be a reference to the kind of scheme one first encountered in the first leg of the provision.

To the question: "What kind of scheme is that?", there is no immediately obvious answer. The phrase "such scheme" could be interpreted in one of two ways:

(a) It could mean that the scheme must have the same purposive characteristic as the scheme referred to in the first paragraph, i e it must be a scheme "for the promotion or financing of exports". On this construction ministerial approval would not be a purposive characteristic of the scheme at all. It would simply be a further condition which has to be fulfilled if a taxpayer seeks exemption from tax under the first leg of the provision but which does not

have to be fulfilled if a taxpayer seeks exemption under the second leg.

(b) On the other hand it could mean that ministerial consent is a substantive and integral part of the scheme itself and that if there has been no such approval the payment by the State cannot qualify as a payment under the scheme at all.

Counsel for the appellant appeared to accept that the interpretation referred to in (b) was supported by what he styled a "cold" reading of the provision. However, he sought to escape from the conclusion that that is its true meaning by relying upon a miscellany of factors, all of which, so he argued, lead to the conclusion that the words "any such scheme" mean a scheme for the promotion or financing of exports, but not necessarily one which has also been approved ministerially for the purposes of the provision. He referred to the legislative history of the provision and especially the changes which it underwent by way of amendment in 1974, 1990, 1991 (the version under consideration), and 1994; the manner in which it was interpreted for some time

by officialdom in the department of internal revenue; reports in which legislative amendments were recommended, made by the Board of Trade and industry into foreign exchange saving systems in the automotive industry, and "Explanatory" memoranda which accompanied the relevant Income Tax Bills introducing the amendments. Coming closer to home, he relied upon certain aspects of the provision itself. Thus, he submitted that the use of the words "as well as" to introduce the second leg of the provision in preference to the word "including" so beloved of parliamentary draftsmen, shows that a different concept was being introduced and not simply more of the same. These words ("as well as") were, so it was suggested, particularly apposite if what the legislature intended to achieve in 1991 was simply to combine in a single provision the 1974 version and the 1990 version of the provision (but subject of course to the inclusion now of interest paid under GEIS with some retroactive effect). It was also contended that such a reading of the provision would

eliminate the tautology which would exist if the competing interpretation were to be adopted, because the words "any amount by way of rebate or other assistance received by or accrued to or in favour of in the first leg of the provision would have also covered the "amounts paid by the State" referred to in the second leg. In essence the argument came to this: the word "such" certainly provides support for the construction for which the Commissioner contends but when the structure of the provision, the context in which the word is used, the history of the provision, and the effect of the competing interpretations are taken into account, it is not the only possible construction and the alternative construction advanced by appellant is the correct construction.

Counsel for the Commissioner contended forcefully that the grammatical meaning of the second leg of the provision is plain and that it cannot accommodate the interpretation which appellant seeks to place upon it.

I turn to a consideration of the contentions. Is the word "such" in

the context in which it is used in this provision so grammatically intractable that it cannot accommodate another meaning to which other admissible indicia might convincingly point? Some illuminating observations as to the meaning and use (or misuse) of the word are to be found in Sir Owen Dixon's judgment in the Australian case of H Jones & Co (Pty) Ltd v Kingborough Corporation 1950 82 CLR 282 (HC of A) at 317 - 319. While readily conceding that "the prima facie logical or grammatical effect" of the word is to require what has been said before to be taken as having been repeated, he said: "It is quite another thing to treat the prima facie meaning as prevailing over the indication of a contrary intention supplied by the context and by the substantial nature of the provisions." (At 317.) After referring to a number of decisions in England in which the courts had declined to give the word "such" a strictly confined grammatical meaning, Dixon J said this:

> "These decisions are, of course, no more than illustrations of the

recognition by the courts that difficulties caused by the ill-considered resort of draftsmen to the use of the word "such" are to be met by a readiness on the part of the courts to mould the application of that not inflexible relative word so as not to defeat the intention gathered from the context. But the observations quoted suggest what is, I believe, the solution of the difficulty in the present case. It lies in recognizing that a draftsman in using the word "such" may not have in mind all the precise qualities which by an adjectival phrase he may have attributed to his antecedent in an earlier part of his text and may really intend to refer only to the general nature of the thing or concept to which he has occasion again to refer. In yielding to the temptation to employ the word "such" and avoid all repetition he may not have seen or been alive to all the implications which a logical application of the word involves. To borrow the phraseology of Lord Chelmsford (this is a reference to what Lord Chelmsford said in Eastern Countries Railway Co v Marriage (1860) 9 HLC 31 at 73 - 74) and give it a somewhat different application, there may for this reason be occasions when the relative "such" ought to be referred not to all the characteristics contained in the previous description of the antecedent but to the more general characteristics to which the context appears properly to attract it. Here I think the truth is that the draftsman desired to confine the provision made in s. 209 to water districts within municipalities and to rivers, creeks and watercourses within the limits of water districts within municipalities. He sought to re-express the limitation by employing the word "such" but he did not intend by so doing to re-express the further limitation of water districts to those which theretofore had been controlled and managed by the council of a rural municipality or other abolished local body. That it

