JUDGMENT OF THE COURT (Grand Chamber)

17 July 2008 *

In Case C-132/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 March 2006,

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

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato,

defendant,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, E. Juhász, A. Borg Barthet (Rapporteur), M. Ilešič, J. Malenovský, J. Klučka and E. Levits, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 September 2007,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

1 By its action, the Commission of the European Communities seeks a declaration from the Court that, by explicitly providing in Articles 8 and 9 of Law No 289 of 27 December 2002 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Law for 2003) (legge n. 289, disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2003)) (Ordinary Supplement No 240/L to GURI No 305 of 31 December 2002) ('Law No 289/2002') for a general waiver of verification of taxable transactions effected in a series of tax years, the Italian Republic has failed to fulfil its obligations under

Articles 2 and 22 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) ('the Sixth Directive'), and Article 10 EC.

Legal context

Community law

2 Article 10 EC provides:

'Member States shall 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. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

3 The second recital in the preamble to the Sixth Directive reads as follows:

'… the budget of the Communities shall, irrespective of other revenue, be financed entirely from the Communities' own resources; … these resources are to include those accruing from value added tax ['VAT'] and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules'.

4 The fourth recital in the preamble to that directive is worded as follows:

'… account should be taken of the objective of abolishing the imposition of tax on the importation and the remission of tax on exportation in trade between Member States; … 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'.

5 The 14th recital in the preamble to that directive reads as follows:

'… 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; … taxpayers should, in particular, make a periodic aggregate return of their transactions, relating to both inputs and outputs where this appears necessary for establishing and monitoring the basis of assessment of own resources'.

6 Under Article 2 of the Sixth Directive, both the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are to be subject to VAT.

7 Article 22 of the Sixth Directive provides:

'…

4. Every taxable person shall submit a return within an interval to be determined by each Member State ….

…

5. Every taxable person shall pay the net amount of the [VAT] when submitting the return. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment.

…

8. … Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

…'

National law

8 Articles 8 and 9 of Law No 289/2002, which govern the 'Supplementary return in respect of past years' and the 'Automatic settlement in respect of past years', respectively, relate both to VAT and to other taxes and compulsory levies.

Article 8 of Law No 289/2002

9 Article 8 of Law No 289/2002 essentially allows taxable persons to submit a supplementary VAT return in order to correct returns which have already been filed in respect of tax periods falling between 1998 and 2001. Under Article 8(3), the supplementary return must be accompanied by payment of the additional VAT due before 16 April 2003, the amount of which is calculated by 'applying the provisions in force during each of the tax periods'. That 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 legal persons.

10 Article 8(4) of Law No 289/2002 provides for the possibility of filing a supplementary VAT return under a confidential procedure. However, that option is not available if the taxable person has not filed any returns for the tax years in question.

11 Under Article 8(6) of Law No 289/2002, the effect of submitting a supplementary VAT return is that, in respect of amounts equivalent to the additional VAT due under that return increased by 100% — in other words, a VAT amount due which is double that declared by the taxable person — fiscal administrative penalties lapse, criminal penalties may no longer be applied to the taxable person concerned for certain offences under tax law or ordinary law, and no more tax verifications may be carried out.

12 Article 8(9) of Law No 289/2002 allows taxpayers who have used the confidential procedure under Article 8(4) of that law to be exempted from all verification save that of the consistency of their supplementary returns.

13 Article 8(10) of Law No 289/2002 provides, however, that the benefit of Article 8 is not to be available to the following:

— taxable persons who, on the date of entry into force of Law No 289/2002, had already been served with a formal report finding an infringement, a correction notice or a notice to attend adversarial proceedings;

— taxable persons in respect of whom criminal proceedings had already been brought for the offences referred to in Article 8(6)(c) of Law No 289/2002 and of which they had been formally informed before the date on which they filed the supplementary VAT return.

14 Under Article 8(12) of Law No 289/2002, submission of a supplementary VAT return cannot constitute information of a criminal offence.

