Joined Cases C-538/08 and C-33/09

X Holding BV

v

Staatssecretaris van Financiën

and

Oracle Nederland BV

v

Inspecteur van de Belastingdienst Utrecht-Gooi

(References for a preliminary ruling from the

Hoge Raad der Nederlanden and the Gerechtshof Amsterdam)

(Sixth VAT Directive – Right to deduct input tax – National legislation excluding certain categories of goods and services from the right to deduct – Option for Member States to retain rules excluding the right to deduct which were in existence when the Sixth VAT Directive entered into force – Amendment after that directive had entered into force)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Exclusion from the right to make deductions – Option for Member States to retain exclusions in existence when the Sixth Directive entered into force*

(Council Directives 67/228, Art. 11(4), and 77/388, Art. 17(6))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Exclusion from the right to make deductions – Option for Member States to retain exclusions in existence when the Sixth Directive entered into force*

(Council Directive 77/388, Art. 17(6))

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Exclusion from the right to make deductions – Option for Member States to retain exclusions in existence when the Sixth Directive entered into force*

(Council Directive 77/388, Art. 17(6))

1. Article 11(4) of Second Directive 67/228 on the harmonisation of legislation of Member States concerning turnover taxes and Article 17(6) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as not precluding the tax legislation of a Member State applicable on the date when the Sixth Directive entered into force from excluding from deduction value added tax that relates to categories of expenditure concerning, on the one hand, the provision of ‘private transport’, ‘food’, ‘drink’, ‘accommodation’ and ‘opportunities for recreation’ to the members of staff of a taxable person and, on the other

hand, the provision of ‘business gifts’ or ‘other gifts’, where those categories of expenditure that have been excluded from the right of deduction have been adequately defined by such legislation. The option given to Member States by the second subparagraph of Article 17(6) of the Sixth Directive presupposes that those Member States adequately define the nature or the purpose of the goods and services in respect of which the right to deduct is excluded in order to ensure that that option is not used to authorise general exclusions from that system.

(see paras 44-45, 57, operative part 1)

2. Article 17(6) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as not precluding national legislation, enacted before the Sixth Directive entered into force, under which a taxable person may deduct value added tax paid on the acquisition of certain goods and services used partly for private purposes and partly for professional purposes not in full but only in proportion to their use for professional purposes.

Even though, taking into account the scope of the option given Member States by that provision, those Member States are entitled to retain, in full, exclusions from the right to deduct in respect of categories of expenditure that are adequately defined, Member States may also restrict the scope of an exclusion from the right to deduct in respect of such categories of expenditure, since such legislation is consistent with the objective of that directive, which is reflected in particular in Article 17(2) thereof.

(see paras 59-61, operative part 2)

3. Article 17(6) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as not precluding an amendment by a Member State, after the entry into force of that directive, to an existing exclusion from the right of deduction, designed in principle to restrict the scope of that exclusion but in respect of which it cannot be ruled out that, in an individual case in a particular tax year, the scope of that exclusion might be extended by reason of the flat-rate nature of the amended scheme. The mere possibility that such an unfavourable effect may arise cannot be a reason to take the view that such a legislative amendment breaches Article 17(6) of that directive, given that that amendment is, in general, more favourable to taxable persons than was the scheme in existence up to that date. In those circumstances, the existence, even if established, of such an isolated or exceptional situation would not affect the principle that the amendment to the national legislation which was adopted after the entry into force of the Sixth Directive has reduced the scope of the previously existing exclusions from the right to deduct.

(see paras 70-71, operative part 3)

JUDGMENT OF THE COURT (Third Chamber)

15 April 2010 (*)

(Sixth VAT Directive – Right to deduct input tax – National legislation excluding certain categories

of goods and services from the right to deduct – Option for Member States to retain rules excluding the right to deduct which were in existence when the Sixth VAT Directive entered into force – Amendment after that directive had entered into force)

In Joined Cases C?538/08 and C?33/09,

TWO REFERENCES for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands) (C?538/08) and from the Gerechtshof Amsterdam (Netherlands) (C?33/09), made by decisions of 14 November 2008 and 20 January 2009 respectively, received at the Court on 4 December 2008 and 26 January 2009, in the proceedings

