JUDGMENT OF THE COURT (Grand Chamber)

3 October 2006 *

In Case C-475/03,

REFERENCE for a preliminary ruling under Article 234 EC, from the Commissione tributaria provinciale di Cremona (Italy), made by decision of 9 October 2003, received at the Court on 17 November 2003, in the proceedings

Banca popolare di Cremona Soc. coop. arl

v

Agenzia Entrate Ufficio Cremona,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Makarczyk, Presidents of Chambers, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász and G. Arestis, Judges,

* Language of the case: Italian.

Advocate General: F.G. Jacobs, and subsequently C. Stix-Hackl,

Registrar: K. Sztranc, Administrator, and subsequently H. von Holstein, Deputy Registrar, and L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 November 2004,

after considering the observations submitted on behalf of:

— Banca popolare di Cremona Soc. coop. arl, by R. Tieghi, avvocato,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and D. Triantafyllou, acting as Agents,

after hearing the Opinion of Advocate General Jacobs at the sitting on 17 March 2005,

having regard to the order of 21 October 2005 reopening the oral procedure and further to the hearing on 14 December 2005,

after considering the observations submitted on behalf of:

— Banca popolare di Cremona Soc. coop. arl, by R. Tieghi and R. Esposito, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,

— the Belgian Government, by M. Wimmer, acting as Agent,

— the Czech Goverment, by T. Boček, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the German Government, by R. Stotz and U. Forsthoff, acting as Agents,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the French Government, by G. de Bergues, acting as Agent,

— Ireland, by J. O'Reilly SC, and P. McCann, BL,

— the Hungarian Government, by A. Müller and R. Somssich, acting as Agents,

— the Netherlands Government, by M. de Grave, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Portuguese Government, by L. Inez Fernandesz, A. Seiça Neves and R. Lares, acting as Agents,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Swedish Government, by K. Norman and A. Kruse, acting as Agents,

— the United Kingdom Government, by E. O'Neill, acting as Agent, and by D. Anderson QC and T. Ward, Barrister,

— the Commission of the European Communities, by E. Traversa and D. Triantafyllou, acting as Agents,

after hearing the Opinion of Advocate General Stix-Hackl at the sitting on 14 March 2006,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 33 of 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), as amended by Council Directive 91/680/CEE of 16 December 1991 (OJ 1991 L 376, p. 1, 'the Sixth Directive').

2 The reference was made in proceedings brought by Banca popolare di Cremona Soc. coop. arl ('Banca popolare') against Agenzia Entrate Ufficio Cremona concerning the levying of a regional tax on productive activities.

Legal context

Community legislation

3 Under Article 33(1) of the Sixth Directive:

'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.'

4 The original version of Directive 77/388 already contained an Article 33 which was essentially the same as that provision.

National legislation

5 The regional tax on productive activities (imposta regionale sulle attività produttive, 'IRAP') was introduced by Legislative Decree No 446 of 15 December 1997 (ordinary supplement to the GURI No 298, of 23 December 1997, 'the legislative decree').

6 Articles 1 to 4 of that decree read as follows:

'Article 1. Introduction of the tax

1. A regional tax on productive activities within the territory of the regions shall be introduced.

2. The tax shall be charged on a real basis and shall not be deductible for the purposes of income tax.

Article 2. Condition for the application of the tax

1. The condition for the application of the tax shall be the regular exercise of an independently run activity whose object is the production of or trade in goods or the provision of services. Activity carried on by companies and organisations, including State bodies and administrations shall in all circumstances give rise to liability to the tax.

Article 3. Taxable persons

1. Traders who carry on one or more of the activities listed in Article 2 shall be liable to the tax. The following shall thus be liable to the tax:

(a) the companies and organisations listed in Article 87(1)(a) and (b) of the consolidated text of the law on income tax, adopted by Decree of the President of the Republic No 917 of 22 December 1986;

(b) collective partnerships and limited partnerships and their equivalents ... and natural persons carrying on the commercial activities listed in Article 51 of the consolidated text;

(c) natural persons, simple partnerships and their equivalents ... who carry on the trades and professions listed in Article 49(1) of the consolidated text;

(d) farmers in receipt of agricultural income ...

...

2. The following shall not be liable to the tax:

(a) joint investment funds ...

(b) pension funds ...

(c) European economic interest groups (EEIG) ...

Article 4. Basis of assessment

1. The tax shall apply to the net value of production deriving from activity carried on within the region.

...'

7 Articles 5 to 12 of the legislative decree lay down criteria for the determination of that 'net value of production' which vary according to the different economic activities which constitutes the chargeable event for IRAP.

