APPLICATION - for a direction that the appeals of the first five Appellants be struck out - application dismissed - VATTR 1986 Rules 18(1)(a) and 19(3)

APPLICATION - for a direction that the first five Appellants be joined as parties to the appeal of the sixth Appellant - application allowed - VATTR Rule 19(3)

APPLICATION - for directions that certain issues be heard as preliminary issues and for other directions leading to the hearing of the appeal - application allowed in part - VATTR Rule 19(3)

LONDON TRIBUNAL CENTRE

CRESTA HOLIDAYS LIMITED (1) AIRTOURS PLC (2) GOING PLACES LEISURE TRAVEL LIMITED (3) SWISS TRAVEL SERVICES LIMITED (4) PANORAMA HOLIDAY GROUP LIMITED (5)	Appellants
-and-	
THE COMMISSIONERS OF CUSTOMS AND EXCISE	Respondents
CGNU PLC	Appellant
-and-	
THE COMMISSIONERS OF CUSTOMS AND EXCISE	Respondents

Tribunal: DR A N BRICE (Chairman)

Sitting in public in London on 7 July 2000

Mr Gerald Barling QC with Mr Michael Conlon, instructed by Messrs Slaughter & May, Solicitors, for Appellants (1), (2), (3), (4) and (5)
Mr Greg Sinfield of Messrs Lovells, Solicitors, for CGNU Plc
Dr Paul Lasok QC, instructed by the Solicitor for the Customs and Excise, for the Respondents

REASONS FOR DIRECTIONS

The applications

1. On 13 April 2000 Customs and Excise applied for a direction that the appeals of Cresta Holidays Limited, Airtours Plc, Going Places Leisure Travel Limited, Swiss Travel Services Limited and Panorama Holiday Group Limited (the first five Appellants) be struck out on the grounds that, because the first five Appellants were not insurers or taxable intermediaries, they were not entitled to claim a

repayment of insurance premium tax, nor were they entitled to request a review of a decision of Customs and Excise, and that therefore they had no right of appeal; alternatively, that the first five Appellants did not have sufficient interest to prosecute an appeal

2. On 27 June 2000 CGNU Plc (CGNU) and the first five Appellants applied for directions that the appeals of all six Appellants be heard together; that certain issues be heard as preliminary issues; and that other directions be given leading to the hearing of the appeal.

3. As it appeared to the tribunal that the hearing of the applications could determine the rights of the parties it was directed that the hearing of the applications be in public under rule 24(2).

The Directions

4. On 30 August 2000 the Tribunal released the following Directions:

(1) that the application of the Respondents, that the appeals of the first five Appellants be struck out, be dismissed;

(2) that the application of CGNU Plc and the first five Appellants, for a direction that the appeals of all six Appellants be heard together, be allowed;

(3) that the appeals be listed for hearing for three days in the week beginning 4 December 2000 or as soon thereafter as counsel are available;

(4) that before the end of September 2000 all the Appellants shall serve at the tribunal centre further and better particulars of their grounds of appeal setting out the facts on which they intend to rely and identifying all the issues they wish to argue;

(5) that before the end of October 2000 the Respondents shall serve at the tribunal centre their Statement of Case;

(6) that before the end of October 2000 each party shall serve at the tribunal centre a list of the documents upon which it intends to rely at the hearing of the appeal;

(7) that a statement of facts agreed by the parties be served at the tribunal centre or before 17 November 2000;

(8) that witness statements be exchanged before the end of November 2000;

(9) that an indexed and paginated bundle of documents be agreed by the parties and four copies lodged at the tribunal centre before the end of November 2000;

(10) that skeleton arguments be exchanged before 4 December 2000;

(11) that any party has liberty to apply for further directions; and

(12) that the costs of these applications be costs in the cause.

5. On 8 September 2000 the Tribunal was requested to provide a written document containing its findings of fact and its reasons for the Directions as provided by rule 30(2) of the Value Added Tax Tribunals Rules 1986 SI 1986 No. 590 (the Rules). This is the document requested.