X Holding BV

v

Staatssecretaris van Financiën (C?538/08),

and

Oracle Nederland BV

v

Inspecteur van de Belastingdienst Utrecht-Gooi (C?33/09),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 December 2009,

after considering the observations submitted on behalf of:

– Oracle Nederland BV, by H. Hop, advocaat, and P. Schrijver, belastingadviseur,

– the Netherlands Government, by C.M. Wissels, M. de Mol and Y. de Vries, acting as Agents,

– the Greek Government, by O. Patsopoulou, S. Trekli, V. Karra and G. Konstantinos, acting as Agents,

– the European Commission, by D. Triantafyllou and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 11(4) of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the

common system of value added tax (OJ, English Special Edition 1967, p. 16; 'the Second Directive') and Articles 6(2) and 17(2) and (6) 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 references were made in the context of two actions brought by, on the one hand, X Holding BV ('X Holding') against the Staatssecretaris van Financiën (State Secretary for Finance) and, on the other hand, Oracle Nederland BV ('Oracle') against the Inspecteur van de Belastingdienst Utrecht-Gooi (Inspector of Taxes, Utrecht-Gooi; 'the Inspector'), in respect of the right to deduct value added tax ('VAT') for certain categories of expenses.

Legal context – Community law

3 Article 11(1) of the Second Directive provided:

'Where goods and services are used for the purposes of his undertaking, the taxable person shall be authorised to deduct from the tax for which he is liable:

(a) the value added tax invoiced to him in respect of goods supplied to him or in respect of services rendered to him;

…'

4 Article 11(4) of the Second Directive provided:

'Certain goods and services may be excluded from the deduction system, in particular those capable of being exclusively or partially used for the private needs of the taxable person or of his staff.'

5 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

6 Article 6(2) of the Sixth Directive is worded as follows:

'The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

7 According to Article 17(2) and (6) of the Sixth Directive:

‘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 four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from 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.’

Legal context – national law

8 Article 2 of the Law of 1968 on turnover tax (Wet op de omzetbelasting 1968; ‘the Law on VAT’) states:

‘A trader may deduct from the tax to be paid on supplies of goods and services the tax charged on supplies of goods and services to him, acquisitions of goods effected by him within the Community and imports of goods intended for him.’

9 Article 15(1) of the Law on VAT is worded as follows:

‘The tax referred to in Article 2 which is deductible by the trader shall be:

(a) the tax which, in the period covered by the return, other traders have charged him by means of an invoice issued in accordance with the applicable rules, in respect of supplies of goods and services which they have made to him;

…’

10 Article 16(1) of the Law on VAT provides:

‘The deduction referred to in the first subparagraph of Article 15(1) may, in certain cases, be totally or partially excluded by royal decree in order to prevent a situation in which goods and services relating to luxury expenditure, for the purposes of persons who are not traders ... are totally or partially exempted from tax.’

11 Article 1 of the Decree of 1968 concerning exclusion from the right to make deductions from turnover tax (Besluit uitsluiting aftrek omzetbelasting 1968; ‘the VAT Decree’), in the version in force from 1 January 1969 to 31 October 1979, provided as follows:

1. The deduction referred to in Article 15(1) of the [Law on VAT] is not allowed in cases where, and to the extent to which, the goods and services are used for:

…

(b) giving business gifts or other gifts to persons in relation to whom, if they had been charged or were to be charged the corresponding value added tax, this would be entirely or mainly non-

deductible;

(c) providing the staff of the trader with food and drink, accommodation, payment in kind, opportunities for sports and leisure activities, or private transport, or for other personal purposes of the staff concerned.

2. “Business gifts” or “other gifts” shall be understood to mean any supplies provided by the trader in furtherance of business relationships or out of generosity towards others without his receiving consideration or for which he receives consideration which is lower than the acquisition or production costs or, in the case of services, the cost price of such services excluding value added tax.’

12 Article 2 of the VAT Decree provided:

‘Where the trader has charged a fee in respect of a supply referred to in Article 1(1)(b) or (c), and therefore owes value added tax, a deduction up to the amount of tax owed by the trader in respect of the supply concerned shall not be excluded.’

