

OPINION OF ADVOCATE GENERAL

MazÁk

delivered on 18 September 2007 (1)

Case C-368/06

Cedilac SA

v

Ministère de l'Économie, des Finances et de l'Industrie

(Reference for a preliminary ruling from the Tribunal administratif de Lyon (France))

(Taxation – VAT – Right to deduct – Council Directive 77/388/EEC – Articles 17, 18, 28(3)(d) and 28(4) – Repeal by France of ‘one-month delay’ rule – Conversion into a debt on Treasury – Repayment by instalments)

1. In this reference for a preliminary ruling under Article 234 EC, the referring court seeks guidance on the interpretation of Articles 17, 18, 28(3)(d) and 28(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (2) (the ‘Sixth Directive’).

I – Relevant Community law

2. Article 17(1) of the Sixth Directive provides that ‘[t]he right to deduct shall arise at the time when the deductible tax becomes chargeable’.

3. Article 18 of the Sixth Directive entitled ‘Rules governing the exercise of the right to deduct’ provides:

‘...

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen...

...

4. Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

...'

4. In Title XVI of the Sixth Directive, Article 28 establishes certain transitional provisions authorising, inter alia, the continuation by Member States of exemptions and derogations maintained with a view to their eventual abolition. Thus Article 28(3)(d) of the Sixth Directive provides that during the transitional period referred to in Article 28(4) the Member States may 'continue to apply provisions derogating from the principle of immediate deduction laid down in the first paragraph of Article 18(2)'.

5. According to Article 28(4) of the Sixth Directive '[t]he transitional period shall last initially for five years as from 1 January 1978. At the latest six months before the end of this period, and subsequently as necessary, the Council shall review the situation with regard to the derogations set out in paragraph 3 on the basis of a report from the Commission and shall unanimously determine on a proposal from the Commission, whether any or all of these derogations shall be abolished.'

II – Relevant national law

6. In accordance with the exception contained in Article 28(3)(d) of the Sixth Directive, France continued to apply after the entry into force of that directive the so-called one-month delay rule. Pursuant to the one-month delay rule taxable persons were unable, in accordance with Article 17(1) of the Sixth Directive, to deduct immediately from the valued added tax (the 'VAT') which they were liable to pay the VAT they had paid on goods not constituting fixed assets and services. The deduction could only be effected the following month.

7. With the adoption on 22 June 1993 of Article 2, paragraph I, of the amending Finance Law No 93-859 for 1993, (3) France repealed the one-month delay rule. Thus pursuant to Article 271(3) of the General Tax Code (le code général des impôts) (the 'GTC'), which was inserted by Article 2, paragraph I, of the Finance Law No 93-859, taxable persons were entitled to deduct the VAT they had already paid on goods and services from the VAT owed by them during the month the right to deduction arose.

8. In addition to the repeal of the one-month delay rule, a transitional provision was inserted by Article 2, paragraph II, of amending Finance Law No 93-859 for 1993 into the GTC. The transitional provision can be found in Article 271 A of the GTC.

9. Article 271 A(1) of the GTC provides for the subtraction of a 'reference deduction' from the deductible tax, in respect of taxable persons who commenced their activities prior to 1 July 1993. The reference deduction is, in general, calculated on the basis of the average monthly amount of tax deductible during the month of July 1993 and the 11 previous months.

10. Article 271 A(2) of the GTC provides, inter alia, that where the amount of the reference deduction may not be subtracted in its entirety from the deductible tax, the surplus is to be deducted the following months. If the amount of the deductible tax obtained after subtraction of the reference deduction is lower than the deductible tax relating to the previous month, the surplus of the reference deduction is carried forward to the following declarations.

11. Pursuant to Article 271 A(3) of the GTC, the amount of the rights to deduction which a taxable person has not exercised pursuant to Article 271 A(1), taking into account the rules laid down in Article 271 A(2), comprises a debt of the taxable person on the Treasury. The debt may not be assigned or sold. It may however be used as a security or as a guarantee. Moreover, the debt may be transferred in the case of, inter alia, merger or sale of the undertaking. The debt is to be repaid,

inter alia, over a maximum period of 20 years.

12. Pursuant to Article 271 A(5) of the GTC, where the amount of the reference deduction does not exceed FRF 10 000, taxable persons are not, in principle, required to subtract the reference deduction in accordance with Article 271 A(1) of the GTC.