> could not have been so intended is, I think, shown by the considerations I have already stated, and effect is best given to the real intention by modifying the strictly logical application of the word "such" and doing so in accordance with what it may reasonably be supposed was felt to be the sense of the word when it was employed." (The emphasis in the passage quoted is mine.)

These observations seem, with respect, so redolent of common sense that I would not wish to demur. However, it remains of course a question whether in any given case there is indeed adequate justification for concluding that the "real intention" of the legislature is properly evidenced. In answering the question the dividing line between impermissible speculation as to the purpose of legislation and permissible reliance upon factors dehors the language under consideration to discover it, is admittedly sometimes fine but it "is a conceptually clear line which must be respected.

Some of the factors upon which appellant seeks to rely are not factors which can legitimately be taken into account. The reports of the Board

of Trade and Industry fall into this category. They are investigative reports containing various findings and recommendations, but they can throw no light upon which of them was accepted and translated into legislation.

Also falling within that category is the manner in which the 1991 provision was for a relatively short period of time interpreted by the Commissioner or members of his staff. That relatively quickly jettisoned interpretation of the 1991 provision is not what is comprehended by the doctrines of subsecuta obervatio and contemporeana expositio. Those doctrines rest upon two foundations. One is that there must at least be room for the interpretation in the language of the provision. The other is that the interpretation must have been accorded it for sufficiently long without being gainsaid that it provides good reason for concluding that that is what it was intended to mean. See Rex v Detody 1926 AD 198 at 202-3. It is true that it was said in Secretary for Customs and Excise v Millman NO 1975 (3)

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544 (A) at 551 F that "it may well be" that a departmental interpretation of an ambiguous provision is a factor which cannot be overlooked and that "it may . . .well be invoked to tip the balance where the language. . . . .may fairly be construed in either of two ways", despite the absence of any indication as to how long that interpretation had been accorded to it, but the observation was tentative and guarded and did not purport to be a considered and definite expression of opinion.

I turn to the provision itself. Whatever the permissible scope for, and the limitations upon, the use of the legislative history of a particular provision as an aid to interpretation may be, I think it is obvious that where a provision has been amended and the amendment is deemed to have taken effect while the provision in its unamended state was operative, one is entitled to examine the implications of that in order to see whether they throw any light upon the interpretation which should be accorded to the amendment. If on one

interpretation of the amended provision it would retroactively destroy vested rights acquired (and even vested rights acquired for value given) in terms of the provision before its amendment, but on another interpretation it would not, that would provide, I think, a strong reason for preferring the latter interpretation unless the language used cannot possibly accommodate it. To my mind, such an indication can be found if the 1990 and 1991 versions of the provision are compared and the implications of their respective commencement dates are appreciated.

While the 1990 version was operative it mattered not that the scheme for the promotion or financing of exports under which the State paid an amount to a taxpayer had not received ministerial approval. The amount so paid was exempt from normal tax in the taxpayer's hands. Moreover it was also exempt from tax in the hands of a third party who had acquired the right to be paid the amount by virtue of an agreement of the kind contemplated in the

proviso to the provision. Third parties who acquired such rights did not acquire them gratis. There would obviously have been a quid pro quo of some or other kind. In return the third party became entitled to receive a tax-free sum from the State. That was a fully vested right.

When the 1991 version of the provision was enacted it was deemed to have come into operation from the commencement of exactly the same tax years as those from which the 1990 version had been deemed to commence. The effect of this in law was that the 1990 version had to be regarded as never having existed and the 1991 version had to be regarded as if it had been operative during the period when the 1990 version was operative. It followed that unless rights to payment by the State of tax-free amounts acquired by virtue of the 1990 provision could have been acquired by virtue of the 1991 provision if it had existed at the time, they would retroactively be deprived of their tax-free status both in the hands of those who first became entitled to claim and in

the hands of third parties. This despite the fact that value had been given for them by such third parties, because of their then tax-free status. That is a result so manifestly unfair and so plainly in conflict with the well-grounded and entirely understandable presumption against an intention to destroy vested rights that it cannot but create serious doubt as to whether the legislature did indeed use the word "such" in its strict grammatical sense. The more so when the provision as amended is so framed as to lend considerable colour to the suggestion that it was intended to synthesise in one provision two previous legislative approaches to the matter each of which had found expression in previous versions of the provision. The first leg of the 1991 version of the provision is identical to the 1974 version (save that the reference to the Minister of Economic Affairs becomes a reference to the Minister of Trade and Industry). The second leg of the 1991 version commencing with the words "as well as" is not framed in language which is identical to that of the 1990 version but