13 Article 3 of the VAT Decree provided:

‘If the total of the acquisition or production costs or the cost price, excluding value added tax, of all the supplies within the meaning of Article 1(1)(b) or (c) provided by the trader in one financial year in respect of a given person does not exceed 250 [Dutch] guilders (“NLG?), those supplies shall fall outside the scope of the present decree.’

14 With effect from 1 January 1980, the VAT Decree was amended to introduce a special scheme for the provision of food and drink; the other provisions of the decree remained unaltered.

15 Accordingly, as from 1 January 1980, the provision of food and drink was excluded from Article 1(1)(c) of the VAT Decree. A new Article 3 was inserted, providing for exclusion of the deduction of VAT payable on food and drink. The amount mentioned in the former Article 3 (now Article 4) of the VAT Decree was increased from NLG 250 to NLG 500.

16 From that time on, Articles 3 and 4 of the VAT Decree have read as follows:

‘Article 3

1. If goods and services are used by the trader for the purpose of providing food and drink to his staff and he has charged less for this purpose than the amount defined in paragraph 2, deduction shall be excluded up to a maximum of 6% of the difference between that amount and the amount which has been charged.

2. The amount referred to in paragraph 1 shall consist in the acquisition costs of the food and drink, excluding value added tax, plus 25%. If the trader has manufactured the food and drink himself, the acquisition costs of the raw materials used shall be taken into account instead of the acquisition costs of the food and drink.

Article 4

1. If the total of the acquisition or production costs or the cost price, excluding value added tax, of all the supplies within the meaning of Article 1(1)(b) or (c) provided by the trader in one financial year in respect of a given person, and the portion of the difference referred to in Article 3(1) and applicable to that person, does not exceed NLG 500, those services and that portion of the abovementioned difference shall not be taken into account for the purposes of the application of

the present decree.

2. In calculating the total referred to in paragraph 1, the difference referred to in Article 3(1) shall not be taken into account if, with regard to the supply of food and drink to the staff of the trader, the deduction was excluded pursuant to Article 3.’

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C?538/08

17 During the period between 1 January 1997 and 31 December 1999, X Holding purchased 34 passenger cars from car dealers. It retained the cars for a limited period, after which it sold them.

18 X Holding deducted in full the VAT which it had been charged when it purchased those cars. It paid on declaration the VAT charged on the supply of each car.

19 On 10 July 2001, an investigation was opened into the accuracy of the VAT returns submitted by X Holding during the years in question. In a report dated 13 November 2002, the finance inspectorate concluded that most of the cars purchased had not been used for the purposes of the company and that X Holding had therefore wrongly claimed deduction of the input VAT paid. Consequently, an additional VAT assessment in the amount of NLG 887 852 (EUR 402 889) was imposed.

20 X Holding lodged an objection against that decision. In the course of the subsequent review, the finance inspectorate concluded that 4 of the 34 cars had been purchased and used in the context of the business exclusively for commercial purposes. In those circumstances, the deduction of the input VAT paid on the acquisition of those four cars was allowed. The additional VAT assessment was therefore reduced to NLG 856 605 (EUR 388 710).

21 X Holding brought proceedings against that decision before the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam). That court, having ruled that the 30 cars which were the subject of an additional VAT assessment had been used for both business and private purposes, dismissed the action.

22 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), hearing the appeal on a point of law brought against the judgment of the Gerechtshof Amsterdam, pointed out that Article 11(4) of the Second Directive allowed Member States to exclude certain goods and services from the deduction system, in particular those capable of being exclusively or partially used for the private needs of the taxable person or those of his staff. That provision therefore allowed Member States to exclude from that system certain categories of motor vehicles, but did not allow them to exclude from it all goods in so far as they are used for the private purposes of the taxable person. Thus, the option provided applies only to maintaining exclusions from deduction with regard to categories of expenditure defined by reference to the nature of the goods or services rather than by reference to the use to which they are put or the manner in which they are used.

23 The Hoge Raad der Nederlanden noted that the restriction of the deduction provided for in Article 1(1)(c) of the VAT Decree also applies to goods and services used ‘for other personal purposes of the staff [of the trader]’ and to payments of wages in kind. As the system concerns all goods for private use, the Hoge Raad considered that restriction to be, on the whole, inadequately defined and too broad. However, it noted that the provision describes some categories of goods and services more specifically, in particular goods and services used to provide opportunities for private transport to the staff of the trader.

