Appeal number: TC/2011/6394 and TC/2013/4056

VAT –preliminary issue - claim to recover VAT on business entertainment since 1988 – whether UK input tax block entirely unlawful since 1988 –no- no reference to CJEU

FIRST-TIER TRIBUNAL
TAX CHAMBER

PRICEWATERHOUSECOOPERS LLP **Appellants**
-AND-
PRICEWATERHOUSECOOPERS SERVICES LTD

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Barbara Mosedale

Sitting in public at Bedford Square, London on 13 November 2014

Mr A Hitchmough QC instructed by the Appellant

Mr A Macnab, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The first appellant had made claims for recovery of what it alleged was under-reclaimed input tax in respect of meals and other refreshments provided to persons other than employees in all accounting periods since the introduction of VAT on 1 April 1973. The claims were rejected by HMRC by letters dated 21 July 2011 (TC/2011/6394) 14 May 2013 (TC/2013/4056) and the first appellant appealed.

2. At the outset of the hearing, as it was agreed, I directed that the second appellant (PricewaterhouseCoopers Services Ltd) be substituted as the appellant in the second appeal (TC/2013/4056) in place of the first appellant. The consolidated appeal was de-consolidated and the two, now separate, appeals were joined for case management and hearing.

3. The hearing was to resolve a preliminary issue agreed by the parties and directed by the Tribunal, which was whether paragraph 9 of the appellants' grounds of appeal was correct. Paragraph 9 read as follows:

> "As a result of the scope of the Input Tax Block having been extended from 1 August 1988, the second sub-paragraph of article 17(6) no longer afforded the vires for **any** part of the Input Tax Block. Accordingly, the on-going validity of the Input Tax Block must be tested against the more stringent requirements set out in the first sub-paragraph of Article 17(6) (see in particular the Opinion of Advocate General Kokott in *van Laarhoven v Staatssecredtaris van Financien C-594/10).*

Article 17(6) was Article 17(6) of the Sixth VAT Directive ('6VD') and the Input Tax Block was the various incarnations of the block on recovery of input tax incurred on goods and services used for the purpose of business entertainment, in particular as amended by Article 2 of the Value Added Tax (Special Provisions) (Amendment) Order 1988 ('the 1988 Order').

4. The Tribunal was not asked to make findings of fact. It was assumed for the purpose of the preliminary hearing that the appellants had, since 1988, purchased goods and services which were used for strictly business purposes but nevertheless the input tax on which had been blocked from recovery under the 1988 Order and its successors. It is HMRC's position that it has not yet even taken a decision on whether the input tax claimed relates to strictly business expenditure or on the quantum of the claims.

The legislation and the appellants' submissions

5. UK law has since the inception of VAT on 1 April 1973 included provisions preventing the recovery of certain types of input tax, even if that tax would be recoverable under the normal rules of attribution.

6. The Value Added Tax (Special Provisions) Order 1977 (SI 1796) ('the 1977 Order') provided so far as relevant:

> **9 Disallowance of input tax**
>
> Tax charged on the supply to a taxable person of goods or services used by him for the purpose of business entertainment shall be excluded from any credit under [the relevant statute] unless the entertainment is provided for an overseas customer of his and is of a kind and on a scale which is reasonable, having regard to all the circumstances.

Article 2 of the 1977 Order contained definitions, including definitions of 'business entertainment' and 'overseas customer'. It was agreed that this legislation was the legislation that had been in force prior to the entry into force of the 6VD. It re-enacted a block that had been in force since the inception of VAT in 1973.

7. Article 9 of the 1977 Order was re-enacted in 1981 in Article 9 of the Value Added Tax (Special Provisions) Order 1981. It was amended by the Value Added Tax (Special Provisions) (Amendment) Order 1988 with effect from 1 August 1988.

8. The appellants accept that the block up to and including 31 July 1988 was lawful under the 6VD. They accept that the effect of the CJEU decision in *Royscot Leasing Limited* C-305/97 was that Art 17(6) permits a block over even strictly business expenditure. They accept that the block was lawful even though it had been re-enacted in identical format on a number of occasions up to the amendment made on 1 August 1988. Further, although their claim for recovery is for all periods back to and including 1973, it agrees that they are no longer pursuing recovery of input tax incurred in any period prior to 1 August 1988.

9. They are pursuing repayment of input tax on all non-employee business entertainment incurred on or after 1 August 1988. The parties are agreed that as a matter of English law the Input Tax Block was effective to block recovery of the tax at issue in this appeal. This is clear, they are agreed, from *Shaklee* [1981] STC 776.

10. The appellants' claim centres on the substantive change to the Input Tax Block made by the the 1988 Order. Although the change in legislation was by way of repeal and re-enactment, in practice the wording of the new block was very close to the earlier block, and identical in effect, save that the 'overseas customer' exemption was removed. So from 1 August 1988 the Block then read as:

> **Article 9 Disallowance of input tax**
>
> 9(1) Input tax on the supply to a taxable person of goods or services used or to be used by him for the purpose of business entertainment shall be excluded from any credit under [the relevant statute]

It contained the same definition of 'business entertainment' but the definition of 'overseas customer' was regarded as otiose and removed.

11. In other words, up to 1 August 1988 input tax on business entertainment was blocked save in so far as it was incurred on reasonable entertainment of overseas

customers as defined. On and after 1 August 1988 all input tax on business entertainment was blocked.

12. Effect of EU law: All parties agree that Article 17 of the 6VD was directly effective and provided the right for a taxpayer to deduct its input tax incurred on strictly business expenditure subject to the caveat in 17(6). The 6VD provided in so far as material as follows:

> **"Article 17 Origin and scope of the right to deduct**
>
> (1) The right to deduct shall arise at the time when the deductible tax becomes chargeable.
>
> (2) In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:
>
> (a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;
>
> .....
>
> (6) Before a period of 4 years at the latest has elapsed form the date of entry into force of this Directive, the Council, acting unanimously on a proposal form the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment. Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force. (my emphasis)

13. The crucial part of Art 17(6) was the part underlined by me: the Council has never decided EU-wide rules on what business expenditure is nevertheless ineligible for deduction. In the absence of such rules, the EU is still in the transitional period in which member States are authorised to 'retain all the exclusions provided for under their national laws' at the date the 6VD came into force.

14. The 6VD has since been repealed and replaced by the Principal VAT Directive 2006/112/EC ('PVD'). It has virtually identical provisions and neither party suggests that the substitution of the PVD for the 6VD has any impact on the issue before the Tribunal. For the sake of completeness, however, I set out Art 176 PVD which enacts a provision very similar to Art 17(6) PVD:

> **Article 176 Restrictions on the right of deduction**
>
> The Council, acting unanimously on a proposal form the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.
>
> Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the

Member States which acceded to the Community after that date, on te date of their accession.