The Rules

6. The procedure before the tribunal is governed by the Rules. The relevant parts of rule 18 provide:

"18(1) A tribunal shall-

(a) strike out an appeal where no appeal against the disputed decision lies to a tribunal ..."

7. The relevant parts of rule 19(3) provide:

"19(3) Without prejudice to the preceding provisions of this rule a tribunal may ... give or make any direction as to the conduct of or as to any matter or thing in connection with the appeal or application which it may think necessary or expedient to ensure the speedy and just determination of the appeal."

The evidence

8. At the hearing of the applications the first five Appellants put in a bundle of documents and the sixth Appellant put in a smaller bundle. A witness statement dated 30 June 2000, and made by Mr Gregory Joseph McMahon, the Group Company Secretary and Head of Legal of the first five Appellants, was produced. The witness statement had not been served within the time stated in rule 21(6) and Customs and Excise had not had fourteen days in which to object to its being read at the hearing of the applications as provided by rule 21(4). However, Dr Lasok QC, for Customs and Excise, did not object to the witness statement being referred to at the hearing although he did not accept that the contents were evidence of all the facts stated. On that basis the statement was referred to.

9. No copies of the contracts between the Appellants and the insurance companies were produced at the hearing.

Findings of fact

10. The following facts were undisputed but are found only for the purposes of these applications.

The first five Appellants

11. Cresta Holidays Limited, Going Places Leisure Travel Limited, Swiss Travel Services Limited and Panorama Holiday Group Limited are wholly owned subsidiaries of Airtours Plc They are all tour operators with the exception of Going Places Leisure Travel Limited which is a travel agent. All the Appellants sell package holidays and travel insurance to holiday makers.

The legislation relating to insurance premium tax

12. Insurance premium tax was introduced by Part III of the Finance Act 1994 (the 1994 Act). Section 49 of the 1994 Act provides that tax is charged on receipt

of a premium by an insurer and section 52(1) provides that the tax is payable by the person who is the insurer. There is also a provision in section 52A(3) for tax to be payable by a taxable intermediary. As originally enacted, section 51 provided that tax should be charged at the rate of 2.5%. A new section 51 was introduced by section 21(1) of the Finance Act 1997 (the 1997 Act). The new section 51 provided that tax should be charged at a higher rate of 17.5% in the case of a premium which was liable to tax at that rate and that tax should be charged at a standard rate of 4% in any other case. Section 22 of the 1997 Act introduced a new section 51A to the 1994 Act which provided that premiums were liable to tax at the higher rate if they fell within one or more of the paragraphs of Part II of Schedule 6A of the 1994 Act. Schedule 4 of the 1997 Act introduced the new Schedule 6A and Part II of that Schedule described the premiums liable to tax at the higher rate. These included travel insurance arranged by a tour operator or travel agent.

13. On 1 August 1998 the higher rate of insurance premium tax was extended to all travel insurance by section 146 of the Finance Act 1998 and a new paragraph 4 of Schedule 6A was enacted. Thus all travel insurance was then taxable at the higher rate whether provided by a tour operator or a travel agent or otherwise.

14. Paragraph 8 of Schedule 7 of the 1994 Act contains provisions for the repayment of overpaid tax and the relevant parts provide:

"8(1) Where a person has paid an amount to the Commissioners by way of tax which was not tax due to them, they shall be liable to repay the amount to him.

(7) Except as provided by this paragraph, the Commissioners shall not be liable to repay an amount paid to them by way of tax by virtue of the fact that it was not tax due to them."

The insurance arrangements of the first five Appellants.

15. The appeals of the first five Appellants concern the period when the rates of insurance premium tax which applied to travel insurance arranged by a tour operator or travel agent differed from the rates which applied to travel insurance arranged by other persons. The period when this occurred was from 1 April 1997 to 31 July 1998 and is referred to as the relevant period.