24 The Hoge Raad der Nederlanden therefore stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive be interpreted as meaning that a Member State wishing to take advantage of the possibility for which those provisions provide of (retaining) the exclusion of deduction with respect to categories of expenditure which are described as “providing the opportunity for private transport” has satisfied the condition requiring the designation of a category of adequately defined goods and services?

(2) If the answer to the first question is in the affirmative, do Article 6(2) and Article 17(2) and (6) of the Sixth Directive leave room for national legislation such as that at issue, which was adopted before that directive entered into force and under which a taxable person may not deduct in full the VAT paid on the acquisition of certain goods and services which are used partly for business purposes and partly for private purposes of the staff, but may do so only to the extent that the VAT is attributable to use for business purposes?’

Case C?33/09

25 In May 2005, Oracle provided, in return for payment, food and drink to its staff. It also secured the services of a disc-jockey for a staff function and arranged for accommodation to be found for one of its employees. By way of a business gift, Oracle also invited third parties to a golfing event. In addition, it placed at the disposal of some of its staff cars which belonged to the company or which the company had leased, partly in return for consideration.

26 In its VAT declaration for May 2005, Oracle identified VAT in the amount of EUR 62 127 as non-deductible; the total amount of VAT it paid for that month amounted to EUR 9 768 326.

27 The said amount of EUR 62 127 related to the following items:

– leasing cars

– without contribution from staff member EUR 8 480

– with contribution from staff member EUR 41 520

– own cars EUR 306

– mobile phones EUR 6 358

– catering EUR 3 977

– entertainment EUR 850

– accommodation EUR 380

– business gifts EUR 256

28 Oracle subsequently lodged a complaint, submitting that it had in fact a right to deduct the VAT relating to those expenses.

29 The Inspector rejected that complaint as unfounded.

30 Oracle brought an action against that decision before the Rechtbank te Haarlem (District Court, Haarlem).

31 The Rechtbank te Haarlem held that the Inspector had been wrong not to allow the deduction of input VAT in respect of the costs of mobile phones, the costs of real estate brokerage and the payment for a golfing event, given that, in respect of those costs, the restriction of the deduction had not been adequately defined. By contrast, the Rechtbank te Haarlem took the view that the other categories of non-deductible expenses were adequately defined and that, consequently, the Inspector had been right to refuse the deduction of input VAT in respect of the items at issue.

32 Both Oracle and the Inspector appealed against that judgment to the Gerechtshof Amsterdam.

33 Before the Gerechtshof Amsterdam, Oracle maintained, inter alia, that the applicable provisions of the domestic legislation at issue, in excluding or restricting the right to deduct VAT on the supply of the goods and services in question in the main action, were contrary to Article 11(4) of the Second Directive and to Article 6(2) of the Sixth Directive. For his part, the Inspector claimed that the refusal of deduction of VAT was based on a provision which had been introduced in the Netherlands before the entry into force of the Sixth Directive, in accordance with the option given to Member States by Article 17(6) of that directive, which is still applicable.

34 In those circumstances, the Gerechtshof Amsterdam stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive to be interpreted as meaning that a Member State wishing to make use of the possibility offered by those articles of (retaining) the exclusion of deduction in respect of categories of expenditure described as [follows]:

– “the provision of food and drink to the staff of the trader”;

– “giving business gifts or other gifts to persons in relation to whom, if they had been charged or were to be charged the relevant tax, such tax would be entirely or mainly non-deductible”;

– “providing the staff of the trader with accommodation”;

– “providing the staff of the trader with opportunities for recreation”,

has satisfied the condition requiring the designation of a category of adequately defined goods and services?

(2) If the answer to the first question is in the affirmative for one of the categories listed, do Article 6(2) and Article 17(2) and (6) of the Sixth Directive leave room for a national statutory provision, such as that at issue, which was enacted before the Sixth Directive entered into force and on the basis of which a taxable person may not deduct in full the turnover tax paid on the

acquisition of certain goods or services because a fee was charged in respect thereof which incurred value added tax, but only an amount up to the amount of tax owed in respect of that supply?

