OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 17 March 2005 (1)

Case C-475/03

Banca Popolare di Cremona

v

Agenzia Entrate Ufficio Cremona

1. This request for a preliminary ruling from the Commissione Tributaria Provinciale (Regional Tax Court) in Cremona raises essentially the question whether a tax such as IRAP – a regional tax on production levied in Italy – is compatible with the Community prohibition of national turnover taxes other than VAT.

Relevant Community legislation

2. The essence of the Community's harmonised VAT system is set out in Article 2 of the First VAT Directive: (2)

'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods and services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

The common system of valued added tax shall be applied up to and including the retail trade stage.'

3. That system of successive applications and deductions of tax thus envisages a chain of transactions in which the net amount payable in respect of each transaction is a specified proportion of the value added at that stage. When the chain comes to an end at the final stage of private consumption, the total amount levied will amount to the relevant proportion of the final price.

4. More detailed rules are contained in the Sixth VAT Directive. (3) Under Article 2 of the Sixth Directive a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT.

5. A taxable person is defined in Article 4(1) as one who carries out an economic activity, whatever its purpose or result. Economic activities are, under Article 4(2), 'all activities of producers, traders and persons supplying services', together with the 'exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'. Under Article 4(5), however: 'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.'

6. Title X of the Sixth Directive provides for a number of transactions to be exempted from VAT. Article 13 lists the exemptions which apply to transactions within the territory of the country – essentially certain activities in the public interest, certain insurance and financial transactions (including the management of special investment funds) and certain transactions relating to immovable property – while Articles 14 to 16 list exemptions in international trade. Article 28c, (4) in Title XVIa, on transitional arrangements for trade between Member States, amends Article 16 to cover intra-Community trade and adds a small number of other exemptions in that context.

7. The essentials of the right to deduct are set out in Article 17. Article 17(2) states: '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 …' Under Article 17(3)(b), exports from the Community, which are exempted under Article 15, give rise to a right to deduct input tax, unlike exempt domestic transactions.

8. Finally, Article 33(1) of the Sixth Directive (5) provides:

'Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

9. According to the Court's settled case-law, that provision prohibits the Member States from introducing or maintaining taxes, duties or charges in the nature of turnover taxes. (6) It seeks to prevent the functioning of the common system of VAT from being jeopardised by fiscal measures of a Member State affecting the movement of goods and services and applying to commercial transactions in a manner comparable to VAT. (7) It is clear that the common system would be jeopardised if a tax similar in essential respects to VAT were to be applied by a Member State but were to escape the harmonisation considered necessary for the internal market.

10. Taxes, duties and charges must in any event be regarded as being such measures if they exhibit the essential characteristics of VAT, even if they are not identical to VAT in all points. Those characteristics are defined by the Court's case-law as follows: VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services, whatever the number of transactions carried out; it is charged at each stage of the production and distribution process; and, finally, it is imposed on the added value of goods and services, since

the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction. Article 33(1) does not, on the other hand, preclude the maintenance or introduction of a tax which does not display one of the essential characteristics of VAT. (8)

Relevant national legislation

11. By Legislative Decree No 446 of 15 December 1997, (9) the ItalianRepublic introduced a tax – the imposta regionale sulle attività produttive, known as IRAP – providing regional authorities with a source of revenue to fund the exercise of their devolved powers.

12. The rules governing the levying of IRAP are complex, with many cross-references to other legislation. I shall not set them out in detail here. However, it appears to be common ground that the fundamental features are as follows.

13. Under Articles 2 and 3 of the Legislative Decree, IRAP is levied from those who regularly carry on an independently run activity with the object of producing or trading in goods or providing services. Most natural and legal persons, including State and public bodies and administrations, are liable for the tax, but certain joint investment funds, certain pension funds and certain European economic interest groups are exempt.

14. Article 4(1) defines the basis of assessment as the net value deriving from production within the region. The precise method of determining that value varies somewhat according to the category of taxpayer, but as a basic principle for commercial undertakings it is the difference shown in the profit and loss account between, on the one hand, total proceeds from the activity, not including income from exceptional financial transactions, and, on the other, production costs not including staff or financial costs. For public authorities and non-commercial private undertakings, the tax basis is essentially the payroll.

15. In accordance with Article 16, the basic rate of tax is 4.25% of the net value thus defined, which is doubled in the case of certain public administrations and which may be varied by the regional authority by up to one percentage point either way.

