**Case C-2/08**

**Amministrazione dell'Economia e delle Finanze**

**and**

**Agenzia delle Entrate**

**v**

**Fallimento Olimpiclub Srl**

(Reference for a preliminary ruling from the Corte suprema di cassazione)

(VAT – Primacy of Community law – Provision of national law laying down the principle of res judicata)

Summary of the Judgment

*Community law – Direct effect – Primacy – Provision of national law laying down the principle of res judicata*

Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question. The rules implementing the principle of *res judicata*, which are a matter for the national legal order in accordance with the principle of the procedural autonomy of the Member States, must not, however, be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness).

In that connection, the interpretation of *res judicata* according to which, in tax disputes, where a final judgment in a given case concerns a fundamental issue common to other cases, it has binding authority as regards that issue even if its findings were made in relation to a different tax period, is not compatible with the principle of effectiveness. Not only does an interpretation of that kind prevent a judicial decision that has acquired the force of *res judicata* from being called into question, even if that decision entails a breach of Community law; it also prevents any finding on a fundamental issue common to other cases, contained in a judicial decision which has acquired the force of *res judicata*, from being called into question in the context of judicial scrutiny of another decision taken by the relevant tax authority in respect of the same taxpayer or taxable person, but relating to a different tax year. Accordingly, if the principle of *res judicata* were to be applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an interpretation of the Community rules concerning abusive practice in the field of value added tax which was at odds with Community law, those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation. Such extensive obstacles to the effective application of the Community rules on value added tax cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness.

Consequently, Community law precludes the application, in such circumstances, of a provision of national law which seeks to lay down the principle of *res judicata*, in a dispute concerning value added tax relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of value added tax.

(see paras 23-24, 26, 29-32, operative part)

JUDGMENT OF THE COURT (Second Chamber)

3 September 2009 (*)

(VAT – Primacy of Community law – Provision of national law laying down the principle of res judicata)

In Case C?2/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 10 October 2007, received at the Court on 2 January 2008, in the proceedings

**Amministrazione dell'Economia e delle Finanze,**

**Agenzia delle Entrate,**

v

**Fallimento Olimpiclub Srl,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann (Rapporteur), P. K?ris, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2009,

after considering the observations submitted on behalf of:

– Fallimento Olimpiclub Srl, by G. Tinelli, avvocato,

– the Italian Government, by I. Bruni, acting as Agent, and P. Gentili and W. Ferrante, avvocati dello Stato,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the Commission of the European Communities, by E. Traversa and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2009,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the application of the principle of *res judicata* in legal proceedings relating to value added tax ('VAT').

2 The reference has been made in proceedings between Fallimento Olimpiclub Srl (Olimpiclub Srl in liquidation; 'Olimpiclub') and the Amministrazione dell'Economia e delle Finanze ('the Finance Administration') concerning four VAT adjustment notices addressed to Olimpiclub for the tax years 1988 to 1991.

**National law**

3 Article 2909 of the Italian Civil Code (codice civile), entitled '*Res judicata*', provides as follows:

'Findings made in judgments which have acquired the force of *res judicata* shall be binding in all respects on the parties, their lawful successors or assignees.'

4 That provision was interpreted by the Corte suprema di cassazione (Supreme Court of Cassation) in its judgment No 13916/06 as follows:

'… where two sets of proceedings between the same parties are concerned with the same legal relationship, and one of those sets of proceedings has culminated in a judgment that has acquired the force of *res judicata*, the findings thus made concerning that legal situation or concerning the resolution of points of fact or of law on a fundamental issue common to both cases – and thus constituting the logical premiss underpinning the decision in the operative part – preclude that same issue of law, now settled, from being re?examined, even if the aims of the subsequent proceedings are different from those reflected in the subject?matter and form of order sought in the first.'

**The dispute in the main proceedings and the question referred**

5 Olimpiclub, a limited liability company the objects of which are to construct and manage sporting facilities, owns a sports complex located on land owned by the Italian State. On 27 December 1985, it concluded with the Associazione Polisportiva Olimpiclub ('the Associazione') – a non-profit-making association, most of the founding members of which also held shares in Olimpiclub – a contract under which the Associazione had the use of all the facilities of that sports complex ('the *contratto di comodato*'). In return, the Associazione was, first, to pay the State fee (the sum payable for the grant of the use of land) to the Italian State; secondly, to repay standard costs in the amount of ITL 5 million per year; and, thirdly, to transfer to Olimpiclub its entire gross income, consisting of the total amount of the annual fees paid by its members.

