CASE NO 571/92

/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE APPELLANT

and

WANDRAG ASBESTOS (PROPRIETARY) LTD RESPONDENT

CORAM CORBETT CJ, BOTHA, KUMLEBEN,

F H GROSSKOPF et HOWIE JJA

HEARD 22 AUGUST 1994

DELIVERED 3 OCTOBER 1994

J U D G M E N T

KUMLEBEN, JA/ ...

KUMLEBEN JA:

The respondent ("Wandrag") in its tax returns submitted for the years 1983, 1984 and 1985 deducted from income the amounts of Rl 048 504,00, Rl 035 116,00 and R948 157,00 respectively as its marketing allowance, for which s 11bis(2) of the Income Tax Act, 58 of 1962 makes provision. The deductions were accepted by the appellant ("the Commissioner"). He, however, subsequently reversed this decision and issued amended assessments. To these Wandrag objected on the grounds that it was entitled to the deductions claimed. At a later stage as regards the amended assessment for the year ended 30 September 1983, Wandrag raised a subsidiary objection. It was that the proviso to s 3(2) of the Act precluded the Commissioner from disallowing the deduction for that year. On appeal to the Transvaal Income Tax Special Court (Melamet J presiding) the main objection was rejected but the subsidiary

one was upheld. An appeal and cross-appeal to the Transvaal Provincial Division followed. The majority judgment of that court (per Van Dijkhorst J with Myburgh J concurring) reversed the decision of the special court and with a qualification upheld the main objection. The substantive order made was that:

> "The appeal is upheld and the cross-appeal consequently falls away. The order of the special court is amended to read:
>
> > 'The appeal against the additional assessments for the years of assessment ended 1983, 1984 and 1985 is upheld.'
>
> In view of the fact that a small portion of appellant's produce was marketed locally the assessments are referred back to the Commissioner for Inland Revenue for reconsideration in the light of our decision on this aspect."

In a dissenting judgment Leveson J agreed with the decision of the special court, being of the view that the appeal and cross-appeal should be

dismissed.

At the hearing before the special court Messrs Walwyn, Harris and Howard gave evidence for Wandrag and Mr Hart for the Commissioner. The evidence of these witnesses, which gave rise to no material disputes of fact, may be thus summarised.

During or about 1960 Wandrag started to mine and produce Cape Blue Asbestos, technically known as crocidolite, at Kuruman, Northern Cape. Mr Walwyn was a director of Wandrag and actively involved in running the affairs of the mine. Griqualand Exploration and Finance Company Limited ("GEFCO"), a subsidiary of General Mining and Finance Corporation Limited ("GENCOR"), and another company, Cape Asbestos, were two of the three other companies mining crocidolite in South Africa. These companies were well-established whereas Wandrag was a newcomer in the Geld. For the sale of its products it was wholly

reliant upon the export market, a highly competitive one. After unsuccessful attempts to secure such sales through an independent marketing agent, it formed an association with GEFCO and Cape Asbestos in order to control the price of foreign sales and to appoint agents jointly to do their marketing abroad.

Towards the end of 1967 Wandrag realised that the overseas demand for its asbestos fibre would shortly come to an end as its product was not of a standard acceptable to foreign buyers. To overcome these difficulties two courses were open. It could at considerable cost erect its own plant to improve the quality of its asbestos and independently arrange for its off-shore marketing. The other option - a commercially more attractive one - was for it to make use of GEFCO's existing facilities both for upgrading its product and for marketing it overseas. As a result of discussions with GEFCO, it was agreed that GEFCO would accept, market

and export Wandrag's total output of asbestos. Accordingly from early 1968 its asbestos fibre was delivered to GEFCO. There it was subjected to further fiberisation and blended with GEFCO's fibres. (A detailed explanation of this process will follow later.) The mixed product was then bagged by GEFCO and exported to buyers pursuant to orders obtained by GEFCO through its marketing facilities. Although this arrangement envisaged, and was intended for, the export of all the asbestos Wandrag supplied, it later emerged that unknown to Wandrag a small amount was sold locally by GEFCO.

In January 1969 the terms of the arrangement or agreement under which they had in the main been operating were incorporated in a written contract (the "agreement"). It read as follows:

> "WHEREAS the parties hereto have agreed that GEFCO will on certain terms and conditions purchase from WANDRAG the whole of its production of asbestos;

AND WHEREAS it is deemed expedient to record in writing the terms and conditions upon which the parties hereto are agreed.

NOW THEREFORE IT IS AGREED AS FOLLOWS -

1. WANDRAG hereby undertakes not to sell any part of its production or stocks of Blue Asbestos fibre to any purchaser other than GEFCO who hereby undertakes to purchase the total production of Blue Asbestos fibre of WANDRAG, which shall be limited (or held in stocks) according to the following specific limitations and provisions-

(a) The total tonnage of fibre to be purchased by GEFCO in any one year shall be limited to 20% (TWENTY PER CENTUM) of the total sales of Cape Blue Asbestos fibre in that year by GEFCO and its subsidiaries, including all sales by subsidiary selling companies and any sales by their agents or sub-agents.

(b) The fibre so to be purchased by GEFCO is further limited to 9 000 (NINE THOUSAND) tons per annum when the total sales do not exceed 50 000 (FIFTY THOUSAND) tons per annum. Should the annual sales exceed 50 000 (FIFTY THOUSAND) tons GEFCO undertakes to purchase additional tonnages of fibre from WANDRAG on the same basis, namely 20% (TWENTY PER CENTUM) of any sales exceeding 50 000 (FIFTY

THOUSAND) tons. These additional tonnages will be limited to 1000 (ONE THOUSAND) tons which will result in a total of 10 000 (TEN THOUSAND) tons of WANDRAG fibre so to be purchased when GEFCO's sales amount to 55 000 (FIFTY-FIVE THOUSAND) tons in any one year.

(c) All purchases made by GEFCO shall be distributed evenly over each year of the contract period at a rate of not less than 400 (FOUR HUNDRED) tons per month.

Notwithstanding the above GEFCO agrees to purchase not less than 4 800 (FOUR THOUSAND EIGHT HUNDRED) tons from WANDRAG in any one year.

2. If at the end of any calendar year the tonnage sold by WANDRAG to GEFCO should be less than or should exceed the figure which GEFCO has agreed to purchase from WANDRAG, namely 20% (TWENTY PER CENTUM) of the total GEFCO sales as shown in the Auditors' Certificate, the deliveries of fibre by WANDRAG in terms of Clause 7 for the first quarter of the ensuing calendar year shall be adjusted so as to take into account the shortfall or excess of fibre sales by WANDRAG to GEFCO for the preceding calendar year.

