OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 25 October 2007 (1)

Case C-132/06

Commission of the European Communities

v

Italian Republic

(VAT amnesty – Immunity from verification – Relationship between sums due and sums collected – Compatibility with the Sixth Directive)

1. The Commission seeks a declaration that, by explicitly providing for a general waiver of verification of taxable transactions effected in a series of tax years, Italy has failed to fulfil its obligations under the Sixth VAT Directive (2) and Article 10 EC.

2. The national provisions in question set up a tax amnesty under which, if certain declarations are made and certain sums are paid immediately, failures to account for amounts of various taxes during the tax years 1998 (or in some cases 1997) to 2001 will not be pursued or subjected to scrutiny. (3)

3. The Commission submits that, in so far as it concerns VAT, the amnesty is contrary to the provisions of Article 2 of the Sixth Directive, which require transactions to be taxed, and Article 22, which impose various obligations as to declaration and payment of VAT.

4. Italy contends that the effect of the amnesty is not a general and indiscriminate renunciation of all verification, that only a limited proportion of persons liable for VAT have had recourse to it, that it has been extremely productive in terms of tax recovered, and that it has thus been a judicious use of limited resources, falling within the latitude necessarily accorded to Member States.

Community provisions

5. Article 10 EC imposes a general obligation on Member States to ‘take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community’, to ‘facilitate the achievement of the Community’s tasks’ and to ‘abstain from any measure which could jeopardise the attainment of the objectives of this Treaty’.

6. Article 2 of the Sixth Directive states:

‘The following shall be subject to value added tax:

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

2. the importation of goods.’ (4)

7. The original Article 22 of the Sixth Directive was replaced by one of the so-called ‘transitional arrangements’ in Title XVI, and the applicable text is to be found in Article 28h. It is entitled ‘Obligations under the internal system’, and is the longest article in the directive. (5)

8. In relation to the alleged failure to fulfil obligations in the present case, the Commission initially cites three of its provisions, from paragraphs 4, 5 and 8:

‘4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. …

…

5. Every taxable person shall pay the net amount of the value added tax when submitting the regular return. …

…

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion …’ (6)

9. The Commission then draws attention to a number of further obligations imposed on taxable persons by Article 22:

– to declare every commencement, modification and cessation of activity as a taxable person (paragraph 1(a) (7));

– to keep accounts in sufficient detail for VAT to be applied and inspected by the tax authority (paragraph 2(a) (8));

– to submit a recapitulative statement of intra-Community transactions (paragraph 6(b) (9)).

10. The Commission finally refers to other provisions of Article 22 which impose obligations on the Member States:

– to identify taxable persons by means of an individual number (paragraph 1(c), (d) and (e) (10));

– to take the necessary measures to ensure that persons other than taxable persons who are liable for payment of the tax comply with all the obligations as to declaration and payment set out for taxable persons (paragraphs 7, 10 and 11 (11)).

National provisions

11. The Commission takes issue with Articles 8 and 9 of the Italian Finance Law for 2003. (12) Those provisions allow taxable persons who have not submitted full returns to submit supplementary returns and to make a payment absolving them from further tax liability in respect of the period concerned, namely the tax years 1998 (or in some circumstances 1997) to 2001 inclusive. They cover a range of taxes, but the Commission's action concerns only VAT, and the following summary of the relevant provisions is confined to the situation as regards that tax.

Article 8

12. Article 8 allows returns which should have been made before 31 October 2002 to be 'completed'. There are two variants of the procedure, governed respectively by paragraphs 3 and 4.

13. Under Article 8(3), completion involves presentation of a supplementary return for each of the tax years concerned and payment of the additional sums due pursuant to the provisions in force in each tax year. In certain circumstances where the purchaser is himself liable for input tax but fails to declare it, it concerns only such VAT as could not have been deducted. The supplementary return is valid only if it shows additional sums due of at least EUR 300 for each tax year. Payments may be made in two equal instalments if they exceed EUR 3 000 for individuals or EUR 6 000 for others.

14. Article 8(4) is not available if the taxable person has filed no returns for any of the tax years in question. Those to whom it is available may submit returns and make payments via certain approved bodies. The amounts due may be paid by monthly instalments, but with additional interest. The procedure is confidential in that the specific amounts due are not linked to individual taxable persons.

15. Under Article 8(6), when the procedure in Article 8(3) or (4) has been followed, then, up to the limit of double the VAT due under the supplementary return, (a) neither the taxable person nor any person jointly liable will be subject to any verification, (b) any tax penalties which might have been imposed lapse and (c) certain procedures in respect of tax evasion can no longer be initiated (though criminal proceedings already brought are not extinguished). Article 8(6bis) confirms that tax verifications may none the less be carried out in respect of sums due in excess of the amount specified in Article 8(6).