Article 9 of Law No 289/2002

15 Article 9 of Law No 289/2002 concerns 'Automatic settlement in respect of past years'. According to Bulletin No 12/2003 of 21 February 2003 of the Agenzia delle Entrate — Direzione centrale normativa e contenzioso (Revenue Authority — Directorate-General for Legislation and Legal Affairs), the point of the return for the purposes of automatic settlement, provided for in Article 9 of Law No 289/2002, as opposed to the supplementary VAT return provided for under Article 8 thereof, is not to declare additional taxable amounts, but rather to provide the information needed to determine the amounts which have to be paid in order to obtain the tax amnesty.

16 Although the tax periods covered by the automatic settlement are the same as those under Article 8 of Law No 289/2002, the return submitted under Article 9 of that law must, by contrast, relate to 'all tax periods, failing which it will be null and void' (Article 9(1) of the law).

17 Under Article 9(2)(b) of Law No 289/2002, the automatic settlement for the purposes of VAT involves, for each of the tax periods, payment in the aggregate of (i) 'an amount equal to 2% of the VAT on supplies of goods or services carried out by the taxable person, in respect of which the VAT has become chargeable during the tax period' and (ii) an amount equal to 2% of the VAT on supplies of goods or services 'deducted during the same period'. That percentage is fixed at 1.5% for input or output tax which exceeds EUR 200 000 and 1% for amounts over EUR 300 000. Where application of Article 9(2)(b) of Law No 289/2000 entails payment of a sum in excess of EUR 11 600 000, the portion exceeding that figure is reduced by 80%. Article 9(6) of that law, 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.

18 For each tax year in respect of which no returns have been submitted at all, Article 9(8) of Law No 289/2002 requires a flat-rate payment of EUR 1 500 for natural persons, and EUR 3 000 for companies and associations.

19 Under Article 9(10)(b) and (c) of Law No 289/2002, the effect of the automatic settlement procedure for VAT purposes is that, for the taxable person concerned, fiscal administrative penalties lapse, criminal penalties may no longer be applied for certain related offences under tax law or non-tax law and no more tax verifications may be carried out.

20 Under Article 9(14) of Law No 289/2002, automatic settlement is not available to the following:

— taxable persons who, on the date of entry into force of Law No 289/2002, had already been served with a formal report finding an infringement, a correction notice or a notice to attend adversarial proceedings;

— taxable persons in respect of whom criminal proceedings had already been brought for the offences referred to in Article 9(10)(c) of Law No 289/2002 and of which they had been formally informed before the date on which they filed the supplementary VAT return;

— taxable persons who failed to submit returns in respect of every tax referred to in Article 9(2) and every tax period referred to in Article 9(1).

Pre-litigation procedure

21 On the view that Articles 8 and 9 of Law No 289/2002 are incompatible with Articles 2 and 22 of the Sixth Directive and with Articles 10 EC and 249 EC, the Commission, pursuant to the procedure provided for in Article 226 EC, sent a letter of formal notice, dated 16 December 2003, to the Italian Republic. By letter of 30 March 2004, that Member State denied the incompatibility alleged by the Commission. Not satisfied with the response from the Italian Republic, the Commission sent that Member State a reasoned opinion by letter of 18 October 2004, calling upon it to comply with that opinion within two months of receipt thereof. In its reply of 31 January 2005 to that reasoned opinion, the Italian Republic again denied that there was such an incompatibility. It was in those circumstances that the Commission decided to bring the present action.

The action

Arguments of the parties

22 The Commission claims that, by explicitly providing in Articles 8 and 9 of Law No 289/2002 for a general waiver of verification of taxable transactions effected in a series of tax years, the Italian Republic has failed to fulfil its obligations under Articles 2 and 22 of the Sixth Directive and Article 10 EC.

23 The Commission states that Articles 2 and 22 of the Sixth Directive and Article 10 EC impose a twofold obligation on Member States, in that they are required to adopt not only all the national legislation necessary to give effect to the Sixth Directive, but also all the administrative measures necessary to ensure that persons liable to pay VAT comply with the obligations arising under that directive, in particular with the obligation to pay in a timely manner the VAT payable following a taxable transaction.

24 According to the Commission, Articles 8 and 9 of Law No 289/2002 derogate from the general legislation governing VAT and transposing the Community VAT directives into Italian law. The Commission considers that such derogation is contrary to Articles 2 and 22 of the Sixth Directive.