13. Pursuant to Decree No 93-1078 of 14 September 1993, (4) Decree No 94-296 of 6 April 1994 (5) and Decree No 2002-179 of 13 February 2002, (6) the debts held by taxable persons pursuant to Article 271 A of the GTC were reimbursed in the following manner:

- in 1993 the debts were repaid in total where they did not exceed FRF 150 000 (EUR 22 867.35). In that same year, debts which exceeded that amount were repaid to the extent of 25%, with a minimum payment of FRF 150 000 (EUR 22 867.35);
- in 1994, the remaining debts were placed in an account and were repaid to the extent of 10% of the initial amount;
- in each subsequent year the debts were repaid to the extent of 5% of the initial amount;
- in 2002, all the remaining debts were repaid in total in advance.

14. The interest rate payable on the debts in question was 4.5% for 1993, 1% for 1994 and 0.1% for each of the following years.

III – The main proceedings and the order for reference

15. On 26 December 2002, the company Cedilac SA (hereinafter the ‘applicant’) requested France to pay it, inter alia, EUR 1 524 806.62 plus interest thereon for damages suffered from 1993 to 2002 as a result of the application to it of the measures that accompanied the repeal of the one-month delay rule.

16. Given that the Minister for Economic Affairs, Finance and Industry (le Ministre de l’économie, des finances et de l’industrie) failed to reply to the applicant’s request, thereby implicitly rejecting that request, the applicant brought an action before the Tribunal administratif de Lyon (Administrative Court) (France) against that implicit decision.

17. By judgment dated 15 November 2005, the Administrative Court, Lyon, requested the opinion of the Conseil d’État (French Council of State) pursuant to Article L.113-1 of the Administrative Code of Justice (le Code de justice administrative) as to whether ‘the enacting clauses adopted by France to accompany the repeal of the one-month delay rule, established by Article 271 A of the General Tax Code and its successive implementing decrees are compatible with Articles 17 and 18(4) of the [Sixth Directive]’.

18. By opinion dated 14 June 2006, the Council of State decided that the above issue was of such a difficult nature as to justify its submission, for a preliminary ruling, to the Court.

19. By decision dated 5 September 2006, the Administrative Court, Lyon, decided to stay the proceedings and to refer the following question to the Court:

‘Are the enacting provisions adopted by France to accompany the repeal of the one-month delay rule compatible with Articles 17 and 18(4) of the [Sixth Directive]?’

20. In its decision dated 5 September 2006, the referring court also requested the Court to examine the above question in accordance with the accelerated procedure provided for by Article

104a of the Rules of Procedure of the Court of Justice, 'in the light of the number of actions already initiated and the considerable financial stake for the State budget ...'.

21. By order dated 25 September 2006, the President of the Court rejected the request by the referring court for an accelerated procedure.

22. The applicant, the French Government and the Commission submitted written observations. No hearing was requested or held.

IV – Main arguments of the parties

23. The applicant considers that the measures adopted to accompany the repeal of the one-month delay rule pursuant to Article 271 A of the GTC and which had the effect of preventing the immediate deduction of VAT are in breach of the principle of neutrality of the VAT system and Articles 17 and 18 of the Sixth Directive.

24. The applicant relies in particular on the judgment of the Court in *Commission v Italy*. (7) In that case the Court found Italy in breach of its obligations under Articles 17 and 18 of the Sixth Directive as that Member State had provided for the refund of excess VAT by the issue of Government bonds to a category of taxable persons. In that case the Court found that the conditions for refund set up by a Member State pursuant to Article 18(4) of the Sixth Directive must enable the taxable person, in appropriate conditions, to recover the entirety of the credit arising from that excess tax. According to the applicant this implies that the refund must be paid within a reasonable period of time and by payment in liquid funds or equivalent means. The method of refund adopted must not, in any event, entail any financial risk for the taxable person.

25. In addition, the applicant stresses the fact that contrary to the situation which existed in the case *Commission v Italy*, where the Italian Government bonds issued to refund excess VAT were listed on the stock exchange, in the present case the debt on the Treasury could not be assigned or sold. Moreover, the debt was subject to an insignificant rate of interest and the taxable person had to bear the almost certain risk of devaluation of the debt over a period of 20 years. The applicant adds that the measures in question breached the principle of equality of taxable persons. The Court should thus, according to the applicant, reply in the negative to the question referred by the national court.

26. The French Government considers that the question referred by the national court should be reformulated. France submits that the referring court is in effect asking whether the measures adopted to accompany the repeal of the one-month delay rule are contrary to Article 28(3)(d) of the Sixth Directive. France considers that the question as reformulated should be answered in the negative.