15. Following the decision of the CJEU in *Danfoss* (dealt with below at §54) the UK government accepted that the change in the Input Tax Block made in 1988 was unlawful because it had had the effect of bringing VAT incurred on the reasonable entertainment of overseas customer into the block, whereas, prior to 1 August 1988 and after entry into force of the 6VD, such VAT had been recoverable (subject to the normal rules of it being strictly business expenditure and attributable to taxable supplies).

16. Therefore, in order to comply with EU law, with effect from 1 May 2011, the input tax block, now contained in the Value Added Tax (Input Tax) Order 1992 (the 1992 Order) was amended by the Value Added Tax (Input Tax) (Amendment) Order 2011 to revert to the pre-1988 position and then read as follows:

> "5
>
> (1) Tax charged on any goods or services supplied to a taxable person, or on any goods acquired by a taxable person, or on any goods imported by a taxable person, is to be excluded from any credit under section 25 of the [relevant Statute], where the goods or services in question are used or to be used by the taxable person for the purpose of business entertainment unless the entertainment is provided for an overseas customer of the taxable person and is of a kind and on a scale which is reasonable, having regard to all the circumstances.

The article gives a definition of 'business entertainment' which is similar but not identical to that contained in the 1977; it also carries a definition of 'overseas customer' which is identical to that contained in the 1977 Order save that references to the UK are now references to the UK and Isle of Man.

17. So far as this Tribunal understands, HMRC have also refunded (subject to normal rules and caps) VAT incurred on entertainment of overseas customers in the period from 1 August 1988 to 1 May 2011 on the basis that the extension to the Input Tax Block was unlawful.

18. <u>the dispute:</u> PwC's claim is that the effect of the unlawful extension to the Input Tax Block on 1 August 1988 was that the entire block became unlawful under EU law and that PwC are therefore entitled to recover VAT on all business entertainment since that date and not just that on entertainment of overseas customers (which, so far as this Tribunal understands, it has already been repaid).

19. Another way of stating this is that in principle input tax on business entertainment is recoverable in so far as it is strictly business expenditure save to the extent the UK has in place a block on it authorised by (what is now) article 176 PVD. The appellants contend that, while the Input Tax Block was lawful up to 1 August 1988, the effect of the changes to the Block on that date were such that what was then art 17(6) and is now article 176 no longer provides the vires for any part of that block.

20. The appellants' skeleton says considerable support for this view is found in the Opinion of Advocate General Kokott in the case of *Van Laarhoven v Staatssecredtaris van Financien C-594/10.* The appellants consider that, while the state of the law is sufficiently ambiguous that I would not be able to resolve the issue in their favour, it is not sufficiently clear to resolve it in favour of HMRC either, and the proper course of action for me is to refer the preliminary issue to the CJEU for a definitive ruling.

21. HMRC consider that the law is quite clear; that I should resolve the preliminary issue in their favour and not trouble the CJEU; and therefore dismiss the appeal. So I will consider the state of the law as it affects the preliminary issue and then consider whether I ought to refer the matter to the CJEU.

22. As I have said, the appellant puts reliance on the Opinion in *Van Laarhoven.* However, it is far from the only case dealing with blocks which were not authorised by Art 17(6) and I understand that the appellants also rely on some of these earlier cases as supporting its position. HMRC, on the other hand, considered the *Ampafrance* decision (below at §123) conclusively resolved the case in their favour.

23. The Appellant's main point was that an unlawful extension to block meant entire block was unlawful from that point onwards as 17(6) ceased to authorise even the part of the block that had hitherto been lawful; its secondary point was that even if that proposition was wrong, nevertheless legislation which included an unlawful extension to a block was entirely unlawful and that meant the earlier law, having been repealed, no longer existed and there was no block at all in force. I deal with this second point first.

Effect of repeal of pre-6VD block/incompatibility of UK law

24. So far as I understand it, it is the appellant's case here that even if Art 17(6) standstill does not strike down the pre-6VD block if it is subsequently extended, nevertheless that can be the effect because of the mechanics by which the legislation which extended the block was introduced. It is its case that if the pre-6VD block is repealed and replaced, then a ruling by the CJEU that the replacement legislation is unlawful cannot magically revive the repealed legislation. The CJEU has no power to make national legislation.

25. The appellant's case is that that is what happened to Article 9 of the 1981 Order. It was repealed and replaced by a provision contained in the 1988 Order with very similar but not identical wording, now extending the block to overseas customers. It was not a case of HMRC removing from Article 9 of 1981 Order the exception for overseas customers, but otherwise leaving the block unaffected. It was an entirely new block and it was (says the appellant) unlawful.

26. While it is true that the CJEU cannot revive repealed national legislation, the CJEU cannot nullify national legislation either. It can simply declare it is incompatible, so that to the extent it is incompatible, national courts should not apply it (*FII* [2009] STC 254 at 142-148). The effect, says HMRC, is that the 1988 Order

was in force until the moment it was repealed. It can only to be disapplied or ignored by national courts to the extent it is incompatible with EU law.

27. And that brings the case around full circle, as HMRC's case is that the 1988 Order was only incompatible in so far as it extended the block to overseas customers; the appellants' case is that it is entirely incompatible because (on its first case) the effect in EU law of the extension to the block was to nullify the entire block.

28. So the appellant's second point identified in §23 above is in practice identical to its first point: the question is simply whether an unlawful extension to a block means the entire, and previously lawful, block loses its vires under Article 17(6) 6VD.

29. Firstly, I consider the case law of the CJEU on Article 17(6). The appellants' position is that the case law either supports its position or at the least does not clearly resolve the issue, thereby justifying a reference to the CJEU.

30. I will then consider what was said in *Laarhoven* and the case of *Ampafrance,* which was not primarily a case on Article 17(6) but is relied on by HMRC as authority on the issue in question.

Commission v France [2001] C-40/00

31. There were two infringement actions against France for allegedly introducing legislation in breach of Art 17(6). The Advocate General gave a combined decision, but the CJEU gave separate judgments. I was only referred to *France* C-345/99 in passing. In brief, in that case, as at the date the 6VD came into effect, the right to deduct VAT on vehicles used for driving instruction was blocked. Later legislation introduced a conditional right to deduct VAT. The CJEU ruled that this was lawful as the block had been reduced in scope.

32. I was referred to *France* C-40/00 in detail. In this case, at the date of introduction of the 6VD, France blocked recovery of VAT on diesel fuel if used in vehicles on which input tax was irrecoverable. After that date, what was a 100% block was modified to allow partial right to deduct (going from 10% eventually up to 90% and back to 50%). Then in 1998 France reintroduced the total ban. The Commission challenged the legality of the French legislation.