25 Regarding the obligation imposed on Member States by Article 2 of the Sixth Directive to make all supplies of goods and services subject to VAT, it is inconceivable, according to the Commission, that a Member State may unilaterally release itself from the obligation to make certain categories of taxable transactions subject to VAT, either by introducing tax exemptions not provided for by the Community legislature, or by excluding from the scope of the Sixth Directive taxable transactions which ought properly to be covered by it.

26 As regards the obligations referred to in Article 22 of the Sixth Directive, the Commission maintains that, as those obligations are framed in unequivocal and imperative terms, Member States may exempt taxable persons from one or other of those obligations only if a specific provision in Article 22 expressly empowers them to derogate from those obligations. According to the Commission, Article 22(8) of that directive is intended to ensure that the national tax authorities possess the necessary means of enforcement through controls, whilst making taxable persons subject to the obligations arising from those enforcement requirements, and to place Member States under an obligation to ensure 'the correct levying and collection of the tax' through an effective strategy of verification and combating tax evasion. According to the Commission, Article 22 of the Sixth Directive does not confer on the Member States a measure of discretion enabling them to exempt all taxable persons from their obligation to keep accounts, to issue invoices and to submit VAT returns.

27 The Commission acknowledges that when Member States check the accuracy of VAT returns and the related payments made by taxable persons, they enjoy a measure of discretion enabling them to adjust their controls according to the human resources and technical means at their disposal for that purpose. However, the Commission argues that Articles 8 and 9 of Law No 289/2002 go above and beyond the discretion granted to Member States by the Community legislature, in that the Italian Republic has introduced a general, indiscriminate and prior renunciation of the right of verification and enforcement through controls in the matter of VAT.

28 On the view that there is no link whatsoever between the tax debt calculated in accordance with the ordinary VAT rules and the amounts to be paid by the taxable persons wishing to take advantage of the amnesty arrangements provided for in Articles 8 and 9, respectively, of Law No 289/2002, the Commission maintains that the provisions laid down in those articles are liable seriously to disrupt the proper functioning of the common system of VAT, to distort the principle of fiscal neutrality inherent in that system and to infringe the obligation to ensure that VAT is collected in a uniform manner in all the Member States.

29 The Italian Republic, which recognises that the Community rules on VAT require Member States to apply VAT to all taxable persons and to carry out checks as a result of that obligation, maintains that the mechanism provided for in Articles 8 and 9 of Law No 289/2002 does not affect either taxpayers' obligations or the components

of VAT. Rather, it comes into play in the area of enforcement and recovery of VAT, where Member States enjoy some margin of discretion.

30 The Italian Republic takes the view that the logical conclusion of the Commission's plea, which aims to classify the mechanism provided for in Articles 8 and 9 of Law No 289/2002 as a 'general, indiscriminate and prior renunciation of the right of verification and enforcement through controls in the matter of VAT', would be that Member States would be generally precluded from making use of conciliation or dispute settlement mechanisms in order to avoid litigation and ensure immediate revenue through negotiated tax reductions.

31 The Italian Republic argues in particular that its tax authorities are unable to carry out controls of all taxpayers; thus the scheme provided for in Articles 8 and 9 of Law No 289/2002 enables it to collect immediately a not insignificant portion of the VAT and to focus its enforcement efforts on those taxpayers who have not availed themselves of the amnesty procedure at issue.

32 The Italian Republic also argues that the fact that the VAT amounts collected have, in its view, been considerably higher than those which could have been collected under the ordinary verification and controls procedure shows that the obligations under the Sixth Directive have been discharged: an allegation of non-compliance with those obligations cannot be sustained solely on the ground that those amounts were recovered in the form of payments made voluntarily by taxpayers rather than in response to a compulsory demand from the tax authorities.

33 The Italian Republic states that the purpose of Article 8 of Law No 289/2002 is to enable taxpayers who are not yet known to the tax authorities as tax evaders to regularise their position, provided that they declare voluntarily the taxable amounts involved in the evasion and pay a sum equal to at least 50% of the VAT evaded (or at least two thirds thereof in the case of a withholding tax). The payment made has the effect of preventing the tax authorities from carrying out controls in respect of amounts which do not exceed by at least 100% the amounts declared on the supplementary return (or by at least 50% in the case of additional withholding tax).

