THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO: 290/2002

In the matter between

RANE INVESTMENT TRUST **APPELLANT**

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

CORAM: HOWIE P, MARAIS, FARLAM, CLOETE, LEWIS JJA

HEARD: 15 MAY 2003

DELIVERED: 30 May 2003

SUMMARY: *Film investment; deduction under erstwhile ss 11bis and 24F of Income Tax Act 58 of 1962; contractual arrangements interpreted in light of parties' conduct.*

JUDGMENT

LEWIS JA

[1] The appellant ('Rane') is an investment trust. In 1989 it became a partner in an *en commandite* partnership formed for the purpose of investing in film ventures. This appeal concerns deductions claimed by Rane for expenditure incurred from income in 1989 under the then ss 11*bis* and 24F of the Income Tax Act 58 of 1962. The respondent (the 'Commissioner') disallowed the deductions. Rane appealed against the assessment to the Cape Income Tax Special Court. That appeal proceeded on several grounds. Conradie J in the Special Court upheld Rane's appeal on one ground (the claim under s 24F) and dismissed it in respect of the others (under ss 11(b) and 11*bis*). Rane appeals now against the decision of the Special Court to confirm the Commissioner's assessment in so far as the claims under ss 11(b) and

11*bis* were concerned; and the Commissioner cross appeals in respect of the decision to grant a film allowance under s 24F.

[2] I shall deal with each ground in turn. Before doing so, however, I shall describe in summary the nature of the film venture and the agreements between the partnership, of which Rane subsequently became a member, and various other entities. The partnership invested in the making and distributing of two films: ‘Devil Fish’ and ‘Final Cut’. It became clear during the course of the hearing in the Special Court, and it was conceded on appeal to this Court, that foreign expenditure in respect of Devil Fish had not been proved and Rane did not persist in any claim in respect of that film. Accordingly only deductions claimed in respect of Final Cut remain relevant.

[3] The agreed facts were as follows. Four agreements were concluded between different parties on the same day – 13 December 1988. First, the commanditarian partnership was formed between Compass Films (Pty) Ltd (referred to as 'Filmco') and Movie Ventures (Pty) Ltd ('Movie Ventures'). Filmco would be the disclosed partner and would manage the partnership. It was agreed that, prior to 15 February 1989, Movie Ventures would find other partners in its stead and would dispose of its interest in the partnership. Movie Ventures undertook to advance to Filmco the sum of R2 793 000 so that Filmco as disclosed and managing partner could buy Final Cut for the partnership. On that date too each partner had to pay its specified contribution to the partnership. *En commandite* partners (such as Rane later became)

would be liable not only to pay the contribution but also for any losses suffered in the tax year in question. Filmco was generally authorized to manage the partnership and to enter into contracts on its behalf.

[4] In terms of the second agreement (the 'sale agreement') Filmco bought Final Cut from a production company, Image Films (Pty) Ltd ('Image'). The price of R2 793 279 was payable in cash on signature. Further, Filmco was obliged to pay an amount equal to 50 per cent of the proceeds of the exploitation of the film to Image.

[5] The third agreement (the 'marketing agreement') was concluded on 13 December 1988 between Filmco and Distant Horizon Ltd ('DHL'). DHL undertook to market Final Cut abroad. In consideration

Filmco undertook to pay DHL a marketing fee of R4 480 000 by no later than 28 February 1989. If the film produced income in excess of R6,4m DHL would be further remunerated.

[6] The fourth contract (the ‘distribution agreement’) concluded on 13 December 1988 was between Filmco and Niche Investments Incorporated (‘Niche’). Niche undertook to distribute Final Cut, and to secure income of at least R6,4m for the partnership by not later than 28 February 1989. Niche further agreed to advance that sum by that date if it had not produced the required income. In turn, Filmco agreed to pay Niche as commission 30 per cent of the gross proceeds (as defined in the agreement). Although the gross proceeds would accrue to Filmco, Niche was authorized to pay, in the following order of

priority, the commission to itself; the marketing fee of R4,48m to DHL; recoupment of the capital contributions of the partners in the sum of R2 793 279 (the amount paid by Filmco to Image); and to Image an amount equal to 50 per cent of the gross proceeds. The balance would be payable to Filmco. The provisions of the distribution agreement dealing with the advance, and Niche's obligations to Filmco and DHL, and their interpretation, are particularly significant to the Rane claims for deduction and will be fully set out and discussed later.