3. The grades of fibre to be purchased in terms of this Agreement will be the normal grades produced by WANDRAG in the

ratio of its normal production and must at all times be within the range of WANDRAG'S current production and must not be less than the minimum specifications of the respective groups of fibre as determined by the provisions contained in the Agreement between the members of the Cape Blue Producers Company, whether this company is still in existence or defunct. It is recorded that the grades currently produced by WANDRAG when mixed together in the normal ratio of production and fiberised to the required degree, will result in a grade which is equal to the current GEFCO Grade 35.

4. GEFCO will pay to WANDRAG in respect of all asbestos fibre so purchased a sum of R124,50 (ONE HUNDRED AND TWENTY-FOUR RAND FIFTY CENTS) per ton on an f.o.b. basis, which sum will be reduced or increased by the difference between this sum and the average price for GEFCO'S total annual sales of its Grade 35. Less -

(a) A selling commission of 15% (FIFTEEN PER CENTUM) on the f.o.b. price of the fibre, and

(b) Charges for R.M.T., railage, handling, storage, shipping and similar costs based on the average of these expenses for all fibre despatched by GEFCO for that year (which, it is recorded) is at present R12/14 per ton;

(c) A figure of R2,00 (TWO RAND) for blending costs;

(d) The cost of bags delivered KURUMAN.

5. The cost of transport of fibre from the WANDRAG depot to the Riries Mine for the purposes of blending or storage, will be for the account of WANDRAG.

6. It is recorded that GEFCO will not be under any obligation to disclose to WANDRAG the final destination of any WANDRAG fibre sold by GEFCO.

7. Determination of the quality of the material will be effected by GEFCO at their laboratory. Any dispute arising from such determinations will be settled by the Council for Scientific and Industrial Research, or failing them, General Superintendence Company (S.A.) (Proprietary) Limited, as umpires, whose decision shall be final. All costs incurred in such disputes will be for the account of the party against whom the umpires may decide. It is hereby agreed that every 20 (TWENTY) ton batch of fibre will be sampled and tested both by GEFCO and WANDRAG in order to limit any disputes which may arise from such determinations to specific 20 (TWENTY) ton lots.

8. In order to ensure an approximately even flow of asbestos from WANDRAG to GEFCO'S Riries Mill, delivery will take place on a daily basis. To this end GEFCO undertakes to inform WANDRAG in advance of its anticipated quarterly sales and at the commencement of each year its anticipated

annual sales. GEFCO also undertakes to submit a Certificate given under the hand of its auditors, confirming the annual tonnages of fibre sold for the account of GEFCO and its subsidiaries and WANDRAG by any of GEFCO'S selling organisations, agencies or sub-agencies.

9. It is agreed that invoices for fibre delivered will be paid in full, excluding commission and other deductions as set out in Clause 4 hereof, on or before the 25th day of the month next following.

10. Notwithstanding the date hereof this Agreement shall be deemed to have commenced on the first day of DECEMBER, 1968 and shall continue for a minimum period of five years, and thereafter subject to the right of either party to terminate the Agreement on two years' written notice provided that notice may not be given during the first three years of the operation of this Agreement."

One notes the following features of this agreement. Although the opening words of clause 1 require Wandrag to deliver all its Blue Asbestos fibre to GEFCO, the quantity which GEFCO is obliged to take and pay for is limited and determined according to the stated formula.

Wandrag had no doubt to adjust its rate of production accordingly and any surplus would be "held in stocks", as it is said in this clause. Clause 3 requires Wandrag to deliver fibre of a certain minimum specification and grade. In terms of clause 4 GEFCO is to pay Wandrag a basic sum of R124,50 per ton for the fibre delivered subject to an adjustment based on the average price for GEFCO's total annual sales of its Grade 35 fibre and subject to the deductions itemised in paragraphs (a) to (d) of this clause. The following are the provisions of the Act relevant to the questions to be decided as they read at the material times:

s 11bis(1)

" 'exporter' means-

(a) any person who carries on an export trade of the nature referred to in paragraph (a) of the definition of 'export trade', and who is registered as an exporter by the Director-General;"

" 'export trade' means-

(a) any trade carried on by any person in the course of which goods are exported or are produced or manufactured for export or in the course of which orders for goods are actively solicited in any export country; ...

s 11bis(2) and 3(a)

"(2) If any exporter has during any year of assessment incurred marketing expenditure, determined as provided in subsection (4), there shall be allowed to be deducted from his income for that year an allowance (to be known as the marketing allowance) the amount of which shall be determined as provided in subsection (3).

(3) The marketing allowance shall be-

(a) an amount equal to seventy-five per cent of the marketing expenditure (determined as provided in subsection (4)) incurred by the exporter during the year of assessment;"

s 11bis(4)(f)

"(4) For the purposes of subsection (3) the marketing expenditure on which the marketing allowance is to be calculated shall be so much of the expenditure incurred by the exporter during the year of assessment and allowed to be deducted from his income under

sections 11 and 17 as is proved to the satisfaction of the Commissioner to have been incurred directly-

(f) in respect of commission or other remuneration for orders for goods exported to any export country ..."

In terms of s 82 of the Act Wandrag bore the burden of proving that it was entitled to the deductions claimed as marketing expenditure. It was common cause that the asbestos was produced in the Republic; that it falls within the definition of "goods"; that Wandrag was a registered exporter; that the expenditure in each case was incurred in the respective years of assessment; and that such expenditure was allowed to be deducted from income under s 11 and s 17 of the Act: in short, that all the requirements for the recognition of a marketing allowance were proved save for two, namely,

(i) whether Wandrag was carrying on an "export trade", and

(ii) whether the "selling commission" paid to GEFCO in terms of

the agreement was "marketing expenditure" within the meaning of that term in s llbis(4)(f).

Central to Mr Levin's argument, on behalf of the Commissioner, on both the above issues was the submission that on a proper construction of the agreement it was one of purchase and sale. To an extent the manner in which the parties expressed themselves lends support to this contention. There is repeated reference in the agreement to "purchase", "purchaser" and "sales". On the other hand, there are terms which are foreign to such a contract. Ordinarily a purchaser after delivery may do as he pleases with the res vendita. In the event of a re-sale he is not accountable to the seller for any profit made or in any other respect. Nor would one expect that after delivery a seller would be responsible for the costs reflected in clause 4. Mr Levin sought to explain these deductions by submitting that they were simply part of a method used by GEFCO to

determine the purchase price. This argument presupposes that we are dealing with a sale. But in such a case a buyer as a rule takes these and suchlike factors into account before deciding on the purchase price simpliciter which he is prepared to pay. Clause 6 records the fact that GEFCO is not obliged to disclose to Wandrag the final destination of "any WANDRAG fibre sold by GEFCO". This is not a provision parties would need to include, or would even contemplate inserting, in a deed of sale. Finally, one notes that in clause 8 the auditor's annual certificate is to confirm the amount of fibre "sold for the account of GEFCO and its subsidiaries and WANDRAG". (My emphasis.) Thus, if one has regard to substance rather than form, the agreement cannot be said to be one of sale. And with particular reference to clause 4(a), it provides for a payment in the form of a deduction and not for a discount on a purchase price.