16. Article 8(9) allows those who have used the confidential procedure under Article 8(4) to escape any verification other than that of the consistency of their supplementary declarations.

17. Article 8(10) excludes the application of the whole article in cases where, when the law came into effect, (a) a reassessment had already been issued, or (b) criminal proceedings for evasion had already been brought, in respect of a particular tax year. However, in some cases, it is possible to comply with a previous reassessment and to use the Article 8 procedure in respect of other periods.

18. Under Article 8(12), submission of the supplementary return cannot constitute information of a criminal offence.

Article 9

19. Article 9 concerns ‘automatic settlement’ in respect of past years. (13) Taxable persons requesting such settlement must submit returns for *all* the tax years in respect of which they should have been submitted by 31 October 2002.

20. By virtue of Article 9(2)(b), automatic settlement involves payment, in respect of each tax year, of a sum equal to 2% of the VAT on the taxable person’s outputs and 2% of the input VAT deducted during that year. That percentage falls to 1.5% for output tax or input tax which exceeds EUR 200 000 and 1% for amounts over EUR 300 000 and, where application of the provision entails payment of a sum in excess of EUR 11 600 000, the portion exceeding that figure is reduced by 80%. Article 9(6) however sets a minimum figure for each year’s payments of EUR 500 where turnover does not exceed EUR 50 000, EUR 600 where turnover is between EUR 50 000 and EUR 180 000, and EUR 700 where turnover exceeds EUR 180 000.

21. For individual years in respect of which no returns have been submitted at all, Article 9(8) requires a flat-rate payment of EUR 1 500 for natural persons, and EUR 3 000 for companies and associations, in respect of each tax year.

22. Under Article 9(9), automatic settlement precludes further deductions or reimbursements not previously claimed by the taxable person. It does not however preclude certain checks, in particular those relating to consistency between declarations made and sums paid and to earlier claims for reimbursement of VAT.

23. Article 9(10) mirrors Article 8(6). When the Article 9 procedure has been followed, then (a) neither the taxable person nor any person jointly liable will be subject to any tax verification, (b) any tax penalties which might have been imposed lapse and (c) certain procedures in respect of tax evasion can no longer be initiated (though criminal proceedings already brought are not extinguished). In contrast to Article 8(6), however, those immunities are not subject to any upper limit based on the amount of additional VAT now paid or declared.

24. Article 9(12) allows payment in two equal instalments where the amount payable exceeds EUR 3 000 for individuals or EUR 6 000 for others.

25. Article 9(13) mirrors Article 8(9). Those who have used the confidential procedure may escape any verification other than that of the consistency of their supplementary declarations.

26. Article 9(14) mirrors Article 8(10). It excludes the application of the whole article in cases where, when the law came into effect, (a) a reassessment had already been issued, or (b) criminal proceedings for evasion had already been brought, in respect of a particular tax year. However, it adds a further exclusion in cases where (c) the taxable person failed to submit any return for any of the tax years covered.

27. Article 9(15) limits the exclusions in Article 9(14)(a) and (b) to the tax years to which they apply. It states that there is to be no automatic settlement on the basis of data which do not correspond to those in the return submitted. Finally, it rules out any reimbursement of sums already paid, which are to be considered advances on tax due.

Pre-litigation procedure

28. Considering that Articles 8 and 9 of the 2003 Finance Law were incompatible with Articles 2 and 22 of the Sixth Directive, the Commission sent Italy a letter of formal notice pursuant to Article 226 EC on 19 December 2003. Italy replied on 30 March 2004, denying any incompatibility. Unsatisfied, the Commission sent a reasoned opinion on 13 October 2004, enjoining Italy to comply within two months. Italy replied on 31 January 2005, still denying any incompatibility. The Commission brought the present action on 8 March 2006.

Declaration sought

29. The Commission asks the Court to declare that, by explicitly providing in Articles 8 and 9 of Law No 289 of 27 December 2002 (Finance Law for 2003) for a general waiver of verification operations on taxable transactions effected in the course of a series of tax years, the Italian Republic has failed to fulfil its obligations under Articles 2 and 22 of the Sixth Directive in conjunction with Article 10 of the EC Treaty. It also asks for an order that Italy pay the costs of the proceedings.

30. Italy contends that the application should be dismissed and the Commission ordered to pay the costs.

Assessment

Admissibility

31. Italy submits that the Commission introduced a new complaint in the reasoned opinion, relating to breach of the principle of VAT neutrality and distortion of competition as a result of the contested provisions. The Commission replies that it was merely recalling, in response to Italy’s arguments, the Court’s case-law on the matter, which is relevant when assessing an alleged infringement of Articles 2 and 22 of the Sixth Directive.