33. In this case the CJEU ruled:

> "[16] According to the judgement delivered today in C-345/99 *Commission v France* [22] where, after the entry into force of the 6VD, the legislation of a Member State is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of the 6VD, that legislation is covered by the derogation provided for by the second subparagraph of Art 17(6) of the 6VD and is not in breach of Art 17(2).
>
> [17] On the other hand, national legislation does not constitute a derogation permitted by the second subparagraph of Art 17(6) of the 6VD if its effect is to increase, after the entry into force of the 6VD,

> the extent of existing exclusions, thus diverging form the objective of that directive.
>
> [18] The same is true of any amendment subsequent to the entry into force of the 6VD which increases the extent of exclusions applicable immediately before the amendment.
>
> [19] It is common ground that the French law at issue, in excluding altogether a right to deduct VAT, amends the French legislation in such a way as to diverge from the objective of the 6VD. It is of little importance that the amendment does not extend the scope of the exclusions that applied when the directive came into force.
>
> [20] Accordingly, that law is not covered by the derogation provided for in the second subparagraph of Art 17(6) and so breaches Art 17(2) of that directive."

34. So far as I understand it, the appellant's point is that France, when re-introducing the total ban, effectively repealed the partial block. The 100% block that replaced that partial block was ruled to be unlawful, *therefore,* says the appellants, the effect was that there was no block at all. Is this right?

35. the significance of [16]: It certainly seems that the position advocated by the appellants must have been the position put forward by the Commission in this case because that was the position it adopted in the other *Commission v France (driving instruction cars)* case (C-345/99) (§31 above). I say this because from [62] of the Advocate General's opinion it is clear the Commission's view was that even reducing the scope of the block removed the block in the national legislation from the scope of the protection of the Art 17(6) standstill.

36. Of course, in C-345/99 *(driving instruction cars)*, as I have said, the CJEU did not accept that France was in breach of Article 17(6) so they did not need to consider the point. Nevertheless, in C-40/00 (*diesel fuel)* where France was found to be in breach, the CJEU repeated its finding in C-345/99 at [16] (above). Here, the CJEU clearly stated the Art 17(6) standstill 'covered' the legislation which had reduced the scope of the block. HMRC's position is that this is an answer to the appellants' case.

37. Nevertheless, it could be said that [16] of C-40/00 only dealt with the partial reduction *before* the subsequent extension and is therefore not authority on whether or not the partial exemption survives an unlawful extension to it. However, the CJEU, having stated in [16] that a reduced block was protected by the standstill because the original, larger block was protected, could not have intended what it then said in [17]-[20] to mean that that partial ban became unlawful once the ban was extended, because if it had meant this, it would have qualified what it had just said in [16] expressly. It seems to me that what was said in [16] by the CJEU must be taken to cover the position both before and after the unlawful extension to the block. So the natural reading of what the CJEU said was that the partial block remained lawful even though it was later unlawfully extended.

38. Natural reading of [17-20]: Nor does it seem to me, that what was said in [17-20] would naturally be read as supporting the appellant's case. In [20] the CJEU said

"that law" was not covered by Art 17(6) standstill. "That law" was a reference to "the French law at issue" (from [19]). And in [19] the French law at issue was described as 'amend[ing] the French legislation in such a way as to diverge from the objective of the 6VD'. In other words, the natural reading of [16]-[20] is that the amendment which extended a partial block to a total block was unlawful. That suggests that the CJEU considered only the extension to the partial block and not the partial block itself to be unlawful.

39. Method of legislative change significant? Not so says the appellant. France did not actually amend its legislation; it entirely repealed the partial block legislation and replaced it with new legislation. So if the CJEU had thought that the partial ban remained lawful not withstanding the unlawful extension, why didn't the CJEU rule that that the new legislation, re-introducing the total ban, was only unlawful to the extent that it exceeded the scope of the lawful partial ban? Instead it said 'that law' was unlawful. It was therefore entirely unlawful, says the appellant.

40. Is there ambiguity here? When the CJEU said 'amends' in [19] were they thinking of the exact legislative process by which France changed its laws, or were they using the term in the more general sense of a change to the law, without attaching any significance to whether it was by way of introducing new legislation which changed older legislation without repealing it, or by way of new legislation being substituted for repealed legislation?

41. In my view, it is quite clear that the CJEU did not attach any significance to the legislative process by which France changed its legislation. There was no reference anywhere in the Opinion or Judgment to any significance being attached to the method by which the legislation was changed by the French Government. The Opinion and Judgment were concerned with the *effect* of the change. I am not aware of any case, and certainly none was drawn to my attention, where the CJEU has ever considered the form of the legislation to be significant. Bearing in mind various member states are likely to have different parliamentary processes, it is highly unlikely that the CJEU would attach significance to whether the old block was simply amended, or repealed and replaced. The constant theme of the CJEU's case law is that it is concerned with effect and not with form.

42. An example of this is that the CJEU considered settled and published administrative practice to be the equivalent of legislative acts (see *Metropol Treuhand* and *Danfoss,* both discussed below): the CJEU is concerned with effect and not form. In *Metropol* the CJEU did not discuss the mechanics of how the blocks at issue in that reference were decreased and increased. This means that it cannot have considered it relevant.

43. So when the CJEU ruled in *France* that 'that law' was unlawful because it 'amend[ded]' the earlier, partial block it must have meant it was unlawful only in so far as it amended the earlier block. In other words, it was only the *change* to the block that was unlawful.

44. Any other interpretation would lead to capricious results: a member state might keep its old partial block in place but introduce new legislation which actually amends the previous law. The new law would be unlawful; the previous law would remain in place. Yet on the appellant's interpretation, a country which amended its legislation by total repeal and replacement would lose the entire block.

45. conclusion: For these three reasons, I do not accept the interpretation of this decision given by the appellant. I agree with HMRC that the statement at [16] of the CJEU's decision in *France* C-40/00 strongly supports the view that the CJEU considered the partial ban survived their decision; and that is the natural reading of [17-20]. But do the other cases cast doubt on this interpretation?

Metropol Treuhand C-409/99

46. The CJEU's decision in this case was given just over a year after its decisions in the *France* cases.

47. In brief, the facts were that at the date of entry into force of the 6VD, VAT on cars with an element of private use was blocked in Austria. The block did not apply to small buses. By an administrative ruling which, while it post-dated the block also pre-dated the 6VD in Austria, minibuses were categorised as small buses rather than cars with the effect that they ceased to be subject to the block. After the 6VD entered into force in Austria, the law was amended to 'correct' the administrative practice and treat minibuses as cars. So the VAT on minibuses was once again blocked, as it had been before the original administrative practice was introduced.

48. At this very generalised level, factually the case is quite similar to *France* C-40/00 because a block was reduced and then increased, although in this case the reduction was before the entry into force of the 6VD. Another distinction is that in France the block was reduced and subsequently increased in percentage terms across the board; in this case the block was reduced and then increased in the sense some items subject to it were removed from it and then put back in.