[7] Rane became a partner on 27 February 1989, acquiring its interest from Movie Ventures, and paid a 'contribution' of R90 000. Final Cut had by then been completed (in November 1988) but was sent to overseas distributors only on 13 October 1989. However, a

certificate was issued by the auditing firm Arthur Young on 17 March 1989 confirming that on 28 February of that year Niche had transferred into its subaccount , ‘Niche Investments Inc sub-account Compass Films’, the sum of $2 560 000 (the equivalent then of R6,4m); and that Niche had paid to DHL an amount of $1 792 000 (the equivalent of R4 480 000) in respect of marketing fees.

[8] In its tax return for the year ended 28 February 1989 Rane claimed various deductions and allowances, which, as I have said, were disallowed. The Commissioner wrote to the trustees of Rane (in February 1998, after considerable correspondence had passed between them) that:

'The losses incurred in the film investments namely, "Final Cut" and "Devil Fish/Evil Below" have been disallowed in respect of both the 1988 and 1989 years of assessment in terms of Section 103(1) of the Income Tax Act. . . . Accordingly, as I cannot agree with your contentions, your objection has been disallowed.'

When asked for reasons for the application of s 103(1) the Commissioner responded (in November 1999):

'Section 103(1) is being applied in respect of the appellant's investment in the production of the films "Final Cut" and "Devil Fish/Evil Below" by means of *en commandite* partnerships. The trust as a partner, is consequently not entitled to claim the trust's pro rata share of the deductions and allowances available to the partnership in terms of sections 11(a), 11(b) and 11*bis* of the Income Tax Act . ..'

[9] When the appeal came before the Special Court the Commissioner changed his approach in respect of the refusal of the

deductions and allowances claimed by Rane. Shortly before the hearing commenced he indicated that he was no longer relying on s 103(1), but on other provisions of the Act, specifically s 11*bis* and s 24F .

[10] Rane objected to this change in approach on two grounds. First it argued that in terms of s 3(2) of the Act, the Commissioner was not entitled to withdraw any decision; and secondly, that Rane was entitled to fair administrative action in terms of s 33 of the Constitution, and that the Commissioner's change of stance was unfair and prejudicial. The Special Court rejected both grounds. And in the hearing before this Court, Rane's attorney ultimately conceded that there was no merit in the arguments. For the sake of completeness, however, and because

some time was devoted to these arguments, I shall outline the issues raised by Rane in relation to the withdrawal of a decision, and to administrative fairness.

[11] Section 3(2) provides that

'Any decision made and any notice or communication issued or signed by any such officer [that is, a person engaged in carrying out the provisions of the Act: s 3(1)] may be withdrawn or amended by the Commissioner or by the officer concerned, and shall for the purposes of the said provisions, until it has been so withdrawn, be deemed to have been made, issued or signed by the Commissioner: Provided that a decision made by any such officer *in the exercise of any discretionary power under the provisions of this Act* or of any previous Income Tax Act shall not be withdrawn or amended after the expiration of two years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if

all the material facts were known to the said officer when he made his decision' (my emphasis).

The decisions made by the Commissioner were to disallow two claims for deduction and a film allowance. Rane conceded that the officer making the decision under each of ss 11*bis* and 24F, the relevant sections governing the claims, did not and was not required to exercise a discretion. He simply considered whether the claimed deductions fell within those provisions and concluded that they did not. The time limit imposed in the proviso to s 3(2) was thus of no application. I shall deal with each of those sections when considering whether Rane was entitled to claim any deduction or allowance.

[12] In so far as the argument based on administrative fairness is concerned, Rane contended that it had prepared to argue the appeal to the Special Court on the basis of s 103(1) of the Act – a tax avoidance provision. It was for the Comissioner to prove that the section had been justifiably invoked. When advised that the Commissioner was not relying on that section, Rane argued that it was not then in a position, as the party now bearing the onus, to present evidence relating to the application of the other provisions of the Act. Rane claimed to have been prejudiced by the change in stance of the Commissioner. The President of the Special Court, Conradie J, accordingly granted a postponement for two weeks to enable Rane to present evidence in support of the deductions and allowance claimed. Although there was some evidence that Rane had found it very difficult to find

documentation so long after the years of assessment in issue (1988 and 1989, when the Special Court hearing took place in 2001) there was no evidence to suggest that it had been impossible to find documents or witnesses, or to support the argument that Rane was in fact prejudiced. Rane had been able to call witnesses and had presented documents in support of its claims. It was not able to show any prejudice caused by the Commissioner's change in stance.