32. Since the Commission does not seek a declaration that the Italian provisions specifically infringe the principle of neutrality or distort competition, its position seems reasonable. I am therefore of the view that there is no obstacle to the admissibility of the action.

Substance

33. There are a number of interlinked issues disputed between the parties in this case, which I propose to deal with under the following headings: (i) the nature and extent of the obligations imposed on the Member States by Articles 2 and 22 of the Sixth Directive, with particular regard to the supervision and enforcement of compliance by taxable persons; (ii) the practical effect of the disputed amnesty provisions, viewed in the light of those obligations; (iii) the significance in that regard of the various limitations on the amnesty provisions; and (iv) the relative effectiveness of the amnesty provisions, in particular in terms of use of resources compared with amounts recovered, the latitude available to the Member States in the administration of VAT, and the extent to which the amnesty provisions fall within that latitude.

34. Although it would be possible – and interesting – to explore a number of other more general issues relating to the legality and/or desirability of VAT amnesties, some of which have been touched upon in the course of the proceedings, I do not feel that it would be helpful for the Court to address those general issues in any great detail in order to decide whether the particular provisions to which the Commission objects are in compliance with the Sixth Directive. I shall confine my analysis therefore essentially to those aspects which are relevant to the declaration sought, referring to the broader issues only as background considerations.

Obligations imposed by the Sixth Directive

35. I agree with the Commission's presentation of the obligations imposed by the Sixth Directive both on individual taxable persons and on the Member States. Indeed, Italy appears also to accept the essentials of that presentation, although it maintains that the details of enforcement and collection are matters for the Member States. The Commission's position may be summarised and restated as follows.

36. From the preamble to the Sixth Directive it is clear that the Communities' own resources 'include those accruing from VAT and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules'; (14) that 'it should be ensured that the common system of turnover taxes is non-discriminatory as regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved'; (15) and that 'the obligations of taxpayers must be harmonised as far as possible so as to ensure the necessary safeguards for the collection of taxes in a uniform manner in all the Member States'. (16)

37. The Court has moreover held that the Sixth Directive must be interpreted in compliance with the principle of fiscal neutrality inherent in the common system of VAT, (17) in accordance with which economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT. (18)

38. The specific obligations imposed by Article 22 of the Sixth Directive are designed to ensure that national authorities have at their disposal all necessary information to ensure that VAT is levied and collected under the supervision of the tax authorities. (19) Those obligations are the corollary of the requirement in Article 2 that (in the absence of a specific exemption) all transactions within its scope must be taxed. That requirement is a general rule from which no Member State may derogate unilaterally. (20) Although under Article 27 of the Sixth Directive (21)

a Member State may seek authorisation from the Council to derogate from the provisions of the directive ‘in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance’, any such simplification is subject to the proviso that it ‘may not affect the overall amount of the tax revenue of the Member State’ (and it is common ground that, in any event, Italy did not seek authorisation in the present instance).

39. Each Member State is thus under an obligation to take all legislative and administrative steps to ensure that VAT is collected in full in its territory in the same way as in other Member States. Although the obligation is not explicitly set out in the Sixth Directive, it is a necessary inference from the whole of that measure, from Article 10 EC and from the Court’s case-law. (22) And, whilst harmonisation is not total and certain administrative aspects are of necessity left to the competence of the Member States, the obligations under Article 22 of the Sixth Directive do imply detailed harmonisation at the legislative level.

40. Pursuant to that harmonisation, Member States are responsible for verifying tax returns, accounts and other relevant documents, and for calculating and collecting the tax due. They have a certain latitude as to how most effectively and most equitably to deploy the resources at their disposal when applying the tax, at least on a case-by-case basis, but that latitude is limited in any event by the need to ensure that

– the Community’s own resources are collected efficiently, and

– there are no significant variations in the treatment of taxable persons either within a single Member State or between Member States.

41. Italy does not deny that Member States are required to oversee and verify, to the extent of their available resources, compliance with the VAT rules by taxable persons. It denies however that the disputed provisions overstep the bounds of the legitimate latitude accorded to them in the exercise of those functions.

42. Consequently, it is necessary first to examine the practical effects of those provisions.

Effects of the disputed provisions

43. The Commission submits that the contested provisions replace the normal legal relationships surrounding VAT liability with new relationships which definitively extinguish that liability, substituting for it a different obligation to pay amounts quite unrelated to those which should have been assessed and accounted for under the normal VAT rules. It describes the amnesty as a ‘general, indiscriminate and prior’ renunciation of the right of verification and reassessment, whereas under the directive any amnesty arrangement with taxable persons should be decided on a case-by-case basis. Furthermore, there is serious disruption of the principle of VAT neutrality and of equality of treatment as between taxable persons.