49. The CJEU did not attach any importance to the distinction. It repeated the rulings virtually word for word given in *Royscot, France (*C-345/99) and *France (*C-40/00). It went on to consider the status of administrative acts. It said 'national laws' in Art 17(6) second subparagraph included legislative acts and administrative measures: [49]. Apart from the point made at §42 above, this aspect of the decision is of no relevance to this case. I note in passing that the CJEU made the same ruling in *Danfoss* at [42] citing *Metropol*. I do not need to refer to this point again.

50. The CJEU went on to conclude that the revocation of the administrative practice was unlawful. The answer that the CJEU gave was very specific to the particular VAT at stake:

> "[51] [the 6VD] precludes a Member State from excluding after the entry into force of the 6VD expenditure relating to certain motor vehicles from the right to deduct VAT where, at the date of entry into

force of that directive, that expenditure gave rise to a right to deduct VAT...."

The significance of this judgment in the context of the issue in this appeal is what it does not say. Here is a case, as I have said, very close to that of *France* C-40/00. The appellant's case is that the CJEU ruled in that case that the block on recovery of VAT on diesel on certain vehicles became entirely unlawful from the moment France unlawfully extended the block back up from its lowest point. Yet a year later in this case, there is no consideration of the point. There is no suggestion that the unlawful extension of the block to minibuses meant that the entire block on all cars became unlawful. It was quite clear from [51] that that is not so. The judgment is very specific to the block on minibuses as minibuses are the 'certain motor vehicles' referred to as they are the vehicles on which input tax was blocked where it had previously not been blocked.

51. It is impossible to suggest [51] is ambiguous. If the CJEU had meant that the entire block became unlawful because of the extension of it, the CJEU would not have restricted its decision to the block on minibuses. Austria was precluded from blocking VAT on minibuses; it was not precluded from blocking VAT on other cars used for private purposes.

52. It is not possible to distinguish the case on the basis that the 'legislative' process of extending the block was different to that in *France*. The 'legislative' process was different (that was the point of the reference) but, as I have said, the CJEU made it clear it was concerned with effect and not form. In any event, the legislative block applied to all cars including minibuses. By removing the administrative concession on minibuses, that meant minibuses fell within the general block. So if there was a rule that an unlawful extension to an existing block lost the entire block its vires, then the entire block on cars would have lost its vires. But from [51] this is clearly not what the CJEU ruled.

53. This analysis appears to dispose of the appellants' case. Nevertheless, I go on to consider all the cases to which I was referred to see if they cast a doubt on this analysis.

Danfoss (2008) C-37/07

54. Chronologically, this was the next decision to be considered. Both parties referred me to it but for the reasons explained below the question which arises in this appeal could not have arisen in *Danfoss* and I derive very little assistance from it. I explain why.

55. The facts were complicated. Before the entry into force of the 6VD Danish law blocked the recovery of input tax on provision of free food to employees. But it also required output tax to be paid on a notional charge (cost price) for the free food. Presumably because of what was in effect a double VAT charge (an output tax charge and blocked input tax), in 1978 Danish tax authorities introduced an administrative concession which permitted input tax recovery where the output tax charge was due to be paid.

56. Twenty years later, a national court held that both the administrative practice and the VAT charge on the notional charge for the food was unlawful. The effect of this decision was that taxpayers went from being liable to charge output tax but able to recover input tax, to not being liable to pay output tax but being blocked from recovering input tax.

57. Two taxpayers claimed repayment of the output tax to the extent that the free food was provided strictly for business purposes (to staff in the course of business meetings). While the original Danish court took the view that the unlawful output tax had been compensated for by the recovery of input tax, a higher court referred the matter to the CJEU.

58. As I have said, the administrative practice was considered to be part of the national law. The CJEU said in [42] that by allowing deduction of the input tax by administrative practice, "the Danish authorities had precluded itself from subsequently limiting the right to deduct that tax."

59. The clear ruling in [44] was that the Danish government could not re-introduce a block which had been lifted by administrative practice. This was not a case of an extension to a block, but the re-imposition of a block. The case is not authority for the proposition that an entire block fails when only part of it was an extension beyond what was in place when the 6VD was introduced; on the facts of *Danfoss* the *entire* block was an unlawful extension. The CJEU were not asked to consider and did not consider the question at issue in this appeal.

Magoora (2008) C-414/07

60. Only a few days later the CJEU gave its decision in this case. The court dispensed with an opinion by the advocate general indicating that the CJEU considered the decision was merely an application of established principles.

61. The facts were that Poland, at the point it joined the EU, repealed its pre-existing, more generous rules on input tax recovery and brought into force new legislation which had (subject to fact finding by the national court) a more extensive input tax block. It later made the rules even more restrictive.

62. Again the CJEU repeated virtually verbatim its rulings from previous cases. It ruled that 'national legislation' in Article 17(6) meant rules which were in actual application at the point the Member State joined the EU and therefore adopted the 6VD. The conclusion in [45] is that Art 17(6) precluded the repeal of the national legislation containing the input tax block if it was replaced with new legislation in which the block was more extensive in scope.

63. While the CJEU did not expressly consider the point at issue in this appeal, its conclusion in this case does not seem consistent with appellants' case, because if appellants were right, CJEU would have ruled that the repeal was effective but the new law ineffective, thus entirely eradicating the block.

X Holding C-538/08

64. The facts are complicated and largely irrelevant to this case. The relevant facts are that the Netherlands had an input tax block in place at the date of entry into force of the 6VD. It later amended the scope of that block by introducing a scheme with a flat rate nature, the effect of which in general was to reduce the scope of the block but meant in some situations an individual taxpayer would find himself able to reclaim less under the new block than under the old block.

65. The CJEU held that nevertheless the new legislation was lawful.

66. It did not consider what the effect would be had it come to the contrary conclusion. It did not consider whether the fact that in a few, rare cases the new law was less favourable to taxpayers than the old law would mean that the block was unlawful only to the extent of those rare cases where the scope of the block was increased or whether the entire block would have become unlawful.

67. The CJEU did not answer this question; it seems to me that they were not asked to consider it. The referring court merely asked, according to the CJEU at [63]:

> "whether Art 17(6) of the 6VD precludes an amendment by a member state, after the entry into force of that directive, to an existing exclusion...."

This question presupposed that, had the CJEU ruled against the Dutch government on this question, rather than in their favour, the old block was lawful. I say this because the question was couched in terms of Art 17(6) precluding an amendment, rather than asking if Art 17(6) rendered an entire input tax block unlawful due to the amendment.

68. However, although the CJEU can rephrase questions if they consider the wrong question has been asked, the fact that they did not do so does not necessarily mean that they considered the right question had been asked.

69. In conclusion, the case is of little help as the CJEU did not definitively rule on the position, although I note it did not correct an assumption made by the referring court which is consistent with HMRC's position.