27. The Commission considers that it is not for the Court to determine, in the context of a reference for a preliminary ruling, whether provisions of national law are compatible with Community law. That competence belongs to the national courts, if necessary, after obtaining from the Court, by way of a reference for a preliminary ruling, such clarification as may be necessary on the scope and interpretation of Community law.

28. France submits that the one-month delay rule, which derogated from the principle of the immediate deductibility of VAT laid down in Article 18(2) of the Sixth Directive, was authorised pursuant to Article 28(3)(d) of that directive. As a result of the repeal of the one-month delay rule from July 1993, taxable persons were able to deduct in July 1993 their rights to deduction which arose during the months of June and July 1993. This reform would have resulted in a burden on the State budget of FRF 80 to 100 billion. A mechanism was thus adopted in order to stagger that

exceptional loss to the State finances over a period of time. France adds that the mechanism did not affect all tax payers. Pursuant to Article 271 A(5) of the GTC, where the amount of an undertaking's reference deduction is less than FRF 10 000, it is not subject to the staggered repayment mechanism. Thus, 82% of undertakings were not subject to that mechanism.

29. France and the Commission consider that the measures which accompanied the repeal of the one-month delay rule comply with the case-law of the Court on Article 28(3) of the Sixth Directive. They consider that the reasoning of the Court in its judgment in *Norbury Developments* (8) should be applied by analogy to the present case. Thus, France and the Commission consider that, while a Member State may not extend an existing derogation foreseen by Article 28(3)(d) of the Sixth Directive, it may partially or progressively renounce that derogation.

30. The Commission states that the repeal of the one-month delay rule and the measures criticised by the applicant in the main proceedings were enacted by the same piece of legislation. The measures were aimed at facilitating the transition to the rules established pursuant to Articles 17 and 18 of the Sixth Directive and the right to immediately deduct VAT.

31. According to France and the Commission, the circumstances of the present case are not similar to those which prevailed in the case *Commission v Italy*. (9)

32. In that case, the Court found that Italy, which provided for the refund of excess VAT by the issue of Government bonds to a category of taxable persons whose tax position was in credit, had failed to fulfil its obligations under Articles 17 and 18 of the Sixth Directive. The reasoning of the Court in that case was based however on the fact that Italy, unlike France in the present case, did not benefit from any derogation foreseen by the Sixth Directive.

33. The Commission adds that all taxable persons are clearly in a more favourable position since the repeal of the one-month delay rule, despite the terms of Article 271 A of the GTC.

V – Assessment

34. By its preliminary reference, the referring court requests a ruling from the Court on whether the provisions adopted by France to accompany the repeal of the one-month delay rule are compatible with Articles 17 and 18(4) of the Sixth Directive.

35. It should be borne in mind that the Court in applying Article 234 EC is not competent to decide questions of compatibility of provisions of national law with Community law. The Court can, however, infer from the wording of the question formulated by the national court, in the light of the facts found by the latter, the matters involving interpretation of Community law. (10)

36. I conclude therefore from the wording of the question and from the reasoning of the decision referring it, that the national court seeks clarification on whether Articles 17, 18, 28(3)(d) and 28(4) of the Sixth Directive preclude measures such as those in issue in the main proceedings.

37. The Court has consistently held that the right to deduct provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. (11) Moreover, any limitation on the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in cases expressly provided for in the Sixth Directive. (12)

38. Prior to the entry into force of the Sixth Directive, France applied the so-called one-month delay rule. According to the pleadings of the parties, pursuant to that rule, taxable persons in

France were not able to deduct from the VAT they were required to pay the VAT they had paid on goods until the month after the right to deduct arose. France was permitted to retain the one-month delay rule, which predated the Sixth Directive, after the entry into force of that directive on foot of an express exception contained in Article 28(3)(d) of that directive.

39. The express exception provided by Article 28(3)(d) of the Sixth Directive was still in force on 1 July 1993 (13) when France repealed the one-month delay rule and adopted transitional measures to accompany that repeal. I therefore consider that the reforms enacted by France with the adoption on 22 June 1993 of Article 2, paragraphs I and II, of the amending Finance Law No 93-859 for 1993 were voluntary, in the sense that that Member State was not required to renounce the exception it enjoyed pursuant to Article 28(3)(d) of the Sixth Directive by the operation of Community law.

40. It would seem from the pleadings of the French Government that as a result of the operation of the one-month delay rule, taxable persons were constantly owed a sum of money by the State Treasury. The amount of the debt in question varied from month to month, depending on the VAT a taxable person was entitled to deduct in a particular month. The debt would appear not to have been subject to the payment of interest.