8 Article 5 of the decree provides that, for the traders referred to in Article 3(1)(a) and (b) of that decree who do not carry on activities as banks, other financial organisations or companies or insurance undertakings, the basis of assessment is the difference between the total of the items which fall within the heading of value of production within the meaning of Article 2425(1)(A) of the Italian Civil Code and the total of those which fall within the heading of production costs within the meaning of Article 2425(1)(B) of the code, excluding certain items such as staff salary costs.

9 Article 2425 of the Civil Code, headed 'Contents of the profit and loss account' provides:

'The profit and loss account must be drawn up in accordance with the following scheme:

(A) Value of production:

(1) Revenues from sales and services;

(2) Variation in stocks of work in progress, semi-finished goods and finished goods;

(3) Change in contract work in progress;

(4) Increase in company-produced additions to fixed assets;

(5) Other revenues and income, with separate indication of contributions in the accounts for the period.

Total.

(B) Production costs:

(6) Raw, ancillary and consumable materials and goods for resale;

(7) Outside services ;

(8) Use of property not owned;

(9) Personnel costs

(a) Wages and salaries;

(b) Social security contributions;

(c) Termination benefits;

(d) Retirement and equivalent pensions;

(e) Other costs;

(10) Amortisation and depreciation:

(a) Amortisation of intangible fixed assets;

(b) Depreciation of tangible fixed assets;

(c) Write-downs of fixed assets;

(d) Write-downs of loans included in current assets and of cash balances;

(11) Variation in stocks of raw, ancillary and consumable materials and goods for resale;

(12) Provisions for risks;

(13) Other reserves;

(14) Miscellaneous operating costs.

Total.

Difference between production value and costs (A-B).

...'

10 Under Article 14 of the legislative decree 'the tax shall be payable in respect of taxation periods, separate tax liability arising in respect of each period. The taxation period shall be determined in accordance with the criteria laid down for the purposes of income tax'.

11 According to Article 16 of the legislative decree, as a general rule, 'the tax shall be calculated by applying a rate of 4.25% to the net value of production'. That rate varies according to the region where the undertaking is established.

The main proceedings and the question referred for a preliminary ruling

12 Banca popolare brought an action before the referring court against the decision of Agenzia Entrate Ufficio Cremona refusing to reimburse the IRAP paid in 1998 and 1999.

13 According to the applicant in the main proceedings, the legislative decree is not consistent with Article 33 of the Sixth Directive.

14 The referring court makes the following points :

— first, 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;

— second, although IRAP operates according to a different procedure from that for value added tax ('VAT'), it is levied on the net value deriving from production, or, more specifically, the net value 'added' to the product by the producer, with the result that IRAP is a value added tax;

— third, IRAP is levied at every stage of the production or distribution process;

— fourth, the total 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.

15 However, the referring court raises the question whether the differences between VAT and IRAP concern the essential characteristics which determine whether or not the taxes belong to the same category.

16 It is against that background that the Commissione tributaria provinciale di Cremona decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 33 of [the Sixth Directive] 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?'

The question referred for a preliminary ruling

17 By its question the referring court seeks essentially to know whether Article 33 of the Sixth Directive precludes the maintenance of a charge to tax with the characteristics of the tax at issue in the main proceedings.

18 In order to interpret Article 33 of the Sixth Directive it must be viewed against its legislative background. To that end it is useful to recall the objectives pursued by the introduction of a common system of VAT, as outlined in the judgment in Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319, paragraphs 13 to 20.

19 According to the preamble to 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 (I), p. 14, 'the First Directive'), harmonisation of legislation concerning turnover taxes should make it possible to establish a common market within which there is healthy competition and whose characteristics are similar to those of a domestic market, by eliminating tax differences liable to distort competition and hinder trade.

20 A common system of VAT was introduced by Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967 (I), p. 16, 'the Second Directive') and by the Sixth Directive.

21 Under Article 2 of the First Directive, the principle of the common system of VAT involves the application to goods and services, up to and including the retail trade stage, 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.

22 However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components. The procedure for deduction is so arranged by Article 17(2) of the Sixth Directive that taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods or services have already borne and that the tax is charged, at each stage, only on the added value and is finally borne by the ultimate consumer.

23 In order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT was intended, according to the preamble to the Second Directive, to replace the turnover taxes in force in the various Member States.

24 Article 33 of the Sixth Directive accordingly permits a Member State to maintain or introduce taxes, duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes.

25 In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33 of the Sixth Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT.

