Corte costituzionale

JUDGMENT NO. 102 OF 2008

FRANCO BILE, PRESIDENT

FRANCO GALLO, AUTHOR OF THE JUDGMENT

JUDGMENT No. 102 YEAR 2008

In this case the Court heard an application by the President of the Council of Ministers challenging certain Sardinian legislation creating a regional tax on capital gains on properties used as second homes, a regional tax on second homes used for tourism and a regional tax on aircraft and regional craft, all of which were levied only on persons not resident for tax purposes in Sardinia. The Court declared the first tax unconstitutional since it departed from the national arrangements governing capital gains. The second tax was also struck down on the grounds that it was essentially a property tax rather than a tax on tourism, and it did not have any effective tourist-environmental rationale. Moreover, the discriminatory effects of this tax were particularly serious for undertakings "since the exemption from the tax only for undertakings resident for tax purposes in Sardinia (or even where their owner was born in Sardinia) results in an unreasonable economic benefit which distorts competition". The third tax on the other hand was intended to pursue a typically regional interest, and satisfied the requirement of reasonableness. Finally, regarding the third tax, the Court held that there was a legitimate question of Community law as to whether the tax imposed a restriction on the freedom to provide cross-border services, and also as to whether it amounted to a prohibited state aid, and accordingly that the prerequisites for a preliminary reference to the ECJ were fulfilled (see order No. 103 of 2008).

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, 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 Articles 2, 3 and 4 of Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies) as originally enacted, of the same Articles as amended, respectively, by Article 3(1), (2) and (3) of Sardinia Region law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), as well as Article 5 of law No. 2, commenced pursuant to two applications by the President of the Council of Ministers, served on 10 July 2006 and 2 August 2007, filed in the Court Registry on 13 July 2006 and 7 August 2007 and registered as No. 91 in the Register of Appeals 2006 and No. 36 in the Register of Appeals 2007.

Considering the entries of appearance by Sardinia Region;

having heard the Judge Rapporteur Franco Gallo in the public hearing of 12 February 2008;

having heard the *Avvocato dello Stato* Glauco Nori for the President of the Council of Ministers and Graziano Campus and Paolo Carrozza, barristers, for Sardinia Region.

The facts of the case

1. – By application No. 91 of 2006, served on 10 July 2006 and filed on 13 July, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, raised the questions of the constitutionality of: a) Article 2 Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), with reference to Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed), Articles 117 and 119 of the Constitution in the light of Article 10 of constitutional law No. 3 of 18 October 2001, Articles 3 and 53 of the Constitution, and Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty; b) Article 3 of regional law No. 4, with reference to Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed), Articles 117 and 119 of the Constitution in the light of Article 10 of constitutional law No. 3 of 2001, Articles 3 and 53 of the Constitution, and Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty; and c) Article 4 of regional law No. 4 with

reference to Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed), and Articles 117 and 119 of the Constitution in the light of Article 10 of constitutional law No. 3 of 18 October 2001, and Articles 3 and 53(2) of the Constitution (principles not expressly indicated).

The applicant claims that the contested provisions – creating, respectively, a regional tax on capital gains from buildings used as second homes, a regional tax on second homes used for tourist purposes and a regional tax on aircraft and recreational craft – cannot be justified under constitutional law by Article 8(i) of the Regional Statute. In fact, the said provision lists "taxes and fees on tourism and other regional taxes which the region may introduce by law in accordance with the principles underlying the system of state taxation" as regional income.

The state representative argues that "the competence is therefore twofold: direct competence over taxes and fees on tourism; indirect competence over other taxes, insofar as the region is competent to raise them, a right which is not conferred directly by the Regional Statute, but must be specifically created through legislation". The wording of Article 8 suggests that "the region's tax raising powers cover tourist services, that is those services provided to tourists during their stay in the region", with the result that it cannot "constitute the constitutional basis for any of the contested provisions because none of them […] relates to tourism as traditionally understood under tax law".

The *Avvocatura Generale dello Stato* then closely examines the individual contested provisions and illustrates the complaints raised in relation to each of them.

1.1. – Regarding the contested Article 2, the state representative notes that it creates and regulates a regional tax on capital gains from buildings used as second homes, which applies – against owners who are resident for tax purposes outwith the region or who have been resident for tax purposes in Sardinia for less than twenty four months, unless they or their spouses were born in Sardinia – to property transfers for consideration of a) buildings situated in Sardinia within three kilometres of the sea shore, intended for residential use, except housing units which for most of the period falling between the purchase or construction and the sale were used as the main residence of the owner or their spouse, as well as b) shares not traded on regulated

markets in undertakings which own or hold other real rights over the said buildings, for the amounts corresponding to such buildings.

In the opinion of the state representative, this provision violates Article 8(i) of the Statute of Sardinia Region because: a) the tax cannot be classified as a tourist tax; b) the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament; c) the tax violates "the principles underlying the system of state taxation" in matters other than tourism.

The same provision is also claimed to violate Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because the region cannot fully exercise its tax raising powers in the absence of basic coordinating legislation enacted by the national Parliament.

In the alternative, "should it be possible to infer fundamental coordination principles of the taxation system from the legislation currently in force", the state representative submits three additional complaints.

The *Avvocatura Generale* claims, first, that the contested provision breaches Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, due to violation of the fundamental principle contained in Article 67(1)(b) of presidential decree No. 917 of 22 December 1986 (Approval of the consolidated law on income tax), which provides that real property capital gains are taxable provided that the sale occur no later than five years after purchase or construction, except immovable property acquired by succession or gift and the other cases mentioned in Article 67.

Secondly, it claims that Articles 3 and 53 of the Constitution have been violated, since the contested legislation disregards the "general principle" that the mere existence of a capacity to pay tax [*capacità contributiva*] does not justify the application of more than one tax, since every tax must have a free-standing legal basis, and must cover "different taxable matters", whilst in the case before the court the region targeted a matter already taxed by the state by Article 67(1)(b) of presidential decree No. 917 of 1986.

Thirdly, it claims that Article 117(1) of the Constitution has been violated, with reference to Article 12 of the EC Treaty, since the contested provision discriminates

against Community citizens by adopting the following criteria for the application of the tax: “not born in Sardinia, which is directly related to citizenship; and not resident for tax purposes in Italy, which is related to residence”. It argues on this point that, according to the case law of the Court of Justice of the European Communities, “Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States . It is often such persons who will in the course of the year leave the country or take up residence there”.

1.2. – As far as the contested Article 3 is concerned, the applicant points out that it creates and regulates a regional tax on second homes used for tourist purposes, due – in line with the surface area – in respect of buildings situated within the region at a distance of less than three kilometres from the sea shore, which are not used as a main residence by the owner or by the holder of other real rights over the same that are enforceable against the owner of the said buildings, or by the holders of usufruct (i.e. profit rights), use or residence rights who are resident for tax purposes outwith the region, unless they or their spouses or parents were born in Sardinia.

The applicant contests the provision with reference to Article 8(i) of the Statute of Sardinia Region since: a) the tax non cannot be regarded as a tax on tourism because it is not related to it; b) the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament; c) “the principles underlying the system of state taxation” over matters other than tourism have been violated. It also claims that the tax jeopardises “the possibilities for state level economic policy, of which taxes are one of the principal instruments”, because it applies to the same taxable matters covered by other taxes, including in particular ICI*, generating a “discordance” with the principles underlying the system of state taxation. Furthermore, it claims that the contested provision breaches Article 53 of the Constitution, which “applies to tax law the principle of equality enshrined in Article 3”, and Article 12 of the EC Treaty, by way of Article 117(1) of the Constitution, insofar as it discriminates against Community citizens by adopting the

* Municipal property tax (*imposta comunale sugli immobili*).

following criteria for determining liability to pay the tax: “not born in Sardinia, which is directly related to citizenship; and not resident for tax purposes in Italy, which is related to residence”.

In the alternative, “should it be possible to infer fundamental coordination principles of the taxation system from the legislation currently in force”, the state representative submits two additional challenges.

It claims in the first place that the contested provision violates Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because the tax is calculated in line with the surface area of the building, without giving any consideration to its value, whilst “the tax based on cadastral values, such as the state tax and ICI, should in any case be regarded as a fundamental principle in that it makes it possible to tax average values calculated for similar areas in line with market values and which in any case vary in line with the quality of the property”.

It also claims that Article 117(1) of the Constitution has been violated, with reference to Article 12 of the EC Treaty, for the same reasons already set out in relation to the challenge to Article 2.

1.3. – As far as the contested Article 4 is concerned, the applicant points out that it creates and regulates a regional tax on aircraft and recreational craft which applies, between 1 June and 30 September, to individuals who are resident for tax purposes outwith the region and who operate aircraft or recreational craft (with exemptions from the tax for ships intended for cruises, boats which come to Sardinia to participate in sporting regattas and recreational craft which remain for the whole year in regional port facilities), and is due: 1) for every stopover in regional aerodromes by general aviation aircraft intended for the private carriage of persons, according to categories determined in relation to the number of passengers which such aircraft are authorised to transport; 2) annually, for the docking in ports, landing places and in mooring points situated within the region of recreational craft, classified according to length, starting from 14 metres.

In the opinion of the state representative, Article 4 violates Article 8(i) of the Statute of Sardinia Region and Articles 117 and 119 of the Constitution, in the light of Article

10 of constitutional law No. 3 of 2001, for the same reasons already mentioned in relation to the contested Article 3.

In the alternative, “should it be possible to infer fundamental coordination principles of the taxation system from the legislation currently in force”, the state representative submits two additional challenges.

It claims first that the contested provision breaches Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because, as regards recreational craft which make stopovers “in unequipped areas, in a sheltered sea inlet, or where the craft is moored to land using the beach as a natural berth”, the region has specified “as a basis for the tax the use of a natural resource over which it cannot exercise any powers”, namely the sea, “which is subject to state jurisdiction alone within the limits of the territorial waters”.

Secondly, it claims that Article 53 of the Constitution has been violated because, as regards aircraft, a) “this case involves a clear duplicate tax”, since “a tax (or rather a fee) of this nature should have been paid to the body charged with maintaining and operating the airport installations used in the stopover. However, these bodies are already able to pass the costs on to aircraft operators through the payment of airport fees, or fees for the use of the airports (law No. 324 of 1976)”; b) “the performance of an activity for which, regardless of how it is defined, a price is paid to cover the cost of the service rendered, plus a profit margin” is not a manifestation of a capacity to pay tax.

Thirdly, whilst it does not expressly invoke Articles 3 and 53 of the Constitution, it complains that, since the tax on recreational craft is due annually, “the more the port facilities are used, the lower proportionally is the burden of the tax, which in this way ends up having a regressive effect”.

2. – Sardinia Region entered an appearance, arguing that it introduced a regional tax on capital gains from buildings used as second homes, a regional tax on second homes used for tourist purposes and a regional tax on aircraft and recreational craft pursuant to the legislative competence conferred upon it by Article 8(i) of the Regional Statute. According to the opponent, this provision allows the region directly to levy “taxes related to tourist activity, even where there is no state coordinating legislation”.

Otherwise it would not make sense that the said provision (again) specified that “only taxes 'other' than those on tourism should comply with the principles underlying the system of state taxation”. This interpretation is argued to be confirmed by a parallel reading of Articles 72 and 73 of the Special Statute of Trentino Alto-Adige Region, which lay down in two distinct provisions the same rules contained in Article 8(i) of the Sardinian Statute, “distinguishing between fees and taxes on tourism (Article 72) and “other regional taxes”, to be created (the latter alone) “in accordance with the principles underlying the system of state taxation”. In any case, again in the opinion of the opponent, the principles underlying the taxation system may be inferred not only from state legislation which expressly provides for them in relation to individual taxes, but “also from state legislation in force concerning taxes not specifically governed by state legislation”; this is because the constitutional case law on the new Article 119 of the Constitution does not apply, because the amendments made to Title V of Part II of the Constitution cannot have the effect of limiting the autonomy already enjoyed by the regions governed by special statute.

In view of the above, the respondent points out in the first place that the taxes governed by the contested provisions are taxes on tourism for the purposes of Article 3 of legislative decree No. 268 of 16 March 1992 (Provisions to implement the Special Statute for Trentino-Alto Adige in matters concerning regional and provincial finance), and that is “forms of taxation which affect activities or the use of immovable property used for tourism, or economic activities classified as tourist activities or that are essential for tourism in that they are directly influenced by tourism in economic terms, also regarding the location of the activities in question”.

Secondly, the region asserts that Article 1 of law No. 135 of 29 March 2001 (Reform of national legislation governing tourism) “provides that regional legislation on tourism shall be compatible with environmental protection requirements, than any initiatives taken shall be sustainable and that the development of tourism shall also take into account the goal of implementing equalisation measures for deprived areas”, thereby allowing regional legislators to classify second homes on the coast as a “reliable” basis for taxation since they are strictly related to summer tourism. The regional initiative to safeguard the coastal environment from speculative building is an indication of this

close link; this initiative led to the enactment of regional law No. 8 of 25 November 2004 (Urgent provisional safeguard measures for landscape planning and the protection of the regional environment), which regulated the procedures for the drafting and approval of the regional landscape plan, at the same time also introducing certain safeguard measures, and subsequently adopting the landscape plan for coastal areas. It is precisely on account of the environmental characteristics of the island that the "consumption" of the environment and the landscape – "which occurs through the mere existence […] of buildings situated along the coast that are intended for use almost exclusively during the summer season" – may be identified as the basis for the taxes introduced by the contested provisions, so much so that Article 8(i) of the Statute, which has constitutional law status, endowed the region with legislative powers over taxes on tourism.

From this perspective, the tax on capital gains from second homes intended for tourist use is a modest and not unreasonable levy on capital gains flowing from coastal properties "by a public policy consisting of investments and planning aimed at reinforcing the tourist industry and the protection of the environment".

As regards the alleged violation of the prohibition on dual taxation, the respondent points out that the taxes introduced by the contested provisions have an entirely free standing and special basis that is distinct from that of state taxes, and asserts, as a preliminary matter, that it is not clear which constitutional principles the applicant claims have been violated.

The respondent then argues that the region may tax the same matters already taxed by the state because: a) Article 8(i) of the Regional Statute allows the region to enact legislation introducing taxes on tourism, without any requirement that it should be empowered to do so by state law; b) the fact that the contested taxes are modelled on taxes already governed by state legislation means it is possible to conclude that the regional legislation complies with the latter; c) the necessarily "ancillary" nature of the regional tax compared to the state tax is a feature common to the whole taxation system in the autonomous territories, which may be moderated by the legislation implementing the new Article 119 of the Constitution; d) Article 8(i) of the Regional Statute "cannot be read as providing that Sardinia Region is empowered to introduce fees and taxes on

tourism with the exception of tourist properties": it raises at most "a problem concerning the extent and proportionality of the new arrangements, which however the application does not present in an adequate manner"; e) the fact that the taxation of real property capital gains more than five years after the purchase of the property is not provided for under state legislation does not mean that it is unconstitutional, not that it conflicts with the principles underlying the state taxation system.

As far as the tax on second homes used for tourist purposes introduced and regulated by the contested Article 3 is concerned, the region argues in the first place that its application only to properties situated along the coast is justified by the goal of discouraging the construction of such buildings.

It then goes on to argue that the reference to the surface area of the building for the calculation of the amount liable to taxation is not at odds with the criterion of the cadastral value used in state legislation governing ICI, because this latter tax also takes the surface area as a parameter for establishing the value of the property, albeit on a presumptive basis.

It also asserts that Article 117(1) of the Constitution and Article 12 of the EC Treaty have not been violated through discrimination on the grounds of nationality, because even state legislation distinguishes between residents and non residents for the purposes of taxation. On regional level, the distinction between residents and non residents is even a requirement of Article 8 of the Regional Statute, "which provides that the majority of the region's income be based […] on income created by residents" which thus means that it is necessary to tax those who have a "real" link with Sardinia, consisting in the ownership of a second home, clearly for the purposes of tourism, in a coastal area. The fact that the owner of a coastal property "is called upon to contribute – albeit through modest contributions – to the maintenance of the environment which […] he contributes to 'consuming'" is in fact consistent with the system of state taxation and with Articles 23 and 53 of the Constitution, invoked as principles by the applicant.

The correctness of this difference between the tax arrangements for Sardinia residents and those for non residents is also confirmed, according to the respondent, by other legislative provisions.

In the first place, legislative decree No. 504 of 30 December 1992 (Reorganisation of the finances of territorial bodies, pursuant to Article 4 of law No. 421 of 23 October 1992) permits the municipalities to modify the ICI tax bands depending on whether the property is used as a main residence, a second home or an unlet but available house, and to reduce the level of tax for those who use the property as their main residence.

