JUDGMENT OF THE COURT (Full Court)

9 December 2003 *

In Case C-129/00,

Commission of the European Communities, represented by E. Traversa, acting as Agent, and P. Biavati, avvocato, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by maintaining in force Article 29(2) of Law No 428 of 29 December 1990 entitled 'Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee (legge comunitaria per il 1990)' (Provisions for the fulfilment of obligations deriving

* Language of the case: Italian.

from Italy's membership of the European Communities (Community law for 1990)) (GURI, Ordinary Supplement No 10 of 12 January 1991, p. 5) which, as construed and applied by the administrative authorities and the courts, allows rules of evidence in relation to the passing on to third parties of the amount of charges levied in breach of Community rules which make exercise of the right to repayment of such charges virtually impossible or, at least, excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas, (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet (Rapporteur), R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 April 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 April 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining in force Article 29(2) of Law No 428 of 29 December 1990 entitled 'Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee (legge comunitaria per il 1990)' (Provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities (Community law for 1990), (GURI No 10 of 12 January 1991, Ordinary Supplement, p. 5; hereinafter 'Law No 428/1990') which, as construed and applied by the administrative authorities and the courts, allows rules of evidence in relation to the passing on to third parties of the amount of charges levied in breach of Community rules which make exercise of the right to repayment of such charges virtually impossible or, at least, excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

National law

2 Law No 428/1990 introduced into tax legislation special rules in respect of 'repayment of taxes recognised to be incompatible with the Community rules'. Article 29(2) thereof provides in that regard:

'Customs import duties, manufacturing taxes, consumption taxes, the tax on sugar and State duties levied under national provisions incompatible with Community legislation shall be repaid unless the amount thereof has been passed on to others.'

3 Previously, that question was governed by the first paragraph of Article 19 of Decree-Law No 688 of 30 September 1982 (GURI No 270 of 30 September 1982, p. 7072), converted into law by Law No 873 of 27 November 1982 (GURI No 328 of 29 November 1982, p. 8599; hereinafter 'Decree-Law No 688/1982'). It provided:

'Any person who... has paid customs import duties, manufacturing taxes, consumption taxes or State duties which were not due shall be entitled to repayment of the sums paid if he provides documentary evidence that the charge in question was not passed on, in any manner whatsoever, to other persons, except in the case of clerical error.'

Facts

4 Article 19 of Decree-Law No 688/1982 has given rise to two judgments of the Court. The first was in Case 199/82 *San Giorgio* [1983] ECR 3595 following a reference for a preliminary ruling and the second, in Case 104/86 *Commission* v *Italy* [1988] ECR 1799, was in an action by the Commission against the Italian Republic for failure to fulfil obligations.

5 In the latter judgment, the Court held:

'6 ... in the absence of Community rules concerning the refunding of national charges which have been levied in breach of Community law, it is for the Member States to ensure the repayment of such charges in accordance with the provisions of their internal law. Furthermore, Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve an unjust enrichment of those entitled. Thus it does not prevent the fact that the burden of such charges may have been passed on to other traders or to consumers from being taken into consideration.

7 Lastly, as the Court held in the judgment... [in] *San Giorgio*..., with regard to Article 19 of the very Decree-Law at issue in this case, any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law is incompatible with Community law; that is particularly so in the case of presumptions or rules of evidence intended to place on the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence.

...

11 ... The disputed Italian legislative provision obliges traders to prove a negative, inasmuch as, in the face of mere allegations by the administration, they must prove that they have not passed on the unduly paid tax to other parties, what is more by means of documentary evidence only. Such a

provision is contrary to the rules of Community law as developed in the Court's case-law.'

6 Article 29(2) of Law No 428/1990 subsequently gave rise itself to references for preliminary rulings, to which the Court replied in Case C-343/96 *Dilexport* [1999] ECR I-579. According to the national court, that provision is applied by the Italian courts to the effect that, in order to resist the repayment of customs duties or taxes paid though not due, the administration may rely on the presumption that such duties and taxes are normally passed on to third parties.