[13] In my view the concessions made by Rane's attorney were appropriate and the arguments that the Commissioner was not empowered to withdraw his decisions, or to change his approach to the appeal, are without substance.

CLAIMS UNDER S11*BIS*

[14] Rane claimed as deductions its proportionate liability in respect of two different amounts for the 1989 year: a marketing fee of R4 480 000 paid by Niche on behalf of Filmco to DHL; and a distribution fee of R1 920 000 paid to Niche as its commission.

Section 11*bis*(2) provided, at the relevant time:

'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)' (my emphasis).

Subsection (3) sets out the quantum that may be claimed. Subsection (4) provides that the marketing expenditure is that which is incurred by the 'exporter' during the particular year directly in respect of various

activities set out in the section. These include distribution and advertising. The Commissioner did not contend that the expenditure incurred by Filmco (and therefore by Rane as a partner) did not fall within these categories.

[15] The Commissioner contends, however, that Filmco earned no income in the year of assessment, and also did not pay to Niche the commission to which it would have been entitled. He does not dispute that marketing fees were paid to DHL, but argues that no income was earned, and no obligation to pay had arisen: thus no expenditure could be deducted. The Commissioner's contentions are based squarely on the interpretation of the agreements between the various parties. Rane too relies on the terms of the agreements, but places a different

interpretation on them, one coloured by the actual conduct of the parties to the agreements.

[16] The Commissioner argued that in determining the meaning of various terms in the distribution and marketing contracts respectively, one must have regard to the fact that they were entered into on the same day, as part of a single scheme for the investment of funds in film ventures. Thus while the parties are different (the distribution agreement is between Filmco and Niche, and the marketing agreement between Filmco and DHL), the agreements must be read together and each understood in the light of the other. Rane argued that each agreement is a distinct self-standing contract. However, nothing turns

on this difference since Rane's essential argument was that the subsequent conduct of the parties tells one exactly what was meant.

The distribution fee

[17] The essence of Rane's argument in respect of the deductibility of the fee paid to Niche is that on 28 February 1989 Niche paid into an account for Filmco the amount of R6 400 000, less the 30 per cent fee due to it for distributing the film Final Cut. That payment, it argued, was income, and the fee payment to Niche was deductible expenditure in terms of 11*bis*. The Commissioner argued, however, that the amount of R6,4m was not income, and was not paid to Filmco: it was an advance of revenue transferred to a sub-account in Niche's bank account by means of book entries. Similarly, no fee was paid to Niche

– Niche simply kept 30 per cent of that amount for itself, calling it commission.

[18] The Commissioner relies in this regard on clauses 6 and 7 of the Distribution Agreement. Clause 6 reads:

'Pre-Sales

Niche hereby undertakes to Filmco that Niche will procure income from the exploitation of the picture for a minimum amount of R6 400 000 . . . by not later than 28 February 1989. In the event that such income is not procured from third parties, Niche will itself be liable for the revenue as an advance against revenue to be received, provided that all the risks of such recoupment shall be borne by Niche.'

Clause 7 is as follows:

‘Remuneration

7.1 As consideration for the distribution of the picture Filmco shall pay Niche a commission equal to an amount of 30% . . . of the *gross proceeds in excess of those* referred to in 7.1.1 above (my emphasis).

7.2 The consideration payable by Filmco to Niche in terms of this agreement shall be determined and payable out of and to the extent of the gross proceeds *as and when received by Niche* on behalf of Filmco.

7.3 . . . ’ (my emhasis).

‘Gross proceeds’ is defined as ‘all income derived from the distribution of the picture in the territory, including . . .’ rentals, advance payments, subsidies and a host of other items.

[19] One curious aspect of clause 7 is immediately apparent. There is no subclause 7.1.1. A variety of explanations was offered by the

parties. Clearly, in the drafting process, there had once been such a clause. Why it disappeared, or whether it was renumbered, are questions to which the parties have no answer. One suggestion was that clause 7.1 was supposed to refer back to clause 6: that is, Niche would be entitled to 30 per cent of any amount in excess of R6,4m. In fact, however, 30 per cent of R6,4m was retained by Niche. Moreover, the clause refers to gross proceeds, whereas clause 6 expressly refers to an advance on revenue. Another argument advanced was that in 7.1 the words 'of the gross proceeds in excess of those referred to in 7.1.1' should be taken *pro non scripto*.

