JUDGMENT NO. 116 YEAR 2013

In this case the Court heard three referral orders from judicial divisions of the Court of Accounts concerning an additional solidarity levy imposed upon high-income public sector pensioners only. Holding that the levy amounted to a tax, the Court struck down the measure "as an unreasonable and discriminatory tax on one single class of taxpayer".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 18(22-bis) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 111 of 15 July 2011, as amended by Article 24(31-bis) of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, initiated by the Court of Accounts, judicial division for Campania Region, by the referral order of 20 July 2012, and by the Court of Accounts, judicial division for Lazio Region, by two referral orders of 25 February 2013, registered respectively as no. 254 in the Register of Referral Orders 2012 and no. 55 and no. 56 in the Register of Referral Orders 2013 and published in the Official Journal of the Republic no. 45, first special series 2012 and no. 12, first special series 2013.

Considering the entries of appearance by Bozzi Giuseppe and others, by the INPS [National Institute for Social Security], in its capacity as the statutory successor of the INPDAP [National Institute for Social Security and Assistance for the Employees of the Public Administration], and the intervention by Gruppo Romano Giornalisti Pensionati [Roman Group of Retired Journalists] and the President of the Council of Ministers;

having heard the judge rapporteur Giuseppe Tesauro at the public hearing of 7 May 2013;

having heard Counsel Vincenzo Greco for Gruppo Romano Giornalisti Pensionati, Counsel Giovanni C. Sciacca for Bozzi Giuseppe and others, Counsel Filippo Mangiapane for the INPS, in its capacity as the statutory successor of the INPDAP and

the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– This Court has been referred questions concerning the constitutionality of Article 18(22-bis) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 111 of 15 July 2011, in the version subsequently amended by Article 24(31-bis) of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, raised by the Court of Accounts, judicial divisions for Campania Region and for Lazio Region by three separate referral orders filed respectively on 20 July 2012 and 22 February 2013, registered as no. 254 in the Register of Referral Orders 2012 and no. 55 and no. 56 of 203.

2.– According to the Court of Accounts, Judicial Division for Campania (Register of Referral Orders no. 254 of 2012), in providing that, with effect from 1 August 2011 until 31 December 2014, pensions paid by bodies operating mandatory pension schemes totalling more than EUR 90,000 gross per annum shall be subject to an equalising contribution of 5 percent on the part exceeding the aforementioned amount up to EUR 150,000, of 10 percent on the part exceeding EUR 150,000 and of 15 percent on the part exceeding EUR 200,000, the contested provision violates Articles 2, 3, 36 and 53 of the Constitution on the grounds that such a levy, which is essentially a tax – in that it has been established through an act of authority with expropriating effect, the proceeds of which are intended to cover the state's financial needs – breaches the principles of equality and reasonableness, as related to the principle of capacity to pay tax. The contested provision is claimed first to affect only public sector pensioners, "leaving inexplicably and illogically untouched all other classes of private and self-employed pension provision: all of these classes are united by the constitutional principle that pensioners must be protected"; secondly, no similar measure was provided for in relation to taxpayers in general in receipt of the same income.

Moreover, in the opinion of the Campania court, the legislation under examination also violates Articles 42(3) and 97(1) of the Constitution in that it implements through

legislation an expropriative initiative affecting a particular class of individual, with no prior assessment of the interests affected and without providing for payment of compensation since [the requirement for] "a careful examination of the interests in play and a well-considered decision on the measure and arrangements governing the sacrifice according to the constitutional principle of good administration (Article 97 of the Constitution) cannot fail to apply also to legislation with administrative status".

2.1.– The referral orders registered as no. 55 and no. 56 in the Register of Referral Orders 2013, the effect of which is identical to those issued by the Court of Accounts, judicial division for Lazio, assert that the contested provision violates Article 2, 3 and 53 of the Constitution since, as specified also by this Court in judgment no. 241 of 2012, although the "equalisation contribution" undoubtedly constitutes a "tax, in that it constitutes a levy analogous to that applied to the overall remuneration of public sector employees […] as ruled unconstitutional by the Court by judgment no. 223 of 2012" and, whilst it was adopted in exceptional economic circumstances, it does not guarantee respect for the fundamental principles of equal treatment for equal income with the category of workers (public or private), as it was imposed without justification only on the pensioners of bodies operating mandatory pension schemes, with the result that it unreasonably limits the class of persons liable to the levy.

The contribution in question was also claimed to have been adopted in breach of the principle of equality in relation to capacity to pay tax as it was imposed only on retired judges, a category which was "more heavily affected than the recipients of other income, including more specifically income from employment", a consequence inferred from the ruling in judgment no. 223 of 2012 that the analogous levy was unconstitutional.