26 The Court has stated in this regard that taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way (see Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, paragraphs 11 and 14, and Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 32).

27 Article 33 of the Sixth Directive 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 (Case C-130/96 *Solisnor-Estaleiros Navais* [1997] ECR I-5053, paragraphs 19 and 20, and *GIL Insurance and Others*, paragraph 34).

28 The Court has established the essential characteristics of VAT. Notwithstanding certain differences of wording, it appears from the case-law that there are four such

characteristics: it applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer (see, inter alia, *Pelzl and Others*, paragraph 21).

29 In order to prevent outcomes which are inconsistent with the objective pursued by the common system of VAT as set out in paragraphs 20 to 26 of the present judgment, any comparison of the characteristics of a tax such as IRAP with those of VAT must be made in the light of that objective. In that connection, particular attention must be paid to the need to safeguard the neutrality of the common system of VAT at all times.

30 In this case, as regards the second essential characteristic of VAT, it must first be observed that, whereas VAT is levied on individual transactions at the marketing stage and its amount is proportional to the price of goods or services supplied, IRAP is, in contrast, a tax charged on the net value of the production of an undertaking in a given period. Its basis of assessment is the difference appearing in the profit and loss account between the 'value of production' and the 'production costs' as defined by Italian legislation. It includes elements such as variation in stocks, amortisation and depreciation, which have no direct connection with the supply of goods or services as such. In those circumstances, IRAP cannot be considered proportional to the price of goods or services supplied.

31 Next, it must be observed, as regards the fourth essential characteristic of VAT, that the existence of differences in the method for calculating the deduction of tax

already paid cannot exclude a tax from the prohibition laid down in Article 33 of the Sixth Directive if such differences are in fact technical in nature and do not prevent that tax from operating in essentially the same way as VAT. On the other hand, a tax levied on production in such a way that it is not certain that it will be borne, like a tax on consumption such as VAT, by the final consumer, is likely to fall outside the scope of Article 33 of the Sixth Directive.

32 In fact, whereas, through the mechanism of the deduction of tax laid down by Articles 17 to 20 of the Sixth Directive, VAT taxes only the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved (Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraphs 19, 22 and 23, and Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraph 29), that is not the case with IRAP.

33 First, a taxable person cannot ascertain exactly the amount of IRAP already included in the purchase price of goods and services. Second, if, in order to pass on the burden of the tax due in connection with his own activities to the following stage in the distribution or consumption process, a taxpayer could include that burden in his sale price, the basis of assessment would then include not only the value added but also the tax itself, with the result that the IRAP would be calculated on an amount based on a sale price incorporating, in anticipation, the tax to be paid.

34 In any event, even on the assumption that a taxable person liable to IRAP selling to final consumers will take account, in fixing his price, of the amount of the charge

included in its general expenses, not all taxable persons have the possibility of thus passing on, or passing on in full, the burden of the tax (see, to that effect, *Pelzl and Others*, paragraph 24).

35 It follows from all the foregoing considerations that, according to the legislation concerning IRAP, the tax is not intended to be passed on to the final consumer in a way that is characteristic of VAT.

36 The Court has, it is true, held a tax which was levied as a percentage of the total sales effected and services provided by an undertaking during a specified period, less the purchases of goods and services by that undertaking during that period, to be inconsistent with the harmonised system of VAT. The Court observed in that case that the tax at issue was comparable, in essential respects, to VAT and that notwithstanding differences it retained its character as a turnover tax (see, to that effect, *Dansk Denkavit and Poulsen Trading*, paragraph 14).

37 However, IRAP differs in that respect from the tax which was the subject of the above judgment in so far as the tax in that case was intended to be passed on to the final consumer, as is apparent from paragraph 3 of that judgment. That tax was levied on the same basis of assessment as that used for VAT, and it was collected in parallel with VAT.

38 It follows from the foregoing considerations that a tax with the characteristics of IRAP differs from VAT in such a way that it cannot be characterised as a turnover tax within the meaning of Article 33(1) of the Sixth Directive.

39 The answer to the question referred for a preliminary ruling must therefore be that Article 33 of the Sixth Directive must be interpreted as meaning that it does not preclude the maintenance of a charge to tax with the characteristics of the tax at issue in the main proceedings.

Costs

40 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 (Grand Chamber) hereby rules:

Article 33 of 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, as amended by Council Directive 91/680/EEC of 16 December 1991, must be interpreted as

meaning that it does not preclude the maintenance of a charge to tax with the characteristics of the tax at issue in the main proceedings.

[Signatures]