44. It has to be acknowledged that the provisions are complex, and the parties have in the course of the proceedings disagreed over their practical effects. However, in the light of their answers to requests from the Court for more precise information, I believe those effects may be summarised as follows.

45. If a taxable person has filed no VAT returns at all for any of the tax years in question, he cannot benefit from the amnesty under Articles 8(4) or 9. However, he may benefit from the amnesty provisions in either Article 8 or Article 9 if he has (a) filed (complete or incomplete) returns for any of the tax years in question but none for other years, or (b) filed returns for all of the

tax years in question, but some or all of those returns are incomplete or inaccurate.

46. When, in respect of a particular tax year, a taxable person files a supplementary return under the Article 8 procedure, showing a greater amount of taxable added value (difference between taxed inputs and taxable outputs) than that originally declared, then (a) he must pay an amount equal to the VAT due on the additional amount (subject to a minimum of EUR 300) and (b) he gains immunity from any further reassessment of his output tax for that year, up to a limit of twice the amount of the additional VAT now paid.

47. The Article 9 procedure leads to different results depending on whether a return had originally been filed or not, and on the amount of input VAT deducted. However, a payment must be made in respect of each of the years concerned (whether a return was filed for that year or not, and whether any such return was accurate or not), and no further deductions are possible. For years in respect of which a return was filed, the payment is equal to between 1 and 2% of the input VAT *initially* deducted plus between 1 and 2% of output VAT *initially* declared for the year, (23) subject to a minimum of EUR 500, 600 or 700, depending on the amount of turnover concerned. For each year in respect of which no returns were originally filed, a flat-rate sum of EUR 1 500 for individuals, and EUR 3 000 for companies, is payable, regardless of the actual amount of under-declaration or non-declaration.

48. On that basis, a taxable person using the procedure under Article 8 will pay an amount equal to the full VAT due on his previously undeclared, but now declared, added value – but only in respect of years for which he has not submitted a full, accurate return. However, he is thereby protected from any further reassessment in respect of amounts due up to double that amount. It therefore seems unlikely, in practice, that he will declare more than half of his previously undeclared added value. The tax authorities will then recover up to half the tax actually due while renouncing any possibility of recovering the other half.

49. A taxable person using the Article 9 procedure must make a payment in respect of each year during the period concerned, whether an accurate return was originally made for that year or not. If a return (accurate or inaccurate) was made, then the payment is a small proportion (up to 2%) of the amount of input and output tax *initially* declared; if no return was made, it is a flat-rate sum of EUR 1 500 or EUR 3 000, regardless of the amount of VAT left undeclared. In either case, the taxable person gains immunity from further reassessment.

50. Where a taxable person has a choice between the two procedures (and wishes to make use of one or other of them), it is reasonable to assume that he will opt for that which costs him less. Where the degree of under-declaration or non-declaration has been limited (and thus perhaps more likely to be due to honest error), the Article 8 procedure appears advantageous, providing immunity from further investigation in exchange for payment of half the amount of VAT due. Where it has been more extensive (and thus perhaps more likely to be due to intentional fraud), the Article 9 procedure will provide immunity in exchange for payment of an amount equivalent to a smaller (and in extreme cases, vanishingly small (24)) proportion of the tax due but not accounted for.

51. The Commission stresses that under Article 9 any taxable person may eliminate any risk of verification or reassessment in respect of a series of tax years, in exchange for a payment quite unrelated to the amount of VAT normally due at the rate of 20%. The amnesty under Article 8 also protects the taxable person from further verification or reassessment, albeit in exchange for a higher payment. Such a wholesale renunciation by the tax authorities of their powers of verification seriously distorts, in the Commission's view, the neutrality of the common VAT system. Different taxable persons are subjected to very different treatment in respect of comparable transactions, which in turn undermines fair competition.

52. Again, I can only agree with the Commission that a legislative arrangement under which honest and assiduous traders account for VAT in full whereas fraudulent or negligent traders can escape any further scrutiny in exchange for a payment of at most half, and possibly very much less, of the VAT actually due is not in compliance with the obligations imposed on Member States by, in particular, Articles 2 and 22 of the Sixth Directive. More specifically, the arrangements under Article 9 of the Italian Finance Law for 2003 completely disregard the detailed provisions of Article 22 of the Sixth Directive cited by the Commission (25) in that they do not involve a declaration of transactions actually effected and in that the sums payable are not linked in any way to the tax which should have been accounted for on those transactions. And, as the Commission rightly points out, the amnesty is quite indiscriminate in that it makes no distinction between occasional and regular underdeclaration, between small sums and large, or between negligence and fraud.

