JUDGMENT NO. 288 YEAR 2019

In this case, the Court considered referral orders from two regional tax boards concerning an urgent decree-law, which provided for the abolition of a certain local tax payment for a large number of taxpayers, whilst at the same time imposing a temporary additional levy on credit, financial and insurance undertakings in order to provide financial coverage for the former measure. The legislation was contested, *inter alia*, due to the fact that it discriminated against certain types of undertaking and also on the grounds that the situation of urgency addressed by the decree-law (i.e. providing financial coverage) had been brought about by the decree-law itself (i.e. the provisions abolishing the local tax payment). Regarding the latter objection, the Court held that the situation of urgency must obtain either prior to or at the time when the decree-law was enacted, i.e. must not only arise at a later stage; indeed, were this not the case, then – as a matter of logic – a decree-law could never be used to provide for any new spending or reduced revenues. The Court also held that it was not unreasonable to designate status as a financial market operator as a qualifying feature for liability to pay tax, as it was "difficult to question the view that the financial market has characteristics that set it apart from the industrial market". It was "not therefore implausible, during a period of crisis, for the legislator to have inferred a specific and self-standing capacity to pay tax from involvement in the financial market, in contrast to industrial operators, which is relevant for the purposes of a temporary measure to counter the adverse economic climate". Moreover, considering the overall circumstances of the tax, including certain measures to mitigate its effect and its temporary nature, "it may be concluded that the legislator did not act arbitrarily when imposing the tax".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

within proceedings concerning the constitutionality of Article 2(2) of Decree-Law no. 133 of 30 November 2013 (Urgent provisions concerning IMU [single municipal tax], the sale of publicly-owned real estate and the Bank of Italy), converted with amendments into Law no. 5 of 29 January 2014, initiated by the referral orders of 5 July 2018 and 12 March 2019 by the Regional Tax Board for Piedmont and the Second-Instance Tax Board for Trent, registered respectively as nos. 7 and 123 in the Register of Referral Orders 2019 and published in the *Official Journal* of the Republic nos. 6 and 36, first special series 2019.

Having regard to the entries of appearance by Online SIM spa and ITAS VITA spa, and the intervention by the President of the Council of Ministers;

having heard Judge Rapporteur Luca Antonini at the public hearing of 20 November 2019;

having heard Counsel Gabriele Escalar for Online SIM spa, Counsel Massimo Basilavecchia for ITAS VITA spa and State Counsel [*Avvocato dello Stato*] Paolo Gentili for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Regional Tax Board [*Commissione tributaria regionale*, CTR] for Piedmont questions, with reference to Articles 3, 53 and 77(2) of the Constitution, the constitutionality of Article 2(2) of Decree-Law no. 133 of 30 November 2013 (Urgent provisions concerning IMU [single municipal tax], the sale of publicly-owned real estate and the Bank of Italy), converted with amendments into Law no. 5 of 29 January 2014.

The provision is contested insofar as it provides that, "[n]otwithstanding Article 3 of Law no. 212 of 27 July 2000, with regard to the tax period ending on 31 December 2013, the rate provided for under Article 77 of the Consolidated law on income tax laid down by Decree of the President of the Republic no. 917 of 22 December 1986 shall be subject to an additional levy of 8.5 percentage points in relation to the credit and financial institutions provided for under Legislative Decree no. 87 of 27 January 1992, to the Bank of Italy and to companies and bodies carrying on insurance business".

In the opinion of the referring body, that provision violates Articles 3 and 53 of the Constitution, first on the grounds that it provides for unreasonable qualitative discrimination between different types of income since there is no apparent enhanced capacity to pay tax, for the credit, financial and insurance undertakings affected by the "additional levy" introduced by it as compared to other bodies liable to pay corporation tax [*Imposta sul reddito delle società*] (IRES). It is also claimed to be unconstitutional on the grounds that it does not pursue a purpose related to solidarity and redistribution.

It is further argued that the fact that the tax measure objected to is only transitory in nature does not mean that it cannot be unconstitutional.

It is also asserted that Article 77(2) of the Constitution has been violated due to the failure to fulfil the prerequisites of necessity and urgency.