Nor can the agreement as a whole, despite the reference to "selling commission", be classified as agency in either of its two ordinary meanings: a mandate coupled with authority to represent or a mandate without such authority. GEFCO, in appointing the marketing agents and in selling and exporting Wandrag's asbestos in terms of the agreement, did not act on behalf of or in the name of Wandrag as principal and no contractual relationship between the latter and the purchasers resulted. And the agreement encompassed more than the duties a mandatory would ordinarily be instructed and obliged to perform though elements of a mandate simpliciter do feature in it.

In the result the agreement is to be regarded as a hybrid or innominate one. Though sui generis, the purpose for which it was concluded admits of no doubt. Wandrag was, as I have said, wholly dependent upon an export market but lacked the marketing and processing

facilities to survive in it. In terms of the agreement these difficulties were overcome. The reciprocal benefit it held for GEFCO was that a potential competitor was removed from the export market at the price of taking over and selling annually a limited quantity of Wandrag's product.

Reverting to the first of the disputed issues, namely, whether Wandrag was an "exporter" by virtue of conducting an "export trade", it appears from paragraph (a) of the latter definition that three forms of export trade are recognised: a trade carried on by a person in the course of which (i) goods are exported; (ii) goods are produced or manufactured for export; (iii) orders for goods are actively solicited in any export country. The special court held requirement (ii) to have been satisfied saying without furnishing reasons that: "It is clear that the asbestos mined and produced by the appellant [Wandrag] was done for the purposes of export." The majority judgment endorsed this view but, as reflected in its order,

determined that the proceeds of the small quantity of Wandrag asbestos sold locally could not be taken into account in calculating marketing expenditure. This conclusion points to a consideration not expressly dealt with by the special court, namely, that it is implicit in requirement (ii) that the goods produced or manufactured are in fact those exported. Thus, for instance, if the Wandrag asbestos fibre was so processed and transformed by GEFCO that it could no longer be identified or regarded as the product of Wandrag, it could not be said that the goods actually exported were produced or manufactured by Wandrag for that purpose. (Similarly, if export trading in terms of (i) above were to be relied upon, in the example postulated it would be the goods of GEFCO, not Wandrag, that would be exported.) It was Mr Levin's submission that such a transformation took place.

Details of the mining and processing of the asbestos emerged

from the evidence of Howard, the mine manager during the relevant three year period, and that of Hart, the executive chairman and managing director of GEFCO. After the rock containing the layers of compacted asbestos has been mined and milled, the asbestos fibre is extracted from the rock. Fiberisation next, so to speak, "fluffs out" the fibre. The quality of the fibre depends upon its length and the extent to which fiberisation has increased the surface area of the fibre. The bonding propensity of the asbestos fibre, and hence its value, depends upon these two factors. During fiberisation no chemical additives or other substances are introduced. After delivery of the Wandrag fibre to GEFCO, further fiberisation takes place after which the Wandrag product is blended (mixed) with Gefco fibre to meet the specifications of the various customers. Once mixed, the Wandrag component cannot be identified and, it follows, cannot be separated from the blend.

Whether goods produced for export can be said to be those actually exported depends upon the facts of each case. The coalescence (commixtio) of goods before exportation resulting in loss of identity is not the sole determinant. Thus, should two producers of the same goods combine their products and their export and marketing operations, each would not be precluded by the definition of export trade from deducting his pro rata share of marketing expenditure. On the other hand, should an article, which is in a sense produced for export, become an integral and subordinate component of the product actually exported, it would be the producer or manufacturer of the end-product who would qualify as the "exporter" carrying on the "export trade". In this case there was no interaction between the Wandrag fibre and the other components of the blend. The fiberisation was a mechanical process that amounted to no more than a sorting out of Gbre lengths and a changing of their

configuration. The Wandrag fibre thus altered cannot be said to have been intrinsically transformed. This conclusion accords with the view taken by the parties as reflected in their agreement. I again refer to its terms in which there is reference to "the final destination of any Wandrag fibre sold by GEFCO" and to "the tonnages of fibre sold for the account of ... Wandrag."

Accordingly the first issue is to be decided in favour of Wandrag.

The second question concerns the interpretation of the provisions of s 116bis(4)(f) and its application to the facts of this case. Concisely posed, the question is whether the payment in terms of paragraph 4(a) of the agreement was "expenditure ... incurred directly ... in respect of commission or other remuneration for [the procurement of] orders for goods exported."

In Secretary for Inland Revenue v Consolidated Citrus Estates Ltd 1976(4) SA 500(A) this court was called upon to consider the requirement of "directness" featuring in a similarly worded predecessor of the present s 11bis(4)(f). In this regard Galgut JA, the author of the majority judgment, said at 519 D - F:

> "[T]he section is concerned to aid the taxpayer who has incurrred market development expenditure. If expenditure has not been incurred by a taxpayer, he will not normally be given the benefit of a deduction for such expenditure or part thereof. It would thus seem that 'directly' refers to and qualifies the act of incurring the expenditure. Obviously the expenditure must have been incurred by the taxpayer, i.e. he must have incurred the liability or made the payment. 'Directly' appears to have been deliberately added in order to serve some purpose that the Legislature had in mind. That purpose, I think, was to postulate that the connection between the taxpayer's incurring the expenditure and the object for which it was incurred (being one of those specified in paras. (a) to (f) in the sub-section) should be direct, i.e., straight, and close, not devious and remote (cf. Concise Oxford English Dictionary s.v. 'direct')."

(I shall return to this decision and refer to its facts in due course.)

Thus in this case it is the connection between payment in terms of clause 4(a) and the procurement of the export orders that must be direct. It is not necessary that there should be a direct connection between the payment and the orders themselves.

It cannot be gainsaid that this payment was, and was intended to be, remuneration for GEFCO for such procurement through its (GEFCO's) appointed agents and perhaps employees. It was conceded that had Wandrag appointed and paid its own foreign agents for this purpose, the expenditure would have been directly incurred by Wandrag whether or not they in turn appointed sub-agents who actually secured the orders. I can see no distinction in principle between that situation and the present in which GEFCO was commissioned and paid to undertake this task and it in turn appointed agents who obtained the orders. It is true that the agreement as a whole cannot be classified as one of agency. But, on the

assumption that the selling commission in clause 4(a) was the quid pro quo for marketing Wandrag's asbestos and for nothing else, one may validly regard this term of the agreement as one of agency in the sense of a mandate given by Wandrag (the mandator) to GEFCO (the mandatory) in terms of which the latter undertook to perform the task of procuring orders for export for the former.