7 The Court held as follows:

'52 If, as the national court considers, there is a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff is required to rebut that presumption in order to secure repayment of the charge, the provisions in question must be regarded as contrary to Community law.

53 If, on the other hand, as the Italian Government maintains, it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law.

54 The answer to the... questions must therefore be that Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to third parties, which the plaintiff must show he has satisfied.'

Pre-trial proceedings

8 The Commission submits, essentially, as the referring court considered in the case which gave rise to the judgment in *Dilexport*, cited above, that, as interpreted and applied by the Italian administrative authorities and courts, the provisions of Article 29(2) of Law No 428/1990 lead to the same result as those of the former Article 19 of Decree-Law No 688/1982.

9 Having given the Italian Republic an opportunity to submit its observations, the Commission, on 17 September 1997, issued a reasoned opinion requesting that Member State to comply with its obligations under the Treaty within a period of two months. Since it was not satisfied with the Italian authorities' reply by letter of 25 November 1997, the Commission decided to bring this action.

Arguments of the parties

10 The Commission claims that, in Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 25, the Court observed that, in relation to indirect taxes, no presumption can be allowed that a taxpayer has passed on

the tax by subsequent sales, requiring him, should he wish to obtain repayment of a charge of that nature, to prove the contrary negative.

11 The Commission argues that the case-law of the Corte suprema di cassazione (Italy) results in the establishment of such a presumption against a taxpayer who is claiming repayment of charges incompatible with Community law, which are covered by Article 29(2) of Law No 428/1990. The reasoning of that court's decisions on the point vary, but rest essentially on the analysis that, save in exceptional circumstances, commercial companies pass on indirect taxes to their customers. The most developed reasoning which the Corte suprema di cassazione has used to reach that conclusion, particularly in its judgment No 2844 of 28 March 1996, is based on the following considerations:

— the importer was not a private individual, but a commercial or industrial company;

— the undertaking was trading normally, unlike in situations of loss-making or insolvency where sales at less than cost price could have been presumed;

— the undue charges had been levied by the entire Italian customs service, which could not but have created a climate of trust as regards their legitimacy;

— the undue charges had been applied over a long period without objection.

12 According to the Commission, the Corte suprema di cassazione also relies on the assumption that commercial undertakings usually pass on indirect taxes to third parties, in order to hold that applications to the courts made by the administrative authorities to obtain the production of accounting documents from the undertakings concerned or the inspection thereof are not purely 'fishing expeditions', which would render them unlawful, but are a valid method of obtaining evidence that charges have been passed on.

13 In addition the Corte supreme di cassazione holds, on the basis of Article 116 of the Italian Code of Civil Procedure, that failure to produce accounting documents following such an application, combined with the presumption that charges are usually passed on, proves that such has indeed been the case. The Commission states that the same solution is applied even where the undertaking which fails to produce those documents explains that they have not been preserved because of the expiry of the 10-year period of obligatory preservation laid down by the Italian Civil Code. In view of the delays of several years which can occur between an application to the court for production of accounting documents and the court's decision thereon, an obligation to preserve those documents beyond the statutory preservation period is excessive for businesses, particularly because of the high costs and storage problems which it involves. It is thus an additional obstacle to the actual repayment of charges contrary to Community law.

14 The Commission states that many trial courts follow those principles, as do certain experts appointed in judicial proceedings to examine the accounting documents of taxpayers and to determine whether or not they have passed on the charges in question. It provides some examples in that regard.

15 That approach establishes a *de facto* presumption that taxpayers pass on to third parties the charges contrary to Community law of which they seek repayment, a presumption which it is then for them to rebut by adducing evidence to the

contrary, in disregard of the Court's holding in paragraph 52 of the judgment in *Dilexport*.

16 The Commission adds that the reasoning in question is illogical, because it starts with the premiss that businesses usually pass on indirect taxes to establish a presumption in exactly the same terms as that premiss. The factors sometimes deployed in this reasoning, relating to the nature of the business, the fact that the applicant is not insolvent and the general and long-term application of the disputed charges, are completely irrelevant. Thus, an undertaking that does not pass on charges to third parties might merely make a smaller profit, but would not necessarily become insolvent. To deduce from the absence of insolvency that taxes have actually been passed on is arbitrary.