Finally, the contested provision is claimed to be intended to provide financial coverage for the reduction in tax revenues resulting from the abolition of the second instalment of the single municipal tax [*imposta municipale unica*] (IMU) for 2013, which was however provided for under Article 1(1) of the same Decree-Law no. 133 of 2013 in order to give effect to a political choice made by the Government: the "additional levy" is thus argued to meet a need that did not exist prior to the adoption of the urgent decree, having been brought about by the Government at the very same time.

2.– Also the Second-Instance Tax Board for Trent raises a question concerning the constitutionality of Article 2(2) of Decree-Law no. 133 of 2013 with reference to Articles 3 and 53 of the Constitution.

According to the referring body – the arguments of which are largely analogous to those proffered by the CTR for Piedmont – the contested provision violates the constitutional provisions invoked by introducing a rule imposing taxes on a limited class of private undertakings, which however lacked an enhanced capacity to pay tax compared to that displayed by other undertakings with identical levels of income that are required to pay IRES.

3.– The two referral orders raise questions that in part overlap and moreover relate to the same provision. Therefore, the respective proceedings must be joined for resolution by one single decision.

4.– State Counsel has averred in both proceedings as a preliminary matter that the questions raised with reference to Articles 3 and 53 of the Constitution are inadmissible due to the failure to provide reasons as to why they are not manifestly unfounded.

The objection – based on the incontrovertible nature of the argument that the transitory status of the "additional levy" would not in itself be capable of "remedying" the violation of the constitutional provisions mentioned above – is not well-founded.

The referring bodies are argued to have limited themselves to objecting to the discrimination resulting from the provisions laid down by Article 2(2) of Decree-Law no. 133 of 2013, asserting that the legislation is unreasonable, in the first place, because the undertakings affected by the "additional levy" do not have an enhanced capacity to pay tax compared to that displayed by other undertakings liable to pay IRES. In fact, the undertakings liable to pay the additional levy are not, so it is argued, "economically stronger" than those operating in different productive sectors, and the fact that the former are subject to public oversight cannot be deemed to be sufficient to that effect.

Moreover, the unreasonable nature of the different level of taxation objected to is claimed to be appreciable, according to the CTR for Piedmont, also with regard to another aspect: when assessed in conjunction with the consideration that the abolition of the second instalment of IMU would benefit "all owners" of "certain types of properties", irrespective therefore of the income generated by them, it is not possible to infer from the aspect mentioned above that the contested provision pursues a purpose related to solidarity and redistribution.

In the light of the arguments illustrated above, the questions raised are admissible, since the conclusion arrived at by the referring bodies that Article 2(2) of Decree-Law no. 133 of 2013 is not compatible with Articles 3 and 53 of the Constitution was supported by full reasons and is capable of operating as a self-standing basis for the objections raised.

Therefore, the assessment as to whether the temporary nature of the "additional levy" under review in these proceedings is capable of precluding any violation of the constitutional provisions invoked above must be carried out on the merits.

4.1.– Likewise, the further objection of inadmissibility, invoked with specific reference to the question raised by the Trent Tax Board, the reasoning of which is alleged by State Counsel to be contradictory in terms of the reasons why it is not manifestly unfounded, is also unfounded.

According to State Counsel, the reasons – which were considered to lie essentially in the economic crisis, which led the legislator to abolish the second IMU instalment, as well as the need to obtain financial resources in order to cover the resulting reduction in tax revenues – that led the referring body to conclude that the questions raised by the claimant within the proceedings before it were manifestly unfounded with reference to Articles 41, 42 and 77 of the Constitution, are also capable of establishing that there was no violation of Articles 3 and 53 of the Constitution.

However, it may readily be countered against this objection that the purpose of dealing with the adverse economic circumstances of the country and the related need for financial coverage are evidently not in themselves sufficient to account in particular for the enhanced capacity to pay tax of the undertakings to which the contested provision applies, the absence of which however constitutes the essence of the first ground for challenge alleging a violation of Articles 3 and 53 of the Constitution.

Therefore, the argumentation is not contradictory as alleged.