53. However, the main thrust of Italy's defence is that the amnesty is of limited availability and is an effective measure, falling within the latitude available to the Member States, for ensuring recovery of sums which would otherwise be lost to the tax authorities. It is therefore necessary to examine those aspects before reaching a final conclusion.

Limitations on the amnesty provisions

54. The Commission describes the contested amnesty as a general and indiscriminate renunciation of the right of verification and reassessment, whereas the Italian Government draws attention to a number of limitations on the availability of the amnesty provisions. Those limitations are, in its view, significant and mean that the amnesty cannot be described as general or indiscriminate.

55. First the amnesty is not available to taxable persons who did not initially submit any VAT returns at all for any of the tax years concerned. (26) That situation, the Commission replies, is by its nature purely marginal.

56. One may indeed hope that such a situation is uncommon, and Italy has not taken issue with its description as 'marginal'. In practice, businesses of any appreciable size may well, even if they wish to defraud the tax authorities, submit sufficiently plausible returns to avoid attracting attention. By contrast, however, a complete absence of declaration may be more common among smaller operators who hope to escape detection in any event, or who feel that evasion is justified by some sort of moral *de minimis* rule. (27) In addition, it is probable that many illegal activities will not be declared at all for VAT purposes, even where in principle they are subject to the tax. (28)

57. I am thus not convinced that the exclusion is marginal in overall terms. As regards the visible economy, it is no doubt marginal, simply because anyone visibly carrying on taxable business will feel the need to declare at least enough of that business to ward off uncomfortable scrutiny and, having done so, will not be excluded from the amnesty. But such reasoning does not

hold true for the invisible, or underground, economy, which has been estimated at over 26% of GDP in Italy. (29)

58. On the other hand, a (theoretically) taxable person who aspires to escape altogether the notice of the tax authorities is perhaps less likely to seek the protection of an amnesty than one who is already known to those authorities but has hidden something from them. He is also less likely to be audited by them, particularly if their resources are limited, as is argued by the Italian Government.

59. On balance, therefore, it seems to me unlikely that the exclusion of taxable persons who have failed to submit any return at all for any of the tax years concerned will have a significant effect on the numbers benefiting or seeking to benefit from the amnesty.

60. Second, the Italian Government argues that the amnesty is not available where irregularities have already been brought to light. (30) The Commission counters that the exclusion is not complete – in some cases another settlement procedure under Articles 15 and 16 of Law No 289/2002 may be used in order to terminate reassessment proceedings and reopen the possibility of recourse to the amnesty – but the Italian Government rejoins that the arrangement in question concerns only those for whom such proceedings were still open to challenge.

61. It appears from the text of Articles 15 and 16 provided by Italy in its rejoinder that reassessment proceedings which have not yet reached the stage of a definitive order or ruling may be terminated by the payment of a sum of at least EUR 150 and up to 50% of the amount of tax claimed, and from Articles 8(10) and 9(14) that, once such payment has been made within the relevant time-limit, the taxable person may have recourse to the amnesty under either Article 8 or Article 9.

62. Consequently, the exclusion invoked by the Italian Government is of limited scope. It is only natural that a tax amnesty seeking to elicit voluntary contributions in lieu of tax which would normally have been due, but which is perceived as difficult to collect by other means, should not extend to reopening, to the benefit of the taxable person, procedures which have already been concluded in the tax authorities' favour. However, taxable persons subject to a pending procedure may benefit from the amnesty, by paying a portion of the sum in issue in that procedure in addition to the sum required under the amnesty procedure. The amnesty will still be attractive for them if it means they can gain immunity by paying a lesser amount overall than that which they would have been likely to pay had the procedure been concluded to their detriment. However, the corollary is that the tax authorities will recover a lesser sum than could have been otherwise recovered, while renouncing any further verification.

63. Third, the Italian Government points out that (31) the amount paid under the amnesty may be verified against the figures in the returns made and that, where claims for reimbursement have already been made, recourse to the amnesty procedure does not preclude any verification of the validity of those claims.

64. As the Commission rightly points out, the first of those verifications is purely formal and wholly dependent on the accuracy of the returns made – which is itself excluded from verification by the amnesty procedure.

