

Downloaded via the EU tax law app / web

**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)

(Sixth VAT Directive – Right to deduct – Principles of immediate deduction and fiscal neutrality – Carry forward of the excess VAT to the following period or refund – One-month delay rule – Transitional provisions – Retention of the exemption)

Opinion of Advocate General Mazák delivered on 18 September 2007

Judgment of the Court (First Chamber), 18 December 2007

Summary of the Judgment

*Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Option for Member States to retain provisions derogating from the principle of immediate deduction*

*(Council Directive 77/388, Arts 17, 18(4), and 28(3)(d))*

Articles 17 and 18(4) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes are to be interpreted as not precluding national measures which are designed to accompany the abolition of a national derogating provision authorised by Article 28(3)(d) of the same directive, in so far as the national court verifies that, in its application to the specific case before it, those measures reduce the effects of the national derogating provision.

Firstly, Article 28(3)(d) of the Sixth Directive is one of the derogations from the common system of VAT provided for by that directive, in the sense that it permits Member States to continue to retain some provisions of their national law which predate that directive and which derogate from the principle of immediate deduction provided for in the first subparagraph of Article 18(2) of the Sixth Directive. Secondly, Article 28(3)(d) of the Sixth Directive, whilst it precludes the introduction of new exemptions or an extension of the scope of existing exemptions following the entry into force of the Sixth Directive, does not prevent a reduction in their scope, given the transitional nature of the derogation for which it provides.

Moreover, a different interpretation of one of the derogations provided for by the Sixth Directive, to the effect that a Member State may maintain an existing exemption but may not abolish it gradually, would be contrary to the objective pursued by that directive, which aims to abolish the derogations therefrom. Likewise, such an interpretation would undermine the uniform application of the Sixth Directive, in that a Member State might find itself compelled to maintain all the exemptions existing at the date of the entry into force of that directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system provided for therein in the field in question.

(see paras 33-34, 37, 43, operative part)

## JUDGMENT OF THE COURT (First Chamber)

18 December 2007 (\*)

(Sixth VAT Directive – Right to deduct – Principles of immediate deduction and fiscal neutrality – Carry forward of the excess VAT to the following period or refund – One-month delay rule – Transitional provisions – Retention of the exemption)

In Case C-368/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal administratif de Lyon (France), made by decision of 5 September 2006, received at the Court on 8 September 2006, in the proceedings

**Cedilac SA**

v

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

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, M. Ilešič and E. Levits, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Cedilac SA, by A. Bouzidi, avocat,

- the French Government, by G. de Bergues and J. C. Gracia, acting as Agents,
  - the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 18 September 2007

gives the following

## **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 17 and 18(4) of 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 (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 The reference was made in the context of proceedings between Cedilac SA ('Cedilac') and the Ministère de l'Économie, des Finances et de l'Industrie (Ministry of the Economy, Finance and Industry) concerning that company's request that the French State be ordered to pay to it damages for losses it claims to have suffered on account of the legislative measures that accompanied the repeal of the rule known as the 'one-month delay' rule applicable concerning the deduction of value-added tax ('VAT') charged on a taxable transaction.

## **Legal context**

### *Community legislation*

3 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'.

4 Article 18 of the Sixth Directive 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 and can be exercised under the provisions of paragraph 1.

...

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.

...'

5 Under Article 28(3)(d) of the Sixth Directive, Member States may, during the transitional period referred to in Article 28(4), 'continue to apply provisions derogating from the principle of immediate deduction laid down in the first paragraph of Article 18(2)'.

6 Article 28(4) of the Sixth Directive is worded as follows:

'The 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’.

### *National legislation*

7 Until 1 July 1993, the Code général des impôts (General Tax Code, ‘the GTC’) provided, in accordance with Article 28(3)(d) of the Sixth Directive, for a rule known as the ‘one-month delay rule’ which derogated from the principle of the immediate deduction of VAT.

8 By reason of that derogation, taxable persons were unable, contrary to the requirement of the first paragraph of Article 18(2) of the Sixth Directive, to deduct immediately from the VAT which they were liable to pay the VAT they had paid on goods not constituting fixed assets and on services. In accordance with the one-month delay rule, such a deduction could be effected only on the amount of VAT payable for the month following that in which the right to deduct arose.

9 However, Article 2, paragraph I of Law No 93-859 of 22 June 1993, the amending Finance Law for 1993 (JORF of 23 June 1993, p. 8815) (‘the 1993 Law’), repealed the one-month delay rule as from 1 July 1993 and inserted into the GTC Article 271-I, paragraph 3 of which is worded as follows:

‘The deduction of the tax paid on goods and services shall be effected by setting that tax off against the tax payable by the taxable person in respect of the month during which the right to deduct arose.’

