APPLICATION - for directions setting out a timetable - application allowed - VATTR 1986 Rule 19(3)
APPLICATION - to hear further issues as preliminary issues of law - application dismissed - VATTR 1986 Rule 19(3)

LONDON TRIBUNAL CENTRE

GIL INSURANCE LIMITED (1) UK CONSUMER ELECTRONICS LIMITED (2) CONSUMER ELECTRONICS INSURANCE COMPANY LIMITED (3) DIRECT VISION RENTALS LIMITED (4) HOMECARE INSURANCE LIMITED (5) PINNACLE INSURANCE PLC (6)	Appellants
-and-	
THE COMMISSIONERS OF CUSTOMS AND EXCISE	Respondents

Tribunal: DR A N BRICE (Chairman)

Sitting in private in London on 6 December 1999

Mr David Vaughan QC and Mr Conrad McDonnell of Counsel, instructed by Messrs Rowe & Maw Solicitors, for the Appellants
Dr Paul Lasok QC and Mr Tim Ward of Counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

REASONS FOR DIRECTION

The applications

1. On 29 October 1999 the tribunal of its own motion gave notice that there would be a Hearing for Directions on Monday 6 December 1999.

2. On Thursday 2 December 1999 the Appellants applied for directions setting out a timetable for the future conduct of the appeal. That application was objected to by Customs and Excise.

3. On Friday 3 December 1999 Customs and Excise applied for a direction that certain issues in the appeal, known as the Sixth Directive issues and the free movement issues, be heard before the other issues as preliminary issues of law. That application was opposed by the Appellants.

The Rules

4. The procedure before the tribunal is governed by the Value Added Tax Tribunals Rules 1986 SI 1986 No. 590 as amended (the Rules). The relevant parts of Rule 19 provide:

"19(3) Without prejudice to the preceding provisions of this rule a tribunal may of its own motion or on the application of a party to an appeal or application ... 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 documents

5. At the hearing of the applications the Appellants put in a bundle of documents and a bundle of authorities. A number of documents originally produced at a hearing on 13 October 1999 were also referred to. Outline submissions were produced in advance of the hearing by the Appellants and by Customs and Excise.

The facts relevant to the applications

6. Each Appellant provides insurance for domestic appliances and each Appellant is registered for insurance premium tax. Between April 1997 and June 1998 the Appellants submitted returns, and paid insurance premium tax at the higher rate, to Customs and Excise. The amounts of tax paid by all the Appellants in the period referred to amounted to about £40M.

7. In September 1998 each Appellant made a claim for the repayment, with interest, of the amounts paid by it by way of higher rate insurance premium tax. On 21 September 1998 Customs and Excise rejected the Appellants' claims. On 28 September 1998 the Appellants required Customs and Excise to review their decisions. On 13 November 1998 Customs and Excise confirmed that the Appellants' claims were rejected. On 20 November 1998 the Appellants appealed against the decisions on review. On 11 May 1999 the Appellants supplied further and better particulars of their grounds of appeal.

8. On 24 June 1999 Customs and Excise applied for six identified issues to be heard as preliminary issues. The application was heard on 25 June 1999 when the tribunal made a number of directions. These included directions that Customs and Excise should serve their Statements of Case, after which either party had liberty to apply for one or more issues to be heard as separate issues. Directions were also made as to the production of documents and witness statements. Customs and Excise served their Statements of Case on 27 July 1999 and these were amended on 5 October 1999. The production of documents and of witness statements has proceeded.

9. The Appellants' Notices of Appeal, and the Statements of Case served by Customs and Excise, identify the following issues for determination in the appeal:

(1) whether the imposition of the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 11, 13, 27, and/or 33 of the Sixth Council Directive on the harmonisation of the laws of Member States relating to turnover taxes (77/388/EEC); these are referred to as the Sixth Directive issues;

(2) whether the imposition of the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 52, 53, 59 and/or 62 of the EC Treaty; these are referred to as the free movement issues;

(3) whether the unequal tax treatment resulting from the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 92 and 93 of the EC Treaty; this is referred to as the state aid issue; and

(4) whether the Appellants passed on the burden of the higher rate of tax to their customers so that repayment of the tax would unjustly enrich the Appellants; this is called the unjust enrichment issue.