Secondly, legislative decree No. 285 of 30 April 1992 (New Highway Code), allows mayors or town councils: a) to designate limited traffic areas in which circulation is restricted to residents; b) to allow the entry or circulation of the motor vehicles of non residents subject to payment of a fee; c) to provide that non residents be charged for parking in such areas.

Thirdly, Constitutional Court judgment No. 220 of 2004 upheld the constitutionality of Article 98(2) of Sardinia Region law No. 23 of 29 July 1998 (Provisions to regulate the protection of wild fauna and hunting in Sardinia) which permits residents to renew hunting licences, and prevents non residents from doing so, on the grounds that resident hunters have a link with the region, according to the principle asserted under state legislation (Article 14(5) of law No. 157 of 11 February 1992, containing "Provisions to regulate the protection of wild homeothermic fauna and hunting").

In conclusion, the respondent points out that the differentiation for fiscal purposes between residents and non residents is widespread under national legislation, and accordingly the contested Article 3 complies with tax law and other legislation in force.

As regards the regional tax on aircraft and recreational craft, introduced and regulated by the contested Article 4, the region claims first that its applicability only to the operators of aircraft or boats who habitually reside outwith Sardinia must be held to be lawful for the same reasons already submitted in relation to the taxes governed by the contested Articles 2 and 3. It also points out that the tax applies to a typical "tourist service" and that the classification of the levy as a tax or a fee is irrelevant. It goes on to assert that the fact that the tax on stopovers by aircraft applies to operations for which consideration is in any case paid in the form of airport fees does not mean that the tax does not comply with the principles underlying the system of state taxation, because that very system includes fees and taxes which – like VAT – apply to the provision of services and the use or consumption of goods.

As far as the tax on stopovers by recreational craft is concerned, the region argues first that – contrary to the assertions of the applicant – the tax does not have a regressive effect and hence does not violate Article 53 of the Constitution The regional legislature's choice to provide an exemption for recreational craft which remain for the whole year in Sardinian ports is claimed to be justified by the goal of encouraging the continuous presence of boats, which "translates into a significant influx of income 'from tourism'" compared to occasional mooring, which on the other hand brings only limited income to the regional tourist industry, even though it causes pollution and consumes limited natural resources.

Secondly, the respondent challenges the applicant's interpretation of the contested provision which considers the docking in unequipped areas of the territorial waters to be taxable, "on the grounds that it is clearly precluded according to a literal reading of the contested provision".

3. – In a written statement filed shortly before the hearing, the President of the Council of Ministers reiterated the arguments contained in its application, specifying in particular that: a) the question as to whether the taxes governed by the contested provisions are related to tourism is irrelevant, because the legislative power of Sardinia Region over taxes must in any case be exercised in accordance with the principles underlying the system of state taxation, even where it concerns taxes on tourism; b) the constitutionality of the taxes introduced by the contested provisions must be assessed on the basis of the prerequisites for rather than the goal of the levy; c) when exercising its legislative powers over tax law matters, the region may not "adopt the same conditions for the state taxes already in force"; d) it is not clear whether the tax on capital gains is intended to encourage or discourage tourism; e) in regulating this tax, the region unlawfully taxed the same circumstances already taxable pursuant to state legislation and did not take into account the principle of the national taxation system that any increase in the value of a property is considered taxable only where it is generated with speculative intentions, and "such an intention may be excluded where the sale occurs after a period of time such as to presume that the purchase was made with a view to its enjoyment"; f) again on the issue of the tax on capital gains, and in contrast to the region's arguments, the criterion of residence may be used only where "there is a

connection between activities, such as hunting, and the region", but cannot justify the exemption from taxation of persons resident in Sardinia because the prerequisites for the tax are satisfied by them just as they are for non residents; g) by introducing the tax on stopovers by aircraft and recreational craft, the region targeted a capacity to pay tax – consisting in the use of airport or port services – already taxed by the state.

4. – By application No. 36 of 2007, served on 2 August 2007 and filed on 7 August, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, raised the questions of the constitutionality of : a) Article 2 of Sardinia Region law No. 4 of 2006, as amended by Article 3(1) of Sardinia Region law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007) – which entered into force on 31 May 2007 pursuant to Article 37 of the same law – with reference to Article 8(h) of the State of Sardinia Region (as amended by Article 1(834) of law No. 296 of 27 December 2006), the principle of reasonableness, Articles 3 and 53 of the Constitution, Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty, and, in the alternative, Article 119 of the Constitution; b) Article 3 of Sardinia Region law No. 4 of 2006, as amended by Article 3(2) of Sardinia Region law No. 2 of 2007, with reference to Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006), Articles 117(3) and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, Articles 3 and 53 of the Constitution, and the principle of reasonableness; c) Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007, with reference to the principles already mentioned in the application against the contested Articles 3 and 4 of regional law No. 4 of 2006, Article 117(1) of the Constitution, due to violation of Articles 3(g), 10, 49, 81 and 87 of the EC Treaty, Articles 117(2)(e) and 120 of the Constitution, Article 3 of an unspecified legislative text, Articles 3 and 53 of the Constitution, and Articles 1, 3, 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006); d) Article 5 of Sardinia Region law No. 2 of 2007, with reference to Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006), Article 119 of the Constitution, in the light of Article 10 of constitutional law

No. 3 of 2001, Article 3 of the Constitution, and Article 117(1) of the Constitution, due to violation of Articles 12 and 49 of the EC Treaty.

The applicant argues that, in order to identify the applicable constitutional principles, it is necessary to verify whether the new Title V of Part II of the Constitution broadened the region's autonomy, and thus compares Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006) with Article 119 of the Constitution.

According to the applicant, "the two provisions do not have the same effects" because the former provides that the regional power over taxation must be exercised in accordance with the principles underlying the system of state taxation, whilst the latter provides that such powers be subject to the limits set by the fundamental coordination principles of the public finances and the taxation system. According to the applicant, Article 119 lays down "the requirements for compatibility between tax systems, but does not condition their internal arrangements", whilst Article 8(h) of the Statute sets out principles applicable within the system, "in the sense that they may have an effect on the structure of individual taxes". In any case, since the Constitutional Court has held – in judgment No. 37 of 2004 – that the fundamental coordination principles of the tax system cannot be inferred from state legislation in force, the contested provisions should be assessed in accordance with the principles contained in the Statute, which allows for the exercise of legislative powers over taxation even where the national legislature fails to establish the said fundamental principles.

Again as a general matter, the applicant also claims that, with the sole exception of the visitors tax, and contrary to the literal wording of the contested provisions, the taxes at issue cannot be defined as tourist taxes or fees, but must on the other hand be regarded as "other regional taxes" pursuant to Article 8(h) of the Special Statute.

Finally, due to the Community importance of the Sardinian tourist market, the applicant also submits certain complaints based on Community law principles – to be considered moot in the event that the complaints founded on Italian law are accepted – in relation to which it requests that a preliminary reference be made to the ECJ pursuant to Article 234 of the EC Treaty.

The *Avvocatura Generale dello Stato* goes on to examine the individual contested provisions and illustrate the complaints raised in relation to each of them.

4.1. – As regards Article 2 of Sardinia Region law No. 4 of 2006, as amended by Article 3(1) of Sardinia Region law No. 2 of 2007, the state representative notes that it regulates a regional tax on capital gains from second homes used for tourist purposes, applicable – against sellers resident for tax purposes outwith the region or who have been resident for tax purposes in Sardinia for less than twenty four months – to property transfers for consideration: 1) of housing units purchased or built more than five years previously, situated in Sardinia within three kilometres of the sea shore, intended for residential use and which are not used as a main residence (pursuant to Article 8(2) of legislative decree No. 504 of 1992), by the owner or the holder of other real rights over the same; 2) of shares not traded on regulated markets in undertakings which own or hold other real rights over the said buildings, for the amounts corresponding to such buildings.

The state representative argues that this provision violates Article 8(h) of the Statute of Sardinia Region (according to which regional income is comprised of "fees and taxes on tourism and other regional taxes which the region may introduce by law in accordance with the principles underlying the system of state taxation"), because "the regional law does not comply with the principles underlying the system of state taxation contained in Article 81 [sic: Article 67] (1)(b) of presidential decree No. 917 of 22 December 1986", which means that "in order for a capital gain to be regarded as 'different' income for a natural person […], a speculative intention is necessary", which "cannot differ from region to region" and "is presumed to be absent where a period of time has passed between purchase and sale such as to render it at the very least improbable".

The provision is also argued to be unreasonable in that, by applying to all housing units situated within three kilometres of the sea shore, it without any justification fixes a distance from the shore that is the same for all regional beaches, without taking into consideration the geography of the locations and, therefore, the different potential for access to the sea.

Furthermore, the contested Article 2 is claimed to violate the principle which calls for a capacity to pay tax, because “the contested provision does not contain any reasons why the capacity to pay tax, consisting in the realisation of capital gains through the sale of properties situated in the region, should differ depending on whether the individual is resident in Sardinia or elsewhere”.

It is also argued that the provision breaches Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty, in that the contested provision discriminates against Community citizens by rendering all non resident individuals subject to the tax.

In the alternative, “should it be possible to infer fundamental coordination principles of the taxation system from the legislation currently in force”, the state representative argues that the provision violates Article 119 of the Constitution insofar as it infringes the fundamental coordination principles of the taxation system, which correspond, at least on a transitional basis and “until the enactment of state legislation implementing Article 119”, to the principles underlying the system of state taxation.

4.2. – As regards Article 3 of Sardinia Region law No. 4 of 2006 (the rubric of which is titled: “Regional tax on second homes used for tourist purposes”), as amended by Article 3(2) of Sardinia Region law No. 2 of 2007, the applicant points out that: a) it makes provision for a regional tax on housing units intended for residential use, due – per square metre and at different rates according to classes of surface area – for housing units in the region built less than three kilometres from the sea shore, not used as a main residence by the owner or the holder of any other real right over the same enforceable against the owner of the said buildings, or against the holder of usufruct, use, residence or surface rights, or against the lessee of the property under a financial leasing contract who is resident for tax purposes outwith the region; b) provides that “For the year 2006 the tax shall be payable at the rate more favourable to the taxpayer between those provided for under this Article and those previously in force” (sub-section 9).

For the state representative, the contested Article 3 violates Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006) and Articles 117(3) and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, on the grounds that: a) the tax cannot be regarded as a tax on tourism because “the tourist usage cannot be inferred from the fact that the property is not used as a main

residence", as is the case, for example, for properties used for work; b) even if it were classified under the category of "other regional taxes", the tax would not "comply with the principles underlying the system of state taxation", since it is calculated in line with the surface area of the building, without any reference to its value, whilst taxation on the basis of cadastral values, as is the case for ICI, should in any event be regarded as a fundamental principle in that it makes it possible to tax average values, established for similar areas in line with market values and which in any case vary in line with the quality of the property; and c) the provision does not have the goal coordinating the tax system, but limits itself to imposing a single tax, and therefore cannot be brought under the head of coordination of the system of taxation, over which competence is shared.

The contested provision is also claimed to violate Article 53 of the Constitution, because "the tax is related to the visibility of the sea, and hence covers panoramic value", which are not taxable in that they are not indicative of a capacity to pay tax – which is on the other hand related to the economic value of the property – and, in the alternative Articles 3 and 53 of the Constitution on the grounds of unreasonableness, because the tax is also due in respect of properties which have no view of the sea. It is also claimed to violate Articles 3 and 53 of the Constitution, again on the grounds of unreasonableness, due to the breach of the principles underlying the system of state taxation resulting also from the fact that the tax is "progressive for available surface areas between 60 and 150 sqm", but "becomes strongly regressive between 150 and 200 sqm, and is even lower for yet higher surface areas".

Finally, again according to the *Avvocatura Generale dello Stato*, the contested Article 3 contrasts with the principle of reasonableness mentioned above, regarding the identification of the individuals liable to pay the tax, unless the provision is interpreted (an interpretation which the applicant asks the Court to adopt) as providing that "if the owner, or the holders of other real rights, are not in possession of the property, the tax shall not be due, either by them (due to lack of possession) or by the holder of those rights, since they are not specified as persons liable to pay the tax".

4.3. – In relation to Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, the applicant points out that it governs the regional tax on aircraft and recreational craft applicable, from 1 June to 30

September, to individuals who are resident for tax purposes outwith the region who operate aircraft or recreational craft (with exemptions from the tax for: boats which dock in order to participate in sporting regattas, gatherings of vintage boats, monotype boats and sailing events, including amateur events, the occurrence of which has been communicated in advance by the organisers to the Marine Authority; recreational craft which remain for the whole year in regional port facilities; technical stopovers, limited to the time necessary to carry out the same), and due: 1) for every stopover in regional aerodromes by general aviation aircraft intended for the private carriage of persons, according to categories determined in relation to the number of passengers which such aircraft are authorised to transport; 2) annually, for the docking in ports, landing places and in mooring points situated within the region and in the equipped mooring fields situated in the territorial waters by recreational craft, classified according to length, starting from 14 metres.

According to the *Avvocatura Generale dello Stato*, the provision violates the principles already mentioned above in relation to the contested Articles 3 and 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(1) and (2) of Sardinia Region law No. 2 of 2007, for the reasons already set out in the challenges to those provisions.

The state representative also argues that, for individuals which carry on business activities, the contested provision breaches Article 117(1) of the Constitution because: a) it violates Article 49 of the EC Treaty "by introducing a limitation on the free provision of services in the Sardinian market for sea and air services, which is a significant part of the European market"; b) it violates Article 81 of the EC Treaty, "in conjunction with Articles 3(g) and 10", because it has the effect of distorting competition within the common market; c) it violates Article 87 of the EC Treaty because it creates a state aid for undertakings based in Sardinia.

The state representative also claims that Articles 117(2)(e) and 120 of the Constitution have been violated, because the contested provision concerns competition law matters, which are reserved to the exclusive legislative competence of the state, thus impinging upon the economic unity of the Republic. It also claims a violation of

"Article 3 [of an unspecified legislative text], the protection of which in economic matters is reserved to competition law".

Regarding the principles contained in Articles 3 and 53 of the Constitution, which are an expression of the principle of reasonableness, the applicant argues that they have been violated because: a) "an activity carried on in the same manner cannot be considered as a manifestation of a capacity to pay tax which differs depending upon the period in which it is carried out"; b) the contested tax has a regressive nature, since the amount levied diminishes in line with the increase in the number of passengers which the aircraft is certified to carry and the length of the recreational craft, and since it is payable only once for the whole year in respect of the latter craft, "the greater the number of stopovers, the lower proportionally the tax burden will be"; c) in relation to stopover by aircraft, the fee amounts to a duplication of the airport fees provided for under law No. 324 of 1976, which are due to the airport managing body for the use of airport installations; d) the same levy on stopover by aircraft "cannot be defined as a tax because it covers individual business operations and not the overall profit", nor can it be defined a fee, "because it is collected by a body which is not involved in the service used".

The state representative finally invokes Articles 1, 3 and 8(h) of the Statute of Sardinia Region because the tax applies to stopovers by recreational craft in the equipped mooring fields situated in the territorial waters, which are not part of the regional territory. In fact, Article 1 of the Statute defines the regional territory as "Sardinia and its islands", whilst the prerequisites for regional taxes may not "be identified outwith the region".

4.4. – Finally, the applicant contests Article 5 of Sardinia Region law No. 4 of 2006, which introduces and regulates a regional visitors tax, "destined for initiatives in the sustainable tourism sector", which the municipalities may apply within the limits of their jurisdiction starting from 2008. Persons who are not registered in the civil registry of one of the municipalities in Sardinia are liable to pay the tax, which is due for visits between 15 June and 15 September in firms which provide accommodation under the terms of regional law No. 22 of 14 May 1984 (Provisions regulating the classification of firms which provide accommodation), in non-hotel accommodation under the terms of

regional law No. 27 of 12 August 1998 (Regulations governing non-hotel accommodation), in accommodation governed by regional law No. 18 of 23 June 1998 (New provisions governing the exercise of agri-tourism), in housing units used as a main residence, as defined by Article 8(2) of legislative decree No. 504 of 1992, which are let or gratuitously loaned for use, or in housing units not used as a main residence (except, for the latter, for use by the owner, his or her spouse, direct blood relations, along with their spouses, cousins up to the third degree, and guests who visit together with at least one of the members of the owner's family). The following are exempt from the tax: employees who visit as part of their duties, certified by their employer, students who visit for study purposes or for professional training certified by the respective universities, schools or training bodies, minors under age eighteen, as well as self-employed workers who visit on certifiable employment grounds.