The reference for a preliminary ruling

16. In 1999, the Banca Popolare di Cremona (‘Banca Popolare’) requested reimbursement of various sums which it had paid by way of IRAP in that and the previous year, arguing that the tax was unlawful because, inter alia, it was incompatible with Article 33 of the Sixth Directive.

17. The validity of IRAP was also challenged in various other proceedings in Italy on grounds of alleged incompatibility with a number of provisions of the Italian Constitution. On 10 May 2001, in a judgment (10) to which this Court’s attention has been drawn by both the referring court and all the parties which have submitted observations, the Corte Costituzionale (Constitutional Court) ruled that those challenges were unfounded.

18. The tax authority subsequently refused to reimburse the sums claimed by Banca Popolare, which has challenged that refusal before the Commissione Tributaria Provinciale.

19. The national court finds that:

– like VAT, IRAP applies in general to all commercial transactions involving production of or

trade in goods, or provision of services, in the context of a trade or professional activity;

– as in the case of VAT, the basis on which IRAP is levied is the net value added by the taxpayer, although the method of calculation is different: whereas for VAT input tax is deducted from output tax, for IRAP costs are deducted from proceeds;

– like VAT, IRAP is levied at every stage of the production or distribution process, since every operator producing taxable added value is liable to tax;

– as in the case of VAT, the total amount of IRAP collected at the various stages up to final consumption is equal to the rate of IRAP applied to the price charged to the final consumer, so that it amounts to a general and proportional tax on the price at which goods or services are sold to the consumer.

20. Considering those findings in the light of the Court's case-law on Article 33 of the Sixth Directive, the Commissione Tributaria takes the view that IRAP displays the essential characteristics of VAT, so that it appears incompatible with Community law and should therefore be disapplied by national courts.

21. However, in view of the novelty of the point and the lack of specific case-law, it has decided first to request a ruling by the Court of Justice on the following question:

'Must Article 33 of Directive 77/388/EEC (as amended by Directive 91/680/EEC) be interpreted as meaning that it prohibits a charge to IRAP of the net value of production deriving from the regular exercise of an independently run activity whose object is the production of or trade in goods or the provision of services?'

22. Written observations have been submitted by Banca Popolare, the Italian Government and the Commission, all of which presented oral argument at the hearing. Banca Popolare and the Commission take the view that Article 33 prohibits a tax with the features of IRAP, while the Italian Government submits that those features are sufficiently different from those of VAT to fall outside the prohibition.

Assessment

23. It is common ground that, in order to be caught by the prohibition in Article 33 of the Sixth Directive, a national tax must display all of the essential features of VAT which, according to the Court's case-law, are four in number, corresponding closely to the definition in Article 2 of the First Directive:

– it applies generally to supplies of goods or services;

– it is proportional to the price of those goods or services, whatever the number of transactions carried out;

– it is charged at each stage of the production and distribution process; and

– it is imposed on the value added to the goods and/or services in question.

24. Possession of all four essential features of VAT is thus both a necessary and a sufficient condition for a tax to be prohibited under Article 33 of the Sixth Directive. However, it is equally undisputed that a tax does not escape the prohibition simply because it is not identical to VAT in

all respects. (11)

25. It is thus necessary to take the four features in turn, and consider whether IRAP exhibits them in at least a substantially identical form. I find it clearer to examine those features in the order used by the referring court, which is slightly different from that often used in the case-law. (12) I shall begin therefore by considering whether IRAP is of general application, then whether it is imposed on the value added to supplies, next whether it is applied at all stages and finally whether it is proportional to the added value, whatever the number of transactions.

26. Clearly, only the Italian courts are competent to determine the precise features of IRAP, which involve rather detailed questions of national law. However, on the basis of the descriptions given by the referring court in the order for reference and by the Corte Costituzionale in its judgment, (13) this Court is in my view in a position to consider whether a tax of the kind described possesses the essential features of VAT.

General application to supplies of goods and services

27. The Commissione Tributaria states that it follows from Article 2 of the Legislative Decree that 'IRAP applies, in general, to all commercial transactions involving production or trade, relating to goods and services and arising from the regular exercise of an activity intended for that purpose, that is, through undertakings, trades and professions'. As both Banca Popolare and the Commission point out, that indicates a very general degree of application for IRAP.