Maritza East C-124/12 (2013)

70. This case actually post-dates *Van Laarhoven*, which I discuss below. Here Bulgaria, on acceding to the EU, amended its input tax block to be more restrictive. As in the case of *Magoora*, the CJEU said that Art 17(6) standstill did not permit Member states to amend national law immediately before the 6VD came into effect. The national input tax block had to have actually been applied before accession before it would be covered by the standstill.

71. In [53] the CJEU said that it was for the national courts to interpret the new law to decide if it unlawfully extended the scope of the block:

> "setting aside, if necessary, any provision of national law which may conflict with that law"

72. It went on to say at [54]:

> "[art 176 PVD] is to be interpreted as precluding a Member State, on its accession to the EU, from introducing a limitation on the right to a deduction under a national legislative provision ...where such an exclusion was not provided for in the national legislation in force until the date of that accession.
>
> It is for the referring court to interpret the provisions of domestic law at issue in the main proceedings, so far as possible, in accordance with EU law. Where such an interpretation proves impossible, the referring court is required to set aside those provisions on the ground that they are incompatible with [Art 176 PVD standstill]."

73. HMRC's case was that here it was clear the CJEU was referring to setting aside the unlawful *extension* of block. On the other hand, of course, the appellants maintained the CJEU must have been referring to the block and said it was noteworthy that the CJEU did not expressly state the original block was preserved.

74. I cannot agree with the appellants. The case concerned a new element of a block introduced on accession (the provision of goods and services free of charge). If that element of the block was unlawful, the appellant in that case would (putting aside other issues in the case) win, irrespective of whether the pre-existing block was lawful. The issue the appellants in this appeal raise was simply not relevant to the case before the CJEU.

Conclusion on the Art 17(6) cases

75. I do not accept that the Art 17(6) cases referred to above either support the appellants' position or at least create real doubt on the issue such that a reference ought to be made.

76. All the cases concern input tax blocked by an 'extension' to a block. The CJEU was never asked directly to consider the issue in this appeal. I do not consider for the reasons given any of the cases support the appellants' position. As explained, from [16] of *France* C-40/00 and [51] of *Metropol* it is clear to me that the CJEU's position was that it was only the extension of a block covered by Art 17(6) that would be outside the continuing protection of Art 17(6).

77. So I have not been able to accept the appellants' position that this case law support its position. But is there sufficient doubt about the position because I do not consider that the CJEU has ever directly considered it? There does not have to be direct authority on a point in order for a Tribunal to conclude nevertheless there is no 'real doubt' about the positioin. It is entitled to rely on general principles elucidated by the CJEU in its case law as well as on CJEU decisions directly on the point. There may be no direct authority because it is clearly not a good point and so has never been referred.

78. I consider some general points on interpretation of of Art 17(6) and what the above case law has to say on them and in particular the issues of:

- Strict interpretation;
- Effect versus form;
- Identification of the block

Strict interpretation

79. The CJEU said at [26] of *Danfoss*:

> "....Furthermore, provisions laying down derogations from the principle of the right to deduct VAT, which ensures the neutrality of that tax, must be interpreted strictly."

The appellants' case was that a strict interpretation of Art 17(6) was that the introduction by a member State of an unlawful extension to a block meant that the entire block became unlawful.

80. I do not agree. A 'strict interpretation' is understood to mean that where there is one or more possible readings, it must be assumed that the more restricted meaning was intended. The CJEU require exceptions to the general principles such as the right to deduct and the liability of supplies to VAT to be interpreted strictly to ensure the integrity of those principles.

81. A strict interpretation of the Art 17(6) standstill might be that 'retain' exclusions should be interpreted to mean that the exclusion must have been in force for some time before the 6VD and not enacted immediately beforehand. While it did not use the expression 'strict interpretation' that was the unsurprising decision reached by the CJEU, as I have explained above, in the cases of *Magoora* and *Maritza East.*

82. A strict interpretation might have meant, although the CJEU held that it did not mean, that any change in law which extended the block in so far as an individual was concerned was unlawful, even if the change for most taxpayers was a lessening in the extent of the block. The CJEU chose not to interpret Article 17(6) this strictly: see *X Holding* (above).

83. But a 'strict interpretation' does not mean that words are to be inserted that are simply not there. Article 17(6) standstill did not say, for instance, "until the above rules come into force, or until a Member State extends the scope of an exclusion, Member states may retain all the exclusions provided for under their national laws...."

84. Moreover, a strict interpretation does not mean that the CJEU should read into the legislation some kind of punishment of the governments of member States for extending a block, so that unlawfully extending a lawful block meant that the entire block became unlawful.

85. I reject the appellants' case that a strict interpretation of Art 17(6) favours their position.

Effect over form?

86. It appears to be at least a part of the appellants' case that they are relying on the form of the changes to the input tax block rather than the effect of them. In particular, that

- the pre-6VD legislation was repealed and no longer exists and any post-6VD legislation must be outside the protection of the Art 17(6) standstill;
- the input tax block protected by Art 17(6) standstill was repealed and the re-enactment was unlawful as it was more restrictive

87. As I have said above, I do not think that the case law supports that proposition that the form of the amendment of the block is of any relevance. In *Magoora* (above) at [45] the CJEU stated expressly that legislation only loses the protection of the Art 17(6) standstill if the new laws 'have the effect of extending the scope of those restrictions'. So legislation which re-enacts a pre-existing block is protected by Art 17(6). This is repeated in *Maritza East* at [46] where the CJEU said the repeal and replacement of an input tax block did not lead to a presumption that art 17(6) standstill was breached; the question was whether the replacement legislation actually increased the scope of the block.

88. So, as I have said, the CJEU is concerned with effect and not form. Nevertheless, does the *Puffer* C-460/07 case place a qualification on this?

89. The facts were that the taxpayer had incurred VAT on her home which had mixed private and business use. Austria had in place a pre-6VD block on recovery of VAT incurred on private use of part of a building. After the 6VD was enacted, it repealed this legislation and replaced it with legislation that treated mixed private-business use buildings as business assets, but treated the private use as exempt use, and therefore as excluded from deduction. The effect was that under the new or old legislation, although for somewhat different reasons, the taxpayer was not entitled to recover the input tax to the extent of the private use of the building.

90. The referring court asked various questions, including whether the new legislation was covered by the Art 17(6) standstill. The ruling at [87] was:

> "...legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date [of entry into force of the 6VD]...
>
> [93] ...even if it cannot be ruled out that they achieve results which, in essence, are identical, the approach of the old and new legislation differs and that they have laid down different procedures, meaning that the new legislation cannot be treated as if it was legislation existing when [the 6VD] entered into force.

91. I do not consider that this does qualify what was said in *Magoora* (§87 above) about 'effect' being what mattered. Had the new law in *Puffer* been identical to the old block, its re-enactment would not have prevented it benefiting from the standstill. The problem in *Puffer* was that an input tax block had been replaced with a deemed exempt supply. This was fundamentally different VAT treatment even if the outcome of nil VAT recovery was the same. The input tax was not blocked under an Art17(6)-compliant block but was irrecoverable because the supply was (deemed to be) exempt: the effect of the new legislation was not same even if the outcome (nil recovery) was.