16. Throughout the relevant period the first five Appellants were party to long term contracts to place travel insurance business with insurers on agreed terms at fixed costs to the first five Appellants. That meant that the Appellants were free to set the premium payable by each holiday maker having regard to market conditions. The first five Appellants paid to the insurers the agreed cost for each policy, together with insurance premium tax, and retained the rest of the premium as their commission. Thus any change in the rate of insurance premium tax affected the amount of the commission retained by the first five Appellants.

17. Throughout the relevant period Cresta Holidays Limited was underwritten by Europe Assistance Insurance Limited. Going Places Leisure Travel Limited, Swiss Travel Services Limited and Panorama Holiday Group Limited were underwritten by Travellers Insurance Association, a subsidiary of CGU. During April 1997 Airtours Plc was underwritten by General Accident and thereafter by Travellers Insurance Association.

18. Europe Assistance Insurance Limited, General Accident and Travellers Insurance Association are registered for insurance premium tax under section 53

of the 1994 Act. The insurance premium tax was paid to Customs and Excise by the insurers. The first five Appellants are not registered for insurance premium tax nor are they liable to be registered. They did not pay any insurance premium tax to Customs and Excise.

The Lunn Poly decisions

19. Lunn Poly Ltd and Bishopsgate provided travel insurance and, after the introduction of the higher rate of insurance premium tax, they sought a declaration that the statutory provisions giving effect to the differential rates were incompatible with Community law. On 2 April 1998 the Divisional Court (R v Customs and Excise Commissioners, ex parte Lunn Poly and another [1998] STC 649) held that the differential rates constituted a state aid within the meaning of Article 92 of the EC Treaty and, since the European Commission had not been notified and had not given its approval as required by Article 93.3, the differential rates were illegal.

20. On 24 April 1998 Customs and Excise published Business Brief 10/98 [1998] STI 688 which said that they did not intend to apply the higher rate of tax retrospectively to those suppliers of travel insurance that had paid at the standard rate.

21. On 26 February 1999 the Court of Appeal upheld the decision of the Divisional Court (R v Customs and Excise Commissioners, ex parte Lunn Poly and another [1999] STC 350).

22. On 31 March 1999 Customs and Excise published Business Brief 8/99 [1999] STI 740 which stated that they would not be appealing to the House of Lords and that they were meeting with the industry to discuss implementation of the judgment of the Court of Appeal.

The events leading to the appeals of the first five Appellants

23. On 15 September 1999 the first five Appellants requested Customs and Excise to confirm that the higher rate of insurance premium tax was not properly chargeable during the relevant period on travel insurance sold by them and that the amount of insurance premium tax should have been by reference to the lower rate of 4% instead of by reference to the higher rate of 17.5%. The letter also requested repayment of certain quantified amounts which the first five Appellants said had been paid to Customs and Excise out of their commission via the insurance companies.

24. On 8 October 1999 Customs and Excise replied to say that only an insurer or taxable intermediary could make a claim for repayment and that, in any event, the normal remedy for unlawful state aid was for the aid to be recovered from the recipient and not for a repayment to be made to those taxed at a higher rate. (This letter was dated after Business Brief 10/98, which had been published on 24 April 1988, stating that the higher rate would not be applied retrospectively). The letter of 8 October 1999 went on to say that Customs and Excise did not consider that the amounts paid by way of higher rate tax were amounts which were "not tax" within the meaning of paragraph 8.

