JUDGMENT NO. 64 OF 2008

FRANCO BILE, PRESIDENT

FRANCO GALLO, AUTHOR OF THE JUDGMENT

JUDGMENT No. 64 YEAR 2008

In this case, the Court heard a reference from the Tribunale di Roma concerning a provision which stipulated that the tax courts should have jurisdiction over disputes concerning a charge for the occupation of public spaces and areas. The Court held that once it has been held that a particular issue is not a tax law matter, "the conferral on those courts of jurisdiction over the dispute in question inevitably results in the constitutionally prohibited creation of a "new" special court". Since the charge concerned was more a consideration than a levy, it was not a tax, and therefore it was unconstitutional to vest jurisdiction in the tax courts.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 2(2) of legislative decree No. 546 of 31 December 1992 (Provisions governing proceedings before the tax courts implementing the authorisation conferred on the government contained in Article 30 of law No. 413 of 30 December 1991), as amended by Article 3-bis(1)(b) of decree-law No. 203 of 30 September 2005 (Measures to combat tax evasion and urgent measures concerning tax and financial matters), converted into law, with amendments, by Article 1(1) of law No. 248 of 2 December 2005, commenced pursuant to the referral order filed on 2 November 2006 by the *Tribunale di Roma* in civil proceedings pending between the Condominium of Viale Mazzini 119, the Municipality of Rome and

another, registered as No. 459 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 25, first special series 2007.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Franco Gallo in chambers on 13 February 2008.

The facts of the case

1. – During the course of proceedings in which a tax payer challenged the enforcement pursuant to Article 615 of the Code of Civil Procedure by the Municipality of Rome, the ordinary court the *Tribunale di Roma* raised by order filed on 2 November 2006, with reference to Articles 102(2) and 25(1) of the Constitution, the question of the constitutionality of Article 2 of legislative decree No. 546 of 31 December 1992 (Provisions governing proceedings before the tax courts implementing the authorisation conferred on the government contained in Article 30 of law No. 413 of 30 December 1991) – as amended by Article 3-*bis*(1)(b) of decree-law No. 203 of 30 September 2005 (Measures to combat tax evasion and urgent measures concerning tax and financial matters), converted into law, with amendments, by Article 1(1) of law No. 248 of 2 December 2005 – insofar as it provides in the second sentence of sub-section 2 that the tax courts shall have jurisdiction also over disputes concerning liability for the said charge.

2. – The referring court finds, as a question of fact, that: a) the dispute concerns the challenge by the taxpayer to the Municipality of Rome's right to serve notice for the enforced recovery of the charge for the occupation of public spaces and areas (COPSA) [in Italian COSAP] for the year 2000; and b) as a preliminary matter, the municipality claimed that the court had no jurisdiction to hear the case, since the dispute fell under the jurisdiction of the tax boards pursuant to Article 2 of legislative decree No. 546 of 1992, as amended.

3. – The lower court also finds, as a question of law, that: a) tax boards are courts which are “fully compatible” with the Constitution, as they existed before the entry into force of the Constitution (Constitutional Court judgments No. 196 of 1982; No. 215 of 1976; orders No. 144 of 1998; and No. 351 of 1995); and b) their jurisdiction must be

considered to be limited to disputes concerning "tax matters" which "ensures compliance with the prohibition on the creation of new special courts" (order No. 144 of 1998).

4. – As regards the non-manifest groundlessness of the questions, the referring court asserts on the basis of the above findings that – in providing that "the tax courts shall have jurisdiction also over disputes concerning liability for the charge for the occupation of public spaces and areas pursuant to Article 63 of legislative decree No. 446 of 15 December 1997, as amended" – the contested provision confers upon the tax boards functions which, according to the case law of the Joined Sections of the Court of Cassation, do not concern tax law matters (judgments no. 14864 of 2006; No. 1239 of 2005; and No. 12167 of 2003) but rather pertain to subjective rights falling under the jurisdiction of the ordinary courts. The contested legislation therefore "distorts" the jurisdiction of the tax courts and hence breaches the prohibition on the creation of new special courts (Article 102(2) of the Constitution), as well as the principle that cases be heard by a court established by law duly vested with jurisdiction (Article 25(1) of the Constitution).