10. The Appellants have also commenced proceedings in the High Court seeking damages for loss arising out of the introduction of the higher rate of insurance premium tax.

11. On 13 August 1999 Customs and Excise applied for a direction that one issue in these appeals (the state aid issue) be struck out or dismissed. In the alternative, Customs and Excise applied for a direction that the state aid issue be heard as a preliminary issue of law. Both applications were opposed by the Appellants.

12. The applications of 13 August 1999 were heard on 13 October 1999. The tribunal directed that both applications be dismissed with costs. A document containing the reasons for that direction (the October Direction) was released to the parties on 26 October 1999.

13 On 29 October 1999 a notice was sent to the parties by the tribunal informing them that there would be a Hearing for Directions in this appeal on Monday 6 December 1999.

14. On Thursday 2 December 1999 the Appellants applied for directions setting out a timetable for the future conduct of the appeal. That application was objected to by Customs and Excise,

15. On Friday 3 December 1999 Customs and Excise applied for a direction that the Sixth Directive issues and the free movement issues be separated from the other issues in the appeal and heard as preliminary issues of law.

16. On Friday 3 December 1999 Customs and Excise appealed to the High Court against the October Direction. The tribunal was first informed of this appeal at the hearing on 6 December 1999.

17. At the hearing of the applications on 6 December 1999 the tribunal, with the consent of the parties, heard first the application of Customs and Excise dated 3 December 1999 and then the application of the Appellants dated 2 December 1999.

The application of Customs and Excise

18. The application of Customs and Excise was that the Sixth Directive issues and the free movement issues should be separated from the other issues in the appeal and heard as preliminary issues of law.

The arguments of Customs and Excise

19. For Customs and Excise Dr Lasok argued that now that the tribunal's Direction about the state aid issue had been appealed to the High Court it would

be desirable for the tribunal to hear as soon as possible the Sixth Directive issues and the free movement issues as preliminary issues of law so that these could be appealed to the High Court with the result that the High Court could reach decisions on all the issues at the same time.

20. As far as the Sixth Directive issues were concerned Dr Lasok argued that the issues arising from Articles 13 and 33 (but not the issue arising from Article 11) had been argued in the Divisional Court in R v Customs and Excise Commissioners, ex parte Lunn Poly Ltd and Another [1998] STC 649. In the view of Customs and Excise the crucial question related to Article 33 of the Sixth Directive which permitted Member States to introduce a tax on insurance contracts so long as it could not be characterised as a turnover tax. If the Appellants succeeded in showing that insurance premium tax was a turnover tax they would win on all issues. The case law had been examined in Lunn Poly where the Divisional Court had held that insurance premium tax was not a turnover tax. Also, the facts relating to the intention behind the higher rate of insurance premium tax had been common ground in Lunn Poly.

21. Turning to the free movement issues Dr Lasok argued that it was the Appellants' case that the higher rate of insurance premium tax indirectly restricted the freedom of insurers established in other Member States to provide services in the United Kingdom. However, it was no part of the Appellants' case that their rights were infringed by the higher rate. The decisions in Esso Espanola SA v Comunidad Autonoma de Canarias [1996] ECR I-4223 and RI.SAN Srl v Comune di Ischia and Others Transcript 9 September 1999 were authority for the view that the only persons who could rely upon these provisions of the EC Treaty were those who wished to move from one Member State to another and whose rights had been infringed.

22. Dr Lasok went on to argue that both the Sixth Directive issues and the free movement issues could properly be decided as preliminary issues of law without any consideration of the facts. Otherwise the evidence to be brought before the tribunal would be voluminous and based on a misapprehension of the legal position; in addition there was an unknown number of witnesses to give evidence on the free movement issues. He accepted that the burden of proof was on the Appellant but submitted that the extensive amount of time required to consider all the evidence might not be a proper use of time and resources. It was in the interests of other appellants, whose appeals might be held up, for the proceedings to be shortened as much as possible. Also, it was not fair on the Appellants in these proceedings to put them through the agony and expense of a lengthy hearing in respect of which they would have to pay the costs.