25. On 11 November 1999 the first five Appellants asked Customs and Excise to review their decision. The letter referred both to the claim for repayment and the decision that higher rate tax was tax which was due. On 25 November 1999 Customs and Excise wrote to say that the provisions of paragraph 8 of Schedule 7

of the 1994 Act did not apply to the first five Appellants as they were neither insurers nor taxable intermediaries. The letter went on to say that Customs and Excise had agreed with the ABI that further action on recovery of state aid should await the outcome of the litigation relating to the higher rate as applied to electrical goods insurance. (This is most probably a reference to the appeals of GIL Insurance limited and Others in respect of which a hearing on preliminary matters is reported at [2000] STC 204)

26. On 22 December 1999 the first five Appellants appealed against the review decision of 25 November 1999. The notices of appeal sought repayments of a total of £8,280,122.45 for all five Appellants

27. On 13 April 2000 Customs and Excise applied for the appeals to be struck out on the grounds that the first five Appellants were not entitled to claim a repayment of tax or request a review of the decision of Customs and Excise and therefore had no right of appeal; alternatively the first five Appellants did not have sufficient interest to prosecute an appeal.

28 It is that application of 13 April 2000 which is the subject of Direction (1).

The events leading to the appeal of CGNU

29. Meanwhile on 20 August 1998 (after the judgment of the Divisional Court in Lunn Poly) CGNU submitted a protective claim in respect of overpayment of insurance premium tax resulting from the application of the higher rate to travel insurance sold through tour operators and travel agents. The amount of tax reclaimed was £10,543,973.39. On 9 September 1998 Customs and Excise responded by saying that they had appealed to the Court of Appeal but that, in any event, the remedy would be for the aid to be recovered from those who had received it. They did not accept that insurers who had paid insurance premium tax at the higher rate had overpaid tax. They would not meet any claims for overpaid tax from insurers. On 5 March 1999 CGNU submitted a further claim for £4,162,870.77. On 20 September 1999 CGNU wrote again to Customs and Excise and asked for a reply to their letter of 5 March. They said that they were being pressurised by their customers to ensure that a claim was made but that no further action would be taken until the final outcome of the Lunn Poly appeal was known. On 5 October 1999 Customs and Excise wrote to CGNU saying that the claim would not be met; the position was the same as in their letter of 9 September 1998.

30. On 8 June 2000 CGNU wrote to Customs and Excise to say that they wished to appeal against the refusal to allow the claims and requested a formal review of the refusal to repay. On 12 June 2000 Customs and Excise wrote to CGNU saying that they agreed that their letter be treated as a request for a review. On 14 June 2000 Customs and Excise wrote to say that the decisions of 9 September 1998 and 5 October 1999 had been reviewed and upheld. The letter went on to say that Customs and Excise were of the view that the remedy would be to recover from those businesses whose supplies were subject to the standard rate of insurance premium tax. On 20 June 2000 CGNU appealed against the decision on review of 14 June 2000.

31. CGNU made the claim for repayment, and appealed against the refusal of the claim, at the request of, and for the benefit of, the first five Appellants. CGNU agreed that, if it received a repayment from Customs and Excise it would pay it to the first five Appellants as they were the only persons who had suffered an economic loss.

32. On 27 June 2000 CGNU and the first five Appellants applied for directions that the appeals of all six Appellants be heard together; that certain issues be heard as preliminary issues; and that other directions be given leading to the hearing of the appeal.

33. It is that application of 27 June 2000 which is the subject of Directions (2) to (10).

Reasons for directions

34. I consider the two applications separately.

(1) The application of 13 April 2000.

35. On 13 April 2000 Customs and Excise applied for a direction that the appeals of the first five Appellants be struck out on the grounds that, because the first five Appellants were not insurers or taxable intermediaries, they were not entitled to claim a repayment of insurance premium tax, or request a review of a decision of Customs and Excise, and therefore had no right of appeal; alternatively the first five Appellants did not have sufficient interest to prosecute an appeal

36. For Customs and Excise Dr Lasok QC first argued that the tribunal had jurisdiction to strike out the appeal either under rule 18(1)(a) or under rule 19(3) and he cited GIL Insurance Limited v Customs and Excise Commissioners [2000] STC 204 at 216d-e.