17 According to the Commission the Italian administrative authorities do not observe the principles applicable to the repayment of charges contrary to Community law either. The circulars of the Minister for Finances No 21/2/VII of 11 March 1994 and No 480/VIII of 12 April 1995 state essentially that the passing on of charges to third parties is established if such taxes have not been accounted for, from the year of their payment, as payments to the public purse for undue tax and credited as an asset in the balance sheet of the undertaking which is claiming their repayment. Lack of such accounting shows that the undertaking regarded the charges in question as ordinary expenses and necessarily passed them on. The Commission submits that such an approach leads to undertakings being subjected to an excessive obligation, above all as regards the years preceding the establishment of the incompatibility of such taxes with Community law.

18 The Commission claims that even if certain taxpayers succeed in their actions before the trial courts, at the price, it says, of long and costly proceedings, that fact does not suffice to conclude that there has been observance of the principle of effectiveness, by which the detailed national procedural rules applied to claims based on rights which subjects derive from Community law must not make the

exercise of those rights in practice impossible or excessively difficult. Moreover, the successful actions by certain taxpayers, which enabled them, according to the Italian Government, to obtain repayment of ITL 120 billion between 1992 and 2000, net of interest and costs, are insignificant compared with the sums which are the subject, in this respect, of litigation. The Commission argues that the principle of effectiveness would be observed only if cases of rejection of repayment claims were exceptional and maintains that the exercise of rights derived from the Treaty cannot be impeded by general measures based on a presumption of abuse of rights.

19 The Italian Government accuses the Commission of indulging in speculation and ignoring facts. Only an actual finding that taxpayers who have paid taxes contrary to Community law cannot, or can only with great difficulty, obtain their repayment could amount to disregard of the principle of effectiveness. In that regard, apart from the amount of the principal sums repaid, mentioned in the preceding paragraph, the Italian Government points to 17 decisions or judgments by various trial courts, which have upheld the taxpayers' claims and become final.

20 As regards the possibility of an inquiry by the Court to quantify the percentage of successful repayment claims in relation to the total number brought, the Italian Government argues that the application of such a measure would be tantamount to transferring to the Court the onus of proving the failure to fulfil obligations alleged by the Commission which the Commission must be able to prove at the end of the pre-litigation stage.

21 In the alternative, the Italian Government analyses the principles of the detailed rules, criticised by the Commission, for the exercise of the right to recover sums paid though not due and argues, first, that the Commission admits that Article 29(2) of Law No 428/1990 is in itself compatible with Community law. It

submits that that provision requires the administrative authorities to show that the taxpayer has passed on the charge to third parties if they are to escape the obligation to repay the amount thereof.

22 The Italian Government points out, secondly, that, in paragraph 25 of the judgment in *Comateb and Others*, cited above, the Court held that, '[t]he actual passing on [of an indirect tax], either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts' and, '[c]onsequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence'. The Italian Government contends that, in his Opinion in *Dilexport*, Advocate General Ruiz-Jarabo Colomer added that the national court could call upon all the methods of proof allowed by national law to establish the facts. The Government explains that the Corte suprema di cassazione is not the judge of the merits, but confines itself to laying down certain general principles of evidence, on the basis of procedural circumstances which may vary considerably depending on the dispute. The judge of the merits might well accept means of deduction as methods of proof. The court decisions in favour of taxpayers produced in this case establish merely that the administrative authorities have not proved that charges were passed on.

23 As for the administrative authorities, which are subject to this burden of proof, it is legitimate for them to seek access to the claimant's accounts, because only such inquiry enables them to adduce that evidence and it is not, consequently, in any way a 'fishing expedition'. If the claimant does not produce its accounts voluntarily, it is usual that, if it pursues its claims in court, the authorities seek such production by the same route. That is the meaning of the two ministerial circulars mentioned in paragraph 17 of this judgment and criticised by the Commission. The Italian Government makes clear that courts regard failure to produce accounts as an argument in favour of the authorities only if the application for production of those documents was lodged before the expiry of the statutory preservation period. In that case, even if the court rules on that

application only after such expiry, the duty to act in good faith in the proceedings requires the taxpayer to preserve its accounts and to produce them pursuant to the judicial decision to grant the application (Judgment No 9797 of the Corte suprema di cassazione of 18 November 1994).