The arguments for the Appellants

23. For the Appellants Mr Vaughan argued that this was the third application by Customs and Excise for the hearing of preliminary issues and the result was delay in bringing the appeals on for hearing. The Appellants had now paid tax of £70M and were paying £700,000.00 each week; they wanted the appeals to be heard as soon as possible. Customs and Excise had waited more than a month before appealing from the October Direction and had not informed the Appellants of their intention to appeal. Although the Appellants would apply for a speedy hearing in the High Court of that appeal it was unlikely to come on for hearing before Easter. If the High Court were to dismiss that appeal, and confirm the Direction of the tribunal, then Customs and Excise might appeal to the Court of Appeal. If they did not do so then the state aid issue would come back to the tribunal for a full hearing of the facts and the law. Customs and Excise had argued that the

present application was made so that the High Court could hear all the issues at once but the High Court was unlikely to delay hearing an appeal against an interlocutory direction so that other issues could catch up. Mr Vaughan also argued that Customs and Excise should have made the present application on 13 August 1999 so that it could have been heard on 13 October 1999 with their second application. A cascade of litigation was resulting from this piecemeal approach.

24. As far as the Sixth Directive issues were concerned Mr Vaughan argued that the arguments on the subject of Article 27 had not been raised in Lunn Poly and many arguments had not been dealt with by the Court of Appeal. In any event all the issues had to be considered within a factual context and Customs and Excise would not agree the facts. For example, there would need to be findings of fact about the intention behind the higher rate tax.

25. As far as the free movement issues were concerned Mr Vaughan argued that there were many complicated facts and two of the Appellants (namely Pinnacle and Homecare) were subsidiaries of foreign companies who came to the United Kingdom in order to exercise their rights of free movement. Accordingly the decision in RI.SAN did not determine these issues. If the free movement issues were to be heard as preliminary issues of law then it would be necessary to agree the facts and Customs and Excise would not do that.

26. Mr Vaughan concluded by arguing that it was only in exceptional cases that a court should direct the hearing of preliminary issues of law when there were other issues in the appeal. He adopted the principles set out in paragraph 61 of the October Direction and argued that the preliminary issues requested would not be decisive of the litigation; the facts were not short and could not be agreed; the facts and law were mixed up; and if a reference were made to the European Court of Justice it was necessary for the facts to have been found. Mr Vaughan stated that, although he did not anticipate asking for a reference to the European Court of Justice on the state aid issue, which had been clarified by the Court of Appeal, he might wish to ask for a reference on the Sixth Directive issues or the free movement issues.

Reasons for Direction

27. In paragraphs 54 to 60 of the October Direction the tribunal reviewed the authorities cited to it on the question as to when to direct that an issue be heard as a preliminary issue of law. In paragraph 61 the tribunal summarised the principles to be derived from those authorities as follows:

"61. From those authorities I derive the principles that the hearing of a preliminary issue of law should only be directed in an exceptional case. Cases where it might be directed include cases where, if the preliminary issue of law is decided in one way, it is decisive of the litigation; or in cases where the legal issue is short and easily decided and the facts are complicated; or in cases where the facts are agreed or are determined as part of the preliminary issue. However, a preliminary issue of law should not be directed where the facts and the law are mixed up ... in uncertain and developing areas of law judgement should be given on the actual facts as found."