37. Next. Dr Lasok QC argued that no appeal against the decisions relating to the first five Appellants lay to the tribunal. The jurisdiction of the tribunal was statutory. The right of appeal was contained in section 60 of the 1994 Act. Section 60(1) provided that an appeal lay with respect to a decision on review under section 59. Section 59(1)(l) provided that a decision on review could be requested with respect to a number of matters one of which was a claim for the repayment of an amount under paragraph 8 of Schedule 7. Paragraph 8 of Schedule 7 dealt with repayments and provided that a repayment was only due to a person who had paid the tax and that the repayment was to be made to that person. Paragraph 8(7) provided that there was no other obligation to repay. It followed that, if a claim for repayment was not within paragraph 8 of Schedule 7, then any decision on it was not a decision on review under section 59(1)(l) and so there was no obligation to review it under section 59 and so there was no review decision. It followed that the tribunal did not have jurisdiction to hear the appeals.

38. In response to the arguments of the first five Appellants that they were also appealing against the amount of tax charged under section 59(1)(b) Dr Lasok argued that the notices of appeal did not refer to section 59(1)(b) They referred to two disputed decisions both of which referred to paragraph 8 of Schedule 7. The appeal was against the letter of 25 November 1999 and the only reason for refusal stated in that letter was that the Appellants were neither insurers nor intermediaries. There was no decision about the amount of tax chargeable and a failure to make a decision was not an appealable matter.

39 Dr Lasok QC also disputed that an interested person could appeal. There was a need for a decision to which section 59(1) applied and only after that had been made could an interested person request a review. Here there was no decision under section 59(1)(b) or 59(1)(l). Also, by virtue of paragraph 8 of Schedule 7 the Appellant could not claim under section 59(1)(l) and so reliance upon section

59(2) was misconceived. He distinguished the position relating to value added tax which was a tax on the final consumer whereas insurance premium tax was a tax paid by the insurer. Also here there was no dispute between the first five Appellants and the insurers. He distinguished Williams and Glyn's Bank Limited v The Commissioners of Customs and Excise [1974] VATTR 262 because the first five Appellants did not have an interest in this appeal. They did not receive the supply of the insurers as that was received by the policy holders. The first five Appellants did not pay the tax. The travellers paid the tax which was received by the Appellants and handed to the insurers after retaining the sums due to them. The evidence did not support the conclusion that the first five Appellants had ever had any contractual entitlement to retain the tax.

40. Dr Lasok QC went on to argue that it was not open to the first five Appellants to argue that paragraph 8(1) of Schedule 7 should be widened following the principles of Community law. He cited Webb v EMO Air Cargo (UK) Ltd [1993] 1 WLR 49 at 59E, 60A and 60F as authority for the view that it was for a United Kingdom court to construe domestic legislation in any field covered by a Community directive so as to accord with the interpretation of the directive laid down by the European Court of Justice but only if that could be done without distorting the meaning of the domestic legislation. He cited Marleasing S.A. v La Comercial Internacional de Alimentacion S.A. (Case 106/89) [1990] ECR I-4135 at paragraph 8 of the judgment as authority for the view that the EC Treaty was binding on courts only for matters within their jurisdiction. Finally he argued that reliance on R v Secretary of State for Transport ex parte Factortame Case 213/89 [1990] ECR I-2433 was misconceived as the principles established there only applied to courts with jurisdiction.

41. For the first five Appellants Mr Barling QC first argued that the tribunal should be wary of striking out an appeal under rule 19(3) as that rule related primarily to the conduct of an appeal. Striking out was an extreme remedy and was specifically provided for in Rule 18(1)(a).