6 In 1992, following investigations into the *contratto di comodato*, the Finance Administration reached the conclusion that the parties to the contract had, in reality, by means of an act which on

the face of it was lawful, intended solely to circumvent the legislation in order to obtain a tax advantage. Thus, Olimpiclub had transferred to a non?profit?making association all the administrative and management burdens of the sports complex in question, while collecting the income produced by that association in the form of the fees paid by its members, which on that basis was not liable to VAT. Since the Finance Administration therefore considered that the *contratto di comodato* could not be relied upon against it, it apportioned to Olimpiclub the entire gross income produced by the Associazione for the years under investigation and, accordingly, by means of four adjustment notices, corrected the VAT returns submitted by Olimpiclub for the tax years 1988 to 1991.

7 Olimpiclub challenged those adjustment notices before the Commissione tributaria provinciale di primo grado di Roma (Provincial Tax Court of First Instance, Rome), which upheld that action, finding that the Finance Administration had wrongly disapplied the legal effects of the *contratto di comodato*, since it had failed to show that the agreement was fraudulent.

8 The Finance Administration brought an appeal against that decision before the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio), which upheld the decision. That court found that the Finance Administration had not proved fraudulent intent on the part of the two parties that had entered into the *contratto di comodato*, since it was plausible that their reasons for concluding that contract had to do with the fact that it was uneconomic for a commercial company directly to manage what are essentially sporting activities.

9 The Finance Administration brought an appeal on a point of law before the referring court against that last decision. Since Olimpiclub had in the intervening period been put into liquidation, the administrator in the liquidation proceedings appeared before the referring court as defendant.

10 In those proceedings, the administrator relied on the existence of two judgments of the Commissione tributaria regionale del Lazio, which had acquired the force of *res judicata* and concerned VAT adjustment notices issued as part of the same tax inspection of Olimpiclub, but relating to other tax years, namely judgments No 138/43/00 and No 67/01/03, for the tax years 1992 and 1987 respectively.

11 Even though they related to different tax periods, the findings in those judgments and the approach adopted are binding in the main proceedings pursuant to Article 2909 of the Italian Civil Code, which lays down the principle of *res judicata*.

12 It is apparent from the order for reference that, in taxation matters, when interpreting Article 2909 of the Italian Civil Code, the Italian courts adhered for a long time to the principle of the discreteness of final judgments, in accordance with which each tax year remains separate from other tax years, also in terms of the legal relationship between the taxpayer and the tax authorities, which is distinct from that of previous or subsequent tax years. The effect is that, whenever disputes relating to different tax years for the same tax (even if they concern similar questions) are decided separately by a number of judgments, each dispute remains separate and the final ruling has no force of *res judicata* for disputes concerning a different tax year.

13 However, that approach has recently been modified, owing in particular to the fact that the principle of the discreteness of final judgments has been discarded. It is now possible, where the findings in a judgment delivered in one dispute relate to issues similar to those arising in another dispute, for the reasoning of that judgment to be properly relied on in the other dispute, even though the judgment in question concerns a different tax period.

14 In so far as the two judgments referred to in paragraph 10 of the present judgment found that there were valid economic reasons for the conclusion of the *contratto di comodato* between

the Associazione and Olimpiclub and, accordingly, found in favour of Olimpiclub, the latter has contended that the appeal before the referring court must be declared inadmissible in that it seeks to obtain a fresh ruling on the same issues of fact and of law.

15 It is in the light of those factors that the referring court regards itself as bound by those judgments, which definitively hold that the *contratto di comodato* is genuine, lawful and not fraudulent. However, the referring court points out that this could preclude it from examining the main proceedings in the light of the Community legislation and the case-law of the Court in relation to VAT, in particular Case C-255/02 *Halifax and Others* [2006] ECR I-1609, and possibly from determining the existence of an abuse of rights.

16 The referring court takes particular note of Case C?119/05 *Lucchini* [2007] ECR I?6199, in which the Court of Justice held that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, laying down the principle of *res judicata* , where the application of that provision prevents the recovery of State aid granted in breach of Community law. The referring court states that that judgment seems to illustrate a trend in the case-law of the Court towards considering the principle of *res judicata* to be relative and requiring it to be disapplied in order to uphold the primacy of provisions of Community law and to prevent conflict with those provisions. The national court refers in that regard to Case C?126/97 *Eco Swiss* [1999] ECR I?3055; Case C?118/00 *Larsy* [2001] ECR I?5063; Case C?201/02 *Wells* [2004] ECR I?723; and Case C?453/00 *Kühne & Heitz* [2004] ECR I?837.