10 Furthermore, Article 2, paragraph II of the 1993 Law introduced transitional measures which are to be found in Article 271 A of the GTC (‘the transitional measures’).

11 Thus, under Article 271 A(1) of the GTC, taxable persons who commenced their activities prior to 1 July 1993 subtracted, when making their first declaration involving the application of the principle of ‘immediate deduction’, a ‘reference deduction’ from the amount of deductible VAT, which was equivalent to the average monthly amount of tax deductible during the months of August 1992 to July 1993. The amount of that deduction was then converted into a debt on the Treasury and made subject to specific detailed rules for repayment.

12 Article 271 A(2) of the GTC provides, inter alia, that where the amount of the reference deduction could not be subtracted in its entirety from the amount of VAT deductible, the surplus is to be deducted the following months from the amount of VAT deductible in respect of goods not constituting fixed assets and services.

13 Article 271 A(5) of the GTC provides that, where the amount of the reference deduction does not exceed FRF 10 000 (EUR 1 524.49), taxable persons are not, in principle, required to subtract the reference deduction in accordance with Article 271 A(1) of the GTC.

14 Pursuant to Decree No 93-1078 of 14 September 1993 (JORF of 15 September 1993, p. 12883), Decree No 94-296 of 6 April 1994 (JORF of 16 April 1994, p. 5646) and Decree No 2002-179 of 13 February 2002 (JORF of 15 February 2002, p. 2968), 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;
- 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; and
- in 2002, all the remaining debts were repaid in total in advance.

15 The interest rate payable on those debts was 4.5% for 1993, 1% for 1994 and 0.1% for the interest relating to each of the following years.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

16 On 26 December 2002, Cedilac requested that the French State pay it the sum of EUR 1 524 806.62 by way of damages for losses which it claims to have suffered from 1993 to 2002 as a result of the application of the transitional measures.

17 As the Minister for Economic Affairs, Finance and Industry failed to reply to that claim for damages, Cedilac brought an action before the Tribunal administratif de Lyon (Administrative Court, Lyon) against that implicit decision of rejection.

18 Before ruling on Cedilac's application, that court, by judgment of 15 November 2005, requested the opinion of the Conseil d'État (French Council of State) on the question whether the transitional measures are compatible with Articles 17 and 18(4) of the Sixth Directive.

19 By opinion dated 14 June 2006, the Conseil d'État took the view that the question put by the Tribunal administratif de Lyon was of such a difficult nature as to justify a reference for a preliminary ruling to the Court.

20 In those circumstances, the Tribunal administratif de Lyon decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'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]?'

21 The national court, taking the view that, in the light of the number of actions already initiated before the administrative courts and the considerable financial stake for the budget of the French State, the question called for an urgent answer from the Court, asked the Court to apply the accelerated procedure to the reference for a preliminary ruling in accordance with the first paragraph of Article 104a of the Rules of Procedure of the Court of Justice.

22 The President of the Court rejected that request by Order of 25 September 2006, taking the view that the conditions laid down in the first paragraph of Article 104a had not been met.

23 By Order of the President of the Court of 23 March 2007, the application to intervene submitted by the Fromagerie des Chaumes SAS was rejected as inadmissible.

### **The question referred for a preliminary ruling**

24 By its question, the national court asks essentially whether Articles 17 and 18(4) of the Sixth Directive are to be interpreted as precluding national measures such as the transitional measures.

25 By suggesting that the Court should answer the question referred by the national court, as stated in the preceding paragraph, in the affirmative, Cedilac submits that the right to immediate deduction constitutes a fundamental principle of the common system of VAT established by the Community legislature, with the result that, in the absence of any derogating provision, that right

should be capable of being exercised immediately in respect of all the VAT charged on transactions relating to inputs.

26 By contrast, the French Government and the Commission propose that the Court's answer to that question should be in the negative, by expounding arguments which are similar to a great extent.

27 In that regard, they state, first, that the one-month delay rule constituted a legitimate derogation from the principle of the immediate deduction of VAT, for which Article 28(3)(d) of the Sixth Directive constitutes the basis, and that the transitional measures are only measures accompanying the abolition of that rule.

28 In particular, the transitional measures, by staggering over a period of several years part of the budgetary burden on the State arising out of the abolition of the one-month delay rule, made possible the transposition into French national law of the general scheme of immediate deduction laid down in Article 18(2) of the Sixth Directive.

29 In those circumstances, an interpretation of the Sixth Directive which prohibits provisions such as those put into application by the transitional measures has the effect of dissuading a Member State from bringing its legislation into line with the general scheme and the objectives pursued by the same directive.

30 Secondly, the Commission maintains that the position of taxable persons subject to the transitional measures is clearly more favourable than that in which they found themselves when the one-month delay rule was applicable.

31 In order to answer the question referred for a preliminary ruling, it should be noted, at the outset, that 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. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, Case C 62/93 *BP Soupergaz* [1995] ECR I-1883, paragraph 18, and Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 43).