34 Relying on Article 8(10) of Law No 289/2002, the provisions of which are referred to in paragraph 13 of the present judgment, the Italian Republic maintains that taxable persons already known to be tax evaders may not avail themselves of the arrangements provided for in Article 8.

35 The Italian Republic states, in respect of Article 9 of Law No 289/2002, that the application of that provision is refused in the two situations specified in Article 8(10) of that law — as explained in paragraph 13 of the present judgment — and, pursuant to Article 9(14) of that law, where the person concerned has failed to submit returns in respect of every tax referred to in Article 9(2) and every tax period referred to in Article 9(1).

36 The Italian Republic states that the reference in Article 9(14) of Law No 289/2002 to 'every tax referred to in Article 9(2)' has always been interpreted to the effect that the taxes referred to in Article 9(2)(a) of that law, on the one hand, and the VAT referred to in Article 9(2)(b), on the other, fall to be considered separately. Thus, it has been accepted that the automatic settlement provided for in Article 9 will not be available where there has been a failure to file a VAT return for all of the years concerned, even if, in respect of those years, returns have been filed for other types of tax. The Italian Republic adds that, under Article 9(9) of Law No 289/2002, the tax authorities may at any time recover the VAT due on the basis of the information in the VAT return and that, in any event, a tax verification may be carried out whenever it is necessary to verify the right (or the lack of any such right) to a VAT refund on the basis of that return.

Findings of the Court

37 It follows from Articles 2 and 22 of the Sixth Directive, and from Article 10 EC, that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory. In

that regard, Member States are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due.

38 Under the common system of VAT, Member States are required to ensure compliance with the obligations to which taxable persons are subject and they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal.

39 That latitude is nevertheless limited by the obligation to ensure effective collection of the Community's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The Court has held that the Sixth Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT (Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 24). Any action by Member States concerning VAT collection must comply with that principle.

40 Under Article 8 of Law No 289/2002, taxable persons who have not complied with their obligations in respect of the tax periods falling between 1998 and 2001 — in certain cases, only one year before the adoption of that law — may completely escape verification, as well as any applicable penalties, up to double the amount of the VAT as it appears from the supplementary VAT return. The Italian authorities no longer have any legal basis for verifying the taxable transactions carried out during the four years preceding the adoption of that law, subject, however, to the limits (in terms of the amounts) laid down in Article 8(6) of that law. That waiver is in principle applicable where the taxable person declares and pays the amount he should have paid initially. However, since verification may be carried out only in respect of amounts higher than double the amounts declared by the taxable person in the supplementary VAT return, Law No 289/2002 is likely to provide taxable persons with a powerful incentive to declare only part of the tax debt actually due. It follows that the taxable persons availing themselves of that article will escape once and for all their obligations to declare and to pay the amount of VAT normally payable for the tax periods falling between 1998 and 2001.

41 The VAT amount due under Article 9 of Law No 289/2002 bears even less resemblance to the amount that the taxable person should have paid. Under that article, a taxable person who has not filed a return for the tax periods falling between 1998 and 2001 will be able to escape any controls as well as any fiscal administrative or criminal penalties by paying an amount equivalent to 2% of the VAT due on supplies of goods or services carried out by that person, plus 2% of the VAT deducted during the same period. That percentage is fixed at 1.5% for input or output VAT in excess of EUR 200 000 and 1% for amounts over EUR 300 000. Where the amount due under Article 9 exceeds a certain level, the surplus portion is reduced by 80%. The amounts to be paid may not be less than EUR 500.

42 It follows that Article 9 of Law No 289/2002 enables taxable persons who have not complied with their VAT obligations for the tax periods falling between 1998 and 2001 to escape once and for all those obligations — as well as the penalties for non-compliance with those obligations — by paying a lump sum in lieu of an amount proportionate to the turnover achieved. Those lump sums are disproportionate in relation to the amount the taxable person should have paid on the basis of the turnover generated by the transactions that he carried out but did not declare.