After the quoted passage from the judgment of Galgut JA, the judgment continues at 519 F - G:

> "The reason [for the requirement that there should be a connection between the expenditure and the object for which it was incurred] was probably to stimulate the personal efforts of the individual exporter to develop an export market for his products; and therefore to ensure that, for the expenditure to qualify for the additional and special allowance, it had to be incurred by the exporter himself ...."

The aim of encouraging exports would be unnecessarily, and unduly, restricted if too narrow a view is taken of this requirement and if the

presence of an intermediary in the form of a mandatory is to be regarded as a bar to claiming a deduction.

It is at this point that one must distinguish between two arguments relied upon in support of the submission that the requirements of s 11bis(4)(f) have not been met. The first, now being considered, is that the payment under clause 4(a) was not direct - irrespective of whether the whole or only part of such payment was for marketing the asbestos. The second argument, still to be considered, is that because only part of such payment was for that purpose and such amount has not been quantified the claim for a deduction must fail.

The special court relied on both arguments in deciding that the expenditure was indirect. At this stage I restrict my comments on the reasoning in that judgment to that which pertains to the first argument. The learned judge considered that this payment was indirect because it

was a

fixed percentage and did not represent the actual amount expended by GEFCO in securing agents and obtaining orders and because Wandrag did not know how the expenditure by GEFCO in obtaining orders was made up. But these are features which might well be present in any appointment of a marketing agent to carry out such a commission. The fact that Wandrag incurred no personal liability under the sales agreements concluded between GEFCO and the foreign buyers was also relied upon: that Wandrag "did not, either in terms of the agreement with GEFCO or in point of fact, incur any personal liability to third parties for orders for goods exported to any export country." It is true that Wandrag incurred no personal liability since by agreement the asbestos was sold in GEFCO's name and no question of representation arose. But this does not detract from the fact that GEFCO was paid by Wandrag to do the marketing of its product. Finally, the special court was of the view that the Consolidated Citrus

Estates case and a further decision, Income Tax Case No 1337 43 SATC 164, supported its conclusion.

The circumstances giving rise to the dispute in the Consolidated Citrus Estates decision are thus summarised in the headnote:

> "Respondent, which conducted business as a citrus farmer, was in terms of Proclamation R.121 of 1964, issued in terms of the Marketing Act, 26 of 1937, obliged to deliver its citrus fruit to the Citrus Board for export. Fruit so delivered to the Board vested in the Board in terms of section 20 of the Marketing Act. In terms of the Proclamation the Board had to pay to the exporter, i.e. the respondent, the proceeds of the citrus fruit sold by it through the Board less any expenses incurred by the Board in the disposal of the fruit. In its returns of income to the appellant for the years 1964, 1965 and 1966, respondent claimed as deductions from its income the amounts deducted by the Board for advertising, selling agents' commission, etc. from the proceeds of the fruit delivered to the Board by the respondent for export. Respondent contended that these amounts were deductible as exporters' allowances in terms of section 11 bis of the Income Tax Act, 58 of 1962, as amended. Appellant disallowed these claims. In an appeal to the Special Court for the hearing of income tax appeals, the appellant's decision was overruled and the claims allowed. In a further appeal by the appellant, the

> respondent contended that the expenditure for advertising, commission, etc. was directly incurred by the respondent as the Citrus Board was the agent of the producer or acted as a 'conduit pipe' and that the expenditure had been 'directly incurred' within the meaning of section 11 bis (4)."

Though the facts do bear some resemblance to those with which we are concerned, they differ in a critical respect. Because the expenses incurred by the Citrus Board were in the execution of its statutory duties and not as a result of an agreement between the taxpayer and the Board, the taxpayer was obliged to base its unsuccessful claim to a deduction on "an estimate of its pro rata share of such expenditure" (510A). That being so, as Galgut JA points out: "The Board incurred the expenditure. It cannot be said that the Company [taxpayer] or any producer was in any way party to the expenditure or brought it upon itself or rendered itself liable for the expenditure. The market development expenditure was, therefore, not

incurred by the Company directly or at all." This important distinction is well illustrated by Mr Bloomberg, counsel for Wandrag, in cautioning that "care must be taken not to confuse the 'commission' paid by the Board (party B) in the Consolidated Citrus Estates case to the agents (party C) appointed by the Board, with the commission paid by WANDRAG (party A) in this case to GEFCO (party B)."

In Income Tax Case No 1337 (supra) the Cape Special Court was concerned with a deduction claimed by the taxpayer in respect of the tax year ending 30 June 1975 and described by him as "contributions to sales promotion and marketing expenses." The relevant provisions of s 11bis(4) applicable to this assessment read at the time as follows:

> "For the purposes of subsection (3) the marketing expenditure on which the exporter's allowance is to be calculated shall be ... so much of the expenditure incurred by the exporter ... as is proved to the Secretary to have been incurred directly -
> (a).....

(b) in advertising or otherwise securing publicity in an export country, soliciting orders therein ..."

In January 1974 the taxpayer entered into an agreement with B, an international manufacturing and selling organisation, with its headquarters in country. The appendix to the agreement read as follows:

"B (C country) shall be entitled to and appellant shall pay the following quantity discounts either in cash or by free delivery of products:

1. On all X products exported on behalf of B (C country)

(a) . . . . . .

(b) an additional discount of 12% to be a contribution to the Sales Promotion and Marketing Expenses in the country of retail sales. The discounts are payable to B every six months." (See judgment page 167.)

In deciding that the objection could not be sustained and that the appeal should be dismissed the president of the special court (Friedman J) observed at 170 that:

"In the Consolidated Citrus Estates case (supra) Galgut JA (who

delivered the majority judgment) in dealing with the purpose for which the word 'directly' was used in s llbis(4) said, at 519:

> 'That purpose, I think, was to postulate that the connection between the taxpayers incurring the expenditure and the object for which it was incurred (being one of those specified in paras (a) to (f) in the sub-section) should be direct, i.e. straight, and close, not devious and remote (cf Concise Oxford English Dictionary s.v. 'direct').'

If B acted as appellant's agent or even as the 'conduit pipe' of appellant in incurring expenditure for the purpose envisaged in para (b) of s 116M(4), such expenditure would be regarded as direct and would be deductible. (See the Consolidated Citrus Estates case (supra) at 520 E - F.) However, on the facts of this case there is no basis on which B can be said to have acted as appellant's agent when it incurred sales promotion or marketing expenses; nor can it be said to have acted as a 'conduit pipe' for appellant in incurring such expenditure." (My emphasis.)