28. The Court has held a tax not to be of general application when it applies only to limited categories of supplies of goods or services (14) or to specific categories of taxpayer. (15) However, it still exhibits this essential feature of VAT if it applies both to commercial activities which are subject to VAT and to other types of industrial or commercial supplies which are not so subject. (16)

29. It seems to me that IRAP displays the feature in question. The provisions of Articles 2 and 3 of the Legislative Decree, which define the activities giving rise to liability and the persons liable, are substantially very similar indeed to those of Article 4(1) and (2) of the Sixth Directive.

30. No categories of goods or services appear to be excluded as such. Some categories of taxpayer are excluded but the exclusions are limited in number and extent, and seem to overlap substantially with certain exemptions under the Sixth Directive or with the exclusion of certain transactions which lie altogether outside the scope of VAT. Both in its written observations and at the hearing, Banca Popolare stated, without being contradicted, that all traders registered for VAT are subjected to IRAP.

31. Also at the hearing, however, the Italian Government argued that, although IRAP may be described as generally applicable, it is not applicable to *supplies* of goods or services; it applies to wealth created and not to supplies made, so that for example an undertaking which in a given tax period produces 1 000 motor vehicles but does not sell them will pay IRAP but not VAT in that tax period. IRAP is thus in any event, unlike VAT, a direct and not an indirect tax. The Italian Government also referred to certain Community conventions and Commission documents classifying IRAP as a direct tax. Banca Popolare vigorously disputed the assertion that IRAP was levied on goods produced but not yet sold.

32. This Court is not competent to determine the stage at which IRAP is levied. However, I do not consider that the Italian Government's submission affects the categorisation of IRAP as

generally applicable to supplies of goods and services.

33. Classification of taxes into ‘direct’ and ‘indirect’ is not always either simple or even, for many purposes, relevant. Here, the question is not whether IRAP is to be categorised as a direct or an indirect tax, but whether it has the same essential features as VAT.

34. However, a commonly accepted distinction between direct and indirect taxation is that the former burdens a (natural or legal) person’s own available wealth or income, with no possibility of being passed on to any other person, whereas the latter is levied on spending or consumption and its burden may be – indeed, normally is – passed on to and borne by the ultimate consumer. In that light, it seems to me that the mechanism described by the Italian Government is that of an indirect tax, the burden of which will essentially be borne by the ultimate consumer.

35. The Corte Costituzionale in its judgment states that IRAP ‘is not levied on the taxpayer’s personal income but rather on the added value produced by independently run activities’. In rejecting certain arguments to the effect that the tax was levied on a ‘mere potentiality of taxable capacity’ , it states that the basis on which IRAP is assessed is ‘the added value produced by independently run activities’. (17)

36. Thus, if IRAP may be levied at a time before goods are actually supplied, that does not prevent it from burdening the subsequent supply as if it had been levied at that moment, with a result exactly equivalent to that of VAT.

37. On the other hand, it seems that IRAP may be in several respects of even more general application than VAT. State and regional authorities for example are apparently not exempt as they are under Article 4(5) of the Sixth Directive, and the tax is levied on exports with no possibility of a refund, unlike the situation under Articles 15 and 17(3)(b) of the Sixth Directive.

38. However, it is clear from *Dansk Denkavit* (18) that where a tax has substantially the same scope as VAT, the fact that it extends also to other areas not covered by VAT does not detract from its resemblance to the latter tax for the purposes of its assessment under Article 33 of the Sixth Directive. Thus, only if its scope were substantially narrower would IRAP lack the essential feature of general application.

39. It follows moreover from that principle, which must be kept clearly in mind when assessing the nature of a tax in relation to VAT, that where IRAP applies to situations not covered by VAT, any differences between its basis of assessment in those situations and the basis of assessment for VAT is simply irrelevant.

Imposed on the value added to goods or services supplied

40. It is common ground that the method of calculating IRAP differs from that used for VAT.

41. The referring court states: ‘With VAT, the fraction or portion of added value produced by an individual producer is quantified and assessed via the mechanism of deduction of tax from tax (input tax paid on purchases is deducted from output tax collected on sales). With IRAP, the fraction is calculated and assessed, roughly, by deducting the cost of acquiring the “thing sold” from the proceeds of the “sales”.’