5.– On the merits, it is necessary to start with the question raised by the CTR for Piedmont with reference to Article 77(2) of the Constitution.

This question in fact is preliminary in nature, as it concerns precisely the proper exercise of authority to enact primary legislation. This means that, were it to be held to

be well-founded, this would deprive the provision of its substantive normativity, thus meaning that the objections made in relation to the other constitutional provisions invoked would be "absorbed" (*ex plurimis*, Judgments no. 16 of 2017, no. 186 and no. 154 of 2015).

5.1.– The question is unfounded.

5.2.– As mentioned above, the violation of Article 77(2) of the Constitution should be assessed specifically in terms of the failure to fulfil the prerequisites of necessity and urgency; it is asserted that these have not been met in this case, since the extraordinary situation that needed to be addressed by the contested provision did not obtain prior to the adoption of the urgent decree, having been brought about by the legislator itself with the specific aim of giving effect to its own political choice.

The reasoning of the referring body is based, more specifically, on the consideration that the need that induced the Government to introduce the contested "additional levy" by Article 2(2) of Decree-Law no. 133 of 2013 consisted in the requirement to ensure financial coverage of the reduction in tax revenues resulting from the exemption – provided for under Article 1(1) of the same Decree-Law in relation to various types of real estate – from the requirement to pay the second IMU instalment for 2013. It is thus asserted that it was the Decree-Law itself that established the prerequisites of extraordinary necessity and urgency, rather than being a timely response to that necessity and urgency.

5.3.– Having thus delineated the constraints within which this constitutional review must operate as regards the provision in question, it must be noted that the referring board did not err in ruling that the contested provision seeks to satisfy the financial need brought about by the provisions laid down by Article 1(1) of Decree-Law no. 133 of 2013.

This is clearly apparent from Article 8 of Decree-Law no. 133 of 2013, which is in fact entitled "[f]inancial coverage", according to which "[t]he charges resulting from Articles 1 and 2 […] shall be covered drawing on the increased revenues resulting from Article 2".

5.4.– Although the premise underlying the argumentation of the CTR for Piedmont is correct, it is not also possible to endorse the consequence that it infers as regards the violation of Article 77(2) of the Constitution. In fact, owing to the purpose of the contested provision, it may on the contrary be concluded that this case does not involve a situation in which the prerequisites of extraordinary necessity and urgency – to which, according to its settled case law, this Court limits its review of the legitimacy of the adoption of a decree-law by the government (*ex plurimis*, Judgment no. 97 of 2019) – are evidently not met.

In this regard, it must be acknowledged that the Constitutional Court has indeed held on various occasions that the pre-existence of a factual situation entailing both the necessity and the urgent need to make provision constitutes a prerequisite for the validity of a decree-law.

Nevertheless, the reference to the pre-existence of extraordinary necessity and urgency – the lack of which constitutes the core of the referring body's objections – results from the evident consideration that it is a prerequisite for the issue of an urgent decree, which means that it cannot, logically speaking, arise after the decree-law. However, contrary to the assertions of the referring body, it is not possible to infer from this consideration the general corollary that the circumstances to which the decree-law relates must without exception have obtained prior to the issue of the urgent legislation.

The circumstances surrounding these incidental constitutionality proceedings are paradigmatic of this aspect.

The requirement that the contested Article 2(2) of Decree-Law no. 133 of 2013 seeks to satisfy is in fact, as clarified above, to secure compliance with the principle of financial coverage laid down by Article 81(3) of the Constitution.

It is therefore clearly evident that – although this requirement did not exist prior to the issue of the urgent decree – there is a need to incorporate the provision into the Decree-Law concerned along with the provisions that, by abolishing the second IMU instalment, brought about the reduction in revenues and new spending for the State State budget: otherwise, the legislator would have failed to comply with the obligation to indicate the relevant source of coverage.