4 (leaving aside the matter of interest) it is very similar. The 1990 version speaks

of "any amount. . . .which is on or after 1 April 1990 paid by the State under any scheme for the promotion or financing of exports". The 1991 version speaks of "any amount. . . . .which is paid by the State, on or after 1 April 1990, under any such scheme". If the legislature did indeed intend the word "such" in the 1991 version to refer back only to "any scheme for the promotion or financing of exports" and not to "any scheme for the promotion or financing of exports which is for the purposes of this paragraph approved by the (relevant Ministers)", such a synthesis would be the result. If on the other hand, it intended to bring about not a synthesis but a sudden reversal of a tax exemption which it had only just conferred the previous year, I would have expected a very differently framed provision.

Closer examination of the 1991 provision convinces me that a synthesis was intended. How else can one account for the deliberate insertion

of the words "on or after 1 April 1990" in the clause "which is paid by the State, on or after 1 April 1990, under any such scheme"? That is the date after which, in terms of the 1990 version, amounts (excluding interest) paid by the State under any scheme for the promotion or financing of exports would be exempt from tax even although the scheme had not been approved by the two ministers. Significantly, such an amount paid by the State before 1 April 1990 does not

qualify for tax exempt status under the 1991 version even although the 1991 version is deemed to have come into operation sooner than that. It is deemed to have come into operation as from the commencement of years of assessment ended or ending on or after 1 April 1990, (sec 12 (2) (f) Act 129 of 1991). These dates are precisely the same dates which governed the coming into operation of the 1990 version and the date after which amounts paid by the State would be exempt from tax in terms of the 1990 version. That is exactly what one would expect if the intention in 1991 was to preserve and perpetuate the

1990 version (no ministerial consent required) where payments are made by the State. If the intention had been to abandon it altogether and to replace it with the 1974 version (ministerial consent required) there would have been no point in differentiating between the period after 1 April 1990 and the periods from the commencement of years of assessment ended or ending on or after 1 April 1990. If ministerial consent was intended in 1991 to be a sine qua non in all circumstances I can conceive of no rational reason why the legislature would have wished to say in 1991 (for this would be the consequence):

> "If you receive from the State at any time during the year of assessment commencing 1 July 1989 and ending 30 June 1990 a rebate or other assistance under a ministerially approved scheme for the promotion or financing of exports it will be tax exempt. If on the other hand, you receive a payment from the State between 1 July 1989 and 31 March 1990 during that tax year under the selfsame scheme it will not be tax exempt. However, if during that same tax year you receive a payment from the State on or after 1 April under that scheme, it will be tax exempt."

The absurdity of the distinction is patent and requires no elaboration.

Nor can one escape from this by asserting that the reference to amounts paid by the State "on or after 1 April 1990" is simply to respect vested rights to have payments made by the State while the 1990 version was operative treated as exempt from tax and to avoid them being stripped of that status retroactively. That purpose would not be achieved by interpreting the word "such" as counsel for the Commissioner would have one interpret it. The reason is plain: if "such scheme" means a ministerially approved scheme payment made by the State in July 1990 under a scheme which had not been ministerially approved, would not qualify under the 1991 version of the provision because it would not be a payment made "under any <u>such</u> scheme".

It is also not possible to read the words "on or after 1 April 1990" in the second leg of the 1991 version as referring to both the words "any amount . . . .which is paid by the State" in the second leg of the 1991 version and to the words "any amount by way of rebate or assistance" referred to in the first

leg. It would be grammatically untenable to do so. Moreover, it would make the deeming provision in sec 12 (2) (f) of Act 129 of 1991 (1991 version deemed operative as from the commencement of years of assessment ended or ending after 1 April 1990) entirely meaningless and inappropriate. It would have sufficed to simply enact the 1991 version as it is because the provision itself would have specified a single date (1 April 1990) from which payments, rebates or other assistance would qualify for tax exempt status (subject only to the special qualification relating to the payment of interest under GEIS).