Moreover, when compared with the contribution provided for under Article 2(2) of Decree-Law no. 138 of 13 August 2011 (Further urgent measures for financial stabilisation and development), converted with amendments into Law no. 148 of 14 September 2011, the levy is claimed to be patently unreasonable and unjustified because – with regard to measures rooted in solidarity with a substantially identical rationale – taxpayers in receipt of overall income in excess of EUR 300,000 would be required to pay a solidarity contribution of 3% on the part of income in excess of the aforementioned amount, irrespective of how their overall income, including pension

income, is comprised, whilst the applicants in the main proceedings would be required (in order to deal with the same exceptional economic situation) to pay a greater levy, which would violate not only the constitutional principles of equality and reasonableness, but also those relating to the capacity to pay tax and the progressive nature of taxation.

Finally, the provision under examination is claimed by the referring courts to result in unreasonable discrimination, since the solidarity contribution provided for under Article 2(2) of Decree-Law no. 138 of 2011 does not apply to income falling under Article 9(2) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010, thereby causing an "unreasonable and arbitrary legislative misalignment due to the asymmetrical nature of the tax mechanism for levying the solidarity contribution".

3.– All of the referral orders relate to the same provision, contested according to arguments which are largely identical, and therefore the proceedings are to be joined for the purposes of settlement by a single ruling.

4.– As a preliminary matter, it is necessary to confirm the order read out at the public hearing of 7 May 2013, which ruled that the intervention in the proceedings initiated pursuant to referral order no. 55 of 2013 by the Gruppo Romano Giornalisti Pensionati was inadmissible. Third parties not involved in the main proceedings may only intervene where they have a qualified interest that is directly related to the substantive right averred in the proceedings, and not simply governed, in the same manner as any other, by the contested provision or provisions (see *inter alia* the order read out in the public hearing of 23 October 2012, confirmed by judgment no. 272 of 2012; the order read out in the public hearing of 23 March 2010, confirmed by judgment no. 138 of 2010; the order read out in the public hearing of 31 March 2009, confirmed by judgment no. 151 of 2009; and judgments no. 94 of 2009, no. 96 of 2008 and no. 245 of 2007).

In the proceedings that gave rise to the questions of constitutionality, the substantive interests averred relate to issues that may affect the pension entitlement of the members of the intervener body, but do not directly concern their prerogatives or rights, and hence the intervention is inadmissible.

5.– Again as a preliminary matter, it is necessary to reject the objection raised by the INPS that the question is inadmissible on the grounds that jurisdiction does not lie with the referring court, but rather with the tax courts.

In view of the self-standing status of interlocutory proceedings compared to the main proceedings, this Court has been settled in asserting that the lack of jurisdiction can only be relevant in cases in which it appears to be macroscopically evident, such that there can be no doubt regarding it; however, it cannot be relevant also when the referring court has given reasons in support of its jurisdiction, which do not appear to be implausible (see most recently judgments no. 279 of 2012 and no. 241 of 2008). In the present case, in particular in the proceedings initiated pursuant to referral orders no. 55 and no. 56 of 2013 the referring courts have stated that they have jurisdiction on grounds that are entirely plausible, in response to the specific objection raised by the other party in those proceedings. In their view, the classification under tax law of the rule making provision for the equalising contribution does not transform the relationship between bodies operating mandatory pension schemes and the beneficiaries of the relative pension payments into a relationship governed by tax law, since allocation to the special jurisdiction of the tax courts is only possible if a challenge has been brought against one of the acts provided for under Article 19 of Legislative Decree no. 546 of 31 December 1992 (Provisions on proceedings before the tax courts, in accordance with the delegation of authority to the Government by Article 30 of Law no. 413 of 30 December 1991) and if the defendant in formal terms is one of the bodies indicated in Article 10 of that Legislative Decree.

When confronted with this express provision, this Court’s review must necessarily be halted, given that such a motivation is not implausible, and is moreover in line with the principles asserted by the Joint Divisions of the Court of Cassation when regulating the issue of jurisdiction, which were mentioned in the referral orders.

6.– The question raised with reference to Articles 3 and 53 of the Constitution is well founded.