17 Since the levying of VAT plays a central role in the accrual of the European Community's own resources, the referring court is uncertain whether the case-law of the Court requires the binding authority of a judgment which has acquired the force of *res judicata* by reason of national law to be disregarded. In the main proceedings, the application of Article 2909 of the Italian Civil Code could prevent the full implementation of the principle of combating abuse of rights, a principle which the Court has developed in relation to VAT as a means of ensuring that the Community VAT system is fully implemented. In that connection, the national court refers to *Halifax and Others*.

18 It was in those circumstances that the Corte suprema di cassazione decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Community law preclude the application of a provision of national law, such as Article 2909 of the Italian Civil Code, laying down the principle of *res judicata*, where the application of that provision would lead to a result incompatible with Community law, thereby thwarting its application, even in areas other than State aid (in relation to which, see … *Lucchini* …) and, in particular, in matters relating to VAT and with respect to the abuse of rights in order to obtain undue tax savings, in particular in the light also of the rules of national law – as interpreted in the case-law of the [Corte suprema di cassazione] – according to which, in tax disputes, where a final judgment drawn up by another court in a case on the same subject contains a finding on a fundamental issue common to other cases, it has binding authority as regards that issue, even if it was drawn up in relation to a different tax period?'

**The question referred for a preliminary ruling**

19 The referring court asks, in essence, whether Community law precludes the application, in circumstances such as those at issue in the main proceedings, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a VAT dispute in relation to a tax year for which no final judicial decision has yet been delivered, where that provision would prevent the referring court from taking into consideration Community law rules concerning abusive practice in the field of VAT.

20 It should be emphasised at the outset that, in order to answer that question, it is irrelevant that the referring court did not set out precisely the reasons for which it is legitimate to doubt that the *contratto di comodato* is genuine, lawful and not fraudulent.

21 Olimpiclub relied on the principle of *res judicata*, as interpreted in the Italian legal system and set out in paragraph 13 of the present judgment, in order to assert the binding and final nature of the finding, made in the earlier judgments relating to different tax periods, that the *contratto di comodato* is genuine, lawful and not fraudulent.

22 In that connection, attention should be drawn to the importance, both for the Community legal order and for the national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question (Case C?224/01 *Köbler* [2003] ECR I-10239, paragraph 38, and Case C?234/04 *Kapferer* [2006] ECR I-2585, paragraph 20).

23 Accordingly, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question (see *Kapferer*, paragraph 21).

24 In the absence of Community legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness) (see, to that effect, *Kapferer*, paragraph 22).

25 The above analysis cannot be called into question by *Lucchini*. That judgment concerned a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the Community in the area of State aid, the Commission of the European Communities having exclusive competence to assess the compatibility with the common market of a national State aid measure (see, to that effect, *Lucchini*, paragraphs 52 and 62). Issues of that nature, relating to the division of powers, do not arise in the present case.

26 Here the question is more specifically whether it is compatible with the principle of effectiveness to interpret *res judicata* in the manner referred to by the national court, that is to say, as meaning that, in tax disputes, where a final judgment in a given case concerns a fundamental issue common to other cases, it has binding authority as regards that issue, even if its findings were made in relation to a different tax period.

27 In that connection, it should be borne in mind that the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to

the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14).

28 It is therefore necessary to determine, specifically, whether the abovementioned interpretation of Article 2909 of the Italian Civil Code may be justified with a view to protecting the principle of legal certainty, in the light of its implications for the application of Community law.

29 It should be noted that – as the national court itself points out – not only does the interpretation in question prevent a judicial decision that has acquired the force of *res judicata* from being called into question, even if that decision entails a breach of Community law; it also prevents any finding on a fundamental issue common to other cases, contained in a judicial decision which has acquired the force of *res judicata*, from being called into question in the context of judicial scrutiny of another decision taken by the relevant tax authority in respect of the same taxpayer or taxable person, but relating to a different tax year.

30 Accordingly, if the principle of *res judicata* were to be applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an interpretation of the Community rules concerning abusive practice in the field of VAT which was at odds with Community law, those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation.

31 In those circumstances, it must be held that such extensive obstacles to the effective application of the Community rules on VAT cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness.

32 Consequently, the answer to the question referred is that Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a VAT dispute relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of VAT.

**Costs**

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

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

**Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a dispute concerning value added tax and relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of value added tax.**

[Signatures]

* Language of the case: Italian.