28. Applying those principles to the facts of the present application this is not a case where any decision on the law relating to either the Sixth Directive issues or the free movement issues will be decisive of the litigation. If Customs and Excise succeed on the preliminary issues of law then the Appellants may wish to request

a reference to the European Court of Justice for which the facts will have to be found; if the Appellants succeed on the preliminary issues of law Customs and Excise have not agreed the facts. Neither is this a case where the legal issues are short and easily decided, as appears from the arguments of the parties. Again, the facts relating to these issues have not been agreed and Dr Lasok does not propose that they be determined as part of the preliminary issues of law. Further, this is a case where the facts and the law are mixed. Finally, this is an uncertain and developing area of the law and so it is desirable for future developments to be made on the basis of actual facts found at the hearing of the appeal. For those reasons alone I would dismiss the application.

29. However, there are other factors which are also relevant. First, the Tribunals Rules provide that any direction should be "necessary or expedient to ensure the speedy and just determination of the appeals". In my view the speedy and just determination of these appeals will best be ensured by an early hearing of all the facts and the legal arguments. The fragmentation of the appeal by interlocutory applications, each of which is open to appeal, has already increased the time and expense of the proceedings. The separation of issues would, in my view, yet further increase the time and expense. The difficulties of separate issues following separate routes of appeal, both to the higher national courts and by reference to the European Court of Justice, cannot be ignored. The hearing of preliminary issues of law may appear to be an attractive shortcut but that shortcut may be treacherous and lead to delay, anxiety and expense. (See Lord Salmon in Tilling v Whiteman [1980] AC 1).

30. It is also relevant that the state aid issue, the Sixth Directive issues and the free movement issues are the main issues in the appeal. The only other substantive issue is the unjust enrichment issue which will only be relevant if the Appellant is successful in the appeal. Accordingly, if this application, and the application the subject of the October Direction were to succeed, then substantially the whole appeal would have been heard as preliminary issues of law without any facts being found. Bearing in mind that the tribunal is primarily a fact-finding tribunal that would be an odd result. I also bear in mind that this is a lead case and that substantial amounts of tax are at stake. In my view the Appellants should have the opportunity of presenting their arguments fully in the substantive appeal rather than having them dealt with as preliminary issues of law.

31. As the application for the hearing of preliminary issues was made by Customs and Excise the arguments they put forward to support it must be examined. First, they said that it would be desirable for all the issues to be heard by the High Court together when hearing the appeal against the October Direction. However, it is not clear that the High Court would delay their hearing of the appeal against the October Direction until this tribunal had heard the additional preliminary issues of law requested in the application. Also, the High Court might take the view that it would not be appropriate to combine the hearing of an appeal against an interlocutory direction with the hearing of an appeal on substantive issues of law. Further, although the High Court might allow the appeal against the Direction that the state aid issue be not struck out, it might not. And it might not allow the appeal against the Direction that the state aid issue be not heard as a preliminary issue of law. In that case the state aid issue would come back to the tribunal for a full hearing of the facts and the law. In the light of that possibility it would seem premature to direct at this stage that other issues be heard as preliminary issues of law. Next, Customs and Excise expressed concern at the voluminous evidence which might be adduced if the facts had to be found. However, the burden of proof is on the Appellants to prove their case; it is for

them to adduce the voluminous evidence, not for Customs and Excise. Thirdly, Customs and Excise were concerned at the effect of the hearing of this appeal on the rights of other appellants. However, it is not likely that the fact that the tribunal has to hear one appeal will delay the appeals of other appellants. Fourthly, Customs and Excise were concerned at the time and expense to which the Appellants in these appeals would be put if the facts had to be found. However, the Appellants are very well advised and if they choose to spend their time in adducing evidence before the tribunal, and if they accept the risk of costs, then that must be a decision for them. Customs and Excise did not state specifically that they were concerned at the time and resources that they would have to devote to the appeal but if this is their concern then it should be balanced by the considerations that the Appellants have paid substantial amounts of tax; that the Appellants are devoting substantial time and resources to the appeal; and that the Appellants are entitled to a fair trial.