41. The referring court indicated that with the adoption of amending Finance Law No 93-859 for 1993, France both repealed the one-month delay rule and adopted the transitional measures contained in Article 271 A of the GTC. It would appear from the relevant national legislation, subject to verification by the national court, that the repeal in question meant that taxable persons who commenced their activities after 1 July 1993 were not subject to the one-month delay rule and thus the VAT paid by those taxable persons was immediately deductible in accordance with the rules laid down in Articles 17 and 18 of the Sixth Directive.

42. France, however, did not merely repeal the one-month delay rule as this would, according to the French Government and the referring court, have given rise to considerable budgetary implications. Those implications arose, according to the French Government and the Commission, due to the fact that taxable persons whose activities predated 1 July 1993 could, in principle, deduct in July 1993 the VAT paid both in the months of June and July 1993 and could, in the months thereafter, deduct the VAT immediately as provided pursuant to Articles 17 and 18 of the Sixth Directive.

43. The referring court indicated that the measures which accompanied the repeal of the one-month delay rule were of an exceptional nature and were adopted for the purpose of allowing that fiscal reform to take place under conditions which could be borne by the State budget. Indeed, as can be seen from the pleadings of the French Government, the sums of money involved by the repeal of the one-month delay rule would seem to be quite considerable. (14) Article 271 A of the GTC, according to the referring court, was therefore designed to stagger, over several years, the financial implications of the repeal in question.

44. It would appear from the national legislative framework, as outlined by the parties in their pleadings, that Article 271 A of the GTC required taxable persons to calculate a reference deduction which was generally based on the average amount of VAT which they could deduct during the month of July 1993 and the 11 previous months. Where the reference deduction was superior to FRF 10 000, it was transformed into a debt on the Treasury. The debt was, according to the national court, subject to the payment of interest and was to be repaid to the taxable person in question over a period of 20 years, which was later reduced to 10 years. The French Government indicated that due to the cut-off sum of FRF 10 000 the measures which accompanied the repeal of the one-month delay rule affected approximately 18% of taxable persons. (15)

45. The applicant submits that the measures which accompanied the repeal of the one-month delay rule prevented the immediate deduction of VAT and are contrary to the principle of neutrality of the VAT system, which requires the deduction of all VAT on inputs, and Articles 17 and 18 of the Sixth Directive. Moreover, in its pleadings the applicant relies extensively on the ruling of the Court in *Commission v Italy*, in which a similar scheme introduced by the Italian Republic was held to violate Articles 17 and 18 of the Sixth Directive.

46. In my view, while there are indeed certain factual similarities between the case in the main proceedings before the referring court and the case *Commission v Italy*, the legal framework applicable in the cases differs fundamentally. In the case *Commission v Italy*, the Member State provided for the refund of excess VAT by the issue of Government bonds to certain taxable persons. Italy did not however benefit from a derogation similar to the French derogation foreseen by Article 28(3)(d) of the Sixth Directive and could not therefore lawfully derogate from the provisions of Articles 17 and 18 of the Sixth Directive by enacting rules which prevented taxable persons from deducting VAT immediately. Consequently, the applicant cannot rely on the judgment in that case to support its arguments.

47. Moreover, while France was clearly and unambiguously authorised to continue to apply the one-month delay rule after the entry into force of the Sixth Directive pursuant to Article 28(3)(d) of that directive, it was not however authorised to adopt a new derogation or extend its existing derogation pursuant to that provision.

48. In addition, I consider, invoking by analogy the reasoning expounded by the Court in *Norbury Developments*, that the Sixth Directive does not prevent a Member State from reducing the scope of a derogation such as the derogation foreseen by Article 28(3)(d) of the Sixth Directive, since the abolition of such derogations is the objective pursued by Article 28(4) of that directive. (16) In *Norbury Developments*, the United Kingdom had reduced the scope of an exemption it enjoyed under the Sixth Directive. (17) The Court reasoned in that case that it would be contrary to that objective to construe Article 28(3)(b) of the Sixth Directive narrowly, to the effect that a Member State may maintain an existing exemption but may not partially abolish it. Such an interpretation would, according to the Court, have adverse effects for the uniform application of the Sixth Directive, as a Member State might find itself compelled to maintain an exemption, even if it regarded it as possible, appropriate and desirable progressively to implement the system laid down in the directive in the sphere under consideration.