92. So even if this case is a footnote to the statement that the CJEU looks at the effect and not the form, it does not qualify what is clear from *Magoora* that repealing and re-enacting a block does not by itself remove the protection of the Art 17(6) standstill.

93. Nevertheless, what was the status of the original block in *Puffer* which had been repealed? This was not discussed. My reading of what the CJEU said, particularly at [93] is that the new legislation was not only outside the protection of the standstill, but it was assumed that the old legislation could not be revived. This makes sense: Austria was found to have given up the pre-6VD block when it repealed and replaced the legislation with an entirely different provision, which was not a block but the creation of a deemed supply. The new block did not encompass or contain the old block. Under the principles in *France* C-40/00 it could not re-enact the old Art 17(6) compliant block which had been repealed some time before.

94. But that point is not relevant here where the re-enacted block in 1988 did encompass the earlier, entirely lawful block.

Identifying the input tax block

95. The appellants' case presents a practical problem and/or leads to capricious results. Its case is that if a block is unlawfully extended, not only is the unlawful extension ineffective but the entire block from then onwards falls outside the protection of the Art 17(6) standstill.

96. But how should a court identify the block that is (on the appellant's case) now outside the standstill? Its case here is that the block is the new article 9 introduced by the 1988 Order. Yet why is it not every provision which blocks input tax recovery in the same piece of legislation amended by the 1988 Order (ie all the blocks in the 1981 Order)? Why is it not all blocks the legality of which depend on Art 17(6)? Why is it just that one clause?

97. And if it is just that one clause, that would make the law capricious. It is clear that member States have very varied blocks enacted in varied ways. The UK has a simple block on 'business entertainment' but what about a block, such as in *X Holding BV,* where different items (food, drink, accommodation, opportunities for sport and leisure, private transport) were all separately enumerated? Was that one block or five blocks?

98. What if the block in this case had been enacted in a different manner: one pre-6VD clause providing that business entertainment for all employees was blocked and another providing that business entertainment for UK resident customers was blocked? And then later, after the introduction of the 6VD, a new block in a separate piece of legislation provided that business entertainment of overseas customers was now also blocked? If that last block failed, what happens to the earlier two blocks? Would they be (on the appellant's case) lawful or unlawful?

99. If it *mattered* whether the unlawful extension to a block was a standalone block or contained within a wider block, because the entire block would fail, then I would expect the CJEU to have addressed the issue of identifying the block that fails. But they have never indicated that it matters, thus strongly suggesting it is *only* the extension of any existing block that fails.

100. I have referred to the case of *Puffer* above. At this point it is worth mentioning because of a subsidiary issue which arose in the case, the CJEU having ruled (for the reasons explained above) that the replacement of the input tax block with a provision creating a deemed transaction was not covered by the Art 17(6) standstill.

101. The precise original Austrian blocking provisions provided (in §1) that VAT on expenditure on buildings was deductible VAT only if deductible for income tax purposes. Another provision, §2(a), provided that services were deemed not to be for business use unless principally deductible for direct tax under specified income tax statutes. In other words, while §1 dealt specifically with land and buildings; §2(a) blocked any expenditure on a person's private life, not just in respect of property. In the case in issue, concerning private use of a property, the two provisions overlapped: it seems the taxpayer's VAT under the old law would have been blocked under both §1 and §2(a).

102. But it was only §1 which was repealed and replaced after the introduction of the 6VD. It was the repeal of §1 and its replacement with legislation creating a deemed exempt supply which was found by the CJEU to be unlawful, as I have discussed above at §§89-94. So the referring court asked, in the event of such a ruling, whether §2(a) would survive a negative ruling on §1. The answer in [96] was that if §2(a) operated independently of §1, had been in force before the 6VD, and had not been amended, it was protected by the Art 17(6) standstill. If the answers to these questions were 'yes', therefore, it seems Ms Puffer lost her case.

103. The significance for this appeal is that this is a case where the CJEU clearly did not consider that a failure of one block necessarily led to the failure of another operative but independent block in the same legislation. It is strongly suggestive the the CJEU does not consider that anything other than the unlawful extension to a block would fall outside the Art 17(6) standstill, albeit not direct authority on the point. It also reiterates the above point that the appellants' case would lead to capricious results as (on the appellants' case) the full extent of the loss of Art 17(6) standstill protection on the occasion of an unlawful extension would depend on whether the member state had a single, general all-encompassing block or a series of narrowly defined, even overlapping, independent blocks.

Conclusion on matters of interpretation

104. In summary these general points are:

- A strict interpretation does not mean the CJEU would read Art 17(6) as going further than it does on its face and in particular would not result in the CJEU reading in a 'punishment' for a member state going beyond what it was permitted;

- The appellant's case would have the CJEU giving significance to the form of a legislative amendment rather than its effect whereas the CJEU has clearly stated it is concerned with effect and not form;

- It would require the extent of the 'block' covered by the Art 17(6) standstill but now unlawfully extended to be identified which (a) the CJEU has never done and (b) would potentially lead to capricious results depending on exactly how any particular member State enacted blocks, and in particular whether they identify the blocked input tax in general terms or have lots of blocks identifying individual types of expenditure;

105. Moreover the appellants' interpretation:

(a) would 'punish' member states for unlawfully extending a block. A small unlawful extension would, on the appellants' case, lead to failure of an entire block. There is no history of the CJEU interpreting the 6VD or PVD, or indeed, other directives, in such a manner so that a deviation is punished rather than merely corrected, and

(b) would go against declared purpose of Art 17(6) standstill which was to permit member states to retain input tax blocks in force when the 6VD entered into force.

106. In conclusion I am not persuaded that there is any real doubt on the issue here that requires the CJEU's determination: the answer lies in settled case law and principles applied by the CJEU in other cases. That brings me on to consider the case on which the appellant relies as establishing (at least) sufficient doubt to justify a reference.

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107. The facts were that under Dutch law a taxpayer was entitled to deduct in full VAT incurred on purchasing a car partly used for business and partly for private purposes, with subsequent flat rate charges to reflect the private use.

108. The national court considered that changes to the rules after the introduction of the 6VD which increased the flat rate charge might be a breach of Art 17(6). However, not surprisingly, the CJEU ruled that Art 17(6) was not in point because there was no input tax block as input tax was fully deductible at the outset: [24]. The Court did not consider Art 17(6) further and dealt with the case under the provisions concerning the taxation of private use of business assets.

109. There is therefore nothing in the CJEU's decision in favour of either party's case. The Advocate General had, however, dealt with the case on Art 17(6) although she too thought ([15]-[22]) that the applicable provisions were those dealing with the taxation of private use of business assets. The appellant, as I have said, relies very much on what the Advocate General said about Art 17(6).