Moreover, the lower court considers that these doubts over the provision's constitutionality cannot be overcome by the case law of the Joined Sections of the Court of Cassation (judgment No. 4895 of 2006) which, accepting the argument that "the 'charges' mentioned in the provision [...] all referred to state income which previously had without dispute been a question for tax law", ruled a similar question of constitutionality concerning the jurisdiction of the tax courts over the environmental hygiene tariff [in Italian TIA] to be manifestly groundless. According to the referring court in fact, this case law not only stands "in stark contrast [...] with the specific judgments concerning the COPSA mentioned above", but does not even consider the differences – pursuant to the law in force – between the TOPSA and the COPSA.

Finally, regarding the question of relevance, the *Tribunale di Roma* points out that "any decision […] cannot overlook the challenge to the court's jurisdiction raised by the defendant", since the validity of this challenge depends on the applicability in the principal proceedings of the contested legislation.

5. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, intervened in the constitutional proceedings and requested the court to rule that the questions raised are groundless.

On the merits, the state representative asserts that: a) "a broadening of the jurisdiction of the tax boards is not equivalent to the creation of a new special court"; b) "the fact that a review has occurred does not bind Parliament to maintain unchanged the organisation and functioning of the tax boards as already reviewed"; and c) "it cannot be stated that the mere conferral of jurisdiction over disputes concerning charges for the occupation of public land distorts the original competences of the boards: this competence is added to that over tax matters *stricto sensu* within a logical system which considers the public law nature of the state income which, whilst is not strictly speaking tax related, is certainly 'fiscal' and with equal certainty is not covered by private law, since it is founded on principles and rules not dissimilar to those underpinning 'taxes'".

Conclusions on points of law

1. – The ordinary court the *Tribunale di Roma* questions the constitutionality of Article 2 of legislative decree No. 546 of 31 December 1992 (Provisions governing proceedings before the tax courts implementing the authorisation conferred on the government contained in Article 30 of law No. 413 of 30 December 1991) – as amended by Article 3-*bis*(1)(b) of decree-law No. 203 of 30 September 2005 (Measures to combat tax evasion and urgent measures concerning tax and financial matters), converted into law, with amendments, by Article 1(1) of law No. 248 of 2 December 2005 – insofar as it provides, in the second sentence of sub-section 2, that the tax courts shall have jurisdiction also over disputes concerning liability for the charge for the occupation of public spaces and areas (COPSA).

In particular, the court asserts that the contested provision violates: a) Article 102(2) of the Constitution because it "distorts" the jurisdiction conferred upon the tax boards, thereby creating a "new" special court prohibited under the Constitution; b) Article 25(1) of the Constitution because, by conferring jurisdiction over disputes concerning liability for the COPSA on the tax courts, it removes the said disputes – concerning

obligations which are not a tax law matter – from their "natural *forum*", that is the civil courts.

2. – The question raised with reference to Article 102(2) of the Constitution is well founded.

On this point, it should be pointed out that, as recognised under the settled case law of this court, the tax courts must be regarded as a special court system pre-dating the Constitution (*inter alia*: judgment No. 50 of 1989; orders No. 144 of 1998, No. 152 of 1997, and No. 351 of 1995). On this basis, the court finds that the question is well founded for the following two reasons: 1) changes may be made to the extent of the jurisdiction of the special courts which pre-date the Constitution, provided that they do not "distort" the matters originally placed within the jurisdiction of that special court; 2) it is settled case law that once it has been concluded that the COPSA is not a tax law matter, the conferral on the tax courts – by the contested provision – of jurisdiction over disputes concerning this charge "distorts" the matters originally placed within the jurisdiction of the tax courts and, in consequence, violates Article 102(2) of the Constitution.