The "additional discount" the taxpayer was obliged to pay in that case arose from an agreement materially different from the one with which we are concerned. And the applicability of paragraph (b) of sllbis(4), no (f), was in issue. However, assuming that the postulate I have emphasised was intended to apply generally to s 116bis(4), in the

absence of any indication that "agent" was intended to be restricted to a mandatory acting in a representative capacity, this statement is not at variance with the reasoning in this judgment.

It remains to consider the second argument relating to this question. The acceptance of the proposition that the payment under clause 4(a) of the agreement was for more than GEFCO's marketing undertaking was the ratio decidendi of the dissenting judgment. After referring to letters written prior to the signing of the agreement and to certain evidence of Walwyn, Leveson J said:

> "The result is that while it is clear that a substantial portion of the 15 per cent paid by the appellant was commission within the meaning of the section the exact amount has not been quantified. For the purpose of making an assessment the respondent has therefore not been furnished with sufficient information to determine what proportion of the 15 per cent was to be allocated to commission properly so called and what proportion to compensation to Gefco for loss of a portion of its market. That being so, in my opinion, the appeal must fail."

The enquiry must start with the manner in which the parties expressed themselves in clause 4(a) itself. In it the parties state explicitly that the payment of 15% is to be for "selling commission". Details of other charges and costs are then set out in the paragraphs that follow. There is no reason why compensation for loss of portion of GEFCO's market or any other charge could not have been in like manner separately stated and a deduction included either as a percentage of sales or in a fixed amount. The fact that other considerations may have influenced GEFCO in deciding on the rate of selling commission it was prepared to agree upon is - one need hardly add - not something to be taken into account: voluntas in animo nihil operatur. At a later stage after the signing of the agreement, the parties sought to renegotiate the rate of selling commission. GEFCO wished to increase the amount paid and this Wandrag resisted. It was common cause, however, that the ensuing correspondence included in the

record, which it would seem reflects only part of these discussions, takes the matter no further in support of the proposition that the payment was not exclusively for marketing Wandrag's fibre. As Mr Levin correctly observed in the course of his cross-examination of Walwyn: "the one said what suited it and the other said what suited it". But counsel did rely on two letters written before the agreement by GENCOR, on behalf of GEFCO, to Wandrag. In the first, dated 15 August 1968, it was said that:

> "The selling commission of fifteen per cent is to cover Gefco's own agents' commissions and to compensate in a small way for loss of profits due to increased unit costs as a result of lower production as well as loss of profits on reduced sales of its own production."

The second written some eight days later states that:

> "The sales commission of 15% is the absolute minimum which we can accept. It is pointed out that, at the very least, one third of this is a direct selling cost and with the additional marketing effort which will have to be made in these circumstances the incremental cost to ourselves will very likely exceed this figure substantially."

It is somewhat strange that if both these grounds were being relied upon as part of the quid pro quo for the payment, only one features in each letter. That aside, the correctness of these assertions was not accepted by Wandrag and no evidence was tendered by the Commissioner to prove the truth of the statements relied upon. There was no other evidence forthcoming from a GEFCO official to say that it viewed the payment in some other light. As to the evidence of Walwyn, Leveson J attached particular importance to an answer given by him. This appears from the following extract from his judgment:

> "The question was then put to Mr Walwyn:
>
> 'It was giving you a guaranteed share of the market, 20% of the market?' And
>
> the answer was:
>
> 'It was the price we had to pay.' It was argued that those words show that the appellant had no alternative but to pay the commission claimed in order to export its product and therefore that the only meaning that can be given to the word 'commission' as used in the letter [of 15 August 1969] is as

> remuneration for the work to be done. I do not agree. In my opinion Mr Walwyn's evidence is at best ambiguous and equally conveys that both commission and compensation (in the sense above set out) had to be paid to secure entry into the export market."

The context in which this answer was given during Walwyn's evidence-in-chief was the following:

> "Would you like to comment at all, Mr Walwyn, on that 15% commission? Is it high or low in your view? – I think it was high, but on the other hand we did know that various commissions had to be paid to get entry into markets and - put it this way - we did not greet that with a sense of shock.
>
> Yes. It was giving you a guaranteed share of the market, 20% of their market? – It was the price we had to pay.
>
> To sell your ...? - Our fibre."

Thus read in context there appears to be little or no ambiguity in this evidence. In the absence of further enquiry by way of cross-examination it must be taken to refer to selling commission. In any event, it is to be considered in conjunction with the following evidence of Walwyn on which

he was also not cross-examined:

> "It was put to you, Mr Walwyn, that the 15% described in the agreement as a 'commission' and in the correspondence as an 'agency commission' or a 'selling commission'. As I understand it was ... The gist of the question was that this was treated as a, really a discount. They were buying from you, they were paying you a price at a discount. Is that how you understand the basis of the agreement? – No.
>
> Then what was this 15%? – The word used was 'commission' and we always understood it as a commission."

In my view the evidence satisfactorily proves that the designation of the payment in paragraph 4(a) accurately reflects its true nature and the intention of the parties.

The second question must therefore also be decided in favour of Wandrag.

In the result I conclude that Wandrag has proved its entitlement to the deductions and it is therefore unnecessary to decide whether the

subsidiary objection is well-founded.

The appeal is dismissed with costs, which are to include those consequent upon the employment of two counsel.

ME
KUMLEBEN
JUDGE OF
APPEAL

BOTHA JA)
F H GROSSKOPF JA) - CONCUR
HOWIE JA)

C

ORBETT CJ:

I have had the benefit of reading the judgment of my Brother Kumleben in this matter. Unfortunately I am not able to concur in his conclusion that the respondent ("Wandrag") was entitled, in the years of assessment in question, to the marketing allowance provided for by sec 11 bis of the Income Tax Act 63 of 1962, as

amended ("the Act"). Accordingly I would allow the appeal of appellant ("the Commissioner") in respect of the 1984 and 1985 tax years. In regard to the 1983 tax year, however, I am of the view that the provisions of sec 3(2) of the Act now preclude a reopening of the assessment. My reasons for reaching the conclusion that Wandrag was not entitled to the marketing allowance are as follows:

The basic facts of the matter and the terms of the agreement of January 1969 are set forth in my Brother's judgment and it is not necessary for me to repeat them. I wish merely to emphasize certain features of the facts and the agreement and to place my interpretations on them. Before I do so it is necessary to give some attention to sec 11 bis of the Act.

The marketing allowance to which Wandrag lays claim is calculated according to a percentage of the taxpayer's "marketíng expenditure" (see sec 11 bis (3)). Marketing expenditure is defïned in sec 11 bis (4). The portion of this subsection relevant for present purposes provides that the marketing expenditure on which the marketing allowance is to be calculated shall be -

> ".... so much of the expenditure incurred by the exporter during the year of assessment and allowed to be deducted from his income under sections 11 and 17 as is proved to the satisfaction of the Commissioner to have been incurred directly -
>
> (f) in respect of commission or other remuneration for orders for goods exported to any export country. . ...."