[20] While conceding that these provisions did give rise to difficulties in interpretation, if looked at in a vacuum, Rane argued that the

conduct of the parties on and after 28 February 1989 showed what the parties had intended in so far as both income and expenditure were concerned. On that date Niche had, through book entries, credited Filmco with the advance on revenue (R6,4m): and had paid to itself ‘in cash’ a commission of 30 per cent (according to the certificate issued by Arthur Young on 17 March 1989). That the sum paid to Filmco was not actually derived from gross proceeds, as defined, did not mean, Rane argued, that it was not income to which Filmco was entitled, and that the right to claim had not accrued on that date. Equally, Niche had a liability to pay that amount on that date. Similarly, although on the face of it Niche should not be entitled to commission, it had in fact taken it, and Filmco had acquiesced in its conduct. There was no

evidence of any protest made by Filmco or any of the other partners at the deduction of commission by Niche.

[21] The Commissioner's contention was that an advance payment was not a substitute for gross proceeds. It was a minimum amount that became payable as a form of guarantee. There was thus no revenue or income earned in the year ending on 28 February 1989. Further, the liability to pay the commission to Niche, if it existed, would have arisen only after midnight on 28 February 1989, when Niche's right to claim payment accrued – after the year under assessment. There was thus, on the Commissioner's argument, no income earned by Filmco, nor any unconditional obligation to pay Niche in that year.

[22] The Commissioner contended further that Niche was not Filmco's agent for all purposes. The agreement empowered Niche to act as agent for a variety of purposes relating to the distribution of the film but not, it was argued, to act as its banker. Again, however, Filmco raised no objection to the arrangement or to Niche's conduct. It made commercial sense, if Niche was entitled to commission, for it to effect payment to itself through the making of book entries. Before determining the soundness of the respective contentions on the meaning of the distribution agreement, it is useful to consider the marketing fee paid to DHL, since that too throws light on the meaning assigned to the agreements by the parties.

The marketing fee

[23] The parties to this agreement, it will be recalled, were Filmco and DHL. Filmco appointed DHL to market the film in a specified territory for a period of five years. Clause 4 reads:

‘Marketing fee

4.1 In consideration for the undertaking to market the picture in the territory in terms of this agreement, Filmco shall pay to DHL a marketing fee of R4 480 000 . . . by not later than 28 February 1989.

4.2 The parties agree that if the income derived from Filmco from the picture exceeds the pre-sale amount stipulated in the distribution agreement to be entered into between Filmco and Niche simultaneously herewith, DHL shall receive a further fee for marketing the picture as determined by agreement between Filmco and DHL, provided that if the parties fail to reach such agreement, the amount which the Partnership is prepared to pay shall be conclusive.’

The Commissioner did not dispute that Filmco was unconditionally obliged to pay the fee to DHL on or before 28 February 1989. He contended that there was no actual expenditure and no proof of payment, but conceded that it was sufficient for the purpose of claiming a deduction that an unconditional obligation had arisen. The payment had in fact been made, Rane argued, and the certificate from Arthur Young, to which I have already referred, was sufficient proof that DHL had been paid by Niche on behalf of Filmco.

Deductibility of both fees

[24] The Commisioner's contention that the agreements form part of a general arrangement for the investment in film ventures is supported by the terms of clause 4 of the marketing agreement, which refers to

the distribution agreement, and in particular to a further fee payable in the event of the proceeds exceeding the ‘pre-sale amount’. That reference is to the sum of R6,4m payable by Niche to Filmco by 28 February in terms of clause 6 of the distribution agreement. It was argued that clause 4 showed clearly that the sum of R6,4m was not income, nor ‘gross proceeds’, and that the 30 per cent commission was payable only on the latter to Niche. The marketing fee, it was conceded, was different, for there was an unconditional obligation to pay DHL irrespective of whether the film did produce any proceeds. Only if the sum of R6,4m was exceeded would any further fee become payable by Filmco to DHL. Similarly, argued the Commissioner, the commission became payable to Niche only if that sum were exceeded.

There was no reason to treat them differently, despite the different wording in the different contracts.