(3) If, in respect of “the provision of food and drink”, the condition is satisfied which requires the designation of a category of adequately defined goods and services, does Article 17(6) of the Sixth Directive preclude an amendment to an existing exclusion of the deduction, from which amendment it seems likely that in principle the scope of the exclusion will be restricted but where it cannot be ruled out that in an individual case in a particular year the scope of the restriction of the deduction might be extended, in particular through the flat-rate nature of the amended scheme?’

35 By order of the President of the Court of 17 June 2009, Cases C?538/08 and C?33/09 were joined for the purposes of the oral procedure and judgment.

The questions referred for a preliminary ruling

The first question referred in each of the two cases

36 By these questions, the referring courts ask, essentially, whether Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive authorise a Member State to exclude from the right to deduct input VAT a certain number of goods and services listed in national legislation, regard being had to the fact that that legislation was applicable when the Sixth Directive entered into force.

37 In order to answer those questions, it is necessary first of all to bear in mind that the right of deduction laid down in Article 6(2) of the Sixth Directive, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT and in principle may not be limited (see Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 43; Case C?409/99 *Metropol and Stadler* [2002] ECR I?81, paragraph 42; and Case C?465/03 *Kretztechnik* [2005] ECR I?4357, paragraph 33).

38 The principle of the right to deduct is, however, subject to the derogation in Article 17(6) of the Sixth Directive, and in particular the second subparagraph thereof. The Member States are thereby authorised to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article (see Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 19, and Case C?371/07 *Danfoss and AstraZeneca* [2008] ECR I?9549, paragraph 28).

39 However, as none of the proposals put to the Council by the Commission under the first subparagraph of Article 17(6) of the Sixth Directive has been adopted by the Council, the Member States may retain their existing legislation in regard to exclusion from the right to deduct VAT until such time as the European Union legislature has established a common system of exclusions and thus brought about the progressive harmonisation of national VAT legislation. European Union law therefore does not yet contain any provision listing the expenditure excluded from the right to deduct VAT (see Case C-280/04 *Jyske Finans* [2005] ECR I?10683, paragraph 23, and *Danfoss and AstraZeneca*, paragraph 29).

40 None the less, the Court has held that Article 17(6) of the Sixth Directive presupposes that the exclusions which Member States may retain pursuant to that provision were lawful under the Second Directive, which pre-dated the Sixth Directive (see Case C?305/97 *Royscot and Others* [1999] ECR I?6671, paragraph 21).

41 In this respect, while Article 11(1) of the Second Directive introduced the right of deduction, Article 11(4) thereof provided that the Member States could exclude from the deduction system certain goods and services, in particular those capable of being exclusively or partially used for the private needs of the taxable person or of his staff.

42 Article 11(4) of the Second Directive did not therefore confer on Member States an unfettered discretion to exclude all, or almost all, goods and services from the right of deduction and thereby deprive of its substance the system established by Article 11(1) of the Second Directive (see, to that effect, *Royscot and Others*, paragraph 24).

43 Furthermore, and in view of the strict interpretation which it must be given as a derogation, the second subparagraph of Article 17(6) of the Sixth Directive cannot be regarded as permitting a Member State to maintain a restriction of the right to deduct VAT which may also apply in a general manner to any expenditure related to the acquisition of goods, irrespective of the nature or purpose of that restriction (see Case C?74/08 *PARAT Automotive Cabrio* [2009] ECR I-0000, paragraph 28).

44 It follows from the foregoing that the option given to Member States by the second subparagraph of Article 17(6) of the Sixth Directive presupposes that those Member States adequately define the nature or the purpose of the goods and services in respect of which the right to deduct is excluded in order to ensure that that option is not used to authorise general exclusions from that system (see, to that effect, *PARAT Automotive Cabrio*, paragraph 29).

45 It is thus necessary to examine whether categories of expenditure that have been excluded from the right of deduction, such as those referred to in the national legislation at issue in the main proceedings, have been adequately defined.

46 In the first place, with regard to expenditure such as that at issue in the first question in Case C?538/08, namely expenditure relating to one of the transactions referred to in Article 1(1)(c) of the VAT Decree, in this case goods and services used by the trader to provide its staff with ‘private transport’, it must be noted that that particular category of transactions relates to goods and services used to offer private transport and the provision of a vehicle for transporting staff members of the taxable person from their place of residence to their place of employment.