In order to qualify for the allowance the taxpayer must, inter alia, be an "exporter". Exporter is defined in sec 11 bis (1) -I quote only the relevant portion of the definition - as:

> " any person who carries on an export trade of the nature referred to in paragraph (a) of the definition of 'export trade' and who is registered as an exporter by the Director-General."

Paragraph (a) of the deGnition of "export trade" reads:

> " any trade carried on by any person in the course of which goods are exported or are produced or manufactured for export or in the course of which orders for goods are actively solicited in any export country."

Tuming to para (f) of sec 11 bis (4), I would point out that the word "commission" is not a term of legal art. The relevant meaning in the Oxford English Dictionary reads -

> "A remuneratíon for services or work done as agent, in the form of a percentage on the amount involved in the transactions; a pro rata remuneration to an agent or factor."

In Drielsma v Manifold [1894] 3 Ch 100, at 107, Davey LJ said:

> "Commission is prima facie the payment made to an agent for agency work, usually according to a scale - it may be an ad valorem scale, but not necessarily an ad valorem scale. It is in my opinion the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary. . . "

The words "other remuneration" clearly spread the net wider, but it is

not necessary in this case to determine exactly how wide.

The words "commission or other remuneration for orders for goods exported to any export country" are cryptic, but I think that their meaning is reasonably clear. What the Legislature had in mind, in my view, was expenditure incurred in the payment of, or an obligation to pay, commission or other remuneration to a person for services rendered in obtaining orders for goods which in terms of the order are exported to any export country. The word "export" means -

> "to send out (commodities of any kind) from one country to another" (Oxford English Dictionary),

and in this context "exported" has a cognate meaning. "Export country" is defined in sec 11 bis (1) to mean any country other than the Republic and certain other Southem African countries. The order which the person obtains thus causes, or is part of the process of, the export of the goods from South Africa to an export country.

A simple, but typical, case satisfying the requirements of sec 11 bis (4)(f) would be where A, an exporter, has paid Rl 000 to

agent B for obtaining an order in terms of which a quantity of A's goods are sold to a purchaser in an export country. In such a case it would be of no moment where B carried on business, whether in this country or elsewhere.

I revert to the facts and the agreement. The true categorization of the agreement was a matter upon which opposing submissions were made by counsel. Appellant's counsel argued that the agreement was essentially a contract of purchase and sale and that the provisions of clause 4 were merely a mechanism created for the ascertainment of the price. Counsel for Wandrag, on the other hand, while submitting that it was not necessary to "pigeon-hole" the agreement, contended that, if it were, it was rather one of principal and agent or, alternatively, a type of joint venture.

I think that there is much to be said for the view that the agreement is a contract of purchase and sale. That is how the transaction is specifically described in the preamble and in clauses 1, 2, 3 and 4 of the agreement itself. The essentials of a contract of sale are agreement upon the merx, the price and the obligation of the seller

to deliver the merx to the purchaser. The seller does not undertake to pass ownership in the merx, but delivery thereof in pursuance of the contract is, in the case of an unconditional credit sale, taken to be accompanied by an intention to pass ownership; and where the seller is the owner as having that effect (see generally Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) SA 464 (A), at 489 G - 490 G; also Commissioner of Customs and Excise v Randles, Brothers & Hudson, Ltd 1941 AD 369, at 398; Concor Construction (Cape) (Pty) Ltd v Santambank 1993 (3) SA 930 (A), at 933 B-E).

In the present case there are strong indications that ownership in the raw asbestos was intended to pass, once it was delivered to Gefco. It is clear from the evidence that after the asbestos deïivered by Wandrag to Gefco had been fully processed (i e fïberised and blended) by the latter and bagged for export it completely lost its separate identity. It became merged with the greater quantity of Gefco's own asbestos. What was exported by Gefco was, according to Mr Walwyn, "a different product". Gefco,

moreover, had a completely free hand in the marketing of this new product. Mr Walwyn's own evidence was to the effect that the asbestos sold by Wandrag to Gefco became the property of the latter. It is true that the agreement places certain obligations on the purchaser, Gefco, with reference to the res vendita, but I do not regard this feature as necessarily being inimical to the concept of a purchase and sale. In this connection reference may be made to Seggfe v Philip Bros 1915 CPD 292 where defendants were appointed "agents" to sell in South Africa tractors made by an English manufacturer. It was held that despite the use of the words "agents" in the defendants' appointment the relationship between them and the manufacturer was one of purchaser and seller. The Court (Gardiner J) did not regard the fact that the defendants agreed not to charge more than certain prices for the tractors when re-selling them as posing a difficulty. He said (at p 298) -

> ". . . . there is nothing inherent in the contract of sale to preclude a vendor from making such a condition as to re-sale".

Admittedly the concluding words of clause 8 of the agreement speak of -

> "... the annual tonnages of Gbre sold for the account of GEFCO and its subsidiaries and WANDRAG by any of GEFCO's selling organizations, agencies or sub-agencies".

This refers to what the auditors' certificate must conGrm in order to determine, I would suggest, the total tonnage of fibre to be purchased by Gefco from Wandrag in any particular ycar, as provided in clause l(a) of the agreement. And here it is interesting to note that in referring to the total annual sales of fïbre cïause I(a) speaks of -

> "... the total sales of Cape Blue Asbestos fibre. . . by GEFCO and its subsidiaries, including all sales by subsidiary selling companies and any sales by their agents or sub-agents."

Here there is no reference to such sales being "for the account of" Wandrag. In a loose sense the asbestos was being sold by Gefco "for the account" of Wandrag in that the more of its product that Gefco sold the more Wandrag's 20 per cent would amount to. But I do not

think that it can be inferred from the use of these words that the parties intended Gefco to act as Wandrag's agent in the marketing of the asbestos. To the extent that the words so suggest this, they must be regarded as a lapsus linguae.

Nor do I think that much can be inferred from clause 6 of the agreement. It must be conceded that normally such a provision would be alien to a contract of purchase and sale, but in this case, owing to the particular way in which the annual sales to Gefco were to be determined and the price calculated, it may have been thought necessary to include a statement such as that contained in clause 6, even if only ex abundanti cautela.

Certain other features of the agreement should be emphasized. Firstly, as regards the selling commission of 15 per cent referred to in clause 4(a), Mr Walwyn stated in evidence that the best guidance as to what this represented was to be obtained from "the original letters", seemingly the letters of 15 August 1968 and 23 August 1968 referred to in my Brother's judgment. His evidence, under cross-examination, proceeded:

"Yes. But there was a percentage of that 15% which was a direct disbursement by Gefco to its agents to sell the product overseas. But that percentage was never fixed, but it was a part of the 15%, not so?-- Correct.