42. However, it goes on, in their results the two mechanisms are ‘as similar as two drops of water’.

43. In any event, what has to be determined is whether IRAP is imposed on the value added to goods and services, not whether that value is calculated in the same way as for VAT. And it may be recalled that the Corte Costituzionale has found that IRAP is a tax on added value. (19)

44. Added value may be defined in different but equally valid ways and, as the Court has stressed, a tax need not be identical to VAT in all respects in order to fall foul of the prohibition in Article 33 of the Sixth Directive.

45. It seems from the information in the case-file that the basis of assessment for IRAP is essentially the difference between the proceeds and the costs (not counting wages or certain financial costs) of the taxpayer's productive activities during a given tax period – normally, it appears, a calendar year. That may clearly be viewed as one, though not the only, way of defining the value added by the taxpayer to the goods and services he supplies.

46. VAT on the other hand is in theory levied on the full value of each taxable supply made, its amount being reduced by that of the tax already paid on the cost components of that supply (again excluding wages and many financial costs, which are exempt). In practice, however, the tax due on all supplies made in a given tax period – of up to one year – is aggregated, as is the tax paid on all cost components acquired during that period, and the latter is deducted from the former. (20)

47. Thus, there is little difference between the two in practice, and perhaps even less in results, even though VAT is conceived as being assessed on a transaction-by-transaction basis. And the existence of what the referring court describes as 'trivial accounting points of negligible consequence' cannot in my view be sufficient to overcome that essential similarity if the prohibition of other duties or charges having the nature of VAT is to have any teeth at all.

48. Indeed, in *Dansk Denkavit*, (21) the Court found to be contrary to Article 33 of the Sixth Directive a tax which it noted was levied as a percentage 'of the total sales effected and services provided by each undertaking during a specified period, less the purchases of goods and services by that undertaking during that period' – a description of a mechanism clearly very close to that by which IRAP is calculated.

49. The Italian Government does however point to one distinction which might appear significant. Because under the VAT system a taxable person may deduct input tax as soon as it is incurred, regardless of the amount of output tax due during the same tax period, situations can and do arise in which the net payment in a particular period is from the tax authority to the taxable person rather than the reverse. With IRAP, that is impossible: if in a given tax period outgoings exceed receipts, the tax is simply nil.

50. It is true that the right to deduct is an expression of the central principle that VAT must be completely neutral as regards the burden on all the taxable economic activities of a business, and as such an essential part of the VAT system.

51. However, the fact that another tax does not use such a mechanism, and may thus not have the same degree of fiscal neutrality, does not affect the question whether it is levied on the value added by the taxpayer.

52. In that regard, we may again draw an analogy with the position taken by the Court in *Dansk Denkavit*, (22) and conclude generally that a tax does not lose the essential features of VAT merely because its scope is broader or because it has other additional features. What matters rather is the extent, if any, to which it may lack any of the essential features referred to.

53. In short, both VAT and IRAP are levied on the value added to goods and services; that situation is not affected by the fact that, unlike VAT, IRAP is not 'reimbursed' when, exceptionally, value is lost rather than added. It is in any event in the very nature of economic activity that such cases are marginal.

Charged at each stage of the production and distribution process

54. Although the Court has referred to charging at each 'stage' of the production and distribution process, it is clear from Article 2 of the First Directive that what is meant is charging at the stage of each transaction in that process. It is not in the nature of a turnover tax to be charged at stages which are purely internal to the taxable person's business, and VAT is not charged at such stages.

55. Article 2 of the Legislative Decree states that the criterion for subjection to IRAP is 'the regular exercise of an independently run activity whose object is the production of or trade in goods or the provision of services', and Article 4(1) that the tax applies to the value of net production arising from the activity carried on within the relevant region.

56. In that regard, the Commissione Tributaria states that 'IRAP is levied at every stage of the production or distribution process, since every trader involved in a stage of the cycle, producing taxable added value, is considered by the law to be liable to tax'.

57. IRAP thus appears to conform to the same pattern as VAT. It is levied on the businesses of all those who carry on a taxable activity, so that where the goods or services of one business are used by another business for the purposes of providing its own goods or services, and the latter are in turn used by a third business which makes supplies to final consumers, the tax will be charged in respect of each stage in that process. Again, the charge is global rather than on a transaction-by-transaction basis but there can be no doubt that it applies at each stage, up to and including the retail stage, as specified in the First Directive.