2.1. – As regards the first argument concerning the limits which the Constitution places on Parliament's ability to amend the scope of the jurisdiction of the special tax courts without "distorting" it, it must be remembered that, as stated in general terms by this court (judgments No. 196 of 1982, No. 215 of 1976, and No. 41 of 1957; order No. 144 of 1998): a) Article 102(2) of the Constitution, raised in the appeal, prohibits the creation *ex novo* of new special courts other than those expressly mentioned in the Constitution; b) transitional provision No. VI of the Constitution – supplementing the provisions contained in Article 102 of the Constitution – imposes the requirement to carry out a review of the special courts which pre-date the Constitution ("except the Council of State, the Court of Accounts and the military courts") within five years of the entry into force of the Constitution. This court subsequently found that, although the review mentioned did not create "a kind of immutability in the structure and functions" of the courts as reviewed, Parliament – when amending the legislation governing these special courts – was nonetheless subject to the dual constitutional requirement "not to

distort (as an essential and characteristic feature of the special courts) the matters conferred" on the said special courts "and to ensure compliance with the Constitution" of the said courts (order No. 144 of 1998). It follows from this case law that the dual limit in question operates in relation to any legislative amendment concerning the special courts which existed before the Constitution (concerning both the first as well as subsequent reviews) and moreover, that the failure to comply with the requirement "not to distort" the matters originally within the jurisdiction of the said court amounts to the creation of a "new" special court, expressly prohibited under Article 102 of the Constitution. It is therefore essential that the matters falling within the jurisdiction of these courts be of identical nature in order to classify any legislative amendments thereto as a permitted "review" of the special courts and not as an unlawful creation of a "new" special court.

2.1.1. – In accordance with the principles mentioned above and with specific reference to the matters falling within the jurisdiction of the tax courts, this court has found in numerous judgments that it is "indispensable" that the jurisdiction of the tax courts be related to the "tax law nature of the relationship" (orders No. 395 of 2007; No. 427, No. 94, No. 35 and No. 34 of 2006). In particular, the court found in these judgments – with reference to questions over the constitutionality of provisions which, according to the referring courts, conferred jurisdiction on the tax courts over disputes which did not concern tax law, thereby violating Article 102(2) of the Constitution – that the questions raised were manifestly groundless because the lower courts had not even tried to make a constitutionally informed interpretation of the contested provisions. In fact, they had not explored the possibility of interpreting this legislation as maintaining unchanged the competence of the ordinary courts over non-tax matters and, therefore, had not broken the inseparable link between the tax courts and tax matters required under the constitutional principle invoked.

2.1.2. – It follows from the above that the conferral on the tax courts of jurisdiction over disputes which do not concern tax law matters entails the violation of the constitutional prohibition on the creation of special courts. Such unlawful conferral of jurisdiction may result directly from an express legislative provision extending the

jurisdiction of the tax courts to non-tax matters, or indirectly through the mistaken classification as "tax law matters" by Parliament (or by the body interpreting the legislation) of a particular area of law (as for example occurs when pecuniary obligations of a non-tax nature are incorrectly placed under the aegis of tax law). When assessing an alleged violation of Article 102(2) of the Constitution, it is therefore necessary to ascertain whether the dispute reserved to the ordinary courts effectively concerns questions of tax law or not. And in doing so it is not possible to disregard the criteria set out in the case law of this court used in order to classify public income as tax; irrespective of the *nomen iuris* used in the legislation governing such income, these criteria include the compulsory nature of the payment and its association with public expenditure required on economically significant grounds (*inter alia*: judgments No. 334 of 2006 and No. 73 of 2005).