110. block 'no longer' covered: In [39] and [40] of her Opinion the Advocate General deals with the issue that the Dutch law changed the approach and procedures of the subsequent taxation of cars for mixed purposes; the Dutch government, reported in [39] and relying on *Puffer* (discussed above) seemed to think that Art 17(6) only applied when there was such a change in approach and procedures; the Advocate General pointed out in [40] that the doctrine was much wider and Art 17(6) would apply where there was a 'mere extension' to a lawful existing block. She said, citing *Commission v France (diesel fuel)* and *X Holding,* that in such circumstances:

> "a mere extension of the amount of an existing limitation to the right to deduct in principle has the effect that the legislation is no longer covered by the second paragraph of Article 17(6) of [6VD]" (my emphasis)

111. The appellant's interpretation of this is that the Advocate General envisaged that the entire legislation fell; otherwise why say 'the legislation is no longer covered…'?

112. What did the Advocate General mean here? She did not actually use the phrase 'no longer' because the Opinion was written in German. What she actually said was "nicht mehr". Nicht mehr could be translated as 'no longer' but could be translated as 'not now' or 'no more'. If it had been translated in that way, the sentence would not really carry the connotation that lawful legislation became unlawful. Moreover, 'the legislation' she refers to is the legislation referred to in [39] which is clearly the 'new legislation' and the 'amendment'. So at best her comment here was ambiguous because the amendment was *never* covered by the standstill.

113. This was not a case on Art 17(6), of course, although the Advocate General felt constrained to answer the question referred on it. In [47] she deals with the fact that the charge to VAT on private use was lawful and tried to fit this into the logic of Art 17(6), saying that only when amendments went further than imposing VAT on private use would they not be covered by Art 17(6). Only then

> "it must be found that the limitation has further diverged from the objective of the directive and that it is therefore no longer covered by the exception under the second paragraph of Article 17(6) of the [6VD]…"

Again the appellant's interpretation is that the 'limitation' referred to is the entire block and the ruling is that that the entire block is 'no longer' covered by Article 17(6) thus supporting their case by analogy that the entire block becomes unlawful when an unlawful extension is made to it. It was really support by analogy only as in this paragraph the Advocate General was discussing a charge on private use as if it was an extension to an input tax block.

114. However, the Advocate General's conclusion was in [48] where she said:

> "..Art 17(6) precludes amendments made to legislation already existing at the time of the entry into force of the directive,
>
> - which limit the deduction.....
> - where the amount of the definitive deduction which is excluded is increased....
>
> only if (and to the extent that) the supplementary limitation goes beyond that which is necessary for the purposes of an appropriate application of VAT to private use." (my emphasis)

115. weasel wording? Mr Hitchmough, colloquially but ill-informed about the nature of mustelids, described the phrase 'and to the extent that' as 'weasel wording' in the sense he meant Mrs Kokott was backtracking on what (on the appellant's case) she had said earlier in [40] and [47] which the appellants interpreted as meaning that the entire block 'no longer' being covered by the standstill.

116. The phrase 'and to the extent that' was dealing with the problem recognised in [47] that she was dealing with a case on a private use charge (output tax) within the provisions of Article 17 (input tax). So she was actually saying that Art 17(6) only precluded an amendment to a block which both extended the previous block *and* went beyond what was necessary to impose a charge on private use. This part of her decision was, as I have said, simply not adopted by the CJEU who said that the question had to be dealt with under Art 6 and 11 and not Art 17 – see [15-22] of CJEU decision.

117. While 'and to the extent that' was a qualification added to deal with the charge for private use, she considered any new legislation would only be invalid in so far as it went further than necessary to make an appropriate private use charge. This does not directly deal with the issue in this Tribunal, but by analogy, it can be reasoned that in [47] she considered any new legislation would only be invalid in so far as it extended an pre-existing lawful block.

118. Mr Hitchmough considers this cowardly backtracking; I think it the case that the phrase 'nicht mehr' in [40] and [47] was not used with the meaning that the entire block lost its vires under Art 17(6) if there was an unlawful extension to it. Put another way, the phrase 'nicht mehr' in [47], if it is taken to mean that the entire block fails because of a private use charge going further than necessary, directly contradicts the words 'and to the extent that' in [48]. That does not make the law ambiguous as the appellant suggests: it would merely mean that the Advocate General's Opinion was confused and of no importance. However, if it is not translated as 'no longer' and loses the connotation that the entire block fails, then her Opinion was that the block only failed 'to the extent that' the charge exceeded necessity. That supports HMRC's and not the appellant's position. It necessarily follows that if 'nicht mehr' in [47] was not intended to suggest the entire block failed, then the same is true in [40], and her Opinion is simply no authority for the appellants' case. On the contrary, the use of 'and to the extent that' is consistent with the implications of [16] of *France* and [51] of *Metropol* and supports HMRC's position.

119. Moreover, the Advocate General's authority for her statement in [40] was *France* and *X Holding* where, as I have already said, there is no authority for the proposition that an unlawful extension leads to the entire block failing. She can only have been relying on them for the proposition that the 'inadmissible extensions' to blocks are not within the standstill, as that is what they are authority for. This again supports the reasoning she was not by the use of the words 'nicht mehr' intending to recommend the CJEU make a significant new ruling but merely intending to summarise the pre-existing state of law.

Conclusion on Van Laarhoven

120. The appellants' case is that the Advocate General's Opinion in *Van Laarhoven* is ambiguous on whether she means the entire block fails if it goes beyond Art 17(6) or the part which exceeds the standstill fails, and for that reason the legal position is uncertain and I should refer the matter to the CJEU.

121. I don't agree that properly read there is any such ambiguity. I think she did not really direct her mind to the issue, as it was not an issue raised, but to the extent that she did her conclusion was in [48] was that it was only the unlawful extension which failed. In any event, I do not accept an ambiguity in an Advocate General's opinion would justify a referral if the case law of the CJEU was clear on the matter.

122. So I have, even without considering *Ampafrance,* not been persuaded that there is any real doubt about the position sufficient to justify a referral. I certainly do not read into *Van Laarhoven* what the appellant reads into it. But for completeness, I go on to consider *Ampafrance,* which is the case on which HMRC placed much reliance.

Ampafrance [2000] C-177/99

123. Ignoring the details in the case which do not matter in this context, the facts of this case were that the French Government had before the 6VD entered into force blocked input tax recovery on what I shall describe for convenience if somewhat inaccurately as 'entertainment' expenditure on employees. After entry into force of the 6VD it applied to the Council of the EU for a derogation from Art 17 to permit it to block input tax recovery on all entertainment expenditure, whether it related to employees or non-employees. It was granted the derogation in general terms: it was permitted to block input tax on all entertainment expenditure. Neither the derogation nor the French legislation which implemented it referred to the employment status (in other words, employed or not employed) of the persons in respect of whom the entertainment expenditure was incurred.