42. Next Mr Barling QC relied upon section 59(2) which provided that any person who would be affected by any decision to which the section applied could require Customs and Excise to review the decision. The first five Appellants had an economic interest in the appeals whereas the insurers did not. The letters to the first five Appellants from Customs and Excise dated 8 October 1999 were decisions within section 59(1) and the Appellants' letters of 11 November 1999 were requests for a review of those decisions. There was authority in the area of value added tax that the recipient of a supply had the right of appeal. He cited Processed Vegetable Growers Association Limited v The Commissioners of Customs and Excise [1973] VATTR 87 at 92, 94, 96 and 97 where the recipient of a supply appealed and the tribunal observed that if the services were found to be exempt then Customs and Excise were bound to repay the tax to the supplier who would hold the money as constructive trustee for the recipient of the supply. He also cited Williams and Glyn's Bank. Finally, he drew attention to section 59(7) which provided that, if Customs and Excise failed to determine a review within 45 days, they were assumed to have confirmed their decision.

43. Mr Barling QC went on to argue that the first five Appellants were appealing against the amount of tax chargeable. The decision requested in the letters of 15 September 1999 related primarily to the amount of tax due. The replies of 8 October 1999 had dealt with the claim for repayment and had said that the amount of higher rate tax paid was the amount of tax due. The letters from the Appellants of 11 November 1999 had asked for a review of the decision about the entitlement to make the claim and also of the decision about the amount of tax

chargeable. The letter from Customs and Excise of 25 November 1999 had ignored the request for a decision about the amount of tax charged and, as no decision about the amount of tax due had been given, the claim was deemed to have been refused. He argued that the appeals of the first five Appellants were both about the amount of tax charged, under section 59(1)(b), as well as about the claim for repayment under section 59(!)(l). The notices of appeal should be read as a whole with the disputed decisions which were annexed to them. It was implicit in the decision letters that the amount of tax charged was a crucial aspect of it. Any difficulty could be cured by amending the notices of appeal.

44 Finally Mr Barling QC argued that Article 93(3) of the EC Treaty had direct effect and national law had to provide a system of safeguards and remedies. He cited Factortame at 2435 and 2473-4 and Hodgson v Commissioners of Customs and Excise [1996] V & DR 200 at paragraphs 32 and 33. This was not a case of distorting the domestic legislation so Webb did not apply.

45. In considering the arguments of the parties I start with the rules. Rule 18(1)(a) gives the tribunal power to strike out an appeal where no appeal against a disputed decision lies to a tribunal. An appeal will only lie to a tribunal if it has jurisdiction to hear the appeal. The tribunal only has jurisdiction to hear appeals if it is given that jurisdiction specifically by statute. In the context of insurance premium tax the list of appealable matters appears in section 60 of the 1994 Act. If a decision does not appear in section 60 then it is a decision where no appeal lies to the tribunal. In such a case Rule 18(1)(a) applies and the appeal must be struck out.

46. The first point of reference is, therefore, section 60 of the 1994 Act. Section 60(1)(a) provides that an appeal shall lie to a tribunal with respect to any decision by Customs and Excise on a review under section 59 (including a deemed confirmation under subsection (7) of that section.) Thus there is a right of appeal in respect of any decision on review under section 59.

47. It is then necessary to examine section 59 and the relevant parts of that section provide:

"(1) This section applies to any decision of the Commissioners with respect to any of the following matters:...

(b) whether tax is chargeable in respect of a premium or how much tax is chargeable ...

(l) a claim for the repayment of an amount under paragraph 8 of Schedule 7 to this Act.".

48. From the combination of sections 60 and 59 it follows that there is a right of appeal in respect of any decision on review relating to the amount of tax chargeable or a claim for repayment.

49. Section 59(2) makes it clear that any person who will be affected by any decision can require a review. Section 59(6) provides that Customs and Excise are obliged to review a decision and section 59(7) provides that, if they fail to do so within 45 days, they are assumed to have confirmed the decision.

50. It is, therefore, first necessary to ask whether there was an original decision relating to either the amount of tax due or a claim for repayment or both. On 15

September 1999 the first five Appellants wrote and asked Customs and Excise to confirm that the higher rate of insurance premium tax was not properly chargeable during the relevant period and that it should have been charged at the rate of 4% and not 17.5%. The letter also requested repayments. Thus the letter of 15 September 1999 requested a decision about the amount of tax chargeable and also requested repayments of certain amounts.