According to the *Avvocatura Generale dello Stato*, the contested Article 5 violates: a) Article 8(h) of the Statute of Sardinia Region, because the region may not introduce municipal taxes, as this prohibition is a principle underlying the system of state taxation; b) Article 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because the region may not introduce a municipal tax without leaving the municipalities any margin of autonomy other than the choice over whether or not to raise the tax; c) Article 3 of the Constitution, because it is unreasonable that persons resident in Sardinia should not be subject to the tax, "since their position *vis-à-vis* the prerequisites for the tax is identical"; d) Article 117(1) of the Constitution, on the grounds that it violates Article 12 of the EC Treaty, because EU citizens are discriminated against compared to regional residents, and Article 49 of the EC Treaty, because "the freedom to provide services within the Community is also violated when obstacles are created to the enjoyment of services by citizens of the Member States".

5. – Sardinia Region entered an appearance, reiterating the arguments contained in its entry of appearance in appeal No. 91 of 2006 concerning the basis for the region's legislative powers over taxation.

5.1. – According to the respondent, the legislative autonomy guaranteed by the Special Statute justifies, within the context of "competitive" federalism, different

treatment for citizens from different regions, in line with the different economic and fiscal policies pursued, subject only to the requirement of reasonableness.

The respondent argues that since the financial resources of the regions governed by Special Statute are comprised of a share of the principal state taxes paid by citizens resident in the region "with reference to income produced and services exchanged in the region", it is clear that both resident and non resident citizens may be treated by regional tax laws in a manner that is reasonably different. This is justified by the different contribution of the two classes of citizens to the region's income from state taxation. The differentiation between residents and non residents is not therefore arbitrarily imposed by the regional legislature, but is based on the fact that non residents do not pay any taxes to the region, except a minimal and entirely contingent share of resources which "arrive from the state […] through transfers to poorer regions and additional resources". Concluding on this point, the fact that, through their occupation of houses used for tourist purposes situated on the coast, non residents make use of Sardinia's territory and environment means that the exercise of the regional tax raising powers – with a view to obtaining additional resources destined for the development, also with a view to tourist potential, of "the inland areas and historical sites of the island" – is reasonable, and hence compatible with Article 3 of the Constitution.

Again according to the region, the exercise of the tax raising powers provided for under the Statute also satisfies an interest of the state in that it relieves the pressure on transfers to poorer regions pursuant to Article 119(3) of the Constitution and additional solidarity transfers made pursuant to Article 119(5) of the Constitution. Indeed, the fact that Sardinia, a region with an average income below the national average, has introduced the taxes governed by the contested provisions should have been viewed positively as a signal of the capacity to obtain new financial resources in order to promote development.

The respondent goes on to discuss several examples of regional legislation which provides for different treatment for residents and non residents, including: a) Article 16(p) of Friuli-Venezia Giulia Region law No. 17 of 25 August 2006 (Miscellaneous provisions concerning farming, natural, forest and mountain resources, and in relation to the environment, territorial planning, hunting and fishing), which provides that "the

region shall determine annually, at different levels for residents and non residents, the fees due for the picking" of mushrooms; b) Articles 41 and 70 of Emilia-Romagna Region law No. 25 of 6 August 1979 (Protection and increase of marine fauna – Organisation of internal waters for the purposes of fishing – Provisions governing fishing in Emilia-Romagna), which reserve fishing rights in particular classes of waters for resident professional fishermen; c) Articles 1 and 2 of Abruzzo Region law No. 53 of 5 September 1991 (Measures to assist maritime fishing operators for damages caused as a result of adverse weather conditions at sea), which provided for measures only in favour of fishermen resident in the region; d) Article 26 of Friuli Venezia-Giulia Region law No. 9 of 20 April 1999 (Miscellaneous provisions concerning matters falling under regional competence), which provided that the owners of property damaged by the 1996 floods who were not resident in the municipalities affected by these events should receive an indemnity equal only to 15% of the damage caused; and e) Article 11 of Liguria Region law No. 15 of 8 June 2006 (Provisions and initiatives concerning the right to education and training), which provides for the award of grants to the most deserving students resident in Liguria.

5.2. – The region then argues, contesting the appellant's assertion that the taxes governed by the contested provisions do not comply with Article 8(h) of the Regional Statute, that through these taxes it was pursuing an economic and fiscal policy of tourist development. The provision of the Statute cited in fact allows for the creation of any type of tax related to tourism, including in the form of a tax on income from real property capital gains or on the assets of second homes used for tourist purposes. For these two taxes, the regional legislature's reference to the limit of three kilometres from the sea shore is thus entirely reasonable, since it corresponds to the provisions of the new regional landscape plan which impose a protection regime precisely for the coastal areas of the island. Within this perspective, the concept of "tourism" contained in the Statute does not coincide with that of "tourist services", but extends to embrace every "consistent and harmonious sectoral economic and tax policy".

More generally, as regards the scope of the region's tax raising autonomy, the respondent disputes the applicant's arguments and asserts that: a) the taxes governed by the contested provisions "are the manifestation of an autonomous tax raising power,

which is justified under the Regional Statute”; b) “regional taxes are distinct from those that are part of the system of state taxation”; c) the region may “introduce specific 'types' of taxes, provided that it does not overstep the competence (which is without doubt residual, but no less effective) vested in it by the provisions of the tax laws of the state in force”; d) “the taxes in question must comply with the principles underlying the system of state taxation” and are based on regional economic policy “which must respect the unity of the system of state taxation”. Again according to the respondent, it follows from the above that in the absence of state legislation coordinating the tax system, Sardinia Region is not prevented from introducing its own taxes, precisely because this right is founded on the Special Statute and not on the legislative power over taxation generally recognised to the regions by Article 117 of the Constitution. It should also be added that, since the taxes introduced and governed by the contested provisions relate to tourism, they “should not encounter particular difficulties in 'complying' with the principles underlying the system of taxation”, precisely because the state has relinquished its tax raising powers over tourism – a matter left by Article 117(4) of the Constitution to the residual legislative power of the regions. The validity of this point has only been increased through the replacement of Article 8 of the Special Statute by Article 1(834) of law No. 296 of 2006. In fact, again according to the respondent region, this legislation is based on an agreement between the state and the region aimed at resolving the consequences of the operational failures of the resource transfer mechanisms introduced in 1983; in this agreement the state is claimed to have implicitly recognised the tax raising powers of Sardinia Region over tourism without rendering them subject to state coordination measures and without adopting any legislation implementing the Statute.

5.3. – Turning now to the applicant's complaint that the taxes governed by the contested provisions violate the principle of progressiveness, the region points out that the “tourism-environmental” taxes apply to an individual or property not as a function of the individual's capacity to pay tax or the venal value of the property, but rather by virtue of their location in a particular place and the “'consumption' or use of the protected resource at issue”. It is precisely on account of this residual nature, which is typical of regional taxes, that they need not respect the “principle of absolute

progressiveness implicit in taxes on income or on property", since they would otherwise overlap with state taxation. Moreover – the region points out – certain state taxes such as VAT or ICI are also devoid of any element of progressiveness since, contrary to the assertions of the state representative, the principle of progressiveness is not "a general and indispensable principle of the tax system".

5.4. – As regards the contested provisions' violation of Community law, by way of Article 117(1) of the Constitution, the respondent notes in the first place that the Constitutional Court has never used this constitutional principle in order to assess the compatibility of national law with Community law, and claims that the relative questions are inadmissible. It goes on to assert that direct taxation is not governed by Community law, because Article 58 of the EC Treaty provides that Member States have the right "to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested". It follows that the differences in treatment between residents and non residents introduced by the contested legislation do not in themselves violate Community law. The respondent then cites in support of this argument taxes on tourism which necessarily distinguish between residents and non residents and which have been found not to breach Community law, such as French and Spanish visitors tax and the German taxes on second homes.

According to the region, there is no violation of Article 12 of the EC Treaty because the taxes introduced by the contested provisions are located "within a broader regional policy for protecting and safeguarding the […] landscape for tourism" and do not cause any undue limitations on the freedom of movement of goods, persons and capital, or the freedom of establishment.

5.5. – In the light of the above, the region moves on to discuss the complaints made by the applicant against the individual taxes.

5.5.1. – As regards the tax on capital gains, the respondent notes as a preliminary point that, whilst the appeal avers that Article 8(h) of the Regional Statute and Articles 3, 53 and 117(1) have been violated, with reference to Article 12 of the EC Treaty, the government's decision of 27 July 2007 to apply to this court mentions only the violation of Article 8(h) of the Statute and Articles 3 and 53 of the Constitution, whilst there is a

generic reference to Article 117(1) of the Constitution and Article 12 of the EC Treaty only in the final clause of the said resolution. Therefore, the invocation of the principle contained in Article 117(1) of the Constitution, with reference to Article 12 of the Treaty, is inadmissible.

The region then asserts that it adopted the contested provisions precisely in order to comply with the position expressed by the government in appeal No. 91 of 2006 in relation to Article 2 of regional law No. 4 of 2006. In its original form in fact, the regional provision taxed capital gains on all property transfers for consideration of buildings situated in Sardinia within three kilometres of the sea shore; in its amended form on the other hand, the provision excluded from the ambit of the tax capital gains from sales which occurred within five years of the purchase or construction of the housing units, precisely in order to avoid overlapping with Article 67(1)(b) of presidential decree No. 917 of 1986, which provides that real property capital gains are taxable only where the sale occurs no later than five years after the purchase or construction of the property.

The region claims that the government's challenge in appeal No. 36 of 2007 to the new wording of the provision (on the grounds that it did not comply with the principles underlying the system of state taxation, since it taxed capital gains beyond five years, in breach of the principle contained in the aforementioned Article 67(1)(b), which thus lacked the speculative nature required under state legislation as a prerequisite for their subjection to taxation) contradicts the challenge contained in appeal No. 91 of 2006 against the previous wording of the provision (on the grounds that it constituted a partial duplication of state taxes on real property capital gains accrued in less than five years insofar as it refers, without distinction, to real property capital gains accrued over any period of time). Indeed, whilst on the one hand the applicant previously complained that the prohibition on double taxation of the same events (real property capital gains accrued in less than five years) had been violated, on the other hand it now disputes the discordance between the choice of the regional legislature to subject to taxation real property capital gains without any speculative element and the state fiscal policy to tax only real property capital gains with this characteristic. In any case, the government's complaints do not consider the fact that, precisely due to its residual nature, the regional

tax on capital gains seeks to cover the greatest value which results objectively from the construction of properties on the coast, irrespective of the capacity to pay tax or speculative intentions of the owners. By not providing for taxation for the first five years of enjoyment of the property, pursuant to the amendment to the tax regime by regional finance law No. 2 of 2007, the region intended to achieve its specific financing requirements without impinging upon on or overlapping with state taxes.

Regarding the state representative's claim that the regional law unlawfully stipulated a distance of three kilometres from the sea shore as a condition for the tax, without taking into account the geography of the places and the different levels of access to the sea, the respondent points out that the reference to the coast as a whole is justified by the general goal of safeguarding the coastal environment which is threatened, and has in part already been disfigured by heavy real estate speculation. The reference to a physical limit to the distance from the coast expressed in quantitative terms is therefore consistent with the protection provided to areas of significant size by Article 142(1)(a) and (d) of legislative decree No. 42 of 22 January 2004 (Cultural heritage and landscape code, enacted pursuant to Article 10 of law No. 137 of 6 July 2002). The reasonableness of the tax is moreover confirmed by the fact that 75 percent of its revenue is destined for the adjustment fund for the development and territorial cohesion of inland areas, with the remaining 25 percent going to the municipality in which the revenue is produced.

As far as the difference in treatment between residents and non residents raised in the appeal is concerned, the region reiterates that the tax is not based on the capacity to pay tax understood strictly in terms of income, but rather on the presence of “a certain individual or certain property in a particular place”. It should be added to this, according to the region, that the region's financial resources are mainly derived from the revenue from state taxes paid by residents, who are naturally in contact with the territory which the tourist tax aims to protect.

As regards the alleged violation of Article 117(1) of the Constitution, with reference to Article 12 of the EC Treaty, the respondent repeats the claim that it is inadmissible, along with the arguments on the merits already submitted in general terms.

5.5.2. – In relation to the tax on second homes used for tourist purposes, the region points out that it has amended the original wording of Article 3 of regional law No. 4 of

2006, also in the light of the observations submitted by the government in appeal No. 91 of 2006. It notes that the amendments made by the contested Article 3(2) of regional law No. 2 of 2007 modified the tax bands, rendering the tax more progressive, and introduced a safeguard clause which, for 2006, allows taxpayers to take advantage of the provisions previously in force in the event that these provide for a more favourable level of tax.

The region contests in the first place the state representative's complaint that the application of the tax even in the absence of possession violates the principle of reasonableness, asserting that there is no doubt that it is reasonable that the tax be borne by the owner irrespective of possession.

In relation to the complaint that the tax is unreasonable because it is also due for properties with no view of the sea, and in any case does not take into account the capacity to pay tax, the region repeats the arguments already made in response to similar complaints raised against the tax on capital gains.

As regards the state representative's complaint based on the regressive nature of the tax for properties with greater surface areas, the respondent first reiterates that tourist-environmental taxes “are not inspired by property based taxation rationales that are strictly related to the capacity to pay tax and the income of the person or property”; secondly, it notes that the progressiveness of the tax must be guaranteed by a maximum ceiling which Parliament specifies must not be exceeded in order to avoid an excessive tax burden. The region points out however that also the state tax ICI is not progressive “within each category (first-time buyer home, alternative residence, office, etc.) of taxable class of the various properties taxed”.

As far as the complaint that the tax does not comply with the principles underlying the system of state taxation is concerned, the respondent argues that the tax is in any case related to the value of the property, because houses along the coast are situated in a similar area in which the increase in value has been particularly significant. Precisely this greater value is the basis for the new tax, which is closely related to the tax policy of the region because 75 percent of the revenue is destined for the development fund for inland areas, with the remaining 25 going to the municipality in which the revenue is generated. Therefore, according to the region, the challenges contained in the appeal

must be rejected because “there is no interference or overlap with state taxes” and because “the progressive nature [of the tax] is safeguarded, as also is the destination of the new income for the region's special development requirements”.

5.5.3. – As regards the regional tax on tourist stopovers by aircraft and recreational craft, governed by Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007, the respondent asserts in the first place that it is related to tourism because it covers stopovers made during the summer season and operators which reside outwith the region; i.e., it covers private stopovers by aircraft in airports for tourist purposes. Secondly, the region denies that the tax amounts to an undue restriction on the provision of sea and air services, as argued by the *Avvocatura Generale dello Stato*, in breach of Articles 49, 81 and 87 of the EC Treaty. On this point, the respondent repeats the claim already made that the complaints based on Community law are inadmissible and asserts on the merits that, according to the case law of the ECJ, Article 49 of the EC Treaty does not prevent the introduction of taxes similar to that at issue in the contested provision, such as the Italian advertising tax and the Belgian taxes on the installation of antennas intended for telecommunications.

In particular, as far as stopovers by aircraft are concerned, the region claims that the regional tax does not amount to a duplication of airport fees, repeating the arguments already made on this point in the entry of appearance in the proceedings commenced pursuant to appeal No. 91 of 2006; it also contests the allegedly regressive nature of the tax, pointing out that the tax is reasonably directed towards benefiting aircraft which carry large numbers of tourists on a single flight compared to those which carry lower numbers.

Concerning the alleged lack of progressiveness of the regional tax on stopovers by recreational craft, the respondent repeats the points already made in relation to stopovers by aircraft and, more generally, on the question of progressiveness, the taxes governed by the contested Articles 2 and 3 of regional law No. 4 of 2006. It goes on to contest the appellant's assertion that it is not lawful to impose a tax also on stopovers by recreational craft in the mooring fields situated in the territorial waters because the territorial waters are not part of the region. For the respondent region, these points are in the first place inadmissible because they were not raised by the government in the

resolution of the Council of Ministers of 27 July 2007; secondly, they are groundless because the conferral on the regions of competence over the issue of concessions of state maritime property or over areas situated in the territorial waters pursuant to Article 105 of legislative decree No. 112 of 31 March 1998 (Conferral of the administrative functions and tasks of the state on the regions and local authorities, implementing part I of law No. 59 of 15 March 1997) allows the region to provide also for the taxation of the matters transferred.

5.5.4. – As far as Article 5 of regional law No. 2 of 2007 is concerned, which introduces and regulates a visitors tax, the region claims that the said tax, formerly in force in Italy until 1989 and still in force in Trentino-Alto Adige, contains “significant indications 'of its purpose'”, because its proceeds are destined for initiatives in the sustainable tourism sector and the sustainable use of environmental resources.