[25] On the face of it, the Commisioner's argument in this regard is logical. If one reads the contracts together, as I consider one must do, it appears that the liability of Filmco to pay commission to Niche (in contrast to DHL) would arise only when income in excess of R6,4m was paid by Niche to Filmco: and no such income was ever produced. However, clauses 6 and 7 of the distribution agreement are far from clear. Part of clause 7 is meaningless. And the only evidence available to the Court as to what the parties actually intended lies in their conduct after the payments had been effected.

[26] It is a general principle of contractual interpretation that where parties to a contract are not agreed as to its meaning one can have regard to extrinsic evidence as to what was intended only where there is ambiguity or uncertainty. In this matter there is undoubtedly uncertainty as to the meaning of the terms of the contracts in question. Evidence of surrounding circumstances, and of the post-contractual conduct of the parties, would in my view be admissible to ascertain what the various parties had meant, in particular in relation to the payment of the commission to Niche. But we are not concerned in this matter with a dispute between the parties. It is a third person – the Commissioner – who seeks to place a different interpretation on the agreements.

[27] There is ample authority for the proposition that in seeking to establish the parties' intentions, when a third person is questioning the meaning of a contact, regard may be had to the parties' conduct in executing their obligations. In cases such as *Goldinger's Trustee v Whitelaw and Son*,[1] *Commissioner of Customs and Excise v Randles, Brothers and Hudson*[2] and *Vasco Dry Cleaners v Twycross*,[3] this Court, in ascertaining the parties' intentions, had regard to subsequent conduct in determining what the parties really intended to achieve. See also *Commissioner for Inland Revenue v Conhage (formerly Tycon)*[4] where Hefer JA, in dealing with tax avoidance measures, stated that a Court will give effect to the true nature and substance of a transaction rather than its form.

---

[1] 1917 AD 66.
[2] 1941 AD 369.
[3] 1979 (1) SA 603 (A).
[4] 1999 (4) SA 1149 (SCA) at 115G—I.

[28] The evidence before the Special Court was that of two witnesses for Rane, and the documents produced by it, in particular the certificate issued by Arthur Young. The evidence in my view all led to the same result. The parties had accepted that Niche had paid R6,4m to Filmco as income, even though it could not be said to have been derived from gross proceeds; Niche had paid to itself 30 per cent commission on that amount; Niche had paid DHL the fee agreed, and none of the parties complained that the contracts had not been complied with. That their conduct does not quite give effect to the apparent meaning of clauses 6 and 7 of the distribution agreement should not, in my view, especially given the confusing terms of these provisions, lead to the

conclusions that income was not received, and that commission should not have been paid to Niche, nor the marketing fee paid to DHL.

[29] That the parties intended the payment of R6,4m to be a surrogate for gross proceeds is the inevitable conclusion reached by having regard to their conduct. The conclusion is supported if one asks the questions 'What was the advance payment supposed to be – an advance of capital or an advance of income? The question is similar to that asked when one must determine whether a payment of damages is payment of a sum capital in nature or compensation for lost revenue. What gap is the payment supposed to fill?[5] The distribution agreement, obscure as parts of clauses 6 and 7.1 may be, clearly indicates that the

[5] See *Port Elizabeth Electric Tramway Co v CIR* 1936 CPD 241; *Silke on South African Income Tax* (Revision Service 24, 2001) Vol 1 para 3-23.

payment of the R6.4m was in lieu of actual earnings in the event that they had not materialized, or been less than that amount, in the year ended 28 February 1989. It filled the ‘income hole’.

[30] Filmco and the other partners, including Rane, were thus entitled to claim for the year of assessment ending on 28 February 1989, deductions under s11*bis* in respect of both the commission paid to Niche and the marketing fee paid to DHL. The appeal in respect of the deductions for the commission paid to Niche in 1989, and the marketing fees paid to DHL in that year, should thus be upheld.

THE FILM ALLOWANCE

[31] Section 24F(2)(a) of the Act provides:

‘There shall be allowed to be deducted from the income of any film owner an allowance, to be known as the film allowance, determined in subsection (3) in respect of the production cost and post-production cost incurred by him in respect of any film used by him in the production of his income or from which any income is received by or accrues to him.’