51. On 8 October 1999 Customs and Excise replied to say that the Appellants could not make a claim for repayment. The reply of 8 October was thus an original decision that the claim for repayment had been refused. The reasons for refusal are not relevant to the right of appeal as they are a matter for argument in the appeal. The fact that there was a decision refusing a repayment is enough. The reply of 8 October 1999 also said that Customs and Excise considered that the amounts paid by way of tax at the higher rate were amounts which were tax due. Thus the decision was that the amount of tax which had been paid was the right amount. (I prefer this construction of the letter to the alternative construction that Customs and Excise failed to give a decision in response to a specific request and thus deprived an appellant of his right of appeal against a decision.)

52. The first five Appellants requested a review on 11 November 1999. Their letters referred both to the claim for repayment and the amount of tax due. A decision was given on review on 25 November 1999. Section 60(1) provides that an appeal shall lie to the tribunal with respect to any decision on review under section 59. It is therefore necessary to ask if the decision on review was given under section 59. Section 59(2) provides that "any person who is or will be affected by any decision to which this section applies" may require a review. One therefore has to decide if the first five Appellants were persons who were or would be affected by the original decision.

53. The authorities cited on this point all concerned value added tax. Processed Vegetable Growers (1973) decided that a tribunal could hear an appeal brought by the recipient of a supply who could establish that the tax had been paid by him and had a sufficient interest in obtaining a decision about the tax. Williams & Glyn's (1974) decided that the recipient of a supply had a sufficient legal interest to maintain an appeal. However, the value added tax legislation does not contain a specific provision, such as that in section 59(2), which gives a right to require a review to persons affected by the decision.

54. I therefore ask whether the first five Appellants are "persons who would be affected by the original decision" within the meaning of section 59(2) and here much depends upon the facts. No copies of the contracts between the first five Appellants and the insurance companies were produced at the hearing of the applications. In paragraph 16 above I have found, for the purposes of these applications only, that any change in the rate of insurance premium tax would affect the amount of the commissions retained by the first five Appellants. That statement was not disputed by Customs and Excise. That means that the first five Appellants are persons who would be affected by the original decision and so they were entitled to require a review of the original decision under section 59(2).

55. The review letter of 25 November 1999 refused the repayment and said that further action about the amount had to await the outcome of the litigation relating to the higher rate of insurance premium tax and electrical goods insurance. In my view that was a failure by Customs and Excise to give notice of their determination on the review about the amount of tax chargeable within the

period of 45 days and so, under section 59(7), they were deemed to have confirmed their previous decision (that the correct amount of tax had been paid).

56 It follows that there was a decision on review relating both to the request for a repayment and also to the amount of tax chargeable. That means that the tribunal has jurisdiction under section 60 to hear the appeal about both of these matters.

57. I agree with Dr Lasok that paragraph 8(1) of Schedule 7 refers only to persons who have paid tax to Customs and Excise. However, that is a reason for refusing a repayment and is a matter for argument in the appeal. It does not mean that a person who has received a decision refusing repayment for that reason does not have a right of appeal.

58. The first five Appellants have leave to amend their notices of appeal to refer to the deemed decisions about the amount of tax charged.

59 The Direction on the application of the Respondents, that the appeals of the first five Appellants be struck out, is that is should be dismissed. That is Direction (1).

(2) The application of 27 June 2000

60. On 27 June 2000 CGNU and the first five Appellants applied for directions that the appeals of all six Appellants be heard together; that certain issues be heard as preliminary issues; and that other directions be given leading to the hearing of the appeal. I consider these three parts of the application separately.

(a) The application that all six appeals be heard together

61. For CGNU Mr Sinfield argued that it was in the interests of all the parties that the appeals of the first five Appellants and of CGNU should be heard together. He cited Maharani Restaurant v Commissioners of Customs and Excise [1999] STC 295 at 300 where the High Court had upheld a direction of the tribunal that two appeals to be heard together where there was an substantial overlap of evidence between the two appeals. Here the evidence in all the appeals would be the same.