Proportional to the price of goods or services, whatever the number of transactions

58. In this regard, the referring court notes that 'the amount of IRAP collected in the various stages of the cycle, from production up to the final consumer, is equal to the rate of IRAP applied to the selling price of goods and services charged to the final consumer. Despite its fractional basis, therefore, IRAP in fact acts as a general and proportional tax on the price of transferring goods or services to the consumer.'

59. IRAP is levied at one of two rates, expressed as a percentage of the basis of assessment, which are laid down in the Legislative Decree but may be varied within limits by the competent regional authority. (23) Since the basis of assessment is essentially the value added by the taxpayer to the goods or services he supplies, it is thus proportional to that value.

60. However, the global nature of IRAP undoubtedly allows economic operators a greater degree of flexibility than is the case with VAT. They may modulate the way in which they pass the burden of the tax on to their customers, or may even choose not to pass the burden on at all. VAT by contrast must be charged at the appropriate rate on each individual supply.

61. Consequently, whereas the VAT system requires the amount of tax to be a specified

proportion of the price charged on each supply of goods or services, so that at least for accounting purposes it remains strictly 'proportional, whatever the number of transactions', that may not be literally true in respect of IRAP, whose amount as a proportion of the price of any given supply may vary considerably or may even be impossible to determine.

62. I do not, however, consider that point to be very relevant to the overall assessment.

63. First, as a matter of economic reality, the burden of a tax levied at any stage in a trading chain will in general be passed on down the chain.

64. Exceptionally and in the short term, some economic operators may for a variety of reasons have opted to absorb the burden of IRAP without passing it on to their customers, but in the long term it is likely that each operator's margin will adjust and the burden will ultimately be borne at the end of the chain.

65. Second, exactly the same option is available, in economic terms, with regard to VAT. There is little or no practical or economic difference, for either party to the transaction, between the situation in which a trader decides to 'absorb' the burden of a tax and that in which he reduces his profit margin – or, perhaps more likely, redistributes his profit margins between various categories of supply in response to competitive forces. And neither situation affects the collection of the tax, which remains in constant proportion to the price of the supplies.

66. In that connection, the Corte Costituzionale in its judgment of 10 May 2001 considered that 'the economic burden of the tax may in fact be passed on in the price of the goods or services produced, according to the laws of the marketplace, or be wholly or partly recouped by means of appropriate organisational choices'.

67. In *Careda*, (24) the Court specifically stated that 'in order to be characterised as a turnover tax, within the meaning of Article 33 of the Sixth Directive, the tax in question must be *capable of being passed on* to the consumer', (25) but that it is not necessary for the relevant national legislation expressly to provide that it may be so passed on, or for such passing on to be recorded in an invoice or equivalent document.

68. If a Member State could introduce what is essentially a tax on added value but escape the prohibition in Article 33 of the Sixth Directive by ensuring that the amount of tax *need not* remain constant as a proportion of the price of each individual supply of goods or services, that prohibition would in effect be rendered inoperative and the harmonisation required by the internal market could be circumvented. (26)

Conclusion as regards the compatibility of IRAP with Community law

69. I thus reach the view that a tax such as IRAP possesses the essential features of VAT and is caught by the prohibition embodied in Article 33 of the Sixth Directive.

70. However, it must also be considered what concrete effects that conclusion entails.

Possibility of temporal limitation of the effects of the judgment

71. According to consistent case-law, individuals are entitled to reimbursement of national charges levied in breach of Community law. (27) It appears that, if IRAP were found incompatible

with Community law, under Italian procedural rules the retroactive entitlement to reimbursement would cover 48 months.

72. At the hearing, the Italian Government stated that the amounts collected and used to finance the activities of regional authorities during that period exceeded EUR 120 billion. In view of the serious consequences, it therefore requested that, if IRAP were to be found incompatible with Article 33 of the Sixth Directive, the temporal effects of the judgment should be limited – as for example in *EKW*. (28)

73. The Court has consistently held that the interpretation it gives to a provision of Community law clarifies and defines the meaning and scope of that provision as it should have been understood and applied from the time of its entry into force.