65. The second type of verification concerns claims for reimbursement of VAT, that is to say, situations where input tax exceeds output tax so that the difference between the two is in favour of the taxable person rather than the tax authorities. The Italian Government asserts that in such cases, regardless of the amnesty, the verification can extend to the supplier who issued the invoices showing the input VAT and who must in any event account for the tax by virtue of having

issued the invoice. (32)

66. It seems to me that this exclusion from immunity from verification is again likely to be marginal. A trader who has claimed a VAT reimbursement to which he was not entitled will have done so either with or without the collusion of his suppliers in providing him with invoices showing an amount of input VAT not in fact accounted for to the authorities. If there has been such collusion, it may be wondered whether he will wish to take advantage of the amnesty at all unless detection seems already imminent, since he is in possession of documents entitling him prima facie to the reimbursement and recourse to the amnesty would necessarily involve denouncing his associate(s) in fraud. In cases of 'missing trader' fraud (where one or more traders vanish without accounting for VAT to the authorities), investigation of the suppliers will by definition be fruitless. And if there has been no collusion, it is less likely that irregularities will be revealed upstream on verification.

67. Overall, the limitations on the scope of the amnesty invoked by the Italian Government, although not entirely illusory, do not appear substantial.

Effectiveness of recovery and latitude available to Member States

68. It is common ground that, under the VAT system as currently harmonised, Member States are responsible for overseeing compliance by taxable persons, for verifying returns, accounts and all other relevant documents, and for calculating and collecting the tax due. Nor is it disputed that they have a certain latitude in that regard, as to how most effectively to deploy the resources at their disposal.

69. Italy submits that the disputed provisions encourage spontaneous declaration of previously undeclared amounts by some taxable persons, thereby freeing resources to audit the unrepentant and providing overall a greater return than could otherwise have been achieved. That falls within the bounds of the latitude which the Commission itself recognises that the Member States enjoy in determining how to deploy resources in order best to ensure compliance and enforcement.

70. The Italian Government specifies that a total of 162 000 taxable persons took advantage of the Article 8 amnesty and 750 000 of the Article 9 amnesty. The latter figure represents 13.37% of the 5 309 654 taxable persons registered in Italy in 2001. (33) In 2003, the total recovered (EUR 1 938 million) amounted to some 1.9% of total VAT (EUR 101 890 million) collected in that year. By contrast, the amounts of VAT recovered following conventional verifications in the years 1999 to 2002 were much lower, varying between EUR 140 million and EUR 357 million and totalling only EUR 1 049 million over the four-year period. (34) Those figures demonstrate, in Italy's view, how unfounded the action is.

71. The Commission retorts that the figures show rather that far too many taxable persons have taken advantage of the amnesty for far too limited a result. The benefits (increased and more efficient recovery) allegedly brought by the amnesty are illusory (the proportion recovered is tiny and the only real effect is to preclude verification by the tax authorities) and in any event quite irrelevant given the binding nature of the requirements of Articles 2 and 22 of the Sixth Directive.

72. Italy rejoins that the disputed provisions encourage spontaneous declaration; that resources can thus be redirected to auditing taxable persons who do not take advantage of the provisions; that for such persons Article 10 of the 2003 Finance Law extended the possible verification period by two years; and that the amounts recovered were appreciably higher than they would otherwise have been. The advantages are thus real and cannot be considered irrelevant. Moreover, (a) the

amnesty concerns cases in which the failure to submit a return had not been detected and might never have been detected, (b) under Article 9 the taxable person must make a payment in respect of every tax year in the series even if only one is concerned by the original failure, (c) the tax, though less than the amount theoretically due, is recovered immediately rather than after a lengthy investigation and recovery procedure.

73. The Commission's objection to VAT amnesties does not appear to be absolute, but it is vehement with regard to the form taken by the disputed provisions.

74. It may be helpful, therefore, to consider briefly the phenomenon in general. Tax amnesties commonly involve immunity from criminal penalties, from fines and from (some or all) interest payments – and the Commission explicitly accepts that, as regards VAT, such matters fall within the competence of the Member States, unfettered by Community law. Equally commonly, however, amnesties require payment in full of amounts due and do not entail exemption from verification. The aim is generally to encourage voluntary payment by granting immunity from punishment (the threat of which is intended to encourage initial compliance but may also discourage delayed compliance if the price of repentance is too high) while not going so far as to make it more advantageous to evade and then repent than to make an accurate and honest initial declaration, and to bring errant taxpayers back into the fold for the future.

75. The literature (35) suggests that, in order to be effective, tax amnesties inter alia should be one-off (or repetition will induce taxpayers to adapt their tactics in anticipation of future amnesties), should involve payment of at least what was due and generally some interest (or evasion will be perceived as rewarded) and should be accompanied by at least a credible announcement of enhanced auditing (or the trade-off between declaration and detection will not seem advantageous).

