

Newsalert

EU Direct Tax Group

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AG OPINION IN CASE C-475/03 (BANCA POPOLARE DI CREMONA): INCOMPATIBILITY OF IRAP WITH SIXTH VAT DIRECTIVE AND TEMPORAL RESTRICTION

IRAP is an Italian tax levied on companies, partnerships and individuals, introduced in Italy in 1998. The ordinary tax rate is equal to 4.25%. IRAP is levied on an amount calculated by deducting production costs from the sales value but excluding principally labor costs.

In 1999, an Italian bank (Banca Popolare di Cremona), requested a reimbursement from the Italian Tax Authorities of the IRAP paid, arguing that the tax was unlawful, because it was contrary to the EU VAT legislation (Article 33 of the Sixth VAT Directive prohibits EU Member States from introducing "any taxes, duties or charges which can be characterized as turnover taxes"). After the reimbursement denial from the Italian Tax Authorities, the Cremona Tax Court referred the case to the ECJ (C-475/03).

Following the first oral hearing, on 17 March 2005 AG Jacobs has issued his opinion in favour of the taxpayer stating that IRAP possesses the essential characteristics of VAT, foreseen in 11 decisions of the ECJ, and therefore must be characterised as a turnover tax prohibited by Article 33 (1) of the Sixth VAT Directive. Nevertheless, AG Jacobs also stated that there were strong arguments (good faith of Italy in application of IRAP and risk of serious difficulties in granting the refunds) for limiting the temporal effects of the ECJ decision and he suggested to reopen the oral procedure to hear all arguments on the issue. ECJ decided to reopen the oral procedure fixing a new hearing.

Following the second oral hearing (in which 12 Member States participated), on 14 March 2006 the AG Stix-Hackl has issued her opinion substantially confirming the incompatibility of IRAP with VAT, but stating, in addition, that the above-mentioned incompatibility is valid only if, for a representative sample of business subject to both taxes, the ratio between the amounts paid in VAT and the amounts paid in IRAP is substantially constant (this condition must be assessed by the national Court).

With regards to the issue of temporal limitation, AG Stix-Hackl has considered (confirming the arguments presented in the previous AG Jacobs's opinion) that a temporal limitation on the effects of the judgement is justified. Diversely from the Meilicke Case (in which AG Tizzano took into account the effects of a similar judgement-Verkooijen), it is not possible to identify any specific case to which a referral could be made in order to establish a date for the effects. The AG Stix-Hackl has suggested that the judgement should take effect at the end of the tax period during which the Court issues its judgement (if a judgement is delivered this year it would take effect as of the end of 2006). A fixed future date for the Court judgement to come into effect allows Italy to enact new measures to change its system of regional financing whereas allowing all taxpayers to rely immediately on the judgement of the Court would be tantamount to abolishing the tax with immediate effect. According to AG Stix-Hackl's opinion an exception to this temporal limitation should be made for all those who had commenced legal proceedings for reimbursement prior to the delivery of AG Jacobs's opinion on 17 March 2005; given that the latter gave rise to a concrete possibility that the Court would deliver a ruling resulting in IRAP being incompatible with EU law. In the AG's opinion this date seems appropriate to distinguish between earlier claims and those commenced only when the probability of success appeared to be more likely.

AG also took into consideration the possible consequences for other Member States. In her opinion, if the Court rules that a tax having the characteristics of IRAP is incompatible with the Sixth VAT Directive, the same will be equally valid for any other tax having the same characteristics in any other Member State. However, any temporal restriction and any exception thereto decided upon by the Court, in the IRAP case, will be based on an assessment of the situation in Italy, and that assessment might be quite different with regards to another Member State which also applied a tax having the same characteristics. A limitation of temporal effects may be allowed only in the actual judgement ruling upon the interpretation sought. In any case, she didn't exclude that in a future similar case the Court could decide on a limitation based on the date of the judgement in the IRAP case – in a manner comparable to AG Tizzano's proposal in Meilicke that the effects should be limited to the date of the judgment in Verkooijen – and on any exceptions that might be called for to the effects of the limitation.

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