7.– The contested provision forms part of Decree-Law no. 98 of 2011, laying down urgent provisions on financial stabilisation, which was issued as part of a broader stabilisation initiative commenced by Decree-Law no. 78 of 2010, converted with amendments into Law no. 122 of 2010, laying down urgent measures on financial

stabilisation and economic competitiveness, subsequently expanded through further legislation contained in Decree-Law no. 138 of 2011. As regards specifically the situations evoked by the referral orders under examination, these decrees laid down measures intended to pursue a general "cooling" of wage dynamics within public sector employment, in addition to temporary measures to reduce pay, and to "solidarity" measures – framed in various forms for different classes of taxpayer – which were imposed both on employees of the public administrations as well as taxpayers as a whole.

As far as is of interest here in relation to the contested provision, this Court has provided an account of the scope of the current wording and the current effect of the provision. As was noted in judgment no. 241 of 2012, Law no. 148 of 14 September 2011, which did not convert into law the original wording of Article 2(1) of Decree-Law no. 138 of 2011 (which had repealed Article 18(22-bis) of Decree-Law no. 98 of 2011), replaced the paragraph not converted into law with a provision which was limited to reasserting the continuing applicability of Article 18(22-bis) of Decree-Law no. 98 of 2011 ("the provisions of Articles […] 18(22-bis) of Decree-Law no. 98 of 6 July 2011, converted with amendments into Law no. 111 of 15 July 2011, shall continue to apply as provided for thereunder respectively from 1 January 2011 until 31 December 2013 and from 1 August 2011 until 31 December 2014"). Consequently, as it was not converted into law, the repeal ceased to operate, with retroactive effect pursuant to Article 77(3) of the Constitution, thereby resulting in the revival of paragraph 22-bis, which had been repealed by the unconverted decree.

7.1.– It should also be observed that, in the light of its clear wording, the provision applies vis-a-vis the disbursement of mandatory pension payments both to staff from public sector employment and to all other payments made by bodies operating mandatory pension schemes, as well as pension arrangements that guarantee additional or supplementary payments to the mandatory pension (including those provided for under Legislative Decree no. 563 of 16 September 1996 on the "Implementation of the delegation of authority by Article 2(23)(b) of Law no. 335 of 8 August 1995 on pensions paid by pension schemes other than general mandatory insurance schemes, for the staff of bodies operating in the areas provided for under Article 1 of Legislative Decree of the Provisional Head of State no. 691 of 17 July 1947", under Legislative

Decree no. 357 of 20 November 1990 laying down "Provisions on pension arrangements at public credit institutions", and under Legislative Decree no. 252 of 5 December 2005 laying down "Provisions on complementary pension schemes"), along with payments to secure defined benefit payments to employees of the regions governed by special statute and the bodies provided for under Law no. 70 of 20 March 1975 (Provisions on the reorganisation of public sector bodies and of employment relations with employees), as amended.

7.2.– This Court has held that the equalisation arrangement in question is a tax, not only when addressing the analogous legislation in Article 9(2) of Decree-Law no. 78 of 2010 (judgment no. 223 of 2012), which was ruled unconstitutional, but also and above all when examining the provision contested in these proceedings in judgment no. 241 of 2012. That judgment asserted that "the contested contribution is provided for in relation to pension payments made by bodies operating mandatory pension schemes and certainly amounts to a tax in that it constitutes a levy similar to that made on the overall pay of public sector workers (described above in section 7.3.) provided for under paragraph 1, insofar as it was ruled unconstitutional by this Court by judgment no. 223 of 2012, which expressly held that it was a tax. In fact, the contested provision involves a definitive reduction of the pension payment, and the allocation of the relative amount to the state budget, which fulfils all of the prerequisites required by this Court in order for the levy to be classified as a tax (see *inter alia* judgments no. 223 of 2012; no. 141 of 2009; no. 335, no. 102 and no. 64 of 2008; no. 334 of 2006; and no. 73 of 2005)".

In the present case, the Court reiterates the status of the contested provision as a tax, and therefore that the interpretation which led the referring courts to challenge the provision due to violation of Articles 3 and 53 of the Constitution is correct.

7.3.– The principal challenges made by the referring courts consider the measure concerned to be an unreasonable and discriminatory tax on one single class of taxpayer. In fact, the measure applies to pensioners only, without guaranteeing respect for the fundamental principles of equal treatment for persons with equal income by unreasonably limiting the class of individuals liable to the levy, which has moreover become even more evident as a consequence of the ruling that the similar levy provided for under Article 9(2) of Decree-Law no. 78 of 2010 was unconstitutional (see judgment no. 223 of 2012).

Having correctly identified the status as comparators of persons who receive pensions paid by bodies operating mandatory pension schemes and all other persons in receipt of income, including but not limited to income from employment, which is clear in referral orders no. 54 and no. 55 of 2013, as occurred in judgment no. 223 of 2012, the question must be reviewed with reference to a potential breach of the principle of "the universal status of taxation" and whether the exception to it is unreasonable, having regard not so much to the difference in treatment between employees or between employees and pensioners or between pensioners and the self-employed or entrepreneurs, as rather that between taxpayers.