According to the line of argument followed by the referring body, it should paradoxically be concluded that it is never permitted to enact rules within urgent decrees that entail new expenditure and/or reduced revenues since the Government could never comply with the requirements of constitutional law by, at the same time, making provision for the requisite financial coverage. However, such a conclusion would be at odds with the case law of this Court, which has on the contrary specified that the obligation imposed by Article 81 of the Constitution to make provision for the financial consequences of primary legislation – whilst being primarily incumbent upon Parliament, which is institutionally charged with the enactment of legislation – "falls by contrast to the Government, where it acts in a legislative capacity, enacting in place of the Houses of Parliament by issuing an urgent decree-law, in the event that the prerequisites laid down by Article 77 of the Constitution are met" (Judgment no. 226 of 1976).

5.5.– Within this perspective, taking account of the functional independence noted above between the contested provision and Article 1(1) of Decree-Law no. 133 of 2013, it is therefore necessary to focus also on the purposes pursued by the legislation.

It must be pointed out in this regard, as a general matter, that the abolition of the second IMU instalment for 2013 by the abovementioned Article 1(1) is in keeping with the title of Decree-Law no. 133 of 2013 laying down "[u]rgent provisions concerning IMU, the sale of publicly-owned real estate and the Bank of Italy", as well as the preamble, which refers, *inter alia*, to the "extraordinary necessity and urgent need to make provision in relation to the payment of the single municipal tax […]".

In view of the above, it should be pointed out that the abolition ordered by the contested provision also furthers the purpose of addressing the "difficult economic climate" by providing assistance that is aimed at furnishing support above all to persons considered to be in the greatest difficulty. Moreover, in contrast with the assertions made by the taxpayer in its written submission, this purpose is clearly stated in the preparatory works for the bill to convert the Decree-Law into law (and as was stated in particular by the Minister for the Economy and Finance on 13 December 2013 to the Finance and Treasury Committee of the Senate).

The choice made by the legislator is thus consistent with the prerequisites for and the purposes of the Decree-Law concerned, if it is considered that it has entailed the removal of liability to pay tax for a broad class of taxpayers, compliance with which would have exacerbated the difficulties resulting from a systemic economic crisis. This conclusion is also supported by the further consideration that, at the time when the Decree-Law was issued, the deadline for the payment of the second IMU instalment was already imminent, with the result that the need to take swift action was pressing.

Taking account of the specific context within which the provision was issued, it is therefore possible to conclude, as per the settled case law of this Court, that the prerequisite of extraordinary necessity and urgent need to make provision (*ex plurimis*, Judgments no. 33 of 2019, no. 137 of 2018 and no. 236 of 2017) was not evidently lacking.

Moreover, such a conclusion is not precluded by the fact – which is stressed by the claimant within the proceedings before the referring body – that the start of the adverse economic climate supposedly dates back to 2008, with the result that in 2013 it had already become "ordinary": it is precisely the persistence of that adverse economic climate (which is moreover substantially acknowledged even by the private party itself in its submissions) that has contributed to fulfilling the factual prerequisites for the issue of the urgent decree.

Finally, it must be stressed that the assertion that the abolition of IMU results from a "political choice" falling within the Government's programme does not negate the position stated above. It must in fact be clarified, first of all, that IMU was abolished on main homes, as a general rule, under different legislation, namely Law no. 147 of 27 December 2013 laying down "Provisions on the formation of the annual and multi-year budget of the state (Stability Law 2014)", and that Decree-Law no. 133 of 2013 only abolished the obligation to pay the second instalment for 2013; secondly, where the prerequisites are met, the Government's programme may indeed be implemented through the issue of urgent decrees.

5.6.– For the reasons illustrated above, it must be concluded that the prerequisites of necessity and urgency are not evidently lacking in this case. As a result, the argument proffered by the private party – in an attempt to highlight the severity of the consequences of the violation alleged – concerning the curtailment of debate owing to the association by the Government of the vote concerning the conversion of the Decree-Law with a vote of confidence may also be rejected with reference to the constitutional provision invoked (see Judgment no. 251 of 2014).