74. Exceptionally, however, having regard to the need for legal certainty, the Court may limit the possibility for parties to rely on the interpretation in such a judgment to call in question legal relations established in good faith in the past. Before deciding to impose such a limitation, it verifies that two essential criteria are fulfilled, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. (29)

75. As regards good faith, the Court has taken account in particular of the position taken by the Commission in relation to the MemberState's legislation. The Court has accepted, for example, that a MemberState can rely on a failure by the Commission to take infringement proceedings against it. A MemberState must be entitled all the more to rely on the Commission's express acceptance of the compatibility of its legislation with Community law.

76. In the present case, the Italian Government relies on the fact that the legislation was notified to the Commission in draft form (at which stage the tax was designated 'IREP'), and that in a reply of 10 March 1997, produced by Italy with other documents at the hearing, the Director-General responsible for customs and indirect taxation wrote: 'As regards … IREP, after careful examination of the documentation provided, I can inform you that, in its present state, the proposal for this new tax does not appear incompatible with the legislation applicable in the field of value added tax. None the less, I reserve the right to re-examine it in the light of any amendments and/or of the implementing provisions to be adopted.'

77. In the light of that letter, and of the absence of any subsequent critical reaction from the Commission, the Italian Government considers that it was entitled to conclude that the tax was not incompatible with Community law. The agent for the Commission, however, argued at the hearing that the letter embodied merely a provisional view taken by the Commission's services, and that no definitive position had ever been taken by the Commission itself. The registry subsequently sent the Commission the documents produced at the hearing, for possible comments, but the Commission added nothing on this point.

78. As regards the risk of serious difficulties, the Italian Government relies on the very large amounts potentially involved in claims for reimbursement of what is now the main if not the only source of revenue for the regions, and on the catastrophic effects which granting those claims would thus have on regional funding.

79. There appears to me to be a strong argument for limiting the temporal effects of a finding that IRAP is incompatible with Community law. I am not persuaded by the Commission's view of the weight to be accorded to the letter of 10 March 1997; it was couched in unambiguous terms and signed by the competent Director-General, and not followed by any further action on the part of the Commission. The risk of serious difficulties appears moreover real; to adapt the words of the *EKW* judgment, (30) an unlimited temporal effect might 'retroactively cast into confusion the

system whereby Italian regions are financed'.

80. However, the question arises of the date which it might then be appropriate to set as a limit for that temporal effect.

81. In *EKW*, following its consistent practice in such cases, the Court excluded reliance on its judgment in claims for reimbursement of tax paid or chargeable 'prior to the date of the present judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim'.

82. However, it later transpired that all the regional authorities concerned in that case had amended their tax codes so as to limit considerably the possibility of succeeding in a claim, even for those who had already initiated proceedings. In all cases those amendments were made after delivery of the Opinion in *EKW* – and in all but one before the delivery of the judgment. (31)

83. In the present case, the problem is a different one. It appears from the Italian press that large numbers of Italian traders are already seeking or being encouraged to seek reimbursement of sums paid by way of IRAP, in anticipation of the Court's ruling in this case.

84. Thus, in view of the effect of various tactics that have been or may still be adopted in anticipation of the Court's judgment, and of the danger of very serious disruption of regional funding – with no probable long-term overall benefit to taxpayers since any shortfall in funding must presumably be made up by other taxation – it might be appropriate to envisage a different approach from that taken in *EKW* and other cases.

85. One such approach might be inspired by that frequently taken by the German Constitutional Court – a finding of incompatibility subject to a future date before which individuals may not rely on the incompatibility in any claims against the State, the date in question being chosen in order to allow sufficient time for new legislation to be enacted.

86. For this Court to take such a step would be a considerable innovation. Such innovations have however been made in the past. It was an innovation for example in 1976 when in *Defrenne* (32) the Court limited the retroactive effect of its interpretation of a Treaty article. There were further innovations in 1980, when in *Providence Agricole de la Champagne* (33) the Court applied the second paragraph of what is now Article 231 EC by analogy in a preliminary ruling, limiting the retroactive effect of a finding that certain Commission regulations were invalid, and again in 1988, when in *van Landschoot* (34) it went a stage further, maintaining the effects of an invalid Community provision until such time as it was replaced by a valid provision.

87. However, in the present case, it may be difficult for the Court to decide on the appropriate temporal limitation, especially since a departure from the Court's customary approach has been neither debated during the proceedings nor requested by the Italian Government. In view of the difficulties involved in choosing the appropriate limitation, it may be desirable for the Court to reopen the oral procedure to hear further argument on that point.