49. In the case *Commission v France*, (18) the Court found that where the legislation of a Member State is amended so as to reduce the scope of an exemption and thereby brings itself into line with the objective of the Sixth Directive, that legislation must be covered by the derogation provided for by the second subparagraph of Article 17(6) of the Sixth Directive. In that case, which concerned an action pursuant to Article 226 EC, the Court found that France, which had reduced the scope of an existing exemption, by replacing a total exclusion of private cars from the right to

deduct VAT with a more limited exclusion which authorised the deduction of VAT in respect of vehicles used exclusively for driving instruction, had not failed in its obligations to fulfil Article 17(2) of the Sixth Directive.

50. It would appear from the decision of the referring court that, unlike the reduction in the scope of an exemption which was enacted by the French legislator in the case *Commission v France* and which appears rather precise and clear-cut, the legislative measures which accompanied the repeal of the one-month delay rule were extremely complex and affected taxable persons, if at all, to varying extents, depending on the amount of their reference deduction. Consequently, despite the abolition of the one-month delay rule from 1 July 1993, certain taxable persons continued to be owed money by the State Treasury until 2002.

51. However, it would appear from the pleadings of the Commission, subject to verification by the national court, that the legislative reforms voluntarily (19) adopted by France which led to the repeal of the one-month delay rule and the measures which accompanied that repeal resulted in the gradual phasing out of the effects of that rule. Moreover, the effects of the measures which accompanied the repeal of the one-month delay rule would also appear to have been progressively reduced and ultimately eliminated in 2002. That process seems to have led, during the period 1993 to 2002, to a decrease in the burden on all taxable persons resulting from the operation of the VAT rules.

52. The effect of the reform adopted by France would therefore appear, on the basis of the pleadings of the Commission and the French Government, to have reduced, over a 10 year period, the disparities which existed between its fiscal system as a result of the operation of the one-month delay rule and Articles 17 and 18 of the Sixth Directive, thereby bringing that Member State into line with one of the key principles of the Sixth Directive, namely the immediate deductibility of VAT.

53. Moreover, it would seem, subject to verification by the national court, that those disparities were completely eliminated already in 1993, firstly, in relation to taxable persons which commenced their activities after 1 July 1993, secondly, where the reference deduction of a taxable person was less than FRF 10 000 and, thirdly, where the debt owed to a taxable person by the State Treasury did not exceed FRF 150 000 (EUR 22 867.35). Indeed, it would appear from the legislative reforms, as explained by the parties, that already in 1993, the year the reforms were enacted, a considerable amount of the reference deduction, namely 25%, was repaid to all taxable persons affected by the transitional measures which accompanied the repeal of the one-month delay rule. In 1994, another 10% of the reference deduction was required to be repaid. In its referring decision, the national court also indicates that the debt on the Treasury was subject to the payment of interest.

54. I therefore consider that Articles 17, 18, 28(3)(d) and 28(4) of the Sixth Directive do not, in principle, preclude measures of the kind at issue in the main proceedings.

VI – Conclusion

55. I consider, accordingly, that the Court should answer the question referred by the Administrative Court, Lyon, as follows:

Articles 17, 18, 28(3)(d) and 28(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment do not, in principle, preclude measures of the kind at issue in the main proceedings.

- 1 – Original language: English.
- 2 – OJ 1977 L 145, p. 1.
- 3 – JORF No 143, 23 June 1993, p. 8815.
- 4 – JORF No 214, 15 September 1993, p. 12883.
- 5 – JORF No 89, 16 April 1994, p. 5646.
- 6 – JORF No 39, 15 February 2002, p. 2968.
- 7 – Case C-78/00 [2001] ECR I-8195.
- 8 – Case C-136/97 [1999] ECR I-2491, paragraph 19.
- 9 – Cited in footnote 7.
- 10 – See by analogy, Case 10/71 *Muller and Others* [1971] ECR 723, paragraph 7.
- 11 – See Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 42.
- 12 – See, inter alia, Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 34 and the case-law cited therein.
- 13 – Despite the initial transitional period of five years as from 1 January 1978 laid down in Article 28(4) of the Sixth Directive, the exception contained in Article 28(3)(d) has not been abolished by the Community legislator. Although not relevant from a temporal perspective for the purposes of the present case, the exception contained in Article 28(3)(d) of the Sixth Directive would seem to have been maintained in the so-called recast VAT directive; see Article 372 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).
- 14 – See point 28 above.
- 15 – See point 28 above.
- 16 – See, to that effect, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 32, and Case C-240/05 *Administration de l'enregistrement et des domaines v Eurodental* [2006] ECR I-11479, paragraph 52.
- 17 – See paragraph 20 of the judgment (cited in footnote 8).
- 18 – Case C-345/99 [2001] ECR I-4493.
- 19 – See point 39 above.