6.– The referring bodies take the view that the contested provision also violates Articles 3 and 53 of the Constitution, first and foremost because it taxes differently situations characterised by the same capacity to pay tax: specifically, the undertakings affected by the "additional levy" are not in fact wealthier than other undertakings also subject to IRES that are however excluded from the considerable additional levy. They argue in this regard not only that the Government failed to carry out "empirical […] analyses" in order to establish that the persons affected by the "additional levy" are "economically stronger" than others, but also that subjection to public oversight cannot be considered, in itself, to be indicative of an increased capacity to pay tax. Therefore, the contested provision is claimed to bring about an unreasonable qualitative discrimination against their income vis-à-vis the general class of other persons liable to pay IRES.

The referring bodies then object that the contested provision does not pursue a purpose related to solidarity and redistribution because the general abolition of the second IMU instalment would benefit all taxpayers affected, irrespective of the income earned by them.

6.1.− The questions are unfounded.

6.2.– However, considering the objections raised by the referring bodies, it is appropriate to clarify as a preliminary matter the constitutional framework within which these proceedings are situated.

It must be pointed out in this regard that, under the Constitution, the duty to pay tax, construed as a contribution to public expenditure having regard to each individual's own capacity to pay tax, may be classified as an inderogable duty of solidarity. This is not only because taxation is essential – as has been established under long-standing theories, which brought it under the paradigm of duties of submission – for the life of the State, but above all as its purpose is to finance the system of constitutional rights, which require massive resources in order to be effective. These rights include both social rights – such as for example the protection of health, which must moreover be assured free of charge to the destitute (Article 32(1) of the Constitution) – as well as most types of civil rights (consider the expenditure required for the administration of justice, which is necessary in order to guarantee *inter alia* also those rights).

In fact, having regard also to the redistributive function of taxation and the functional linkage with Article 3(2) of the Constitution, it is this bond that enables the duty to pay tax to be inferred from the mandatory status of Article 2 of the Constitution; as a result, it is readily apparent from this status that any violation of the provision will cause harm not only to long-standing paradigms but, in particular, to the above-mentioned system of rights.

However, considering the systemic context within which it operates, that classification is only justified if and insofar as the tax system remains firmly anchored to the general body of principles and the related balancing operations provided for and permitted under the Constitution, including specifically respect for the principle of capacity to pay tax (Article 53 of the Constitution).

As a result, when the legislator fails to respect these conditions, it departs from the ultimate considerations of legal culture that operate as a foundation for the duty to pay tax: in such cases, the tax relationship is altered, which has serious consequences in terms of the disorientation not only within the development of the legal system itself, but also of its social context.

6.3.– It must therefore be considered that the objections raised by the referring bodies may be classified under so-called "qualitative discrimination in terms of income", which is one of the most sensitive issues under constitutional tax law: in fact, whilst the legislator theoretically has broad discretion, subject to the limit of the prohibition on arbitrary action, in identifying indications of capacity to pay tax, this discretion is more limited where, considered in comparative terms, other specific situations become apparent within which the legislator has made different choices in relation to taxation notwithstanding otherwise identical circumstances, thus acting inconsistently.

These cases in fact call into question the principle of equality within taxation, which may be inferred from the combined provisions of Articles 3 and 53 of the Constitution. Within the case law of the Court, this has given rise to some of the most significant rulings striking down tax legislation as unconstitutional. These include in particular Judgment no. 10 of 2015, which held that "any treatment by the tax regime that provides for different treatment on the basis of economic area or type of taxpayer must be supported by adequate justification, failing which the different treatment will degenerate into arbitrary discrimination" (substantially following Judgments no. 104 of 1985 on employees' back pay and no. 42 of 1980 on local income tax).

6.4.– This principle must be reiterated here, and therefore this Court has been called upon to verify whether there is sufficient justification for the tax introduced by

Article 2(2) of Decree-Law no. 133 of 2013, which increased the tax due from a single, limited class of persons on an extraordinary and temporary basis.

6.5.– The answer to that question, in the light of the considerations set out below, is in the affirmative; as a result, the objections raised by the referring bodies with reference to Articles 3 and 53 of the Constitution are unfounded.

6.5.1.– First and foremost, it must be clarified that, although it has been expressly classified by the legislator as a "additional levy", the tax appears more correctly to be classifiable as a "surcharge": given an identical level of the relevant parameter (income) compared to the main tax IRES, the levy is only imposed on particular taxpayers and on a tax base that is only in part different from that for IRES.