The respondent first contests the applicant's complaints that the tax is a municipal tax which, for this reason, may not be introduced by the region unless it complies with the fundamental coordination principles of the tax system. The respondent argues that, pursuant to Article 3(b) and (p) of the Regional Statute, it disposes of exclusive legislative powers over local finance and tourism, and that in any case it limited itself to introducing a regional tax “the management of which was left to the municipalities”, which may decide whether or not to introduce it. In resolution No. 5 of the Minister for the Economy and Finance of 4 April of 2002, the government itself accepted that the regions may also create new taxes for the local authorities.

Secondly, the respondent claims that the complaint made in the appeal that the regional legislation violates Article 119 of the Constitution, because it does not leave the municipalities any margin or autonomy over the tax, other than the ability to chose whether to impose it, is groundless. The region argues that, since the tax is regional, it is a matter for the regional legislature to establish the breadth of the competences conferred on the municipalities, and that the government has never contested Trentino Alto-Adige Region law No. 10 of 1976, which created a visitors tax without giving the municipalities any choice over whether to apply it.

Finally, in support of the claim that the arguments contained in the appeal concerning the alleged breach of Community law by the contested provisions are groundless, the

region refers to the arguments already made in general terms and in relation to the other taxes regulated by the contested provisions.

6. – In the proceedings commenced by appeal No. 36 of 2007, the President of the Council of Ministers filed a written statement shortly before the hearing which reiterated the arguments already set out in the appeal, specifying in particular that: a) the taxes governed by the contested provisions cannot be regarded as taxes on tourism, because tourism is the final goal but not the prerequisite therefor; b) the taxation of both stopovers and visits is inconsistent with the taxes' stated goal of promoting tourism; c) "it is not clear how the environment can be protected by imposing a tax which is inversely related to the number of visits, […] and hence not related to the pollution caused, and which is not even levied at all for dingies which are present throughout the year"; d) Article 8(h) of the Statute does not grant the regions general legislative powers over taxation, because the ability to introduce individual taxes must be conferred by different provisions; e) in any case, "once a tax has been provided for, the region should identify the state tax to which is most closely related and follow the principles which inform the relevant legislation"; f) contrary to the assertions of the respondent, the questions based on the violation of Community law are not inadmissible due to their "constitutional irrelevance", because the Constitutional Court may rule on them either directly or by preliminary reference pursuant to Article 234 of the EC Treaty; g) "the fact that non resident Italians may be discriminated against does not *ipso facto* mean that the situation is legitimate also from the Community law point of view"; h) the taxation of second homes should have been applied to all owners of second homes and not only those not resident in Sardinia; i) the fact that Sardinia residents already contribute to the region's finances through their shares of state taxes collected in Sardinia does not justify the subjection of non residents to regional taxation, because the Special Statute already assigns to the region a share of state taxes at a higher level than that assigned to ordinary regions; l) the tax on capital gains is unreasonable because it was created by the same subject (the region) which, by adopting the territorial development plan, "brought about the production of the matter subject to taxation"; m) the tax on capital gains has a contradictory rationale because, by not taxing the real property capital gains accrued in less than five years, it does not apply to increase in the

value of coastal properties brought about as a result of the building restrictions ordered in the regional landscape plan; n) contrary to the assertions of the respondent, it is fully possible to seize the court directly with questions of interpretation, and hence the question as to whether the tax on second homes used for tourist purposes must be interpreted as providing that owners not in possession of the properties cannot be subject to the tax is also admissible; o) the tax on stopovers by aircraft is unreasonable because it also taxes aircraft used for business purposes, violates Community law, and "out of the flights directed in Sardinia" it benefits "those operated by Sardinian undertakings"; p) the region may only carry out police actions to enforce the state's property rights in the territorial waters, "which do not include the power to apply taxes to those who are moored there"; q) the visitors tax is not regional but local (i.e. municipal).

Conclusions on points of law

1. – In the first of the two appeals mentioned in the headnote (No. 91 of 2006), the President of the Council of Ministers contests:

a) Article 2 of Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), with reference to: Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed); Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 18 October 2001, and also due to violation of the fundamental principle contained in Article 67(1)(b) of presidential decree No. 917 of 22 December 1986 (Approval of the consolidated law on income taxes); Articles 3 and 53 of the Constitution; and Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty;

b) Article 3 of the above regional law, with reference to: Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed); Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001; Articles 3 and 53 of the Constitution; and Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty;

c) Article 4 of the above regional law, with reference to: Article 8(i) of the Statute of Sardinia Region (as in force when the application was filed); Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001; Article 53 of the Constitution; and Articles 3 and 53(2) of the Constitution (principles not expressly indicated).

Each of the contested articles creates and regulates a particular regional tax: a) the "regional tax on capital gains from buildings used as second homes" (rubric to Article 2); b) the "regional tax on second homes used for tourist purposes" (rubric to Article 3); c) the "regional tax on aircraft and recreational craft" (rubric to Article 4).

2. – In the second of the two appeals mentioned in the headnote (No. 36 of 2007), the President of the Council of Ministers contests:

a) Article 2, again of regional law No. 4 of 2006, as amended by Article 3(1) of regional law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), with reference to: Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 27 December 2006), and also due to violation of Article 67(1)(b) of presidential decree No. 917 of 1986; Article 3 of the Constitution (principle not expressly indicated); Articles 3 and 53 of the Constitution; Article 117(1) of the Constitution, due to violation of Article 12 of the EC Treaty; and Article 119 of the Constitution;

b) Article 3 of regional law No. 4 of 2006, as amended by Article 3(2) of the aforementioned regional law No. 2 of 2007, with reference to: Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006); Articles 117(3) and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001; Article 53 of the Constitution; Articles 3 and 53 of the Constitution; and the principle of reasonableness;

c) Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007, with reference to: the principles already mentioned in relation to the contested Articles 3 and 4 of regional law No. 4 of 2006, as amended by Article 3(1) and (2) of regional law No. 2 of 2007; Articles 117(2)(e) and 120 of the Constitution; Article 3 of an unspecified legislative text; Articles 3 and 53 of the Constitution; Articles 1, 3 and 8(h) of the Statute of Sardinia Region (as amended by Article 1(834)

of law No. 296 of 2006); and Article 117(1) of the Constitution, due to violation of Articles 3(g), 10, 49, 81 and 87 of the EC Treaty;

d) Article 5 of regional law No. 2 of 2007, with reference to: Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006); Article 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001; Article 3 of the Constitution; and Article 117(1) of the Constitution, due to violation of Articles 12 and 49 of the EC Treaty.

Each of the contested Articles regulates a different regional tax, either following the amendments introduced by regional law No. 2 of 2007 to the corresponding tax provided for under the previous regional law No. 4 of 2006, or as introduced ex novo by regional law No. 2 of 2007. In particular, the challenges concern: a) the "regional tax on capital gains from second homes used for tourist purposes" (rubric to Article 2 of regional law No. 4 of 2006, as amended by Article 3(1) of regional law No. 2 of 2007); b) the "regional tax on second homes used for tourist purposes" (rubric to Article 3 of regional law No. 4 of 2006, as amended by Article 3(2) of regional law No. 2 of 2007); c) the "regional tax on tourist stopovers by aircraft and recreational craft" (rubric to Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007); d) the "visitors tax" (Article 5 of regional law No. 2 of 2007).

3. – The judgments on the above appeals should be joined to be treated together in a single decision, in view of the clear similarities of the questions raised.

4. – The questions raised in the two appeals all concern regional taxes – insofar as introduced by regional law pursuant to Article 8(h) [formerly(i)] of the Regional Statute – and may be subdivided into three groups according to the principles invoked in relation to each tax: a) questions concerning the division of legislative competences between the state and the region; b) questions based on constitutional provisions which do not concern the division of competences; c) questions based on provisions of Community law invoked through Article 117(1) of the Constitution

In the first group of questions, which concern the division of legislative competence over taxation between the state and the regions, the following provisions are invoked: a) Article 8(i) – which subsequently became sub-section (h) pursuant to the amendment by Article 1(834) of law No. 296 of 2006 of the Statute of Sardinia Region – which

provides that the Region's income is comprised of “fees and taxes on tourism and other regional taxes which the region may introduce by law in accordance with the principles underlying the system of state taxation”; b) Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001.

The second group of questions invoke Articles 3 and 53 of the Constitution, which the applicant claims are the basis for the principles of reasonableness, equality and the capacity to pay tax.

The third group of questions invoke, by way of Article 117(1) of the Constitution, Articles 12, 49, 81 – “in conjunction with Articles 3(g) and 10” – and 87 of the EC Treaty.

5. – The first group of questions (mentioned above under letter a) raise the preliminary problems of the identification of the criterion according to which the legislative tax raising powers of Sardinia Region can be determined: i.e. if they must be examined with reference to Article 8(i) – now sub-section (h) – of the Special Statute or to Articles 117 and 119 of the Constitution.

This court finds that the former hypothesis is correct.

In this case, the court cannot take into consideration the provisions contained in Title V of Part II of the Constitution, since they do not guarantee the Special Statute the “greater autonomy”, which alone is a condition for their application to the regions governed by Special Statute pursuant to Article 10 of constitutional law No. 3 of 2001. The Statute allows for greater autonomy because the condition which Sardinia Region must respect when introducing its own taxes is only that – provided for pursuant to 8(h) of the Statute – of compliance with the principles underlying the system of state taxation, whilst the ordinary regions are subject to the twofold limit of the obligation to exercise their tax raising powers in accordance with the fundamental coordination principles as well as the prohibition on introducing or regulating taxes which already exist under state law, or creating others with the same basis, at least until the enactment of state coordinating legislation.

5.1. – In order to reach this conclusion, it is necessary to start from the premise that the new Title V of Part II of the Constitution provides that: a) the state has exclusive legislative competence over the “system of state taxation” (Article 117(2)(e) of the

Constitution); b) the regions have exclusive legislative powers over taxation not expressly reserved to the state, with regard – clearly – to prerequisites for taxation that are associated with the territory of each region, and provided that the exercise of these powers is not tantamount to the creation of a tariff barrier or hindrance to the free movement of persons and goods between the regions (Articles 117(4) and 120(1) of the Constitution); c) the regions and local authorities "shall establish and apply their own taxes and income under the terms of the Constitution and according to the coordination principles […] of the tax system" (Article 119(2) of the Constitution); d) the state and the regions share legislative competence over the "coordination […] of the tax system", in which legislative competence over the determination of fundamental principles is reserved to the state. This reservation of legislative competence over the coordination of the tax system cannot however entail any reduction of the tax raising powers already vested in the regions governed by Special Statute and the autonomous provinces because, under the terms of Article 10 of constitutional law No. 3 of 2001, the new constitutional arrangements apply to them (up until the amendment of the respective statutes) only insofar as they provide for "greater autonomy compared to that formerly granted" and therefore can never have the effect of restricting the extent of the autonomy guaranteed by the special statutes prior to the reform of Title V of Part II of the Constitution (see, *inter alia*, judgment No. 103 of 2003).

The legislative framework established by the constitutional reform has been interpreted by this court as providing, first, that the regions' freedom to exercise this power is conditioned prevalently by the basic choice made by the state when establishing the fundamental coordination principles of the tax system and, secondly, that the exercise of the exclusive power of the regions to regulate their tax take is restricted to those limited cases of taxes, which are largely "earmarked" or [paid as] "consideration", which have prerequisites different from those for the existing state taxes. This reasoning is supported by judgment No. 37 of 2004, in which the court expressly found that, under the terms of the combined provisions of Article 117(2)(e), (3) and (4) of the Constitution, as well as Article 119 of the Constitution, "the region cannot fully exercise its autonomous tax raising powers in the absence of basic coordinating legislation enacted by the national Parliament". In other words – when

exercising its own legislative competence over the determination of the “fundamental coordination principles of the tax system” – the state has the power to determine, by law, “not only […] the principles to which regional lawmakers must adhere, but also to lay down the basic architecture of the tax system and define the areas and limits within which the power to raise taxes may be exercised by the state, the regions and the local authorities respectively”. This judgment, and the others which have followed it, have drawn the further conclusion from this assertion that, until the enactment of the state law in question, the regions may not introduce or regulate regional taxes which have the same prerequisites as state taxes, and may not pass legislation concerning existing taxes introduced and regulated by state laws (judgments No. 451 of 2007; Nos. 413, 412, 75 and 2 of 2006; Nos. 455, 397 and 335 of 2005; and No. 431 of 2004). Only in relation to the limited cases mentioned above of regional taxes which have prerequisites different from those of state taxes has the Court recognised that the regions have the power to create new taxes, pursuant to Article 117(4) of the Constitution, even in the absence of a specific state coordinating law, provided however that, in addition to complying with the Constitution, they also respect the principles underlying the tax system, even though they are only “'so to speak 'incorporated' into a system of taxes that is substantially governed by the state” (on this point, see again judgment No. 37 of 2004 as well, in general terms, as judgment No. 282 of 2002).

5.2. – In order to identify, in the light of the above, the constitutional law applicable in the case before the court, it is therefore necessary to ascertain whether the twofold limit imposed, with reference to taxation, on the regional legislature by Articles 117 and 119 of the Constitution, as interpreted by the constitutional case law referred to above, is more stringent than the limit contained in the Special Statute. It is therefore necessary to verify whether the “compliance with the principles underlying the system of state taxation” – which, as noted above, is the only specific condition required under the Statute for the lawful creation and regulation of taxes by Sardinia Region – is different, considered as a whole, in the sense that it allows for greater autonomy, from observance of the “fundamental coordination principles of the tax system”.

On this point, as a preliminary matter, it is important to note the difference between the principles underlying the system of state taxation and the fundamental coordination

principles of the tax system as a whole. The former relate specifically to the type and structure of state taxes, as well as their underlying rationales. The compliance of regional taxes with these principles must hence be understood as respect by the regional legislature for the "spirit" of the system of state taxation (see, *inter alia*, judgment No. 304 of 2002) and accordingly as consistency and homogeneity with that system as a whole as well as with the individual institutions of which it is comprised. The latter concern those elements which inform the rules that govern the relations and connections between the the state taxation, special statute regional taxation and local authority taxation systems, and are premised on a state law which expressly enunciates them.

Both "compliance with the principles underlying the system of state taxation" as well as observance of the "fundamental coordination principles of the tax system" therefore have a coordinating function in a broad sense between the different sub-systems of the tax system as a whole. There is however a difference, that whilst compliance with the "principles underlying the system of state taxation" requires only that, when introducing regional taxes, the region assess the consistency of the regional system with the state system and accordingly bring its own taxes into line with the essential features of the state system and the rationales for individual taxes. On the other hand, insofar as they result in coordination *stricto sensu*, the "fundamental coordination principles of the tax system" concern the delineation of the bounds of legislative competence over taxation and – with the exception of the low number cases mentioned above – are premised on the existence of a specific law which enunciates them. An example of this last type of coordination is that brought about through principles which establish a specific percentage ratio (in terms of the taxable base or revenue) between state taxes and regional or local taxes, or which divide the prerequisites for taxation between the different executive bodies.

5.3. – Having stated this, it should be pointed out that whilst the legislation contained in the reform of Title V of Part II of the Constitution – as interpreted by the judgments of this court referred to – prevents the ordinary regions from regulating taxes already introduced by state law or from creating others with the same prerequisites as pre-existing state taxes in the absence of state legislation containing fundamental coordination principles, a similar prohibition cannot however be inferred from the

Special Statute of Sardinia Region, which is limited to the requirement that regional taxes comply with the principles underlying the system of state taxation. Nor can it be argued that the above prohibition constitutes one of the principles with which Sardinia Region's legislation must comply. It follows from the points made above in fact that the prohibition in question is a coordination principle *stricto sensu* – identified through interpretation in the case law of this court and applicable on a transitional basis until the enactment of the specific state law in this area – which concerns only the division of the prerequisites for taxes between different executive bodies, according to the criterion of "*lex anterior derogat posterior*" in the exercise of legislative tax raising powers.

It follows that Title V of Part II of the Constitution does not provide for legislative autonomy over taxation which is as a whole broader than that granted to Sardinia Region under the Special Statute. The Statute is the only legislation applicable in the case before the court, and hence the applicant's complaints based on the violation of Title V of Part II of the Constitution cannot be taken into consideration, which means that, for the purposes of the court's decision, they must be examined on a case by case basis with reference to the substantive content of the individual challenges.

5.4. – It must be remembered that this interpretation does not mean that the state cannot contain or broaden the legislative autonomy over taxation granted to regions governed by special statute. It only means that this can be achieved not through the enactment of a state law which fixes the fundamental principles provided for under Article 117 of the Constitution, but rather through an amendment to the Statute carried out using the special cooperation procedures provided for under Article 54 of the Special Statute, which provides that the provisions of the Statute concerning financial autonomy "may be amended by ordinary laws of the Republic proposed by the government or by the region, and in any case following consultation with the region".