47 The specific characteristics of such transactions must be considered to constitute an adequate description of the nature or purpose of the goods and services to which they relate for the purposes of the requirements laid down by the case-law in respect of the system of derogations set out in Article 17(6) of the Sixth Directive.

48 In the second place, it is necessary to assess whether expenditure such as that at issue in the first question in Case C?33/09 may also be regarded as meeting those requirements.

49 In the present context, what is at issue is the provision of ‘food’ and ‘drink’ to the trader’s staff, the provision of ‘accommodation’ to members of that staff, the giving, under certain conditions, of ‘business gifts’ or ‘other gifts’ and the granting to that staff of opportunities ‘for sports and leisure activities’.

50 As regards categories of expenditure such as those relating to the provision of food and drink as well as accommodation, these must be considered to be adequately described for the purposes of the requirements laid down by the abovementioned case-law.

51 As the Gerechtshof Amsterdam states, the category ‘food and drink’ concerns foodstuffs

and beverages as well as the goods and services involved in the making and preparation of such foodstuffs and beverages. The other category of expenditure, namely that relating to the provision of accommodation, comprises, as the Gerechtshof Amsterdam points out, making accommodation available to members of the trader's staff as well as the cost incurred in using agency or brokerage services with a view to providing such accommodation.

52 As regards categories such as those relating to 'opportunities for sports and leisure activities' and to 'business gifts' and 'other gifts', these must also be considered to be adequately defined for the purposes of the abovementioned requirements.

53 The category 'business gifts' is defined in more detail by Article 1(2) of the VAT Decree, according to which 'business gifts' or 'other gifts' are to be understood to mean any supplies provided by the trader 'in furtherance of business relationships or out of generosity towards others'.

54 Likewise, the category 'providing the staff of the trader with opportunities for recreation' is restricted to certain goods and services. These may be identified by taking into account the measures normally adopted by companies to motivate their staff.

55 This interpretation is, furthermore, supported by the second sentence of the first subparagraph of Article 17(6) of the Sixth Directive, according to which, if the Council does take legislative action in the matter, expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment, is under no circumstances to be deductible.

56 Consequently, all the categories of expenditure examined above must be considered to be consistent with the system of derogations established by Article 17(6) of the Sixth Directive.

57 In the light of the foregoing considerations, the answer to the first question referred in each of the two cases is that Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive must be interpreted as not precluding the tax legislation of a Member State from excluding from deduction VAT which relates to categories of expenditure concerning, on the one hand, the provision of 'private transport', 'food', 'drink', 'accommodation' and 'opportunities for recreation' to the members of staff of a taxable person and, on the other hand, the provision of 'business gifts' or 'other gifts'.

The second question referred in each of the two cases

58 Given that the first question referred in each of the two cases has been answered in the affirmative, it is necessary to examine, in a manner identical for both cases, whether Article 6(2) and Article 17(2) and (6) of the Sixth Directive preclude national legislation, adopted before that directive entered into force, under which a taxable person may deduct VAT paid on the acquisition of goods and services relating to one of the categories at issue in the cases in the main proceedings which are used partly for private purposes and partly for professional purposes not in full but only in proportion to their use for professional purposes.

59 In order to reply to that question, it must be noted that, even though, taking into account the scope of the option provided to Member States by Article 17(6) of the Sixth Directive, those Member States are entitled to retain, in full, exclusions from the right to deduct in respect of categories of expenditure that are adequately defined, Member States may also restrict the scope of an exclusion from the right to deduct in respect of such categories of expenditure.

60 Such legislation is consistent with the objective of the Sixth Directive, which is reflected in particular in Article 17(2) thereof.

61 Therefore, the answer to the second question referred in each of the two cases is that Article 17(6) of the Sixth Directive must be interpreted as not precluding national legislation, enacted before the Sixth Directive entered into force, under which a taxable person may deduct VAT paid on the acquisition of certain goods and services used partly for private purposes and partly for professional purposes not in full but only in proportion to their use for professional purposes.

The third question referred in Case C?33/09

62 The first question in Case C?33/09 having been answered in the affirmative as regards the category of goods and services relating to 'the provision of food and drink', it is now necessary to examine the third question referred in that case.