76. The disputed amnesty does not appear to display any of those features. It has indeed been extended for subsequent years, (36) possibly creating an expectation of future amnesties and thus decreasing the likelihood of compliance. And there is evidence that Italy has made abundant use of tax amnesties in the past. (37) Indeed, it has been stated that they are so regular that the expectation of future amnesties has become a factor in the low national level of tax compliance. (38) Even if, as Italy stated at the hearing, VAT receipts have in fact increased in subsequent years, no evidence has been put forward to establish either any specific link with the amnesty (rather than with any of the many other possible explanations) or any durable effect.

77. Italy claims that the amounts collected total nearly 2% of annual VAT income. If the VAT gap (the difference between the amount theoretically collectable and the amount actually collected) can be estimated at 35 to 40% in Italy, (39) that means that the amount actually collected is in the region of 3 to 4% of the amount theoretically due but never declared. (40)

78. It is true that no tax authority can ever hope to catch all tax fraud and it would not be for the Court to advise Italy on how best to deploy its resources even if it had the necessary expertise to do so. None the less, it seems to me that a method which apparently brings in some 3 to 4% of uncollected tax (and thus leaves the uncollected amount at least 95% intact, with at least a proportion of that definitively irrecoverable) is not obviously an efficient use of resources.

Overall analysis

79. It cannot be seriously maintained that the methods of raising revenue embodied in Articles 8 and 9 of Italy's 2003 Finance Law are in any way consistent with the rules for levying VAT which

are imposed on the Member States by the Sixth Directive. Nothing in that directive allows a Member State to charge VAT at half its standard rate (which is the practical result of Article 8). (41) Still less does it authorise the levying of an amount equivalent to 2% of declared input tax plus 2% of declared output tax in lieu of a totally undetermined amount of VAT which should have been declared but was not. Finally, although VAT is a 'self-assessed' tax, it is clear that Member States are required to verify and enforce compliance, and are not authorised to abdicate that responsibility in respect of whole swathes of taxable economic activity.

80. The disputed amnesty provisions apply in theory to the whole of Italy's undeclared taxable trade, which is consistently estimated by economists as representing a sizeable portion of the country's GNP – perhaps between 25 and 40%. In practice, they have been resorted to, according to the Italian Government's figures, by over 17% of taxable persons. (42) Their effect is thus far from insignificant, and constitutes a serious encroachment on the proper application of VAT in accordance with the harmonising rules of the Sixth Directive.

81. Nor does it appear credible to defend them on grounds of an efficient use of resources. On the contrary, as common sense and economic analysis demonstrate, they are liable to lead to diminished VAT compliance in (at least) the medium and long term because they reward non-compliance over compliance and, viewed in historical context, hold out plausible hope of similar treatment in future.

82. The declaration sought by the Commission should therefore be granted.

Costs

83. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I am of the view that the Commission's application should be granted and since it has asked for costs, it follows that Italy should be ordered to pay the costs of the proceedings.

Conclusion

84. I am consequently of the opinion that the Court should

– declare that, by explicitly providing in Articles 8 and 9 of Law No 289 of 27 December 2002 (Finance Law for 2003) for a general waiver of verification operations on taxable transactions effected in the course of a series of tax years, the Italian Republic has failed to fulfil its obligations under Articles 2 and 22 of the Sixth Directive in conjunction with Article 10 of the EC Treaty;

– order the Italian Republic to pay the costs.

1 – Original language: English.

2 – 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, amended on numerous occasions). On 1 January 2007, the Sixth Directive was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – The amnesty in issue has been extended to subsequent years, and the Commission has

brought a further action (Case C-174/07) concerning that extension, which is currently pending.

4 – Those provisions are now in Article 2(1)(a) and (d) of Directive 2006/112.

5 – It is replaced by, in particular, Articles 213 to 271 of Directive 2006/112.

6 – Provisions now to be found in, respectively, Articles 252(1), 206 and 273 of Directive 2006/112.

7 – Article 213(1) of Directive 2006/112.

8 – Although the Commission gives paragraph 3 as the source; now Article 242 of Directive 2006/112.

9 – Article 262 et seq. of Directive 2006/112.

10 – Articles 214 to 216 of Directive 2006/112.

11 – Articles 207, 209, 210, 256 to 258 and 267 of Directive 2006/112.

12 – Legge 289/2002, GURI 31 December 2002, as amended.

13 – The arrangement is referred to as a '*condono tombale*' ('graveyard amnesty'), presumably because tax debts are 'dead and buried'.

14 – Second recital; recital 8 in the preamble to Directive 2006/112.

15 – Fourth recital; not in the preamble to Directive 2006/112.

16 – 14th recital; recital 45 in the preamble to Directive 2006/112.

17 – See, for example, Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 36.

18 – Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 24.