24 The Italian Government adds that even if long proceedings are sometimes necessary in order to obtain repayment, the adverse effects connected to such length of time are offset by the award of interest on the sums due.

Findings of the Court

25 According to the Court's settled case-law, in the absence of Community rules on the recovery of national charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia*, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33).

26 As regards Article 29(2) of Law No 428/1990, as pointed out in paragraph 7 in this judgment and in the light of the differences in construction of that provision, the judgment in *Dilexport*, cited above, delivered in the context of a reference for a preliminary ruling where it was for the national judge to decide the case, stated

that, if there was a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff was required to rebut that presumption in order to secure repayment of the charge, the provision in question must be regarded as contrary to Community law.

27 In the present action for failure to fulfil obligations, it is by contrast for the Court itself to determine whether, taking account of the matters relied upon by the Commission, the application by the Italian authorities of Article 29(2) of Law No 428/1990 actually leads to the establishment of such a presumption or otherwise results in making the exercise of the right to repayment of such taxes virtually impossible or excessively difficult, in which cases it would be necessary to make a declaration of the Italian Republic's failure to fulfil obligations.

28 The Commission's complaint in support of its action has three aspects. First, many Italian courts, especially and repeatedly the Corte suprema di cassazione, consider that the passing on of charges to third parties is established from the sole fact that the claimant is a commercial undertaking, sometimes adding to it the grounds that the undertaking has not gone bankrupt and that the charge has been levied for years throughout the national territory without objection. Secondly, the authorities systematically seek the production of claimants' accounting documents. The courts before which claimants bring objections accede to such applications by adopting the same sort of reasoning as that set out above and they regard with disfavour claimants' failure to produce the documents even though the statutory period for their preservation has expired. Thirdly, the authorities regard failure to account for the amount of the taxes in question, from the year of their payment, as payments to the public purse for undue tax and credited as an asset in the balance-sheet of the undertaking which is claiming their repayment, as proof that those charges have been passed on to third parties.

29 A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15).

30 The scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, particularly, Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 36).

31 In this case what is at issue is Article 29(2) of Law No 428/1990 which provides that duties and charges levied under national provisions incompatible with Community legislation are to be repaid, unless the amount thereof has been passed on to others. Such a provision is in itself neutral in respect of Community law in relation both to the burden of proof that the charge has been passed on to other persons and to the evidence which is admissible to prove it. Its effect must be determined in the light of the construction which the national courts give it.

32 In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.

33 Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law.

34 In the present case, the Italian Government does not dispute that a certain number of judgments of the Corte suprema di cassazione lead, by deductive reasoning, to the conclusion that, in the absence of evidence to the contrary, commercial undertakings trading normally pass on an indirect tax by subsequent sales, in particular if it is levied throughout the national territory for an appreciable period without objection. The Italian Government confines itself to explaining that numerous trial courts do not accept such reasoning as proof of such passing on and to providing examples of taxpayers who secured repayment of charges contrary to Community law, since the authorities did not succeed in those cases in proving to the relevant court that the taxpayers had passed on those charges.

35 The reasoning followed in the cited judgments of the Corte suprema di cassazione is itself based on a premiss which is a mere presumption, namely that indirect taxes are in principle passed on by subsequent sales by economic operators where they have the chance. The other factors, if any, taken into account, namely the commercial nature of the taxpayer's business, the fact that its financial situation is not parlous and the levying of the tax in question throughout the national territory for an appreciable period without objection, permit the conclusion that an undertaking which has carried on its business in such a context has in fact passed on the charges in question only if one relies on the premiss that all economic operators act thus, save in special circumstances such as the absence of one or other of those factors. However, as the Court has already held (see *San Giorgio*, cited above, paragraphs 14 and 15; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR I-1099, paragraph 17; *Commission* v

Italy, cited above, paragraph 7, and *Comateb and Others*, paragraph 25), and for the economic reasons pointed out by the Advocate General in points 73 to 80 of his Opinion, such a premiss is unjustified in a certain number of situations and is merely a presumption which cannot be accepted in the context of the examination of claims for repayment of indirect taxes contrary to Community law.