As against all this, if "such scheme" is read as meaning merely "a scheme for the promotion or financing or exports" the selection of these dates and periods becomes rational and is no longer in conflict with the presumption against retroactivity which violates vested rights. Benefits acquired from the commencement of the years of assessment ended or ending on or after 1 April 1990, under ministerially approved schemes, from whomsoever they emanated,

would be recognised as exempt from tax. Those were the dates from which ministerial approval was no longer a condition precedent to tax exemption in terms of the 1990 version but, as against that, only amounts paid by the State qualified. So in one sense the provision was broadened; in another it was narrowed. The deeming provision which governed the coming into operation of the 1991 version had two effects. First, it reinstated the 1974 version which was broader as to source of benefit (it need not necessarily emanate from the State) but narrower in requiring ministerial approval, in such a way that there was no break in the continuity of its operation. Secondly, it preserved the 1990 version which was narrower as to source of benefit (it had to be an amount paid by the State) but broader in that it did not require ministerial approval, and did so from the date that such payments became tax exempt under the repealed 1990 provision thus again ensuring that there was no break in the continuity of operation of the 1990 version. (I have omitted reference to variations in regard

to the payment of interest because they do not derogate from the main thrust of the argumentation).

The reference in the 1991 version to interest paid in terms of GEIS is also instructive. It is common cause that GEIS came into operation on 1 April 1990 and that GEIS is an export promotion scheme but not a ministerially approved scheme within the meaning of the first leg of the 1991 version. Yet it is specifically enacted that payments of interest made after 1 April 1990 in _ terms of GEIS in respect of any period falling after 1 April 1991 are to be tax exempt. It would be strange indeed if the interest payable upon an amount paid by the State under GEIS was to be tax exempt but not the amount itself. Given the history of the provisions in so far as they related to interest in general it seems plain that the 1972 and 1974 provisions made no express reference to interest, that the 1990 provision excluded all interest, and that the 1991 provision specifically included interest payable under GEIS but under no other

scheme. The exemption of interest paid under GEIS is explicable only if the amount in respect of which it was paid was also exempt. But GEIS was not a ministerially approved scheme. What this shows, so it seems to me, is that the legislature intended other amounts paid by the State under GEIS to be tax exempt and considered it to be unnecessary to say so in terms because GEIS was in fact a scheme for the promotion of exports and would therefore be covered by the words "any such scheme".

Then there is this consideration. There is a clear conceptual distinction between describing a scheme, on the one hand, by reference to its purpose and, on the other, by reference to a factor external to it, such as approval by a third party. The former description is based upon the content of the scheme itself; the latter description is based upon a factor dehors the scheme. It is certainly possible that when the words "any such scheme" were used in the second leg of the 1991 version what was meant was a scheme which

satisfied both those descriptions but I think it is at least equally possible that. only the first description had to be satisfied. In short, the provision is ambiguous. Regard being had to the cumulative impact of all the considerations to which I have drawn attention, I conclude that the latter interpretation is to be preferred as the correct interpretation.

There are two decisions in the Special Income Tax Court which go the other way. They are Income Tax Case No 1600,58 SATC 131 (Froneman J) and Income Tax Case No 9992 (unreported 22.03.1996, Transvaal Income Tax Special Court, Wunsh J). With all due respect, I am unable to agree with them. They are founded upon what the learned judges considered to be the intractability of the words "any such agreement" and the considerations to which I have drawn attention were not weighed. The other factors which were thought to support the conclusion reached are, in my opinion, of dubious validity and cannot outweigh the potent indicia of a contrary legislative intent

which I have set out. It was largely upon those judgments that the judgment of the court a quo in this matter was founded.

This conclusion obviates the need to comment upon any of the other submissions made by counsel for the taxpayer. However, there remains an argument raised by counsel for the Commissioner with which I must deal. He submitted that it had not been established that the Phase VI Scheme under which the claims to tax exemption were made is a scheme for the promotion or financing of exports. It is certainly not a scheme for the financing of exports but I am satisfied on the evidence that despite a passing challenge during cross-examination by counsel for the Commissioner, the Phase VI Scheme was a scheme for the promotion of exports. It was not its only purpose; its purpose was also the provision of incentives to use local components when manufacturing vehicles. But that in turn was aimed at reducing the use of scarce foreign currency. Exports served to positively strengthen foreign currency

other hand, the services of attorneys were also used by the appellant and their charges (subject to taxation) may legitimately be recovered. The Commissioner is therefore ordered to pay the costs on appeal excluding any costs occasioned by the engagement of counsel for the appellant.

R M MARAIS
JUDGE OF APPEAL

MAHOMED CJ)
EKSTEEN JA) ZULMAN
JA) CONCUR
FARLAM AJA)