19 – See, for example, Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 24; Case C-141/96 *Langhorst* [1997] ECR I-5073, paragraphs 17 and 28.

20 – See, for example, Case 203/87 *Commission* v *Italy* [1989] ECR 371, paragraph 10.

21 – Article 395 of Directive 2006/112.

22 – Both Italy and the Commission have cited Case C-128/05 *Commission* v *Austria* [2006] ECR I-9265, in which the Court found that Austria was in breach of its obligations by excluding certain international transport operators entirely from VAT obligations. See also Case C-228/05 *Stradasfalti* [2006] ECR I-8391, especially at paragraph 66; in that case, the Court stressed that Italy could not unilaterally impose on taxable persons a derogation from the right to deduct.

23 – The percentage falls even lower for amounts payable in excess of EUR 11 600 000, which are reduced by 80% – thus to 0.2% of the input and/or output tax initially declared.

24 – The Commission cites the case of a taxable person having failed to submit any declaration in a given tax year, in which he should have accounted for EUR 600 000. Under the Article 9 procedure, the maximum payable in order to benefit from complete immunity is EUR 3 000 – a definitive loss for the tax authorities of EUR 597 000. I would add that the proportion lost might be

even more exorbitant, since the provision explicitly envisages payments in excess of EUR 11 600 000.

25 – See points 8 to 10 above.

26 – Articles 8(4) and 9(14)(c).

27 – In contrast with the situation in some other Member States, Italy has no VAT registration threshold, so that even the smallest businesses are required to account for tax.

28 – See, for example, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 50, and the case-law cited there.

29 – See, for example, the European Employment Observatory Review, Autumn 2004, in particular at pp. 77 and 106 to 110.

30 – Articles 8(10) and 9(14).

31 – Under Article 9(9), in particular as interpreted by a judgment of the Constitutional Court of 27 July 2005.

32 – Article 54bis of Presidential Decree No 633/72; cf. Article 21(1)(d) (in Article 28g) of the Sixth Directive, Article 203 of Directive 2006/112.

33 – That appears to be a miscalculation. 750 000 is 14.125% of 5 309 654. The 162 000 for Article 8 amount to 3.05% of the total number of taxable persons.

34 – Comparing those figures with those for the total VAT collected in the same four years, as provided by the Italian Government, I calculate that the tax recovered following verifications amounted to between 0.18% and 0.38% of the total collected in a given year, or 0.3% of the total for the four-year period.

35 – For example, Stella, Peter, ‘An economic analysis of tax amnesties’, *IMF Working Paper* 89/42, 1989; Boise, Craig M., ‘Breaking open offshore piggybanks: Deferral and the utility of amnesty’, *George Mason Law Review* 2007, p. 667, esp. at p. 693 et seq.

36 – See footnote 3 above.

37 – A 1998 United States Congress paper states that ‘Italy has conducted more than a dozen tax amnesties, an average recently of about one every two years’. An article cited by the Commission in its application (*Il condono fiscale tra genesi politica e limiti costituzionali*, De Mita, Diritto e pratica tributaria, 2004, Parte I, p. 1449) states that the 2003 amnesty was the 58th since 1900.

38 – *Is One More Tax Amnesty Really That Bad? Some Empirical Evidence from the Italian 1991 VAT Amnesty*, M. Marè and C. Salleo, 59th IIPF Congress, Prague, August, 2003. See also *Gradual Recovery in Euroland,* Kai Carstensen, Klaus-Jürgen Gern, Christophe Kamps, Joachim Scheide, Kiel Discussion Papers 405: ‘… in the first half of 2003 Italy raised additional revenue equivalent to approximately 0.8% of GDP in connection with a large-scale tax amnesty. In the short run, Italy was able to prevent exceeding the threshold of the Stability and Growth Pact thanks to this one-off measure. In the medium run, however, the probability of exceeding the 3% threshold increases. As experience shows, frequent tax amnesties – in Italy it was the third amnesty in 20 years – weaken tax honesty. In consequence, tax revenue is lower in the medium run and in the long run than what it would have been without the amnesty.’

39 – IMF Working Paper 07/31 *VAT fraud and evasion: what do we know and what can be done* Michael Keen and Stephen Smith, February 2007, at p. 19.

40 – That is to say, 2% of the 60 to 65% collected is (roughly) between 3 and 4% of the 35 to 40% not collected.

41 – And it may be noted that half of Italy's standard rate of 20% is 10%, which is lower than the minimum standard rate of 15% authorised by Article 12(3)(a) of the Sixth Directive.

42 – According to the Commission at the hearing, the number of those who took advantage of the amnesty significantly exceeds the total number of taxable persons in a medium-sized Member State such as Belgium.