In fact, whilst the contested Article 2(2) of Decree-Law no. 133 of 2013 provides in the first sentence that "the rate provided for under Article 77 of the Consolidated law on income tax laid down by Decree of the President of the Republic no. 917 of 22 December 1986 shall be subject to an additional levy of 8.5 percentage points", it goes on to state in the second sentence that "[t]he additional levy shall not be due in respect of any increases resulting from the application of Article 106(3) of the above-mentioned Consolidated law".

This has the effect of disregarding any "increases" resulting from the application of Article 106(3) of Decree of the President of the Republic no. 917 of 22 December 1986 laying down the "Approval of the consolidated law on income tax" [*Testo unico delle imposte sui redditi*] (TUIR). This provision enacts special rules, for the purposes of determining the amount liable to IRES, for credit and financial institutions falling under Legislative Decree no. 87 of 27 January 1992 (Implementation of Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions, and Directive 89/117/EEC on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents), which was subsequently extended by the reference in Article 16(9) of Legislative Decree no. 173 of 26 May 1997 (Implementation of Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings) also to insurance companies.

That special legislation essentially provides that, whilst any losses on or writedowns of client loans can theoretically be deducted in full subject to the sole condition of entry into the financial statements on that basis, they are in actual fact only deductible on an extremely diluted basis for each tax year, which thus results in an (often) significant increase of the statutory balance sheet, and therefore of the tax liable to IRES.

As a result of the disapplication of that clause, the new tax was therefore originally introduced for a tax base that had been significantly reduced compared to the ordinary tax base for IRES: from this point of view, the assumption by the referring bodies that the rate of IRES would necessarily have increased to 36 percent due to the combined effect of ordinary taxation (at 27.5 percent) and extraordinary taxation (at 8.5 percent) is incorrect.

6.5.2.– However, the rule described above for determining the tax base is not in itself capable of justifying the contested tax; it is rather relevant within a different perspective, concerning specifically the overall tax legislation enacted by the legislator, considered also within its primary temporal context, namely the serious crisis that has affected all sectors of the economy.

In this regard, subject to the limits set out below, it does not appear in itself to be objectionable for the legislator to have adopted as a prerequisite for taxation the status of the persons liable to pay the new tax as financial market operators (a market in which they evidently participate), identifying therein a specific capacity to pay tax.

State Counsel's Office has observed in this regard that, within this market: a) "there are 'entry barriers' in the sense that the relative lines of business may only be pursued after having obtained specific licences from the supervisory authority, based on verification of the asset and financial stability of the undertakings concerned"; b) consequently, there is "competition that, as much as it may be broad, is limited only to operators that have also been licensed"; c) "the practically essential nature [of] banking, insurance and financial services" favours the creation of demand that is substantially "price-inelastic".

According to State Counsel, this is the meaning that must be attributed to the "reference to subjection to public oversight of the banking, financial and insurance sectors that is contained within the preparatory works for the Decree-Law".

In effect, it is difficult to question the view that the financial market has characteristics that set it apart from the industrial market. It is in fact a market that, on account of the structural barriers described, takes on oligopolistic features, with the result that the undertakings operating on it have significant market power, which results also from a certain level of demand inelasticity (although this varies for the different services and sectors).

It is not therefore implausible for the legislator, in the context of a period of crisis, to have inferred a specific and self-standing capacity to pay tax from involvement in the financial market, as opposed to involvement in the industrial sector – a capacity that is deemed relevant as a temporary measure to counter the adverse economic climate.

On the other hand, adopting a more general perspective, on other occasions this Court has ruled unfounded, due to the existence of objective justifications, challenges relating to taxes that were established only for certain taxpayers within a specific category. In Judgment no. 201 of 2014, it held that the restriction to the "financial sector" only of the class of taxpayers liable to the "additional levy" on remuneration in the form of bonuses and stock options was not unjustified. Similarly, in Judgment no. 269 of 2017, it was held that "it is not unreasonable that the operating costs of the Authority responsible for the correct functioning of the market [AGCM] should fall upon companies characterized by a significant presence on the relevant markets [with annual revenue greater than 50 million euros] and endowed with considerable influence on the flow of economic activity corresponding thereto".