In fact, it needs to be pointed out in this regard that the status of pension income is not any different or *minoris generis* by virtue of its origin from the other forms of income taken as a reference for the purposes of compliance with Article 53 of the Constitution, which does not permit less favourable treatment for particular classes of income from gainful activity. This Court has in fact stressed (see judgments no. 30 of 2004, no. 409 of 1995 and no. 96 of 1991) the particular protection guaranteed to pensions in our legal system which, under the various systems contemplated by the law, constitute the final element of a pension relationship resulting from compliance with the applicable age and contribution requirements.

When confronted with a similar need to raise tax, dictated by the requirement to procure resources for financial stabilisation, Parliament chose to treat the income of pensioners differently: the solidarity contribution applies at lower thresholds and at higher rates, whilst for all other taxpayers the measure applies to income above EUR 300,000 gross per annum at a rate of 3 percent, which in such cases is deductible from income.

According to the case law of this Court, "the Constitution by no means requires uniform taxation according to criteria that are absolutely identical and proportional for all types of taxation, but by contrast requires an inseparable link with capacity to pay tax, within the context of a system inspired by the principles of progressive taxation, as a further manifestation within the specific field of taxation of the principle of equality, which is related to the task of removing *de facto* financial and social obstacles to the freedom of and equality between people, within a spirit of political, economic and social solidarity (Articles 2 and 3 of the Constitution)" (see judgment no. 341 of 2000). The

review conducted by the Court in relation to the violation of the principles laid down by Article 53 of the Constitution, as a manifestation of the fundamental principle of equality pursuant to Article 3 of the Constitution, must therefore be encapsulated in a "judgment as to whether or not the legislature has made reasonable use of its discretionary powers in relation to taxation with the goal of verifying the internal coherence of the structure of taxation with the circumstance establishing liability to taxation, and that the scale of taxation is not arbitrary" (see judgment no. 111 of 1997).

As regards initiatives to stabilise the public finances, which include the provision under examination, this Court has stressed the substantial overlap between the tax levies under comparison, holding that any difference in treatment between public sector employees and taxpayers in general is unreasonable (see judgment no. 223 of 2012).

Also in this case, it is similarly necessary to point out that the rationale for the provision contested in these proceedings is identical both to that of the analogous provision already ruled unconstitutional as well as to the solidarity contribution (Article 2 of Decree-Law no. 138 of 2011) of 3 percent on annual incomes above EUR 300,000, which has also been used as a comparator.

With the aim of securing resources for financial stabilisation, Parliament subjected pensioners alone to the further special tax challenged in these proceedings by unjustifiably limiting the class of persons liable to pay the tax.

It is necessary to reiterate also in this case the assertion made in judgment no. 223 of 2012 that the fact that the "solidarity" rationale for the various initiatives is substantially identical leads to the conclusion that the different treatment reserved to the affected class is unreasonable and arbitrary, which moreover "presaged a budgetary result which could have been very different, and more favourable for the State, had Parliament complied with the principle of equality and economic solidarity, which could also have been achieved by shaping a 'universal' tax in a different manner". Whilst on the one hand the exceptional nature of the economic circumstances which the state must confront is such as to permit the adoption of exceptional measures, pursuing the difficult task of striking a balance between the satisfaction of financial interests and guaranteeing the services and protection which all individuals require, on the other hand this cannot and must not result once again in the trampling of the fundamental principles of equality on which the constitutional order is based.

In the present case moreover, it is even more apparent that the sectoral measure is unreasonable if it is considered that, according to the case law of the Court, ordinary pensions constitute deferred remuneration (see *inter alia* judgment no. 30 of 2004, order no. 166 of 2006), which means that the imposition of a tax levy higher than for other classes of income will be even more clearly discriminatory, as it will apply to income with a now consolidated amount, associated with work previously performed by taxpayers who have finished their working life, for whom it is no longer possible to re-frame the employment relationship on a contractual level.

Accordingly Article 18(22-bis) of Decree-Law no. 98 of 6 July 2011, converted with amendments into Law no. 111 of 15 July 2011, as amended by Article 24(31-bis) of Decree-Law no. 201 of 6 December 2011, converted with amendments into Law no. 214 of 22 December 2011, must be declared unconstitutional.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 18(22-bis) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 111 of 15 July 2011, as amended by Article 24(31-bis) of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, is unconstitutional.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 June 2013.