124. Ampafrance had re-claimed VAT on entertainment expenditure it had incurred in respect of employees and non-employees. It challenged the assessment to recover from it this tax in the French courts, which then referred the case to the CJEU.

125. It was Ampafrance's case (see [32]) that the derogation was unlawful and therefore the French legislation made under that derogation was also unlawful and that it followed that the block on recovery of input tax on entertainment expenditure

incurred in respect of both employees and non-employees was ineffective. The French government contended in response ([33]) that the derogation only applied to block recovery of input tax on entertainment expenditure incurred in respect of non-employees.

126. I am not concerned with the CJEU's decision on why the derogation was unlawful save to the result which was that the CJEU did find the derogation unlawful.

127. The appellants' case seems to be that that was the end of the CJEU's decision in *Ampafrance* and it cannot be inferred from it that an unlawful extension to an input tax block means that only the extension to the block rather than the entire block falls.

128. What is clear from the CJEU's decision, however, is that although the derogation purported to authorise the block in relation to both employees and non-employees, the CJEU held that it only authorised the block in so far as the block was not already part of French law:

> "[39] In that regard, it must be pointed out that the exclusions from the right to deduct VAT in existence prior to the entry into force of the 6VD were subsequently retained unaltered in French law, which, moreover, extended the exclusion from the right of deduction to certain other situations. In those circumstances, expenditure which was already excluded from the right to deduct VAT pursuant to [the pre-6VD French law] must be regarded as being covered by the 'standstill' clause in the second sub-paragraph of Art 17(6)."

129. The appellants' case is that *Ampafrance* simply did not consider anything more than the validity of the derogation, and [39] was said in the context of defining the scope of the derogation actually given prior to determining the validity of the legislation enacted in reliance on it. The CJEU, says the appellants, did not rule on whether the pre-6VD block remained valid in France after the date the scope of the block was unlawfully extended in reliance on the unlawful derogation.

130. I agree with HMRC that it is not possible to give [39] such a narrow interpretation. The CJEU here clearly held that insofar as the input tax block pre-dated the 6VD, then it was covered by the standstill clause. That was why it was not covered by the derogation: because it didn't need it. And by that the CJEU clearly meant that the French legislation on employees was lawful irrespective of the derogation. And that was true both before and after the French government implemented the unlawful derogation.

131. Looked at the other way, if the 'employee' block, now contained within the new combined block, was not authorised by Art 17(6) standstill, it would have been within the scope of the derogation. This is because the derogation applied to input tax relating to expenditure on both employees and non-employees. So if after implementation of the unlawful derogation, the 'employee' input tax block became unlawful despite the Art 17(6) standstill, then its lawfulness would have depended on the derogation (which on its face covered it) and the CJEU would not have said what it did in [39].

132. But as I have said, the French legislature had replaced its old 'employee' input tax block with a new block that did not refer to employees, thus encompassing all persons, employees and non-employees. Nevertheless, in [39] the CJEU ruled that in so far as it blocked expenditure which had been blocked pre-6VD the block was 'covered' (in the sense of lawful) because of the Art 17(6) standstill.

133. In other words, repealing a narrow, pre-6VD block and enacting a much wider block post 6VD has the effect that the new law is valid to the extent it corresponds with the pre-6VD narrow block, even if the rest of the new law is invalid.

134. That seems to entirely dispose of the appellants' case, but the appellant does not accept this. They rely on the comment of the Advocate General in §40 Van Laarhoven that:

> "...the judgment in *Commission v France* [C40/00] which is at the origin of the case-law concerning inadmissible extensions...."

This comment establishes, says the appellants, that *Ampafrance* was not a case on Art 17(6) as the later case of *France (diesel fuel)* was described as the origin of the case law on Art 17(6).

135. Firstly, this is a comment by an Advocate General, not the CJEU. Secondly it was made in passing when answering the question whether the new legislation is only unlawful if it has a different approach and new procedures. Thirdly, it is somewhat vague. It certainly cannot be relied on as a definitive statement that *Ampafrance*, a case which was primarily about the legality of a derogation, did not rule on the effect of Art 17(6) in so far as relevant to the issue of the derogation in that case. Moreover, I note that in *Metropol* the CJEU did refer to *Ampafrance* as a case which had dealt with Article 17(6): see [42] and [48].

Conclusion

136. It seems to me that the decision in *Ampafrance* is the reason why the CJEU and referring courts have never squared addressed and answered the issue raised by the appellants in this case: the matter was already made clear. There is no authority in the CJEU case law in support of the appellants' case and *Ampafrance* is clearly against it. Logic and application of general principles is against the appellant as explained at §104-6.

Should I refer?

137. The well known dicta in *ex parte Else* [1993] QB 534 the Court of Appeal ruled:

> "if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself....If the national court has any real doubt, it should ordinarily refer."

138. What is meant by 'complete confidence' and 'any real doubt'? The Court of Appeal ruled in the later case of *Littlewoods Organisation plc* [2001] EWCA Civ 1542 that:

> "...A measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed....
>
> ....[a] development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunals can resort in resolving new questions of Community Law. Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case law. Experience has shown that the case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference...."

139. Applying *Ampafrance,* [16] of *France* C-40/00 and [51] of *Metropol* and the general considerations referred to at §104-6, I am confident that the issue raised by the appellants is clear: it is only the unlawful extension to a block that is not covered by the Article 17(6) standstill. Even a re-enactment and extension of a pre-existing block is lawful except for the extension. The re-enactment of the pre-existing lawful block in 1988 by the 1988 Order was unlawful and ineffective to block input tax only to the extent of reasonable expenditure on overseas customers. The block was otherwise effective and the appellants have no claim.

140. Mr Hitchmough informed me that if I decided the preliminary issue against the appellants, he was instructed that they would appeal me. I understood him to mean that it would save the parties costs for the FTT to refer the matter to the CJEU, because (in his view) a higher court would be bound to refer.

141. Whether or not the appellant will appeal this decision, and whether or not it would be given permission to do so, is not the test for referring a point of law to the CJEU. I say this recognising that the test for permission to appeal is whether the appellant has a reasonable prospect on appeal. But (assuming and not deciding that the appellant would be given permission to appeal) it is necessarily easier to show that there is an arguable case that there is real doubt, than actually to show there is real doubt. So even if the appellant can show it would be given to permission to appeal, it does not mean that this Tribunal ought to refer the case to the CJEU. If I consider that there is no real doubt, as I do, then I should not refer.

142. So the inevitability of an application for permission to appeal does not cause me to re-consider my decision not to refer. I have no real doubt and I will not refer. I agree with HMRC that deciding the preliminary issue against the appellants ends their appeal and therefore I dismiss the appeals.

143. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 06/01/2015