In view of the above, the contested tax therefore passes muster in terms of the existence of a rational link: after all, within a complex context such as the prevailing one, where new and variegated forms of value creation are being developed, the concept of capacity to pay tax does not necessarily have to be tied only to traditional indicators such as assets and income. Indeed, other and more evolved forms of capacity, which may indeed indicate economic force or potential, may also be taken into account.

6.5.3.– Having clarified the above, it is however necessary to specify that, when identifying a particular economically assessable tax base as an indication of a new capacity to pay tax for certain persons only, the legislator is subject to an obligation not to act arbitrarily in relation to the level of taxation, which must be proportionate with the tax base. This is the case above all when, as in this case, it is certainly not possible to conclude that, despite its structural characteristics, the financial market itself has not

in turn been affected by the crisis, as has moreover been documented by the private parties.

Regarding this issue, it is not possible to endorse the justification set out by State Counsel that it is possible to "shift" the tax costs of financial market services onto clients: indeed, the shifting of direct taxes ends up hitting a different capacity to pay tax from that of the person actually liable to pay the tax, as such rendering entirely uncertain the assessment of the capacity to pay tax of the third parties to which the burden is shifted. Moreover, above all in cases involving essential services, the direct tax ends up having a regressive effect precisely as a result of the shift, with the result that its compatibility with Article 53 of the Constitution might be far from certain.

Constitutional review must therefore operate on a different level.

From this perspective, it is important to recall that, in Judgment no. 21 of 2005, this Court did indeed hold that the stipulation of different rates for different sectors fell within the discretion of the legislator (provided that it is based on not unreasonable redistributive policy considerations). However, it then clearly specified that "[t]he provisional and calibrated increase in rates [of regional business tax, IRAP] for the banking, financial and insurance sectors" was justified by the specific need to offset the reduced impact of the still new tax on those very sectors: it was therefore within the context of a systemic review that the tax was considered not to be arbitrary.

6.5.4.– Within these proceedings too, it is therefore necessary to consider the overall package of legislation enacted alongside the contested provisions. Moreover, these provisions must be placed within the context of a reform (which is also in some sense systemic in nature) that resulted in significant compensatory effects for the persons liable to the new tax.

It should be pointed out in this regard not only that Article 2(2) of Decree-Law no. 133 of 2013 disregarded any increase pursuant to Article 106(3) of the Consolidated law on income tax for the purposes of calculating the amount liable to the new tax, but also that Article 1(160)(c), number 1 of Law no. 147 of 2013, which was approved before the Decree-Law was converted into law, subsequently affected the provision cited above, in relation however to ordinary IRES, amending it as follows: "[a]ny writedowns of or losses on client loans entered into the financial statements on that basis other than those achieved through assignment for consideration shall be deductible for credit and financial institutions falling under Legislative Decree no. 87 of 27 January 1992, in equal amounts during the financial year in which they are recognised and during the following four years. Any losses on loans realised through assignment for consideration shall be deductible in full during the financial year in which they are recognised within the financial statements. For the purposes of this paragraph, any writedowns and losses that are deductible in fifths shall be considered after any revaluations of the loans reported in the financial statements". Moreover, a similar provision on deductibility was introduced in relation to the regional business tax [*imposta regionale sulle attività produttive*] (IRAP).

These are changes which, with effect from the 2013 tax year itself (without prejudice to the application of the previous tax rules to value adjustments reported in the financial statements for previous tax periods), have therefore: a) considerably mitigated the impact of the increases; b) reduced the pro-cyclicality of the tax system, by allowing greater amounts to be deducted during adverse economic periods; c) generally alleviated the level of taxation for financial market operators during periods of high losses

(although these normally have a greater impact on the banking sector than on the insurance sector).

In this way, the legislator has shown to have catered to a particular requirement that is specific to the financial, credit and insurance sectors as a consequence of the economic crisis.