Rane claimed as a deduction its share of the cost of acquiring the film. ‘Production cost’ is defined in s 24F(1), and includes expenditure incurred by a film owner in the acquisition of a film. The deduction was refused. The Commissioner based its refusal on the timing of the acquisition by Rane: the film had been bought in December 1988 and Rane became a partner only on 27 February 1989.

[32] Earlier in this judgment reference was made to the partnership agreement between Movie Ventures and Filmco, and to the

sale agreement in terms of which Filmco, as the disclosed partner, bought from Image the film still in question, Final Cut. The price was paid on the date the agreements were entered into – 13 December 1988. Further, fifty per cent of the proceeds would be payable from the exploitation of the film.

[33] When Rane became a partner on 27 February 1989 it paid Movie Ventures, which then ceased to be a partner, R90 000. The Commissioner contended that the film allowance could be deducted only in the year in which income accrued to a partner. The partnership was not itself a taxable entity. Moreover, as soon as there is a change in partners, the partnership is reconstituted. On 27 February 1989, the argument ran, when Rane became a partner, a new partnership was

formed. Rane, as a new partner, would not be liable for any of the previous partners' obligations. However, s 24H(5)(a) of the Act provided that a portion of income received by or accrued to a partnership is deemed to have been received by or accrued to each partner individually on the date it was received by or accrued to them in common. Subsection (5)(b) provided that where a portion of income is deemed to have been received by or accrued to a partner, he may claim his portion of any deduction or allowance from the income 'so derived'.

[34] Conradie J, in the Special Court, held that s 24F does not specify that the income earned, and in respect of which the allowance may be granted, must be income produced or accrued in the year of

assessment in which the expenses are incurred. He pointed out that where the legislature intended (as in s 11*bis*(2)) that income should be produced before a deduction will be allowed, it says so expressly. He concluded therefore that the film was paid for by Filmco (using funds acquired through partnership contributions) in the year of assessment, and that the allowance could be carried forward to a future year as an assessed loss. He held that Rane's claim for an allowance in the sum of R89 943,53 under s 24H should have been allowed by the Commissioner.

[35] The Commissioner argued further, however, that Rane's expenditure was in respect of its acquisition of its partnership share, not in the acquisition of the film. That argument loses sight of the

principle that in acquiring the share, Rane was also acquiring, as part of the business of the former partnership, a share in the film – already an asset. It was the expenditure on the film as an asset taken over by the new partnership, that was deductible, and not the amount of R90 000 paid to become a partner.

[36] The approach of the Special Court to the film allowance under s 24F is in my view sound. It must be borne in mind too that s 24F(3), which prescribes the manner in which the allowance is to be calculated, limits the amount that may be claimed to ‘any one film’ and that any expenditure incurred, if carried forward as an assessed loss, may be claimed only in respect of the particular film acquired. Where the allowance is carried forward as an assessed loss it would have

been limited in terms of s 24F(5), applicable at the relevant time, to 50 per cent of the cost of acquisition of the film. That is not the position in this matter, however.

[37] The finding of the Special Court was based on the premise that no income was received by Filmco in the year ended 28 February 1989. I have already taken a different view in this regard, having found that the payment by Niche to Filmco of R6,4m on that day was revenue in the hands of Filmco. The cross appeal cannot, therefore, succeed.

[38] Rane accordingly enjoys substantial success in its appeal against the decision of the Special Court, and in the cross appeal. The

Commissioner, despite his limited success in respect of the film Devil Fish, did not argue that, in the event of his succeeding only on this aspect of the appeal, he should be entitled to a costs order in his favour. No time was spent in argument on this aspect, Rane having conceded at the outset of the hearing that it could not succeed in its claim for foreign expenditure under s 11(b) of the Act. And since the submissions that were made in the parties' heads of argument in respect of the various claims made by Rane largely overlapped, there is no reason to make any costs order in favour of the Commissioner.

[39] The following order is made:

(a) The appeal in respect of the deductions claimed for Final Cut is upheld, with costs.

(b) The cross-appeal is dismissed, with costs.

(c) The order of the Special Court is set aside and replaced by the following: 'The Respondent is ordered, in respect of the film Final Cut, to allow the deduction of the film allowance under s 24F of the Income Tax Act, and the deductions of marketing and distribution fees under s 11*bis* of the Act, as claimed by the appellant in its 1989 tax return.'

_____

C H LEWIS
JUDGE OF APPEAL

CONCUR:

HOWIE P
MARAIS JA
FARLAM JA
CLOETE JA