5.5. – This conclusion is not changed by this court's view that temporary overall limits on current expenditure fixed by state legislation apply to the regions governed by special statute, as well as the regions governed by ordinary statute (judgments No. 169 and No. 82 of 2007). In fact, according to this view, these limits, derived from "fundamental coordination principles of the public finances", apply to regions governed by special statute only by virtue of the mandatory requirement to ensure the uniformity

in spending policies considered overall which the state must achieve – under both internal as well as Community and international law – through the "participation of all regions […] in the recovery of the public finances" and respect for the so-called "stability pact". Insofar as it places constraints on public expenditure, a requirement of this nature does not affect Sardinia Region's tax system – the consistency of which with the state system is guaranteed by the requirement of "compliance with the system of state taxation" mentioned above – which therefore means that the constitutional case law referred to is not relevant in the case before the court.

5.6. – It should also be pointed out that the text of Article 8(h) (formerly sub-section (i)) of the Special Statute (which provides that the region's income is comprised of "fees and taxes on tourism and other regional taxes which the region may introduce by law in accordance with the principles underlying the system of state taxation") should be interpreted as providing that there is no distinction between taxes "on tourism" and "other regional taxes" as far as the need to ensure "compliance with the principles underlying the system of state taxation" is concerned. As regards regional taxes – irrespective of whether they relate to tourism – the same requirement that it not be incompatible or inconsistent with the state taxation system in fact applies. A different interpretation, such as that proposed by both of the parties, is not only not required under the Statute (as clarified by judgment No. 62 of 1987 in relation to the similar provisions contained in the Special Statute for Trentino Alto-Adige), but would create an unjustified imbalance in treatment between the taxes on tourism and other regional taxes.

5.7. – In the light of the above, the examination of the questions submitted to this court will be carried out both with reference to Articles 3, 53 and 117(1) of the Constitution, as well as the principle of the Statute mentioned. In particular, it must seek to ascertain whether the contested regional legislation is consistent with the principles of equality and capacity to pay tax, complies with the "spirit" of the tax system – or more specifically, with the rationales underlying state taxes on the same or on similar taxable matters – as does not breach the Articles of the EC Treaty mentioned by the applicant.

6. – It is now necessary to examine the questions raised in relation to Article 2 of regional law No. 4 of 2006, both as originally enacted and as amended by Article 3(1) of regional law No. 2 of 2007, raised in the first and second applications respectively.

6.1. – This provision, as originally enacted, creates and regulates with effect from 18 February 2007, the date of publication in the *Official Journal of Sardinia Region* of the resolutions of the regional council provided for under sub-sections 8 and 9, a "regional tax on capital gains from buildings used as second homes" situated in Sardinia within three kilometres of the sea shore and intended for residential use. The tax applies – to sellers who are resident for tax purposes outwith the region or who have been resident for tax purposes in Sardinia for less than twenty four months, unless they or their spouses were born in Sardinia – to property transfers for consideration: 1) of the above buildings, except housing units which for most of the period falling between the purchase or construction and the sale were used as the main residence of the owner or their spouse; 2) of shares not traded on regulated markets in undertakings which own or hold other real rights over the said buildings, for the amounts corresponding to such buildings (sub-sections 1-4).

In the first application, the President of the Council of Ministers contests the provision with reference to Article 8(i) of the Statute of Sardinia Region – as in force when the application was filed – because: a) the tax cannot be regarded as a tax on tourism, since it bears not relation to tourism; b) the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament; c) "the principles underlying the system of state taxation" in matters other than tourism have been "violated".

In the alternative, should it be "possible to infer the fundamental coordination principles of the tax system from the legislation still in force", the applicant challenges Article 2 due to violation of Articles 3 and 53 of the Constitution, with reference to the "general principle" according to which the capacity to pay tax does not justify the imposition of more than one tax, because every tax has a free standing prerequisite, and must cover "different taxable matters", whereas in the case before the court the region taxed the same matter already taxed by the state pursuant to Article 67(1)(b) of presidential decree No. 917 of 1986, which provides that real property capital gains

shall be taxed provided that the sale occur no later than five years after purchase or construction, except properties which were inherited or received as gifts, or the other cases mentioned therein.

6.2. – Article 2 of regional law No. 4 of 2006, as amended by Article 3(1) of regional law No. 2 of 2007, governs, with effect from 31 May 2007, the "regional tax on capital gains from second homes used for tourist purposes", which applies – against sellers for consideration who have been resident for tax purposes in Sardinia for less than twenty four months or who are resident for tax purposes outwith the region, "pursuant to Article 58 of presidential decree No. 600 of 29 September 1973" – to property transfers for consideration: 1) of housing units purchased or constructed more than five years previously, situated in Sardinia within three kilometres of the sea shore and intended for residential use, provided that they are not used as main residences (as defined by Article 8(2) of legislative decree No. 514 of 30 December 1992) by the owner or holder of any other real right over the same; 2) of shares not traded on regulated markets in undertakings which own or hold other real rights over the said buildings, for the amounts corresponding to such buildings (sub-sections 1, 2 and 4). Sub-section 3 specifies that "The tax shall not apply to property transfers for consideration of housing units intended for residential use made by undertakings which build or sell properties, provided that they were registered as outstanding in the last approved budget".

In the second application, the President of the Council of Ministers challenges this provision, with reference to Article 8(h) of the Statute of Sardinia Region (as amended by Article 1(834) of law No. 296 of 2006), because "the regional law does not comply with the principles underlying the system of state taxation contained in Article 81 [sic: Article 67](1)(b) of presidential decree No. 917 of 22 December 1986 (Approval of the consolidated law on income tax)", which provides that " in order for a capital gain to be regarded as 'different' income for a natural person […] a speculative intention is necessary", which "cannot differ from region to region" and "is presumed to be absent where a period of time has passed between purchase and sale such as to render it at the very least improbable". It also complains that Articles 3 and 53 of the Constitution have been violated, with reference to the principle of the capacity to pay tax, because "the contested provision does not contain any reasons why the capacity to pay tax, consisting

in the realisation of capital gains through the sale of properties situated in the region, should differ depending on whether the individual is resident in Sardinia or elsewhere".

6.3. – As a preliminary matter it is necessary to examine the respondent's claim that the second application is inadmissible.

Sardinia Region argues that, as far as the tax on capital gains is concerned, the invocation of the principle contained in Article 117(1) of the Constitution, with reference to Article 12 of the EC Treaty, is inadmissible because these principles were mentioned only in the final clause of the government decision to apply to this court of 27 July 2007 and not in the reasons.

The challenge must be rejected because the government's decision to apply to this court contains – albeit in the final clause – an indication of the said principles, and this is sufficient for the purposes of the admissibility of the application. In fact, as this court found in judgment No. 533 of 2002, such resolutions may be limited to "indicating the specific provisions which the government considers […] to be *ultra vires*" for the region, "and the identification of the grounds for the challenge may be left to the technical discretion of the *Avvocatura Generale dello Stato*".

6.4. – In the light of the comments made above in paragraph 4, the regional levy contested in the two applications may be considered as a regional tax introduced pursuant to Article 8(h) [formerly (i)] of the Special Statute. The court must therefore limit itself to ascertaining whether the said tax "complies" with the principle underlying the system of state taxation contained in Article 67(1)(b) of presidential decree No. 917 of 1986 which the appellant claims, in both of its applications, have been substantively violated.

More specifically, in the first application the above principle underlying the system of state taxation is invoked first only generically ("violation of tax law principles") with reference to Article 8(i) of the Special Statute, and then specifically (with express reference to Article 67 of presidential decree No. 917 of 1986), in relation to the alleged violation of Articles 3 and 53 of the Constitution. Article 8(h) of the Regional Statute is on the other hand expressly invoked in relation to the above principle in the second application. It is nonetheless clear that, also in the first application, the applicant intended to dispute the regional law's departure from a principle underlying the system

of state taxation and, therefore, claimed that the principle contained in the Statute referred to had been violated. The basis for the applicant's challenge is questionable, because it first averred a violation by the Statute of unspecified principles underlying the system of state taxation, then going on to argue in the second application, albeit averring also a breach of Articles 3 and 53 of the Constitution, that the principle underlying the state taxation system not respected by the regional legislature was that laid down in Article 67 of presidential decree No. 917 of 1986. Nevertheless, it is clear that this lack of precision does not invalidate its complaint over the incompatibility, which is significant with regard to the Regional Statute, with the above principle underlying the state taxation system.

6.5. – Article 67(1)(b) of presidential decree No. 917 of 1986, referred to by the applicant, provides that "capital gains realised through property transfers for consideration of property purchased or constructed less than five years previously, except those which have been inherited and urban housing units which for most of the period falling between the purchase or construction and the sale were used as the main residence of the owner or their family" shall be subject to taxation. The provision moreover imposes two prerequisites for the application of the state tax: a) the positive condition of the short space of time between the purchase or construction and the sale of the property; b) the negative condition that the capital gains not result from sale of properties used for primary residential needs, or have been acquired under the terms of an will. The fulfilment of these conditions means that the capital gains are liable to taxation in accordance with that which was once designated as an absolute legal presumption of the speculative nature of the sales made during the five year period (to which the applicant refers) and which today could be defined as a generic legal assessment of an objective contribution of the tax payer's behaviour to the generation of income; in the case before the court, this functional relationship constitutes the effective rationale for the state tax.

The complaints based on the discordance with this rationale for taxation are well founded.

6.5.1. – It should first be pointed out that the taxation provided for under state legislation and that provided for pursuant to Article 2 of regional law No. 4 of 2006

both concern, as far as is relevant for our present purposes, increases in value generated through the property transfer for consideration of a property or of participations in undertakings which own or hold real rights over property; this increase consists of the difference between the sale price and the purchase price or construction costs of the property sold (according to the similar calculation criteria provided for, respectively, under Article 68 of presidential decree No. 917 of 1986 and the contested Article 2(5) and (6) of of regional law No. 4 of 2006). As far as the original formulation of the contested provision is concerned, it should however be pointed out that the tax thereby introduced: a) creates an overlap of taxes insofar as it covers the same prerequisites as the state tax, subjecting to taxation capital gains realised through the sale of “buildings used as second homes” purchased or constructed no earlier than five years previously and already taxed pursuant to Article 67 of presidential decree No. 917 of 1986, in accordance with the generic legal assessment of income generation mentioned above; b) applies to those capital gains realised during the five year period which, by contrast, the aforementioned Article 67 exempts from taxation, that is to capital gains resulting from the sale of urban housing units which have been inherited or which “for most of the period falling between the purchase or construction and the sale were used as the main residence” of members of the owner's family other than the spouse; c) also applies to capital gains beyond five years, going against the state legislature's choice to subject to taxation only capital gains resulting from sales carried out in the previous five years, to which it applies the generic legal assessment mentioned.

Although the state tax and the regional tax relate to the same type of income, they are however inspired by different rationales: whilst the rationale underlying Article 67 of presidential decree No. 917 of 1986 falls under the general principle of taxing “different income”, consisting in a capital gain from the purchase *inter vivos* and subsequent sale of property (events which occur essentially at the start and on conclusion of the five year period following the transaction); by contrast, the rationale underlying the contested provision disregards these characteristics and, therefore, not only overlaps with this tax but also, in considering revenue as income, subjects all capital gains to taxation, regardless of when they were realised, due to the sole fact of the existence of a positive difference between the sale price and the initial price or cost. It is therefore

clear that there is a discordance between the two regimes, resulting from the difference between and incompatibility of the rationales for taxation and, in particular, the coexistence of the two contradictory fiscal policies mentioned: the state policy, which taxes capital gains subject to fulfilment of the conditions provided for under Article 67(1)(b) of presidential decree No. 917 of 1986 and, accordingly, as a function of the economic concept of “generated income”; and the regional policy, which not only increases the taxation on capital gains realised during the five year period, but – from the above viewpoint of “revenue as income” – extends it for an indefinite period to other cases not covered by the above conditions.

The taxation of capital gains realised through the sale of participations in undertakings which hold real rights over buildings “for the amounts corresponding to such buildings” also contrasts with the rationale underlying the state regime because, according to the regional legislature, it is justified exclusively as a measure to combat tax evasion and therefore – just as the tax on buildings used as second homes – is amenable to the different rationale for the taxation mentioned above

6.5.2. – As far as the current formulation of the contested provision is concerned (introduced by Article 3(1) of regional law No. 2 of 2007), the complaint raised in the second application is well founded for similar reasons. This provision – the rubric of which is titled, in contrast to the first, “Regional tax on capital gains from second homes used for tourist purposes” – limits itself to amending the original legislation governing the regional tax, eliminating the taxation of capital gains resulting from sales made during the five year period and confirming that on capital gains made over more than five years.

As it argued in the first application, the applicant claims that the contested provision breaches the principle, mentioned above, contained in Article 67(1)(b) of presidential decree No. 917 of 1986. This complaint is also well founded because the contested provision maintains the qualitative difference noted between the two types of tax, and does not follow the state legislature's choice to tax only capital gains resulting from sales made during the five year period. In particular, whilst the new contested provision removed the overlap between the taxes in relation to capital gains realised during the first five years, it has not resolved the clear contradiction between the tax's underlying

rationale and the general fiscal policy choice which the state legislature made when exempting from taxation capital gains beyond five years resulting from the sale of buildings (to which the generic legal assessment, referred to at various points, does not apply) as well as the sale of participations in undertakings which own the said buildings.

6.6. – The contradiction pointed out between the rationale underlying the contested regional tax and the state legislature's fiscal policy choice of limiting taxation only to capital gains realised during the previous five years is accentuated heightened by the fact that, in both of its formulations, the contested provision unjustifiably discriminates against individuals officially resident abroad and individuals officially resident in Italy but who are not resident for tax purposes in Sardinia, thereby violating Articles 3 and 53 of the Constitution.

In order to determine who is exempt from the tax, the contested provision uses as a criterion residence for tax purposes identified pursuant to Article 58 of presidential decree No. 600 of 1973, providing that the tax be levied on persons resident for tax purposes outwith the region or who have been resident for tax purposes in Sardinia for less than twenty four months. Pursuant to Article 58 of presidential decree No. 600 of 1973, cited above: a) natural persons resident in Italy are “resident for tax purposes in the municipality where they are registered in the civil registry”; b) natural persons not officially resident in Italy are resident for tax purposes “in the municipality in which the income was produced or, if the income was produced in more than one municipality, in the municipality in which the highest income was produced”. It follows from this provision that, in all cases in which natural persons officially resident abroad generate the capital gain/income in Sardinia as their highest income produced in Italy, they must for this very reason be regarded as being resident for tax purposes in Sardinia, and hence not subject to taxation for the purposes of the contested provision (if they have been resident for tax purposes in Sardinia for at least twenty four months); whilst even if the capital gains of natural persons officially resident in Italy, but outwith Sardinia, are made in Sardinia, such persons are – just as foreign residents – in any case not resident for tax purposes in Sardinia, and are therefore subject to taxation. This is notwithstanding the fact that there is no reasonable justification for this difference in

treatment. Similar considerations may also be made for entities other than natural persons.

6.7. – The contested provisions are incompatible, as averred, with the principles underlying the system of state taxation, irrespective of the issue of the further unjustified discrimination – overshadowed by the applicant by its reference to Article 12 of the EC Treaty by way of Article 117(1) of the Constitution – which the contested provision creates by exempting from taxation individuals resident for tax purposes in Sardinia, whilst subjecting to taxation individuals resident in the Member States of the European Union who are not resident in Sardinia for tax purposes. It is clear that this provision violates the prohibition on restrictions on the movement of capital between the Member States contained in Article 56 of the EC Treaty, as interpreted by the European Court of Justice. The ECJ has held in a case similar to that governed by the contested provisions – albeit with reference to a state tax – that the national legislature may not subject "capital gains resulting from the sale of property situated in a member state […], where that transfer is made by a resident of another Member State, to a tax burden greater than that which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated" (ECJ judgment of 11 October 2007 in Case C-443/2006, *Hollmann* [2007] ECR I-8491).

6.8. – If the challenges averring the violation of Article 8(h) [formerly sub-section (i)] of the Regional Statute are accepted, then all other complaints averring that Article 2 of regional law No. 4 of 2006 is unconstitutional, raised in each appeal with reference, respectively to the original text of that provision and as amended by Article 3(1) of regional law No. 2 of 2007, are moot.