32 The Court has also stated that given that any limitation on the right of deduction of VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States, derogations are permitted only in the cases expressly provided for in the Sixth Directive (see, to that effect, *BP Soupergaz*, paragraph 18, and Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 34). However, such derogations can only be transitional in nature, as the objective of Article 28(4) of the Sixth Directive is their abolition (see, to that effect, Case C-136/97 *Norbury Developments* [1999] ECR I-2491, paragraph 20; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 32; Case C-345/99 *Commission v France* [2001] ECR I-4493, paragraph 21; and Case C-240/05 *Eurodental* [2006] ECR I-11479, paragraph 52).

33 In the present case, firstly, Article 28(3)(d) of the Sixth Directive is precisely one of the derogations from the common system of VAT provided for by that directive, in the sense that it permits Member States to continue to retain some provisions of their national law which predate that directive and which derogate from the principle of immediate deduction provided for in the first subparagraph of Article 18(2) of the Sixth Directive.

34 Secondly, Article 28(3)(d) of the Sixth Directive, whilst it precludes the introduction of new exemptions or an extension of the scope of existing exemptions following the entry into force of the

Sixth Directive, does not prevent a reduction in their scope, given the transitional nature of the derogation for which it provides (see, by analogy, *Commission v France*, paragraph 21).

35 In that regard, it must be borne in mind that in paragraph 20 of the judgment in *Norbury Developments*, which concerned another transitional provision of the Sixth Directive, namely Article 28(3)(b) thereof, relating to certain exemptions from VAT, the Court held that amendments inserted into the legislation of a Member State which had not widened the scope of the VAT exemption in question, but had on the contrary reduced it, had not been adopted in disregard of the wording of that provision.

36 Clearly, Article 28(3)(d) of the Sixth Directive lends itself to a similar interpretation. Thus, in so far as the legislation of a Member State reduces the scope of an existing derogation from the principle of immediate deduction provided for by that article, it must be held that the legislation is covered by that provision and does not infringe Article 17(1) of that directive.

37 Moreover, as the Court held in *Norbury Developments*, a different interpretation of one of the derogations provided for by the Sixth Directive, to the effect that a Member State may maintain an existing exemption but may not abolish it gradually, would be contrary to the objective pursued by that directive, which aims to abolish the derogations therefrom. Likewise, such an interpretation would undermine the uniform application of the Sixth Directive, in that a Member State might find itself compelled to maintain all the exemptions existing at the date of the entry into force of that directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system provided for therein in the field in question (see, to that effect, *Norbury Developments*, paragraph 21).

38 In the case in the main proceedings, it must be pointed out that the transitional measures are only accompanying measures of limited duration which have the aim of reducing the impact on the budget of the State, of the transition, on 1 July 1993, from the one-month delay rule to the application of the principle of immediate deduction.

39 Moreover, it must be stated first that, as is apparent from the case-file, the transitional measures, in contrast to the effect of the application of the one-month delay rule, allows a not insignificant number of taxable persons, including, in particular, those who commenced their activities after 1 July 1993 and those with a debt not exceeding FRF 10 000, to rely, as from 1 July 1993 and without any limitation, on the principle of immediate deduction.

40 Moreover, such measures also allow the debts which arose after their implementation to produce interest, in contrast to the debts resulting from the application of the one-month delay rule.

41 Lastly, the transitional measures reduce the taxable person's debt on the Treasury to the amount of the reference deduction only, by providing for the immediate deduction of the difference between that amount and the total amount of deductible VAT and guarantee the staggered repayment of the amount of the reference deduction. Thus, those measures in end effect made it possible, as from 2002, for the principle of immediate deduction to be applied in France without any derogation.

42 As stated by Advocate General in points 52 and 53 of his Opinion, subject to verification by the national court in each specific case, the transitional measures have the effect of reducing, in principle, the scope of application of the one-month delay rule.

43 Therefore, the answer to the question referred for a preliminary ruling must be that Articles 17 and 18(4) of the Sixth Directive are to be interpreted as not precluding national measures such as the transitional measures, which are designed to accompany the abolition of a national

derogating provision authorised by Article 28(3)(d) of the same directive, in so far as the national court verifies that, in its application to the specific case before it, those measures reduce the effects of the national derogating provision.

### **Costs**

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Articles 17 and 18(4) of 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, are to be interpreted as not precluding national measures such as the transitional measures provided for by Law No 93-859 of 22 June 1993, the amending Finance Law for 1993, which are designed to accompany the abolition of a national derogating provision authorised by Article 28(3)(d) of the same directive, in so far as the national court verifies that, in its application to the specific case before it, those measures reduce the effects of the national derogating provision.**

[Signatures]

\* Language of the case: French.