32. The conclusion is that the application of Customs and Excise should be dismissed.

The application of the Appellants

33. The application of the Appellants was dated 2 December 1999 and was that a timetable should be directed for the future conduct of the appeal. Specifically, the Appellants applied for a Direction:

(1) that the Respondents' statement of objections to the Appellants' application for further disclosure be served by 22 December 1999;

(2) that the Appellants' statement of objections to the Respondents' application for further disclosure be served by 22 December 1999

(3) that a hearing to consider the objections for further disclosure be listed to be heard on 10 January 2000 or shortly thereafter;

(4) that the Appellants' and Respondents' lists of further documents in their possession, custody or power which they intend to produce at the hearing of the appeal be served by 30 January 2000;

(5) that any witness statements be served by 29 February 2000;

(6) that any experts' reports be served by 31 March 2000; and

(7) that an agreed list of the issues in dispute between the expert witnesses be served by 14 April 2000.

34. For the Appellants Mr Vaughan applied for the directions on the basis, however, that it was not intended that the appeals should come on for hearing before the decision of the High Court on the appeal against the October Direction was known.

35. For Customs and Excise Dr Lasok stated that he did not object in principle to the timetable proposed. However, it might be preferable to stay the proceedings until the decision of the High Court on the appeal against the October Direction was known.

36. Once again reference is made to the Tribunals Rules and to the requirement that any direction should "ensure the speedy and just determination of the appeals". In my view the speedy and just determination of the appeals is most likely to occur if the directions requested by the Appellants are made. This will ensure that the preparation for the appeals proceeds while the appeal against the October Direction is waiting to be heard by the High Court.

37. The conclusion is that the application of the Appellants is allowed with necessary amendments to (1) and (2) to reflect the date of the release of this Direction.

The consolidation of the appeals

38. At the hearing on 6 December 1999 the question of the consolidation of these appeals was raised together with the alternative suggestion that they be not consolidated but heard together.

39. The Appellants have leave to make an application for a direction that the appeals be consolidated, or that the appeals be heard together.

Costs

40. For the Appellants Mr Vaughan applied for costs. He argued that Customs and Excise had now agreed the timetable proposed in the Appellants' application of 2 December 1999 and there would not have been any need for a hearing if Customs and Excise had not made the application of 3 December 1999 for the hearing of further preliminary issues of law.

41. For Customs and Excise Dr Lasok agreed that costs should follow the event.

42. Rule 29(1)(a) of the Rules provides that a tribunal may direct that an applicant shall pay to the other party to the application within such period as the tribunal may specify such sum as the tribunal may determine on account of the costs of such other party of and incidental to and consequent upon the application.

43. As Customs and Excise have been unsuccessful in these applications they should pay the Appellants' costs.

DIRECTION

44. For the reasons given THIS TRIBUNAL DIRECTS :

(1) that the application of Customs and Excise dated 3 December 1999 (for a direction that the Sixth Directive issues and the free movement issues should be heard as preliminary issues of law) be dismissed;

(2) that the application of the Appellants dated 2 December 1999 (for a timetable for the future conduct of the appeal) be allowed and specifically:

(a) that the Respondents' statement of objections to the Appellants' application for further disclosure be served by 31 December 1999;

(b) that the Appellants' statement of objections to the Respondents' application for further disclosure be served by 31 December 1999;

(c) that a hearing to consider the objections for further disclosure be listed to be heard on 10 January 2000 or shortly thereafter;

(d) that the Appellants' and Respondents' lists of further documents in their possession, custody or power which they intend to produce at the hearing of the appeal be served by 30 January 2000;

(e) that any witness statements be served by 29 February 2000;

(f) that any experts' reports be served by 31 March 2000;

(g) that an agreed list of the issues in dispute between the expert witnesses be served by 14 April 2000; but

(h) that the appeal be not listed for hearing until the decision of the High Court on the appeal against the October Direction is known;

(3) that the Appellants have leave to make an application for a direction that the appeals be consolidated or that the appeals be heard together; and

(4) that Customs and Excise pay the costs of the Appellants of and incidental to and consequent upon these applications on the standard basis the amount of such costs

to be agreed between the parties but failing agreement to be determined by a tribunal.

DR A N BRICE
CHAIRMAN
Date of Release: 22nd December 1999

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