More specifically, these further complaints were raised by the President of the Council of Ministers in the first application (No. 91 of 2006), which claimed that Article 2 of regional law No. 4 of 2006 violated Articles 117 and 119 of the Constitution, in conjunction with Article 10 of constitutional law No. 3 of 2001 and the fundamental principle contained in Article 67(1)(b) of presidential decree No. 917 of 1986 that real property capital gains are taxable, provided that the sale occur no later than five years after the purchase or construction of the property, subject to the

exemptions provided for by law. The state representative also avers the violation: a) of Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because the region cannot fully exercise its tax raising powers in the absence of basic coordinating legislation enacted by the national Parliament; and b) in the alternative of Article 117(1) of the Constitution, with reference to Article 12 of the EC Treaty, since the contested provision discriminates against Community citizens by adopting the following criteria for the application of the tax: "not born in Sardinia, which is directly related to citizenship; and not resident for tax purposes in Italy [sic. Sardinia], which is related to residence". The other complaints, which are also moot, against Article 2 of regional law No. 4 of 2006, as amended by Article 3(1) of regional law No. 2 of 2007, were raised by the President of the Council of Ministers in the second application (No. 36 of 2007), which claimed, in the alternative to the other complaints raised, that Article 119 of the Constitution had been violated since the legislation breached the fundamental coordination principles of the tax system, which mirror, at least on a transitional basis and "until the enactment of state legislation implementing Article 119", the principles underlying the system of state taxation. In the same application, the state representative also claims, in relation to the same provision, that the principle of reasonableness has been violated because, by applying to all housing units situated within three kilometres of the sea shore, the contested provision unjustifiably sets a distance from the shore which is the same for all regional beaches, without taking into account the geography of the places and, therefore, the different levels of access to the sea. Finally, the applicant claims that Article 117(1) of the Constitution has been violated, with reference to Article 12 of the EC Treaty, since the legislation discriminates against Community citizens by subjecting all non residents to taxation.

7. – It is now necessary to examine the questions concerning Article 3 of regional law No. 4 of 2006, both as originally enacted, and also as amended by Article 3(2) of regional law No. 2 of 2007, raised respectively in the first and second application.

7.1. – This provision, as originally enacted, introduces and governs a "regional tax on second homes used for tourist purposes", due – in line with the surface area – in respect of buildings situated within the region at a distance of less than three kilometres from

the sea shore, which are not used as a main residence by the owner or by the holder of other real rights over the same enforceable against the owner of the said buildings, or by the holders of usufruct, use or residence rights who are resident for tax purposes outwith the region, unless they or their spouses or parents were born in Sardinia.

In the first appeal (No. 91 of 2006), the President of the Council of Ministers contests the provision with reference to Article 8(i) of the Statute of Sardinia Region – as in force when the application was filed, that is before the entry into force of Article 1(834) of law No. 296 of 2006 – because: a) the tax cannot be regarded as a tax on tourism, since it bears no relation to tourism; b) the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament; c) "the principles underlying the system of state taxation" in matters other than tourism have been "violated". It also complains that the tax undermines "the possibilities for state level economic policy, of which taxes are one of the principal instruments", because the tax applies to the same taxable matters covered by other taxes, including in particular ICI, rendering it incompatible with the principles underlying the system of state taxation. It also complains that the contested provision violates Article 53 of the Constitution, which "applies in tax law of the principle of equality enshrined in Article 3", as well as Article 12 of the EC Treaty, by way of Article 117(1) of the Constitution, since it discriminates against Community citizens by adopting the following criteria for the application of the tax: "not born in Sardinia, which is directly related to citizenship; and not resident for tax purposes in Italy [sic. Sardinia], which is related to residence".

7.2. – Article 3 of regional law No. 4 of 2006, replaced – as of 31 May 2007 – by Article 3(2) of regional law No. 2 of 2007, governs the "Regional tax on second homes used for tourist purposes", due – per square metre and at different rates according to classes of surface area – for housing units situated in the region at a distance of less than three kilometres from the sea shore not used as a main residence by the owner or by the holder of any other real right over the same. The tax applies in particular to the owners of such housing units, or the holder of usufruct, use, residence or surface rights, or against the lessee of the property under a financial leasing contract who is resident for tax purposes outwith the region. Article 3(9) provides that "For the year 2006 the tax

shall be payable at the rate more favourable to the taxpayer between those provided for under this Article and those previously in force".

In its second application (No. 36 of 2007), the President of the Council of Ministers contests this provision with reference to Article 8(h) of the Statute of Sardinia Region and Articles 117(3) and 119 of the Constitution, as well as Article 10 of constitutional law No. 3 of 2001, on the grounds that: a) the tax cannot be regarded as a tax on tourism because "the tourist usage cannot be inferred from the fact that the property is not used as a main residence", as is the case, for example, for properties used for work; b) even if it were classified under the category of "other regional taxes", the tax would not "comply with the principles underlying the system of state taxation", since it is calculated in line with the surface area of the building, without any reference to its value, whilst taxation on the basis of cadastral values, as is the case for ICI, should in any event be regarded as a fundamental principle in that it makes it possible to tax average values, established for similar areas in line with market values and which in any case vary in line with the quality of the property; and c) it does not have the goal of coordinating the tax system, but limits itself to imposing a single tax, and therefore cannot be brought under the head of coordination of the system of taxation, over which competence is shared. It also claims that Article 53 of the Constitution has been violated, because "the tax is related to the visibility of the sea, and hence covers panoramic value", which is not taxable in that it is not indicative of a capacity to pay tax, which is on the other hand related to the economic value of the property. In the alternative, it claims that Articles 3 and 53 of the Constitution have been violated on the grounds that they are unreasonable, because the tax is also due in respect of properties which have no view of the sea. It also claims that Articles 3 and 53 of the Constitution have been violated, again on the grounds of unreasonableness, due to breach of the principles underlying the system of state taxation, also on the grounds that the tax is "progressive for usable surface areas between 60 and 150 sqm", but "becomes strongly regressive between 150 and 200 sqm, and is even lower for yet higher surface areas".

7.3. – In the first application (No. 91 of 2006), the applicant avers, in complex and detailed submissions, the violation of Article 8(i) of the Statute of Sardinia Region. In contrast to the complaints concerning the other regional taxes, the state representative

does not limit itself to asserting that a regional tax on second homes used for tourist purposes is not related to “tourism”, but rather draws from this assertion the consequence that, by applying to the same matters covered by ICI, the tax betrays the inconsistent pursuit by the region of the goal of guaranteeing sustainable tourism, and is detrimental “also to the possibilities for state level economic policy, of which taxes are one of the principal instruments”. According to the applicant, the fact that the regional tax covers the “same taxable matters” taxed by the national legislature with ICI means that it is incompatible with the principles underlying the system of state taxation and, above all, gives rise to numerous forms of discrimination prohibited under Article 53 of the Constitution, which “applies in tax law of the principle of equality enshrined in Article 3”. The applicant mentions, as an example of this discrimination – also averring a corresponding violation of Article 12 of the EC Treaty – the difference in treatment between individuals born outwith Sardinia but not resident for tax purposes in the region, who are subject to the regional tax, and individuals also not resident for tax purposes in Sardinia, but who were born there, who are on the other hand not subject to taxation solely on the grounds that they were not born in Sardinia (Article 3(4)).

The complaint, formulated in a convoluted manner, should be interpreted as a claim by the applicant that the principles of reasonableness and capacity to pay tax have been violated by virtue of the difference in treatment between individuals resident for tax purposes or born in Sardinia and those who to not satisfy these requirements.

7.4. – The question, as formulated in the above terms, is well founded.

Despite the declared intention of the regional legislature to tax the tourist use of second homes, the contested provision introduces a property tax on buildings situated along the Sardinian coast that are not used a main residence, which does not apply to the general class of the “occupiers” of such properties, and therefore results in the unjustified differences in treatment challenged by the applicant.

7.5. – Invoking the headnote and sub-section 1 of the contested provision as arguments ("regional tax on second homes used for tourist purposes”), as well as the location of the properties subject to taxation along the Sardinian coast, the respondent region asserts that the contested tax is not a property tax, but a tax with so-called “ecological-tourist” goals, which seeks to contain the environmental pollution generated

by tourism and, in particular, from the possession of “second homes used for tourist purposes”. According to the region, the contested provision thus pursues “tourist-environmental goals” and infers the capacity to pay tax from the fact that, as a non resident occupier of a property in a tourist location with high environmental value, the persons liable to pay the tax “consume and use” the environment (the protected good), without such use and consumption being justified by any stable relationship of the occupier with the territorial community.

This account of the nature and function of the tax is not however supported by the overall formulation of the contested provision.

On this point, it should be pointed out that, pursuant to Article 3(2) of the aforementioned regional law No. 4 of 2006, the prerequisites for the tax are the “possession of buildings” (defined as “houses” by sub-section 1 of the same Article) situated along the Sardinian coast and the fact that they are “not used as a main residence by the owner or by the holder of other real rights over the same”. However – by adopting the identical legislative technique and the same wording as that used by the state legislature in relation to ICI (Articles 1(2) and 3 of legislative decree No. 504 of 30 December 1992 containing the “Reorganisation of the finances of territorial bodies, pursuant to Article 4 of law No. 421 of 23 October 1992”) – the regional legislature uses the concept of “possession of buildings” which must be compared with the subsequent mandatory indication of the individuals liable to pay the tax, identified by the contested provision as the holders of specific legal rights over the property subject to taxation (Article 3(3) of the regional law). It follows that this “possession” should not be understood in civil law terms (Article 1140 of the Civil Code), but exclusively in the particular sense of fact that the person liable to pay the tax has the above legal rights over the building. This clarification (which can dispel the interpretative doubts raised on this point by the state representative, in particular in the second appeal) makes it clear that the application of the tax bears no relation to the “tourist use” (both actual or potential) of the “buildings” (regarded as “homes”). In fact – in providing that the restricted, imprecise and non-technical expression “second homes used for tourist purposes” used by the regional parliament in Article 3(1) must be understood in the broader, more precise and technical sense of “houses” or “buildings non used as a main

residence" – Article 3(2) of the regional law removes all references both to "second homes" as well as the use of the building for tourist purposes. The precise legislative definition of the prerequisites for the tax, contained in sub-sections 2 and 3 of the contested Article 3, accordingly require the court to find (in contrast with the more restricted expression, mentioned above, used to refer to the tax, contained in the headnote and in Article 3(1)) that the tax applies to all cases in which the individual liable to taxation (and therefore also the lessee of a property under a financial leasing contract, mistakenly not mentioned in sub-section 2) does not use the building "occupied" by him and situated on the Sardinian coast as a main residence.

According to this interpretation of the provision, the tax also applies in cases in which the individual liable to pay the tax – that is the person who displays a specific capacity to pay tax through the "possession" of the building – uses the housing unit for purposes other than tourism, that is for work, business (where this is compatible with the aforementioned residential use of the property) or rental. In particular, where the property is rented, the lessor "possessor" of the "house" is subject to taxation for the sole reason that he was not born in Sardinia or is not resident there for tax purposes, even if he uses the property solely as a business venture, irrespective of the manner in which the lessee uses it (i.e. tourist or not) and without any provision by the law for reimbursement to the lessor. In other words, the above lessor is subject to taxation both when he uses the property for non tourist purposes (for example as his own main residence), and also when he uses it for tourist purposes, thus remaining subject – provided that he is not resident in Sardinia – to the visitors tax provided for (with effect from 15 June 2008) under the contested Article 5 of regional law No. 2 of 2007.

The taxation of individuals not resident for tax purposes in Sardinia (or who were not born there), provided for under the contested provision in cases in which the "possessor" of the building does not use the property (even indirectly) for tourist purposes is hence justified only on objective grounds, due to the mere fact of the "possession" of a property situated in an area of particular importance for tourism. However, in this case, even though it applies to houses situated in the areas mentioned of particular importance for tourism, the tax can be classified as a property-ownership tax, such as ICI, rather than as a tourist-environmental tax. The court therefore finds

that, notwithstanding the official term “regional tax on second homes used for tourist purposes”, the tax before the court does not have any effective tourist-environmental rationale.

A further corollary of this conclusion is the groundlessness of the arguments which invoke the above rationale as justification for the subjective exemptions from the tax provided for under the contested provision. In particular, the respondent region argues that the exemptions indicated are legitimate in that they require a particular degree of affiliation of the individual with the local community and culture, given also the specific geographical characteristics of Sardinia. It is precisely on account of this link with the region, together with the regional legislature's intention not to hinder tourist visits to Sardinia by persons born in Sardinia (and by their spouses and children) or who are resident there for tax purposes, that it is reasonable – from this standpoint – to exempt the above individuals from the tax where they possess houses used for tourist purposes along the Sardinian coast. Regardless of its persuasiveness (above all regarding the appropriateness of the degrees of affiliation chosen by the regional legislature), this argument is however premised on the mistaken assumption that the tax applies to the “tourist use” of the houses. The fact, mentioned above, that the tax is a property tax removes the basis for this assumption, which therefore means that the justifications invoked for the limitation of the class of persons liable to pay the tax are without foundation.

7.6. – It follows from the above that the contested regional tax is characterised, in objective terms, by a logic of property taxation along the same lines as ICI. As for ICI in fact, the basis for this regional tax consists – as mentioned above – in the ownership of the property, or the possession of real rights to use or conclude a financial leasing contract in relation to the buildings, irrespective of the effective use of the property and whether or not it is occupied by an individual resident in Sardinia for tax purposes. The only difference is that, whilst ICI concerns buildings, building land and agricultural land, regardless of their use (Articles 1 and 3 of legislative decree No. 504 of 1992), the contested provision limits the applicability of the tax to housing units not used as a main residence situated along the Sardinian coast. Therefore, it is sufficient that an individual “possess” housing units which have even simply the potential to be used as dwellings,

and which are in any case not intended to satisfy the primary residential requirements of the “possessor”.

However, in order for the tax to be consistent with the general regime of property taxation, it should have provided for the taxation in general terms of the housing units in question, without the broad subjective exemptions contained in the contested provision based on the criteria of tax residence and birth in Sardinia of the relevant individual (or a relationship of marriage or parentage with a person born in Sardinia). The regional legislature's choice, in providing for these exemptions, to distance itself from the ICI framework contrasts in fact with the general nature of property taxes and distorts their essential character. In particular, it leads to unjustified subjective discrimination in the application of the tax, as well as a strong discordance with the principle underlying the system of state taxation that – as already mentioned above – requires that the above types of tax be applied to all holders of legal rights over properties situated within the territorial jurisdiction of the taxing body (except, obviously, limited subjective or objective exemptions which do not alter the nature of the tax), regardless of whether or not they are resident for tax purposes in the territory where the property is situated, and without any significance being given to their birthplace.

This discrimination is all the more striking where the case of individuals who are resident for tax purposes in Italy, but not in Sardinia, is compared with that of individuals who are resident abroad but resident for tax purposes in Sardinia. Indeed, as noted above in paragraph 6.6., where they are holders of real rights over properties situated in Sardinia, the latter are resident for tax purposes in Sardinia pursuant to Article 58 of presidential decree No. 600 of 1973 (provided that they do not receive greater income produced in Italy outwith Sardinia). In contrast to those who are resident for tax purposes in Italy, but not in Sardinia, they are therefore not liable to pay the above regional tax, regardless the number of relevant housing units situated in Sardinia, even though they are not ordinarily resident in Sardinia.

7.6.1. – Nor can it be objected – as the respondent attempts – that the above exemptions from the tax are justified by the fact that the exempted individuals already contribute to the regional finances by paying income taxes collected in the region, 70%

of the the revenue of which is assigned to the region pursuant to Article 8(a) of the Special Statute, and is used also for environmental protection and sustainable tourism.

Above all, it is important to point out that, as far as the individuals liable to pay the tax are concerned, there is no necessary correlation – but only a probable one – between residence for tax purposes in Sardinia Region and the payment in the same region of income tax. For example, persons who earn less than the taxable threshold, or who are otherwise exempt, are not required to pay income tax even though they are resident for tax purposes in Sardinia. It should also be noted that, even assuming that the respondent's arguments are valid, there would be an unreasonable difference in treatment between individuals resident for tax purposes in Sardinia who are exempt from taxation, even though they possess “second homes” situated along the coast, and individuals, again resident for tax purposes in Sardinia but who, since they do not possess “second homes”, bear through the payment of income tax the economic burden of environmental protection and the promotion of sustainable tourism resulting also from second homes along the coast belonging to the former.

Moreover, the fact, noted above, that the tax is a property tax – i.e. based on real rights – undermines the respondent's argument at root. This means that the above requirement of general application cannot be subject to exceptions incompatible with the underlying rationale of the tax, such as those based on the fact that the revenue from the taxes [already] paid by persons resident for tax purposes in Sardinia is destined to finance environmental protection and the sustainable development of tourism in the region. In addition, the above subjective exemptions are not only unjustified in the light of the nature of the tax, but are not even capable of removing the inconsistencies within the tax itself mentioned above.