6.5.5.– It is clear precisely from the specific nature of the legislation applicable to these productive sectors that they cannot be compared with other sectors with which they share only the characteristic (which is in itself immaterial) of operating within a supervised market. Therefore, the assertions made by Online SIM spa, which – in objecting to the unjustified difference in treatment between persons liable to pay the contested "additional levy" and those liable to pay IRES operating within the electricity and gas distribution or the rail and air transport sectors – compares dissimilar terms, must be rejected.

6.5.6.− Having thus identified the basis for the contested "additional levy", it must consequently be concluded, first of all, that the levy does not have the status of a tax on excess profits (an argument raised, albeit in order to reject it, within the parties' submissions); and secondly that it does not seek to tax (as by contrast was mistakenly asserted by State Counsel's Office) the "high 'short-term' liquidity" available to operators in the credit, financial and insurance sectors.

As regards the first aspect, it is sufficient to note here that the new tax applies to all income – calculated in the manner illustrated above – and not only to the part attributable to notional types of excess profits. After all, not only is there no legislative support for this argument, but neither the legislator (as is apparent from the preparatory works) nor the referring bodies, nor indeed State Counsel, has ever asserted that the "additional levy" has the status of a tax on excess profits.

Regarding the second aspect, it must be noted here too that the "additional levy" is not based on liquidity reserves, which are besides required under sectoral legislation and are subject to supervision; as a result, it would be very difficult for them to be considered as a suitable, new indicator of capacity to pay tax, for IRES purposes.

6.5.7.– It is only after these considerations have first been made that the transitory nature of the new tax can be taken into account as part of an overall assessment of the context within which it operates.

In itself, in fact, temporary status is not a sufficient argument in order to justify any given tax, which might otherwise depart from constitutional principles, with the serious consequences set out above at the end of point 6.2.

However, within the case at issue in these proceedings, it operates as an additional argument to the systematic assessment carried out above, in demonstrating that, in order to offset the reduction in ordinary IRES and IRAP, an increase in tax has been provided for through the new tax for 2013 only.

6.5.8.– By virtue of these aspects – which contextualise the contested tax, reining in its impact – it may be concluded that the legislator did not act arbitrarily when imposing the tax.

7.– Besides, the contested tax was introduced for the purpose of providing coverage, during 2013, for a redistributive operation aimed at lightening the tax burden incumbent above all on residents, owing to the requirement to pay the second IMU instalment, under specific circumstances during a difficult and critical stage of the economic cycle; this accordingly concerns a wealth tax applicable principally to the

main home, which must therefore be paid out of liquidity that cannot normally be derived from the asset that is being taxed.

Leaving aside any consideration concerning the significant destructuring of local-government finance arrangements that was subsequently caused by the definitive abolition of IMU on the main home, it may therefore be concluded that the balance struck by the legislator may be considered, from this perspective, not to be unreasonable.

This conclusion is not refuted by the argument raised by the referring bodies, and reiterated by the parties that entered appearances, that the contested tax cannot be deemed to have any element rooted in solidarity since, despite the exclusion from its scope of "luxury" properties, the abolition of the second IMU instalment also benefited high-income taxpayers.

In any case, in fact, the legislation entailed a shift in the tax burden from the taxation of real estate owned by natural persons to the taxation of the income of particular legal persons; as a result, it in any case brought benefit also to less wealthy families affected by the difficult economic climate, giving rise to an undeniable, albeit partial, redistributive effect rooted in solidarity.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

1) *declares* that the questions as to the constitutionality of Article 2(2) of Decree-Law no. 133 of 30 November 2013 (Urgent provisions concerning the single municipal tax (IMU), the sale of publicly-owned real estate and the Bank of Italy), converted with amendments into Law no. 5 of 29 January 2014, raised with reference to Articles 3, 53 and 77(2) of the Constitution, by the Regional Tax Board for Piedmont by the referral order mentioned in the headnote, are unfounded;

2) *declares* that the question as to the constitutionality of Article 2(2) of Decree-Law no. 133 of 2013, as converted into law, raised with reference to Articles 3 and 53 of the Constitution, by the Second Instance Tax Board for Trent by the referral order mentioned in the headnote, is unfounded.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 20 November 2019.