36 As regards the requirement, as a condition precedent to any repayment, for production of the accounting documents of the undertaking which is claiming repayment of charges contrary to Community law, the following considerations must be taken into account.

37 Such a requirement, concerning the years for which repayment is claimed, which is raised during the period for which the accounting documents in question must obligatorily be preserved, cannot be regarded in itself as reversing, to taxpayers' disadvantage, the burden of proof that the charges have not been passed on to third parties. Such documents provide neutral factual information from which, in particular, the authorities may try to show that the charges have been passed on to others (see, to that effect, Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 115). In that situation, and in the absence of special circumstances upon which the claimant could rely, failure to produce accounting documents when they are requested by the authorities can be regarded by them or by the courts as a factor to be taken into account in showing that the charges have been passed on to third parties. However, that factor cannot, by itself, be sufficient for it to be presumed that those charges have been passed on to third parties nor, *a fortiori*, to impose on the claimant the onus of rebutting such a presumption by proving the contrary (see, to that effect, *Weber's Wine World and Others*, cited above, paragraph 116).

38 In any event, in situations where the authorities seek the production of those documents after the expiry of their statutory preservation period and the taxpayer fails to produce them, the fact of drawing the conclusion therefrom that the

taxpayer has passed on the charges in question to third parties or of drawing the same conclusion subject to the taxpayer proving the contrary amounts to establishing to the taxpayer's disadvantage a presumption which results in making excessively difficult the exercise of the right to repayment of charges contrary to Community law.

39 In relation to the fact that the authorities consider that the passing on of a charge to third parties is established if the amount of that charge has not been accounted for, from the year of its payment, as a payment to the public purse for undue tax, and credited as an asset in the balance-sheet of the undertaking seeking its repayment, it must be held as follows.

40 Such reasoning leads to the establishment of an unjustified presumption to the claimant's disadvantage. In view of the conditions in which a claim for repayment of a charge occurs, to add the amount of that charge as an asset to the balance sheet for the year of its payment assumes that the taxpayer immediately considers that it has a high chance of successfully disputing its payment, although, under the very terms of Article 29(1) of Law No 428/1990, it has a period of several years to bring such claim. Furthermore, the taxpayer may very well, even while challenging the payment of the charge, consider its chances of success insufficiently sure to take the risk of accounting for the corresponding amount as an asset. In that regard, in view of the difficulties of obtaining a favourable outcome to a claim for repayment in the circumstances revealed in this case, such an entry could even be alleged to be contrary to the principles of lawful accounting. In addition, to consider that the passing on of the charge to third parties is established on the ground that its amount has not been added as an asset to the balance sheet already depends on the presumption that indirect taxes are usually passed on by subsequent sales, a presumption which has been declared to be contrary to Community law in the course of the consideration of the first aspect criticised by the Commission.

41 In the light of the foregoing considerations, it must be declared that, by failing to amend Article 29(2) of Law No 428/1990, which is construed and applied by the

administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

Costs

42 Under Article 69(2) of the Rules of Procedure, the party who has been unsuccessful is to be ordered to pay the costs if they have been claimed in the other party's pleadings. In this case, the Italian Republic has been unsuccessful and the Commission has claimed an order for its costs. That Member State must therefore be ordered to pay the costs.

On those grounds,

THE COURT (Full Court)

hereby:

1. **Declares that, by failing to amend Article 29(2) of Law No 428 of 29 December 1990 entitled 'Disposizioni per l'adempimento di obblighi**

derivanti dall'appartenenza dell'Italia alle Comunità europee (legge comunitaria per il 1990)' (Provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities (Community law for 1990)), which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione (Italy), in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty;

2. Orders the Italian Republic to pay the costs.

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Rosas
Edward	La Pergola	Puissochet
Schintgen	Macken	Colneric
	von Bahr	

Delivered in open court in Luxembourg on 9 December 2003.

R. Grass — Registrar

V. Skouris — President