43 By replacing, shortly after the expiry of the deadlines fixed for the payment of the VAT amounts normally payable, the obligations under Articles 2 and 22 of the Sixth Directive for the parties concerned with other obligations which do not require the payment of those amounts, Articles 8 and 9 of Law No 289/2002 render those articles of the Sixth Directive — which form nevertheless the basis for the common system of VAT and are thus an intrinsic part of the very structure of that tax — meaningless. The effect of the considerable imbalance between the amounts actually due and the amounts paid by taxable persons wishing to take advantage of the tax amnesty in question is tantamount to a tax exemption.

44 It follows that Law No 289/2002 seriously disrupts the proper functioning of the common system of VAT. Its provisions distort the principle of fiscal neutrality by introducing significant variations in the treatment of taxable persons in Italy. For the

same reason, those provisions infringe the obligation to ensure that VAT is collected in a uniform manner in all the Member States.

45 Since, as is stated in the fourth recital in the preamble to the Sixth Directive, the purpose of the principle of fiscal neutrality is to enable the achievement of a common market permitting fair competition, the very functioning of the common market is compromised by the Italian legislation because, in Italy, it is realistic for taxable persons to hope not to be required to pay a large portion of their tax debt.

46 It should be pointed out in that context that the prevention of tax evasion is an objective recognised and encouraged by the Sixth Directive (see Case C-255/02 *Halifax and Others* [2006] I-1609, paragraph 71, and Case C-162/07 *Ampliscientifica and Amplifin* [2008] ECR I-4019, paragraph 29). Thus, Article 22(8) of the Sixth Directive calls on Member States to impose, where appropriate, additional obligations to prevent tax evasion.

47 It is clear that the Italian legislation has the opposite effect in that taxable persons who are guilty of tax evasion are placed in a more favourable position by Law No 289/2002.

48 The Italian Republic maintains that the true impact of the tax amnesty at issue is minimised because of the cases in which persons are barred from the benefit of those arrangements. It argues, inter alia, that taxable persons who have not filed any VAT returns for the tax years concerned, as well as those who have not complied with their VAT obligations and in respect of whom proceedings have already been closed in favour of the tax authorities, may not avail themselves of the amnesty.

49 The figures provided by the Italian Republic in its statement in defence, however — according to which almost 15% of taxable persons, that is to say, approximately 800 000 of them, applied for the tax amnesty in 2001 — highlight the breadth of a

measure which cannot be regarded as being of limited scope, notwithstanding the debarment situations emphasised by the Italian Republic.

50 Since debarment applies only in very limited sets of circumstances, it is clear that the Commission is correct in classifying the disputed tax amnesty as a general and indiscriminate renunciation of the tax authorities' right of verification and recovery.

51 The Italian Republic contends that Law No 289/2002 enables the public purse to recover part of the VAT not initially declared immediately and without having to engage in lengthy legal proceedings.

52 However, by introducing an amnesty measure very shortly after the expiry of the deadlines by which taxable persons should have paid VAT and by requiring payment of an amount which is paltry as compared with the VAT actually due, the measure in question enables the taxable persons concerned to escape once and for all their VAT obligations, despite the fact that the national tax authorities would have been able to detect at least some of those taxable persons during the four years preceding the date after which recovery of the tax normally payable would be time-barred. In so doing, Law No 289/2002 undermines the responsibility incumbent on each Member State to ensure the correct levying and collection of the tax.

53 Consequently, it is appropriate to consider the Commission's action as well founded and to declare that, by providing in Articles 8 and 9 of Law No 289/2002 for a general and indiscriminate waiver of verification of taxable transactions effected in a series of tax years, the Italian Republic has failed to fulfil its obligations under Articles 2 and 22 of the Sixth Directive, and Article 10 EC.

Costs

54 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. As the Commission has applied for costs against the Italian Republic and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by providing in Articles 8 and 9 of Law No 289 of 27 December 2002 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Law for 2003) (legge n. 289, disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2003)) for a general and indiscriminate waiver of verification of taxable transactions effected in a series of tax years, the Italian Republic has failed to fulfil its obligations under Articles 2 and 22 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, and Article 10 EC;**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]