62. For the first five Appellants Mr Barling QC adopted the arguments of Mr Sinfield. The same tax was in issue in all the appeals; the appeals concerned the same premiums; and the same issues arose in all the appeals.

63. For Customs and Excise Dr Lasok QC referred to rule 19(3) and asked whether the Direction requested would ensure a speedy and just determination of the appeals. He also pointed out that there was little evidence as to the private law relationships between the first five Appellants and the sixth Appellant and there would be dangers in making a direction on a false assumption of facts.

64. In the light of the facts which I have found for the purposes of these applications I conclude that it would ensure the speedy and just determination of the appeals of all six Appellants if they were heard together as there is likely to be a very substantial overlap of evidence and argument. I appreciate the point made by Dr Lasok QC about the evidence concerning the private relationships of the six Appellants. It is for that reason that I have made findings of fact for the purposes of these applications only.

65. The Direction on the application that all six appeals be heard together is that it be allowed. That is Direction (3).

(b) The application for the hearing of preliminary issues

66. The application of 27 June 2000 applied for directions that the issues as to whether the differential rates of insurance premium tax amounted to a state aid, and whether repayment of the differential was an appropriate remedy, be heard as preliminary issues and that any other issues be held over.

67. At the hearing of the application Mr Sinfield, for CGNU, also suggested that unjust enrichment be heard as a preliminary issue.

68. For the first five Appellants Mr Barling QC adopted the arguments of Mr Sinfield and suggested that perhaps the facts could be agreed. Alternatively, the appeals could be listed after the appeal in GIL Insurance Limited and Others and then the Sixth Directive issues could be argued as well.

69. For Customs and Excise Dr Lasok QC argued that the notices of appeal referred only to the state aid issue and there had been no indication previously that the parties wished to argue other issues. The tribunal had an appellate jurisdiction and heard appeals against decisions of Customs and Excise. The decisions under appeal related only to state aid. At the very least the Appellants should be required to submit further and better particulars of their grounds of appeal with details of the facts and matters upon which they intended to rely. Also, Customs and Excise would not agree the facts relating to unjust enrichment and he argued that the hearing of preliminary issues would not be appropriate in the present appeal.

70. I do not accept that, because the decision letters referred only to state aid, it is not possible to argue other issues in the appeals. That would be confusing the grounds of the decision with the grounds of appeal, The decisions appealed against are about the amount of tax chargeable and the right to repayment. However, in appealing those decisions the Appellants are not restricted to the grounds stated in the decision letter but may raise other grounds of appeal. All the issues mentioned by the Appellants are valid grounds of appeal.

71. As the hearing of the applications progressed new issues were mentioned. In addition to the state aid issue, and the appropriate remedy issue, which were mentioned in the application, the issues of unjust enrichment and the Sixth Directive issues were also mentioned. In the light of that development I concluded that it would not be appropriate at the present stage to direct that any issue be heard as a preliminary issue. In addition I adopt the suggestion of Mr Barling QC that the appeals be listed after the appeal in GIL Insurance Limited and Others. That is the reason for Direction (3).

72. I also accept the argument of Dr Lasok QC that Customs and Excise are entitled to know at the earliest possible date what the grounds of appeal are. That is the reason for Direction (4).

(c) The application for other directions

73. The application of 27 June 2000 also applied for other directions leading to the hearing of the appeal. There was little argument about these. Accordingly,

they were given almost as requested save that the dates were changed so as to make the time limits realistic. That is the reason for Directions (5) to (10).

74. It is appreciated that, as the preparations for the hearings of the appeals progress, the parties may wish to make applications for further Directions and that is the reason for Direction (11).

DR A N BRICE
CHAIRMAN
RELEASE DATE: 3rd October 2000

LON/2000/9000-9004
LON/2000/9019