And those were expenses - as I understand it - Mr Walwyn, of Gefco. They were not the expenses directly, of Wandrag. Wandrag didn't pay those agents?-- Well, we didn't pay the person overseas. We paid Gefco by way of reimbursement.

Yes. And it didn't know, and it had no control over the amount of the expenses or commission that Gefco paid to its overseas agents, did it? It was entirely within the control of Gefco?-- Correct.

And it had no idea what the balance of the 15% was for, it may not have been an expense at all. It may just have been an arbitrary Ggure?-- Well, the expressíon I used, it was the price we had to pay.

Yes, it was a price you had to pay and it was what Gefco was getting for buying your production, bïending it and selling the final product overseas. That was going to be its profit on the transaction. It was going to buy raw materials from Wandrag; it was going to expend money in mixing that product, in fiberising the product, in packing it, sending it overseas. The príce that it paid Wandrag would be based on the final sales price of the end product, less its expenses. And whatever its going to get, would be the difference between its expenses, including the commission and that 15%?-- Correct."

This evidence, read with the passages from the two above-mentioned letters quoted in my Brother's judgment and with the provisions of clauses l(a), 6 and 8 of the agreement, indicates:

(a) That some, at least, of the asbestos exported by Gefco was sold through the medium of agents appointed by Gefco. There was, in fact, a dearth of evidence as to how Gefco marketed the asbestos fibre exported by it and to the extent that such evidence is important in deciding the issues in this case such dearth must redound to the detriment of Wandrag upon whom the onus lay.

(b) That Wandrag had nothing to do with the agents employed by Gefco, and more particularly did not pay them.

(c) That the 15 per cent commission provided for by the agreement bore no direct relationship to the expenditure incurred by Gefco in employing overseas agents to market the asbestos fibre. The indications are that a substantial, but inderterminate, portion of the 15 per cent had nothing to do with the remuneration paid by

Gefco to its agents.

I agree with Kumleben JA that the agreement as a whoïe cannot be classified as one of agency in either of its two forms. I incline to the view that if the contract has to be pigeon-holed it fulfils the requirements of a contract of purchase and sale, but I am prepared to accept, in Wandrag's favour, that it is a contract sui generis. (Cf Raad van Toesig op die Suiwelnywerheid v Ladysmith Towerkop Koöperatiewe Kaasfabriek Bpk 1971 (3) SA 511 (C), at 518 H to 519 H and the authorities there cited.) I shall also assume, in favour of Wandrag, that in the tax years in question it was to be classified as an "exporter" of asbestos fibre.

Where Wandrag's case falls down, in my opinion, is in its failure to establish that Wandrag incurred expenditure "directly in respect of commission or other remuneration for orders for goods exported to any export country". Even if the so-called "commission" paid to Gefco may be regarded as constituting, say "other remuneration", I do not think that the requirement of directness is satisfied in thís case.

The meaning of "directly" in this context was considered by this Court in the case of Secretary fór Inland Revenue v Consolidated Citrus Estates Ltd 1976 (4) SA 500 (A). Here the taxpayer, a company carrying on business as a citrus farmer, was obliged (together with other citrus producers), in terms of a proclamation issued under the Marketing Act 26 of 1937, to deliver its citrus fruit to the Citrus Board for export. Fruit so delivered to the Board became the property of the Board, which marketed it overseas by the creation of export "pools". ïn so disposing of the fruit the Board, acting through an organization called the South African Co-operative Citrus Exchange, incurred expenditure in respect of advertising and commissions paid to agents overseas. The producers (including the taxpayer) who delivered fruit to the Board for export received their pro rata shares of the net proceeds, i e the proceeds of the sale of the fruit overseas less the marketing expenditure, including that incurred in regard to advertising and the payment of commission. The taxpayer claimed allowances in the tax years then under review in terms of sec 11 bis (4) of the Act in respect of the amounts

deducted by the Board, in respect of advertising and commission, from the proceeds of the fruit delivered by the taxpayer to the Board for export.

The wording of sec 11 bis (4) was slightly different when the Consolidated Citrus case was decided, but in my view nothing turns on this. When the matter came before this Court, a difference of opinion arose as to the meaning of the word "directly" in sec 11 bis (4). In this regard Galgut JA (Wessels, Trollip and Rabie JJA concurring and Rumpf CJ dissenting) held as follows (at 519 E - G):

> "'Directly' appears to have been deliberately added in order to serve some purpose that the Legislature had in mind. That purpose, I think, was to postulate that the connection between the taxpayer's incurring the expenditure and the object for which it was incurred (being one of those specified in paras. (a) to (f) in the sub-section) should be direct, i.e., straight, and close, not devious and remote (cf. Concise Oxford English Dictionary s.v. 'direct'). The reason was probably to stimulate the personal efforts of the individual exporter to develop an export market for his products; and therefore to ensure that, for the expenditure to qualify for the additional and special allowance, it had to be incurred by

the exporter himself and also had to be easily identiHable and thus readily provable to the Secretary's satisfaction as being clearly expenditure for one or other of the speciHed objects."

In applying this meaning of the word to the facts of the case Galgut JA stated at 520 B-H (the taxpayer being referred to as "the Company"):

"It becomes necessary to decide whether, on the facts of this case, the expenditure was incurred directly by the Company. It was argued that if the Board was the agent of the producer or acted as a 'conduit pipe', the expenditure was incurred by the producer. That expenditure, by an agent, in the ordinary sense of that word, could constitute expenditure by the principal, goes without saying. Thus, if a producer employs an agent, for his export trade, who does the research, advertising, etc, or causes it to be done on his behalf and he (the producer) in consequence incurs the liability or makes the payment therefor, the expenditure is nevertheless directlv incurred by the producer; the connection between the expenditure and its object is then still direct, i.e., straight and close and not devious or remote. This can be illustrated by using sec. 17. It provides that any expenditure incurred by a taxpayer in connection with the appointment of an agent for the sale outside the Republic

is deductible from his income. According to sec 11 bis (4) if any such expenditure was 'incurred directly' for research, advertising, etc, it would also qualify for the exporters' allowance. That indicates that, even though the taxpayer incurred the expenditure through an agent, it can still be regarded in the appropriate circumstances as having been directly incurred by the taxpayer. The same could apply if the Board, for the purposes of incurring the expenditure, was merely, as it were, the tool and so the 'conduit pipe' of the producer. In the light of the background sketched above, it is difficult to see how for the advertising or in respect of the commission, the Board was the agent of the producer or the tool of, or 'conduit pipe' for the producer. In creating the pool or pools, in conducting the advertising each year, in employing the salesmen, it was carrying out an activity which it was enjoined to do by the Marketing Act and the scheme. It was carrying out an activity of its own. It incurred and paid the liability for the advertising and commissions itself. The producer could not at any stage before, during or after the pool activities had commenced, have vetoed any act of the Board. In all these circumstances it seems somewhat doubtful whether the Company can be said to have incurred any expendimre itself for the advertising or commissions; but assuming, without deciding, that it did, the connection between such expenditure supposedly incurred by it and the services arranged by the Board for the advertising and commissions was not direct, close and clearly

> identifiable; on the contrary it was devious and remote. Viewed in this light the expenditure was not directly incurred by the Company. It follows that I am of the view that the Company was not entitled to the benefit of the exporters' allowance."