In any case, the objection based on the claim that the share of revenue from income taxes assigned to the region is equal to the revenue from the regional property tax certainly does not justify the exemption from the class of persons liable to pay the regional tax for persons born in Sardinia along with their spouses and children, because such individuals do not have any objective link with the region and are therefore not equivalent to individuals resident for tax purposes in Sardinia.

7.6.2. – The region also justifies the broad subjective exemptions from the tax due to the need: a) to provide a fiscal deterrent on the construction of “second homes used for tourist purposes” along the coast in order to avoid the potential environmental pollution caused by tourism; b) to tax the increase in value of the said housing units generated as a result of the prohibitions on building imposed by the regional landscape plan, also in view of the importance of tourism for the coast.

However, not even these arguments can negate the unreasonable nature of the tax contained in the contested provision.

Regarding the goal of discouraging on environmental protection grounds the construction of “second homes used for tourist purposes” along the coast, it should be pointed out that this should be pursued predominantly through the instruments of territorial government. In any case, with relation both to fiscal and environmental considerations, the pursuit of the same goal cannot also disregard properties built by individuals resident or born in Sardinia, who are equally capable of causing pollution and therefore jeopardise a model of sustainable tourism.

As far as the alleged goal of taxing the increase in value of the housing units in question is concerned, the court finds that this should be pursued by subjecting to taxation also individuals resident in Sardinia for tax purposes. However, in any case, this goal cannot be achieved through the contested tax, since the value taxed is not in itself suitable for measuring the said increase because it is calculated on the basis of surface area.

7.6.3. – Finally, it must be pointed out that the discrimination is particularly serious where it affects undertakings which let out properties, since the exemption from the tax only for undertakings resident for tax purposes in Sardinia (or even where their owner was born in Sardinia) results in an unreasonable economic benefit which distorts competition.

7.6.4 – As regards the version of the contested provision currently in force (introduced by Article 3(2) of regional law No. 2 of 2007), the court finds that the complaint made in the second application is also well founded for similar reasons. In fact, the provision leaves substantially unchanged the original structure of the regional

tax, limiting itself to removing the exemption from taxation for individuals born in Sardinia along with their spouses and children.

As in the first application, the challenge is to be interpreted as a complaint by the applicant that the contested provision violates the principles of reasonableness and capacity to pay tax due to the different treatment of individuals who are resident for tax purposes in Sardinia and those who do not satisfy this requirement.

This challenge is also well founded due to the fact that the provision does not establish a tax on the tourist use of second homes, but a property tax on buildings situated along the coast that are not used as main residences, which does not apply to the general class of the "possessors" of such properties – as is however required by the general principles underlying the system of state taxation for this type of tax – and therefore creates the unjustified differences in treatment contested in the first appeal and reiterated in the second.

7.7. – The acceptance of the complaints averring the violation Article 8(h) [formerly sub-section (i)] of the Special Statute means that all the other challenges to the constitutionality of Article 3 of regional law No. 4 of 2006, raised in each application with reference, respectively, to the original text of this provision and that amended by Article 3(2) of regional law No. 2 of 2007, are moot.

More specifically, these additional challenges were raised by the President of the Council of Ministers in the first application (n. 91 of 2006) with reference to Article 3 of regional law No. 4 of 2006, averring the violation of Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001: a) because the region cannot fully exercise its tax raising powers in the absence of basic coordinating legislation enacted by the national Parliament; b) in the alternative, since the tax is calculated in line with the surface area of the building, without any reference to its value, whilst "taxation on the basis of cadastral values, as is the case for the state tax and ICI, should in any case be regarded as fundamental principle in that it makes it possible to tax average values, established for similar areas in line with market values and which in any case vary in line with the quality of the property". The other complaints, also moot, concerning Article 3 of regional law No. 4 of 2006, as amended by Article 3(2) of regional law No. 2 of 2007, were raised by the President of the

Council of Ministers in the second application (No. 36 of 2007), averring the violation of Articles 117(3) and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, on the grounds that: a) the tax cannot be regarded as a tax on tourism because “the tourist usage cannot be inferred from the fact that the property is not used as a main residence”, as is the case, for example, for properties used for work; b) even if it were classified under the category of “other regional taxes”, the tax would not “comply with the principles underlying the system of state taxation”, since it is calculated in line with the surface area of the building, without any reference to its value, whilst taxation on the basis of cadastral values, as is the case for ICI, should in any event be regarded as a fundamental principle in that it makes it possible to tax average values, established for similar areas in line with market values and which in any case vary in line with the quality of the property; and c) it does not have the goal of coordinating the tax system, but limits itself to imposing a single tax, and therefore cannot be brought under the head of coordination of the system of taxation, over which competence is shared. In the same application, the state representative also claims that the principle of reasonableness has been violated, unless the contested provision is interpreted as providing that “if the owner, or the holders of other real rights, are not in possession of the property, the tax is not due, either by them (due to lack of possession) or by the holder of those rights, since they are not specified as persons liable to pay the tax”.

8. – It is now necessary to examine the questions relating to Article 4 of regional law No. 4 of 2006, both as originally enacted (which was in force from 13 May 2006 to 30 May 2007), and also as amended by Article 3(3) of regional law No. 2 of 2007 (in force since 31 May 2007, pursuant to Article 37 of this latter law). Due to the differences between the complaints, it is appropriate to examine each application individually.

8.1. – Article 4 of Sardinia Region law No. 4 of 2006, as originally enacted, introduces, starting from 2006, a "'regional tax on aircraft and recreational craft”. The tax is levied, from 1 June to 30 September, on persons or undertakings which are resident for tax purposes outwith the region and which operate aircraft or recreational craft (with exemptions from the tax for cruise liners, boats which come to Sardinia to participate in sporting regattas and recreational craft which remain for the whole year in

regional port facilities) and is due: 1) for every stopover in regional aerodromes by general aviation aircraft intended for the private carriage of persons, according to categories determined in relation to the number of passengers which such aircraft are authorised to transport; 2) annually, for the docking in ports, landing places and in mooring points situated within the region of recreational craft within the meaning of the Maritime Recreational Code (legislative decree No. 171 of 18 July 2005), classified according to length, starting from 14 metres.

8.1.1. – In the first appeal (No. 91 of 2006), the applicant claims that the contested provision violates three different groups of constitutional principles: a) Article 8(i) of the Statute of Sardinia Region, because the tax cannot be classified as a tourist tax and the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament, and moreover, in any case, the tax "violates the principles underlying the system of state taxation" in matters other than tourism; in the alternative Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001 because, as already asserted in the application, the region cannot fully exercise its tax raising powers over matters other than tourism in the absence of basic coordinating legislation enacted by the national Parliament; again in the alternative, should the court "be able to infer the fundamental coordination principles of the tax system from the legislation still in force", Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001 because, as regards recreational craft which make stopovers "in unequipped areas, in a sheltered sea inlet, or where the craft is moored to land using the beach as a natural berth", the region has specified "as a basis for the tax the use of a natural resource over which it cannot exercise any powers", namely the sea, "which is subject to state jurisdiction alone within the limits of the territorial waters"; b) Article 53 of the Constitution both because, in relation to aircraft, there is a "clear tax overlap" with "airport fees or fees for the use of the airports (law No. 324 of 1976)", as well as because "the provision of a service for which […] a price is paid to cover the cost of the service rendered, plus a profit margin" is not a manifestation of the capacity to pay tax; and c) Articles 3 and 53(2) of the Constitution (principles that are however not expressly indicated) because, as far as recreational craft are concerned, the tax has a

“regressive nature” in that it is due annually, with the result that “the more the port facilities are used, the lower proportionally is the burden of the tax”. These challenges, which shall be examined separately, are groundless.

8.1.2. – As far as head a) of the challenge is concerned, the court finds that as a preliminary matter it is necessary to examine exclusively the alleged violation of the Regional Statute because – as already pointed out in paragraph 5 – the legislation governing the division of legislative competences between the state and the regions introduced by the reform of Title V of Part II of the Constitution does not provide for greater autonomy than that foreseen under the Statute of Sardinia Region, and accordingly, pursuant to Article 10 of constitutional law No. 3 of 2001, the Regional Statute alone applies in the case before the court.

On the merits, bearing in mind all issues raised, the above challenge is groundless.

In the first case, it must be reiterated (as already noted in paragraph 5.6.) that it is irrelevant whether or not the above regional tax relates to tourism, because the aforementioned Article 8(i) of the Statute of Sardinia Region confers upon the region specific exclusive legislative competence over the matters not only of “taxes and fees on tourism”, but also of “other regional taxes”. Therefore, even were the court to find (albeit implausibly) that the period during which stopovers by aircraft and recreational craft in the region are subject to taxation (that is the period falling between 1 June and 30 September of each year, corresponding to the tourist high season) and the residence for tax purposes of the persons liable to pay the tax (outwith Sardinia Region) did not constitute a sufficient basis for classifying the contested tax as a tax “on tourism”, this would be no means entail the violation of the Regional Statute. In fact, the tax would still be classifiable as a “regional” tax and, therefore, lawfully created pursuant to the legislative competence granted under the statute, provided that it satisfied the requirement – contained in Article 8(i) of the Statute – of “compliance with the principles underlying the system of state taxation”.

Secondly – as already noted above in paragraph 5.3., and contrary to the assertions of the state representative – the legislative powers of Sardinia Region over regional taxation are not subject to the prior enactment by the state of a law which sets out the fundamental coordination principles of the tax system.

Thirdly, the applicant has not indicated with which principles underlying the system of state taxation the contested provision does not "comply". The challenge is therefore made in entirely general terms. Moreover, the applicant may not refer, as a principle underlying the system of state taxation alleged to have been violated, to the "general principle of the coordination of the tax system" mentioned by it in its claim in the alternative. In fact – as already noted in paragraph 5.2. – the principles of the state tax system are fundamentally different in nature and scope from the "fundamental coordination principles of the tax system". In particular, the applicant has specified as a "fundamental coordination principle" concerning maritime recreational craft the principle that the sea is "subject to state jurisdiction alone within the limits of the territorial waters": however this principle, as formulated by the applicant, is not only foreign to the system of state taxation, but does not even have any basis in law. The sea may indeed be subject to regional legislation, as occurs for example, for the regions not governed by special statute, within the ambit of the shared competence over ports and large navigation networks, or, for Sardinia Region – under the terms of Article 3(i) of the Statute – within the ambit of the exclusive competence over fishing. Should moreover the applicant have only meant to assert that the respondent region could not have taken the use of the sea as a basis for the regional tax, the challenge would, in the absence of further argumentation, be immaterial, because – contrary to the assertions of the state representative – the contested provision clearly specifies that the prerequisites for the regional tax on recreational craft do not include the mere use of the "sea", but "stopovers in ports, landing places and mooring points situated in the region", i.e. the use of facilities inside Sardinia.

As regards the challenges raised by the applicant in the alternative based on Articles 117 and 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, the court again finds that they are inadmissible for the reasons already set out above in paragraph 5.3.

8.1.3. – In head b) of its challenge, the applicant asserts that insofar as it relates to aircraft, the contested provision breaches Article 53 of the Constitution, both because the regional tax amounts to a "duplicate tax" overlapping with the provisions of state law governing airport fees or fees for the use of airports, as well as because the making

of a stopover is not a manifestation of the capacity to pay tax, since users of airports already pay a price for the services used.

This challenge is also groundless.

The state representative bases its arguments on three different assumptions: that the above airport fees provided for under the state legislation in force can be classified as taxes; that the regional tax is due for services used during stopovers in airports; that the regional taxes of Sardinia Region may not have an identical or similar basis to regional taxes.

These assumptions are mistaken.

As regards the first, the court finds that, under the terms of the interpretative provision contained in Article 39-*bis* of decree-law No. 159 of 1 October 2007 (Urgent economic and fiscal measures to promote development and social equity), converted into law, with amendments, by law No. 222 of 29 November 2007, the airport fees provided for pursuant to law No. 324 of 5 May 1976 (New provisions concerning fees for the use of airports open to civil traffic) are not taxes but private law consideration for certain airport services (on this point, see Court of Cassation judgment No. 379 of 2008, as well as this court's judgment No. 51 of 2008). It should also be added that those required to pay the landing fees (in addition to departure, waiting or storage fees) are not the operators of the aircraft used for private carriage (as for the regional tax under examination), but the pilots of the aircraft where the latter do not carry on business activities (Articles 2(2) and 3(2) of law No. 324 of 1976).

As far as the second assumption is concerned, the court finds that the regional tax applies irrespective of the obligation on the relevant person to pay the fees due for the services used during stopovers by aircraft, since the tax is due from the relevant person on the sole grounds that the aircraft operated by him and used for private carriage makes a stopover in an airport situated in Sardinia, regardless of whether the aircraft actually used airport services or whether the relevant person was required to pay airport fees (the tax is due, for example, also where the relevant person is the operator authorised to provide airport services).

As far as the third assumption is concerned, it is sufficient here to recall the conclusions reached above, set out in paragraph 5.3., on the absence of any prohibition

on Sardinia Region to introduce and regulate regional taxes with the same prerequisite as state taxes.

It follows that: a) there are not two different taxes, one of them a state tax (airport fees) and the other a regional tax (the tax on aircraft), but only a regional tax; b) the prerequisite for the regional tax (stopover in Sardinia) is different from the acts giving rise to the obligation to pay airport fees (use of airport services); c) in any case, a regional tax created by Sardinia Region would not be unlawful solely on the grounds that it has an identical or similar prerequisite to that of a state tax. Finally, it hardly needs to be pointed out that – contrary to the assertions of the applicant – there can be no doubts over the fact that the prerequisite for the tax (that is a stopover in an airport situated in Sardinia during the period falling between 1 June and 30 September of each year) is a valid manifestation of a capacity to pay tax on the part of the operator of the aircraft.

8.1.4. – Finally, as regards head c) of the challenge, the applicant argues that the contested provision violates Articles 3 and 53(2) of the Constitution in relation to maritime recreational craft because, since the regional tax is due annually at a fixed rate with reference to each class of length of recreational craft, “the effect is that, the more the port facilities are used, the lower proportionally is the burden of the tax, which in this way ends up having a regressive effect”.

The complaint is groundless.

Under the terms of the contested provision, the tax is not due for maritime recreational craft which remain for the whole year in regional port facilities (as well as cruise liners and those which visit Sardinia to participate sporting regattas), whilst it is due annually for craft which dock (during the period falling between 1 June and 30 September of each year) in ports, landing places or mooring points situated in Sardinia, as follows: a) Euro 1.000 for boats longer than 14 but shorter than 15.99 metres; b) Euro 2.000 for boats longer than 16 but shorter than 19.99 metres; c) Euro 3.000 for boats longer than 20 but shorter than 23.99 metres; d) Euro 5.000 for ships longer than 24 but shorter than 29.99 metres; e) Euro 10.000 for ships longer than 30 but shorter than 60 metres; f) Euro 15.000 for ships longer than 60 metres; g) for sailing craft with an auxiliary motor the above amount is reduced by half. It is clear from this legislation

that, in setting the tax at a fixed level (according to classes of length of the boat) and in exempting from the tax recreational craft which remain for the whole year in Sardinian ports, the regional legislature was evidently pursuing the goal of favouring a heavier use of the above facilities by boats, having found it to be preferable from an overall economic point of view to provide for tax breaks encouraging a stable connection with Sardinia of the individuals potentially liable to pay the tax. This rationale is neither arbitrary nor unreasonable.

Turning now to the alleged violation of Article 53(2) of the Constitution, it is sufficient to recall that this court has consistently held that "criteria of progressiveness" must inform the "tax system" as a whole and not individual taxes (see, *inter alia*, judgment No. 128 of 1966). This means that, contrary appellant's argument, the contested regional tax on recreational craft does not violate the above constitutional principle simply because the amount due in tax is "regressive", in the sense that it does not increase either in proportion with, or at a proportionally greater level than, the use of Sardinian port facilities.

8.2. – Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007 (in force as of 31 May 2007, pursuant to Article 37 of the latter law), introduces, starting from 2006, a "regional tax on tourist stopovers by aircraft and recreational craft", essentially reproducing the original formulation of the provision (paragraph 8.1.) and making, insofar as is of interest for our present purposes, the following amendments: a) the person liable to pay the tax (that is the operator of the aircraft or recreational craft who is resident for tax purposes outwith Sardinia) is no longer indicated as a "person or […] company", but as a "natural or legal person"; b) exemptions from the tax are also granted for boats which dock in order to participate in sporting regattas, gatherings of vintage boats, monotype boats and sailing events, including amateur events, the occurrence of which has been communicated in advance by the organisers to the Marine Authority, as well as for technical stops by aircraft and boats, limited to the time necessary to carry out the same; c) exemptions are no longer granted for cruise liners; d) the tax is due not only for recreational craft, but also for "craft used for recreational purposes"; e) the tax is also due for stopovers in "equipped mooring fields situated in the territorial waters along the coast of Sardinia".