On this point, it should be pointed out that, where the matters over which jurisdiction has been conferred on the tax courts have been found not to concern tax law matters, the conferral of jurisdiction in question must be ruled unconstitutional. Nor moreover is it possible to bring arguments against such a ruling which are not founded on Article 102(2) of the Constitution and transitional provision No. VI of the Constitution. For example, in order to demonstrate that there has been no "distortion" of the matters over which the tax courts have jurisdiction, it would not be enough to assert that, in spite of the fact that they do not concern tax law matters, disputes concerning certain particular charges have been lawfully placed within the jurisdiction of the tax boards for the sole reason that the situation which gives rise to the pecuniary obligations in question is similar to the legal basis which certain taxes had in the past. It would not even be sufficient to invoke mere reasons of expediency as justification, under constitutional law, for the conferral of jurisdiction on the tax courts over non-tax disputes concerning situations which are to a certain extent similar to tax law matters *stricto sensu*. By contrast, as this court has already found, the non tax-law status of the dispute necessarily removes the constitutional basis for the jurisdiction of the tax courts, which means that the conferral on those courts of jurisdiction over the dispute in question inevitably results in the constitutionally prohibited creation of a "new" special court.

2.2. – As regards the second line of argument mentioned above regarding the COPSA's status as not a tax law matter, this court must as a preliminary matter take note of the fact that the contested provision has been considered in numerous judgments of the Court of Cassation. After having located the contested Article 3-*bis*(1)(b) of decree-law No. 203 of 2005 against the background of Parliament's tendency progressively to broaden the jurisdiction of the tax courts through successive amendments to Article 2 of legislative decree No. 546 of 1992, this case law has consistently found that disputes relating to the COPSA are not tax law matters (*inter alia*, Court of Cassation, Joined Civil Sections, Nos. 25551, 13902, and 1611 of 2007; No. 14864 of 2006; No. 1239 of 2005; No. 5462 of 2004; and No. 12167 of 2003). In particular, having found that the COPSA applies as an alternative to the "tax for the occupation of public spaces and areas" (TOPSA) [in Italian TOSAP], the Court of Cassation has found that the said charge, in the first place, "was conceived by Parliament as a *quid* which was fundamentally different, in a strictly legal sense, from the tax (TOPSA) in place of which it may be applied" and secondly "is intended as consideration for a real or (in cases of unlawful occupation) presumed granting of the exclusive or special right to use public property".

These decisions on the non-tax status of the COPSA, which – due to their elevated number, materially identical content and the status of the adjudicating body as the guarantor of the uniform interpretation of the law – constitute applicable precedents, offer a plausible reconstruction of the institution which does not contrast with the criteria, mentioned above, developed in the case law of the Constitutional Court in order to identify tax income. There are therefore no grounds for this court to carry out an autonomous assessment of the nature of the COPSA.

3. – It therefore follows from the above finding (that the COPSA is not a tax law matter) that the contested provision is unconstitutional because it gives the tax courts jurisdiction over disputes concerning non-tax pecuniary obligations and, therefore, amounts to the creation of a new special court prohibited pursuant to Article 102(2) of the Constitution.

4. – The question raised by the referring court with reference to Article 25(1) of the Constitution is moot.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 2(2)(ii) of legislative decree No. 546 of 31 December 1992 (Provisions governing proceedings before the tax courts implementing the authorisation conferred on the government contained in Article 30 of law No. 413 of 30 December 1991) – as amended by Article 3-*bis*(1)(b) of decree-law No. 203 of 30 September 2005 (Measures to combat tax evasion and urgent measures concerning tax and financial matters), converted into law, with amendments, by Article 1(1) of law No. 248 of 2 December 2005 – is unconstitutional insofar as it provides that "The tax courts shall have jurisdiction also over disputes concerning liability for the charge for the occupation of public spaces and areas pursuant to Article 63 of legislative decree No. 446 of 15 December 1997, as amended".

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 10 March 2008.

Signed:

Franco BILE, President

Franco GALLO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 14 March 2008.

The Director of the Registry

Signed: DI PAOLA