The ratio in the Consolidated Citrus case was applied by the Special Court in the case of Income Tax Case No 1337,43 SATC 164. In that case the taxpayer, a company which manufactured and sold goods in the Republic, entered into an agreement with company A, a South African corporation having an association with company B, an international manufacturing and selling organization with its headquarters in a foreign country. In terms of this agreement the taxpayer undertook to manufacture goods under the B franchise for sale in the Republic. Some years later the taxpayer concluded a further agreement with company B whereunder it undertook to manufacture a certain product in excess of company A's requirements and it was agreed that the excess production be purchased by B and exported. The taxpayer was supplied with delivery schedules to customers overseas. Payment for products exported under the

agreement was to be effected by drawings against letters of credit established by company B. On all products so exported the taxpayer was obliged to pay to company B, inter alia, a discount of 12 per cent, every six months, as -

> ". . . . contribution to the Sales Promotion and Marketing Expenses in the country of retail sales".

In the implementation of this agreement company B paid the taxpayer's accounts for the supply of the goods exported and the taxpayer, in turn, every six months paid to company B 12 per cent on the value of these sales. The issue in the case was whether the taxpayer was entitled to claim these 12 per cent payments as marketing expenditure in terms of sec 11 bis (4)(b), i e expenditure incurred directly -

> "in advertising or otherwise securing publicity in an export country, soliciting orders therein or participating in trade fairs in export countries."

The Special Court held that this expenditure in question

did not qualify under sec 11 bis (4)(b). In delivering the judgment

of

the Court, the President (Friedman J) pointed out that the evidence in that case showed that the taxpayer did not incur any personal liability to third parties in respect of the sales promotion or marketing activities undertaken by company B; that the taxpayer did not know how such expenditure was made up, nor did he have any control over company B's activities in this connection. Such expenditure was entirely B's concern. Having referred to the Consolidated Citrus case (supra) and the dictum of Galgut JA at 519 E included in the passage quoted above, Friedman J continued (at 170) -

> "If B acted as appellant's agent or even as the 'conduit pipe' of appellant in incurring expenditure for the purpose envisaged in para (b) of s 11 bis (4), such expenditure would be regarded as direct and would be deductible. (See the Consolidated Citrus Estates case (supra) at 520 E - F.) However, on the facts of this case there is no basis on which B can be said to have acted as appellant's agent when it incurred sales promotion or marketing expenses; nor can it be said to have acted as a 'conduit pipe' for appellant in incurring such expenditure. The plain fact is that B was completely at large to determine how expenditure was to be incurred, both on sales promotion and marketing. The agreement did not

envisage that appellant would have any control over these activities of B, nor did appellant in practice exercise any such controí.

The facts of the Consolidated Citrus Estates case differ from those of the present case maínly in that the relationship between the Citrus Board on the one hand and the citrus producers on the other was regulated by statute, whereas in the present case the relationship between the parties is govemed by the agreement between them. The expenditure in the instant case is, however, to my mind no more direct than that in the Consolidated Citrus Estates case. ïn fact, in one respect the expenditure is less direct in the instant case. In the Consolidated Citrus Estates case the amount which the producer ultimately received for his goods was a nett amount determined inter alia by reference to the aggregate amount expended by the Citrus Board on advertising and on commissions. In the present case the price which appellant receives for its product is fixed in the agreement and is in no way dependent on the amount actually expended by B in selling those products. Appellant receives the same amount irrespective of the expenditure incurred by B on sales and marketing, and B receives the same Gxed contribution in terms of clause l(b) of the appendix to the agreement, irrespective of the actual amount expended by it. The fact that B paid the purchase price of the products in full and that appellant, in tum, paid B the 12 per cent to which it was entitled every six months does not, in my view, advance

appellant's case."

This seems to me, with respect, to be a correct application of the ratio in the Consolidated Citrus Estates case

As I have said before, there is a dearth of evidence in this case as to how Gefco marketed the asbestos 6bre which it exported. Nevertheless, from the provisions of the agreement (see particularly clauses l(a) and 8 thereof) and the evidence of Mr Walwyn (see particularly the passage therefrom quoted above) it would seem that at least a substantial part of the exported Gbre was sold through the medium of agents appointed by Gefco. In employing such agents and in concluding such sales Gefco cannot be regarded as having acted as Wandrag's agent or conduit pipe. As has already been emphasized, Wandrag had no knowledge of who Gefco's agents were; had no direct dealings with them; was not even entitled to know who they were; and had no say whatever in what they were paid. Gefco handled all this on its own and on its own authority.

Furthermore, as appears from the evidence (and here again

I would draw particular attention to the passage from the evidence of Mr Walwyn quoted above) there was no correlation between the disbursements incurred by Gefco in remunerating agents employed by it and the 15 per cent "commission" paid by Wandrag in terms of clause 4(a) of the agreement. The indications are that a substantial, but indeterminate, portion of this 15 per cent had nothing to do with Gefco's disbursements; and it was entitled to its 15 per cent irrespective of the quantum of such disbursements. As Mr Walwyn put it -

> ". . . . it was the price we had to pay".

It is possible that some of the asbestos fibre marketed overseas by Gefco was sold by it without the intervention of an agent. I doubt whether in such a case the necessary directness between Gefco's efforts in this regard and the 15 per cent payments can be said to have existed, but in any event it is impossible to quantify the expenditure incurred in this connection and the point cannot assist Wandrag, upon whom the onus lay.

24 For these reasons I am of the view that, even if Wandrag's 15 per cent payments can be regarded as expenditure in respect of commission or other remuneration, it was not direct expenditure in the sense of being -

". . . . straight and close, not devious and remote".

Indeed if this is not a case of indirectness. I have difficulty in visualizing one. Accordingly I am of the view that the Special Court arrived at the correct conclusion in regard to the 1984 and 1985 years of assessment.

In regard to the 1983 tax year, I am of the view that, as held by the Special Court and by Leveson J in the Court below, the Commissioner was precluded by sec 3(2) of the Act from re-opening the relevant assessment when he did. Since this is a minority judgment I do not propose to enlarge on my reasons for reaching this conclusion.

I would allow the appeal with costs, including the costs of two counsel, and alter the order of the Court a quo to read:

"Appeal and cross-appeal dismissed with costs, including in each case the costs of two counsel".

M M CORBETT