63 In that final question, the Gerechtshof Amsterdam asks whether Article 17(6) of the Sixth Directive precludes an amendment by a Member State, after the entry into force of that directive, to an existing exclusion from the right of deduction, designed in principle to restrict the scope of that exclusion but in respect of which it cannot be ruled out that, in an individual case in a particular tax year, the scope of that exclusion might be extended by reason of the flat-rate nature of the amended scheme.

64 In order to reply to that question, it must be noted by way of a preliminary point that it concerns only the particular situation of the partial exclusion from the right to deduct of the category of expenditure relating to the 'provision of food and drink [to the staff of the trader]' in Article 1(1)(c) of the VAT Decree.

65 It is necessary to recall in this regard that the VAT Decree was amended in respect of that category of expenditure after the Sixth Directive had entered into force.

66 As the Gerechtshof Amsterdam has pointed out, that legislative amendment had the effect of reducing the scope of the exclusion from the right to deduct for the category of expenditure at issue.

67 So far as concerns compliance of such a legislative amendment with Article 17(6) of the Sixth Directive, the Court has held that, where, after the entry into force of the Sixth Directive, a Member State amends the scope of existing exemptions from deduction so as to reduce that scope and thereby brings its legislation into line with the objective of the Sixth Directive, that legislation must be considered to be covered by the derogation in the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2) thereof (see *Commission* v *France*, paragraph 22; *Metropol and Stadler*, paragraph 45; and *Danfoss and AstraZeneca*, paragraph 32).

68 As regards the possibility, referred to by the Gerechtshof Amsterdam but which the parties agree is irrelevant to the main proceedings, that, in exceptional cases, the amended scheme of partial, flat-rate exclusion from the right to deduct, introduced after the Sixth Directive had entered into force, may lead to a less favourable result than under the previous scheme, by reason of the specific rules for applying the new scheme, it must be held that that circumstance does not undermine the principle of interpretation laid down in the abovementioned case-law.

69 As the Gerechtshof Amsterdam has stated, such a situation is likely to arise only where the

taxable person offers food and drink to his staff, without contributing either to their preparation or to facilitating their consumption, while exceeding a certain threshold per member of staff during the same accounting year.

70 As the Advocate General stated in point 86 of his Opinion, the mere possibility that such an unfavourable effect may arise cannot be a reason to take the view that such a legislative amendment, introduced after the entry into force of the Sixth Directive, breaches Article 17(6) of that directive, given that that amendment is, in general, more favourable to taxable persons than was the scheme in existence up to that date. In those circumstances, the existence, even if established, of such an isolated or exceptional situation would not affect the principle that the amendment to the national legislation which was adopted after the entry into force of the Sixth Directive has reduced the scope of the previously existing exclusions from the right to deduct.

71 Consequently, Article 17(6) of the Sixth Directive must be interpreted as not precluding an amendment by a Member State, after the entry into force of that directive, to an existing exclusion from the right of deduction, designed in principle to restrict the scope of that exclusion but in respect of which it cannot be ruled out that, in an individual case in a particular tax year, the scope of that exclusion might be extended by reason of the flat-rate nature of the amended scheme.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 11(4) of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax and Article 17(6) 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 must be interpreted as not precluding the tax legislation of a Member State from excluding from deduction value added tax which relates to categories of expenditure concerning, on the one hand, the provision of 'private transport', 'food', 'drink', 'accommodation' and 'opportunities for recreation' to the members of staff of a taxable person and, on the other hand, the provision of 'business gifts' or 'other gifts'.**

2. **Article 17(6) of Sixth Directive 77/388 must be interpreted as not precluding national legislation, enacted before the Sixth Directive entered into force, under which a taxable person may deduct value added tax paid on the acquisition of certain goods and services used partly for private purposes and partly for professional purposes not in full but only in proportion to their use for professional purposes.**

3. **Article 17(6) of Sixth Directive 77/388 must be interpreted as not precluding an amendment by a Member State, after the entry into force of that directive, to an existing exclusion from the right of deduction, designed in principle to restrict the scope of that exclusion but in respect of which it cannot be ruled out that, in an individual case in a particular tax year, the scope of that exclusion might be extended by reason of the flat-rate nature of the amended scheme.**

[Signatures]

* Language of the cases: Dutch.