Conclusion

88. I am therefore of the opinion that the answer to the question raised by the Commissione Tributaria should be that:

A national tax such as the imposta regionale sulle attività produttive which

– is levied on all natural and legal persons who regularly carry on an activity with the object of producing or trading in goods or providing services,

– is imposed on the difference between the proceeds and costs of the taxable activity,

– is charged in respect of each stage in the production and distribution process corresponding to a supply or set of supplies of goods or services made by a taxable person, and

– imposes a burden at each of those stages which is globally proportional to the price at which the goods or services are supplied

must be characterised as a turnover tax prohibited by Article 33(1) of the Sixth VAT Directive.

89. However, for those seeking to rely on the ruling to be given by the Court, its effects should be subject to a temporal limitation, by reference to a date to be fixed by the Court.

1 – Original language: English.

2 – First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

3 – 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, hereinafter ‘the Sixth Directive’).

4 – Introduced by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

5 – As amended by Article 1(23) of Directive 91/680, cited in footnote 4.

6 – See, most recently, Case C-308/01 GIL Insurance [2004] ECR I-0000, at paragraph 31, and the case-law cited there.

7 – See Case C-437/97 EKW [2000] ECR I-1157, at paragraph 20, and the case-law cited there.

8 – See GIL Insurance, cited in footnote 6, at paragraphs 32 to 34, EKW, cited above, at paragraphs 21 to 23, and the case-law cited in both judgments.

9 – Published in GURI No 298, of 23 December 1997, hereinafter ‘the Legislative Decree’; since amended.

10 – Judgment 256/2001.

11 – See the case-law cited in footnotes 6 and 7 above.

12 – See points 11, 20 and 24 above.

13 – See point 18 above.

14 – Joined Cases 93/88 and 94/88 Wisselink [1989] ECR 2671, paragraph 20; Case C-109/90 Giant [1991] ECR I-1385, paragraph 14; Case C-208/91 Beaulande [1992] ECR I-6709, paragraph 16; Case C-347/95 UCAL [1997] ECR I-4911, paragraph 36; Case C-28/96 Fricarnes [1997] ECR I-4939, paragraph 40; Case C-130/96 Solisnor-Estaleiros Navais [1997] ECR I-5053, paragraph 17;

EKW, cited n footnote 7, paragraph 24; Case C-101/00 Tulliasamies [2002] ECR I-7487, paragraph 101; GIL Insurance, cited in footnote 6, paragraph 33.

15 – Case C-347/90 Bozzi [1992] ECR I-2947, paragraph 14.

16 – Case C-200/90 Dansk Denkavit [1992] ECR 2217, paragraph 15.

17 – See point 18 above, at sections 6 and 10.1 of the reasoning in law in the judgment.

18 – Cited in footnote 16.

19 – See point 18 above.

20 – See Article 28h of the Sixth Directive, replacing Article 22 concerning the obligations of persons liable for payment under the internal system, in particular paragraphs 4 to 6 of that article, which clearly envisage an aggregation of data and calculations for each relevant tax period.

21 – Cited in footnote 16.

22 – See points 29 and 39 above.

23 – See point 16 above.

24 – Joined Cases C-370/95, C-371/95 and C-372/95 [1997] ECR I -3721, paragraphs 15, 18 and 26.

25 – Paragraph 15, emphasis added.

26 – See point 10 above.

27 – For a recent example referring to earlier case-law, see Case C-62/00 Marks and Spencer [2002] ECR I-6325, at paragraph 30.

28 – Cited in footnote 7, paragraphs 55 to 60.

29 – See, most recently, the judgment of 15 March 2005 in Case C-209/03 Bidar, at paragraphs 66 to 69.

30 – At paragraph 59.

31 – See Case C-147/01 Weber’s Wine World [2003] ECR I-0000, paragraph 11 et seq.

32 – Case 43/75 [1976] ECR 455, at paragraphs 69 to 75.

33 – Case 4/79 [1980] ECR 2823, at paragraphs 42 to 46; and in two other related judgments delivered on the same day – Case 109/79 Maïseries de Beauce [1980] ECR 2883, paragraphs 42 to 46, and Case 145/79 Roquette Frères [1980] ECR 2917, paragraphs 50 to 52.

34 – Case 300/86 [1988] ECR 3443, at paragraphs 22 to 24.