8.2.1. – In its second application (No. 36 of 2007), the applicant claims that the contested provision violates various groups of constitutional principles: a) the principles already invoked by it in relation to the contested Articles 2 and 3 of regional law No. 4 of 2006, as amended by Article 3(1) and (2) of regional law No. 2 of 2007, to the "extent already noted in the treatment of the previous sub-sections" (that is Article 3(1) and (2) of the aforementioned regional law No. 2 of 2007); b) Articles 117(2)(e) and 120 of the Constitution, because the tax concerns competition law matters, which are reserved to the exclusive legislative competence of the state, thus impinging upon the economic unity of the Republic; c) "Article 3, the protection of which in economic matters is reserved to competition law"; d) Articles 1, 3 and 8(h) of the Statute of Sardinia Region because the regional tax also applies to stopovers by recreational craft in the equipped mooring fields situated in the territorial waters, and hence violates the principle that the prerequisites for regional taxes may not "be specified outwith […] the region" (limited by Article 1 of the Statute of Sardinia Region to "Sardinia and its islands"); e) Articles 3 and 53 of the Constitution, enshrining the principle of reasonableness, because: e.1.) "an activity carried on in the same manner cannot be considered as a manifestation of a capacity to pay tax which differs depending upon the period in which it is carried out"; e.2.) the contested tax has a regressive nature, since the amount levied diminishes in line with the increase in the number of passengers which the aircraft is certified to carry and with the length of the recreational craft, and since it is payable only once for the whole year in respect of the latter craft, "the greater the number of stopovers, the lower proportionally the tax burden will be"; e.3.) in relation to stopover by aircraft, the fee amounts to a duplication of the airport fees provided for under law No. 324 of 1976, which are due to the airport managing body for the use of airport installations; e.4.) the levy on stopover by aircraft "cannot be defined as a tax because it covers individual business operations and not the overall profit", nor can it be defined a fee, "because it is collected by a body which is not involved in the service used"; and f) Article 117(1) of the Constitution, in relation both to Article 49 of the EC Treaty, because it introduces "a restriction on the freedom to provide services in the Sardinian market for sea and air services, which is a significant part of the European market", as well as Article 81 of the EC Treaty, "in conjunction with Articles 3(g) and

10”, because it has the effect of distorting competition within the common market, as well as Article 87 of the EC Treaty because it creates a state aid for undertakings based in Sardinia. It also asserts that “questions of Community law should be referred to the European Court of Justice”.

The grounds of unconstitutionality indicated shall be examined separately, following an order of logical priority, leaving the examination of the violation of Community law alleged until last.

8.2.2. – Before moving on to an examination of the individual challenges, it is necessary to examine the respondent's claim that the application is inadmissible.

Sardinia Region claims that, in relation to the regional tax on tourist stopovers by aircraft and recreational craft, the applicant's arguments – that the region is not allowed to apply the tax also to stopovers by recreational craft in the mooring fields situated in the territorial waters because the territorial waters are not part of the regional territory – are inadmissible since they were not raised by the Government in the resolution of the Council of Ministers of 27 July 2007.

The court dismisses this objection because the government decision to apply to this court contains a reference to all the principles invoked in the appeal and this is sufficient – as already noted in paragraph 6.3. – for the purposes of the admissibility of the latter (judgment No. 533 of 2002).

8.2.3. – Head a) of the challenge consists in a mere referral, in the absence of any more detailed argument, to the challenges raised in appeal No. 36 of 2007 in relation to Articles 2 and 3 of regional law No. 4 of 2006 as amended, respectively, by Article 3(1) and (2) of regional law No. 2 of 2007.

The challenges are inadmissible because they are made in a generic matter, without any indication of elements capable of establishing their relevance for the contested tax. Indeed, in spite of the fact that it concerns a “regional tax on tourist stopovers by aircraft and recreational craft”, the question is raised with a reference to issues concerning radically different taxes (namely, the “regional tax on capital gains from second homes used for tourist purposes” and the “regional tax on second homes used for tourist purposes”) and in terms which are so vague that they fail to satisfy the requirement incumbent on the applicant to specify the grounds for the averred

unconstitutionality with specific arguments in support of its own complaints, as required under the settled case law of this court (see, *inter alia*: judgments No. 38 of 2007; No. 233 and No. 139 of 2006; No. 360 and No. 336 of 2005).

8.2.4. – Under head b) of the challenge, the applicant argues that, insofar as it concerns a competition law matter, the contested provision breaches Article 117(2)(e) of the Constitution, introduced by the reform of Title V of Part II of the Constitution in the context of the new arrangements for the division of legislative competences between the state and the regions not governed by special statute.

The challenge is inadmissible because the applicant does not provide any reasons why this constitutional principle should be relevant. In fact, the state representative does not clarify why the legislative competence conferred by the Regional Statute on the autonomous Sardinia Region over regional taxation should be limited by a provision of the Constitution enacted in order to regulate the division of legislative competences between the state and the regions not governed by special statute. As is known, Article 10 of constitutional law No. 3 of 2001, referred to at various points, provides that the constitutional legislation governing the division of competence, introduced by the reform of Title V of Part II of the Constitution, applies to the regions governed by special statute only where it provides for greater autonomy than that provided for under the statute whereas, in the case before the court, the applicant itself asserts that the application of Article 117(2)(e) of the Constitution would entail a restriction of the legislative autonomy of Sardinia Region as provided for under the Statute. Furthermore, in breach of its obligation to specify its own challenges, the applicant does not provide any substantive reasons as to how the contested regional legislation, enacted in accordance with the exclusive legislative competence of the autonomous region over regional taxation, might concern “competition law”. The reference to Article 120 of the Constitution is equally generic. In fact, this challenge is not free standing in relation to the alleged violation of Article 117(2)(e) of the Constitution, since the applicant limits itself to asserting – without proving any more detailed arguments – that by encroaching upon “competition law matters”, the contested provision undermines “as a result the economic unity of the Republic.

8.2.5. – The court also finds that head c) of the challenge is inadmissible because the applicant, first, does not specify the constitutional principle invoked, referring to "Article 3" of an unspecified legislative text and, secondly, presents the grounds for unconstitutionality in an obscure and generic matter, limiting itself to asserting the violation of the aforementioned Article 3, "the protection of which in economic matters is reserved to competition law".

8.2.6. – In head d) of its challenge, the applicant avers the violation of Articles 1, 3 and 8(h) of the Statute of Sardinia Region, asserting that, since it also applies to stopovers by recreational craft in the equipped mooring fields situated in the territorial waters along the coast of Sardinia, the regional tax violates the principle that the prerequisites for regional taxes cannot "be identified outwith the […] territory" of the region (limited by Article 1 of the Regional Statute to "Sardinia and its islands"). The applicant therefore assumes that, since they are situated within the territorial waters, the above mooring fields are state maritime property, drawing from this assumption the conclusion that the respondent region has no "territorial" competence to introduce a regional tax on stopovers in the said mooring fields (the applicant does not however extend the objection to the similar case of the regional tax on stopovers in ports in Sardinia that are state maritime property).

The complaint is groundless because, even though the applicant's assumption is valid, the consequence which is drawn from this is not however correct.

There is no doubt that the mooring fields in question, situated in the territorial waters (as defined by Article 2 of the Navigation Code), must be considered state maritime property, pursuant to Articles 28 and 29 of the Navigation Code, that is property owned by the state. The state maritime property was not in fact transferred to the respondent region because Article 14(1) of the Regional Statute expressly provides, with reference to this property, that Sardinia Region shall not adopt the property and rights of the state. Nevertheless, contrary to the assertions of the applicant, the fact that the mooring fields are state maritime property does not mean that the region is not competent to introduce a regional tax on stopovers in the said mooring fields. In fact, this court has already found that, for the purposes of the review of the constitutionality of the exercise of the legislative powers of Sardinia Region within the ambit of the territorial waters, "it is not

relevant whether or not the territorial waters are state maritime property, and not even whether the relevant waters are territorial waters or part of state maritime property", since it is only necessary to verify the limits of the legislative power of the region, with the result that "the territorial waters are irrelevant […] for the purposes of establishing the territorial limits of the efficacy of the regional law"; this is because "even if the territorial waters were not part of the region for the purposes of the region's competence, the conferral upon the region of legislative and administrative powers" in a particular field "means that regional legislation […] must extend its own efficacy to the outer limit of the maritime space which surrounds the territory and over which the powers of the state are exercised, albeit on an ancillary basis" (judgment No. 23 of 1957, concerning the competence of Sardinia Region over fishing in the territorial waters).

The territorial waters in which the above mooring fields are situated are therefore of relevance as a mere spatial area in relation to which regional legislation may make provisions and stipulate legal effects, within the limits of the legislative competence of the region.

In general, there is no doubt that Sardinia Region has the right – under the terms both of the Statute and of the implementary presidential decree No. 1627 of 24 November 1965, concerning state maritime property and the territorial waters, as well as the legislation which provided for the transfer of the administrative functions of the state in this area to the regions (Article 105(2)(l) of legislative decree No. 112 of 31 March 1998, as amended) – to exercise a range of powers over the territorial waters, which exist in tandem with those vested in the state: these powers therefore apply irrespective of any issue of the status of the territorial waters and may also be regulated by regional legislation (as held in judgment No. 23 of 1957, mentioned above).

More specifically, there is by the same token no doubt that, as far as the territorial waters are concerned, the Regional Statute and the principles of the state taxation system mentioned in Article 8(h) of the Statute do not impose any limit on the tax raising powers of the region. Indeed, the applicant correctly mentions the principle of the "territoriality" of local taxes as one of the principles of the state taxation system. To this end however, the state representative however invites this court to adopt a restricted understanding of the term "territory" (as encompassing only "dry land" and "internal

waters”), without providing any adequate justification for this interpretative choice and limiting itself to referring to the text of Article 1(1) of the Statute, which provides that “Sardinia and its islands shall be an autonomous region […]”. By contrast, the narrow interpretation of the spatial extent of the efficacy of regional laws averred cannot be justified either by a literal reading or by the rationale of the said provision. A literal reading is not sufficient because Article 1 does not use the term “territory”; the rationale is not sufficient because the provision only has the purpose of establishing the autonomous region and not that of establishing the spatial extent of its legislative and administrative competences. It is on the other hand clear that, in the light of this court's findings in judgment No. 23 of 1957, mentioned above, territory should not be understood in the restrictive, literal sense proposed by the applicant, but in the broader sense of the area over which the legitimate normative power of the region extends, including the power to raise taxes. This power may therefore also extend to the territorial waters, provided that the respondent region exercise it in order to protect interests of regional importance, such as the interest in regulating the influx of tourists also through taxation.

The contested provision fully satisfies this requirement, because it identifies as a prerequisite for the tax stopovers in mooring fields “situated in the territorial waters along the coast of Sardinia”, that is in equipped areas which, whilst they are not physically and stably connected to dry land, nevertheless make it possible to link the basis for taxation with the region's tourist and environmental circumstances. In the case before the court, this link exists because, by permitting stopovers during the tourist high season by boats with a distinct tourist nature ("recreational” craft or craft otherwise “used for recreational purposes”), the mooring fields in question not only make the immediate use of tourist and environmental resources possible, but are also the base for access to Sardinia's islands by natural persons, which means that the contested provision does not violate the constitutional principle invoked since it is intended to pursue typically regional interests and as such is expressly permitted under the Regional Statute.

8.2.7. – In point e) of its complaint, the applicant claims, with reference to Articles 3 and 53 of the Constitution, that the principle of reasonableness has been violated on four grounds.

None of these arguments is well founded.

8.2.7.1. – As regards the first argument – that "an activity carried on in the same manner cannot be considered as a manifestation of a capacity to pay tax which differs depending upon the period in which it is carried out" – the court finds (as already noted in paragraph 8.1.3.) that the making of a stopover during the tourist high season is a manifestation of the capacity to pay tax by the persons liable to pay the tax, which was not arbitrary chosen by the legislature. In particular, the application of the tax to those who make stopovers during that period shows that one of the rationales for the provision is that of encouraging stopovers during other periods of the year, in order to allow for a sustainable distribution of tourist (or at least predominantly tourist) visits to Sardinia. This is accompanied by the additional primary rationale of providing for the contribution by individuals not resident in Sardinia for tax purposes – who, in contrast to persons resident for tax purposes in Sardinia, do not pay the majority of their taxes, fees and state, regional and local contributions in that region – to the public costs resulting from the use by tourists of the natural/environmental and historical/artistic heritage (thereby displaying a common feature with the regional visitors tax, which will be examined below, since it is the object of a specific challenge).

8.2.7.2. – As regards the second argument concerning the allegedly regressive nature of the tax on tourist stopovers by aircraft and recreational craft, it is important to reiterate that this characteristic is not in itself relevant for the purposes of the contested provision's averred unconstitutional status. As noted above in relation to the first application (paragraph 8.1.4.), it must be remembered that, pursuant to Article 53(2) of the Constitution, "criteria of progressiveness" must inform the "tax system" as a whole and not individual taxes.

In particular, under the terms of the contested provision, the tax is not due for recreational craft which remain for the whole year in regional port facilities, whilst it is due annually for stopovers by recreational craft or craft otherwise used for recreational purposes (from 1 June to 30 September of each year), at the same level set, classifying

the craft according to length, by the Article as originally enacted (the new text of the provision states that the amount due for motorsailers is that applicable to the particular category of sailing craft with an auxiliary motor).

As pointed out above in relation to the first application (paragraph 8.1.4.), it follows from these arrangements that the intention of the regional legislature was clearly to encourage a heavier use of port facilities by these boats, considering it to be preferable from an overall economic point of view to provide tax incentives for a stable link of individuals with Sardinia. This rationale, which acts as a basis for the level at which the tax is set, does not overstep the limits of non-arbitrariness and reasonableness which the respondent region must respect when exercising its legislative discretion.

Similar considerations apply to the tax on tourist stopovers by aircraft, due for general aviation aircraft intended for the private carriage of persons, for every stopover made in regional airports between 1 June and 30 September of each year (except technical stopovers, limited to the time necessary to carry out the same), at the following levels: a) € 150,00 for aircraft certified for the carriage of up to four passengers; b) € 400,00 for aircraft certified for the carriage of between five and twelve passengers; c) € 1.000,00 for aircraft certified for the carriage of more than twelve passengers. It is clear from this legislation that, in setting the tax at a level not proportional to the number of passengers transported, the regional legislature essentially intended to provide fiscal incentives for a lower volume of air traffic for an equal number of passenger journeys, and therefore the de-congestion of air traffic in the period between 1 June and 30 September. Such a rationale appears to be neither arbitrary nor unreasonable, and therefore the contested provision is immune from the challenges raised.

8.2.7.3. – Turning now to the third argument, according to which the tax on stopovers by aircraft amounts to a duplication of airport fees, since the question raised is identical, the conclusions already reached in the examination of the first application (paragraph 8.1.4.) on the non existence of the “duplicate tax” averred also apply here.

8.2.7.4. – The applicant's fourth argument is directed exclusively against the tax on stopovers by aircraft and is based on the claim that this levy is unreasonable because it cannot be classed either as a tax or as a fee.

This argument is not well founded. The levy provided for under the contested provision is in fact not a fee (since, as mentioned above, it is not related to the use of airport services), but a tax, because it is a compulsory levy charged in order to contribute to public expenditure and is imposed upon individuals on the basis of a specific manifestation of a capacity to pay tax (that is making a stopover in an airport within the context of the "private transport of persons").

Nor can it be objected, as the applicant attempts, that the contested levy is not a tax since it applies "to individual business activities and not to the overall resulting profit". The tax in question is not in fact a tax on company income, in relation to which alone the problem of the assessment of the "overall resulting profit", as the applicant puts it, could arise.

Furthermore, the contested tax doe not necessarily presuppose – as the applicant mistakenly considers – the exercise of business air transportation activities. The court reaches this conclusion through the reconstruction of the complex legislative framework encompassing the contested provision, according to which the tax applies to "general aviation aircraft for the purposes of Article 743 *et seq* of the Navigation Code intended for the private carriage of persons". In reality, these Articles of the Navigation Code, as applicable when the contested provision came into force, do not mention "general aviation", nor do they divide "private aircraft" into three categories: a) "public transport aircraft intended for the carriage of persons or things for remuneration of any nature, or also without remuneration where the carriage is made by an air transport company"; b) "aerial work aircraft, intended for industrial and business purposes or any other use for remuneration, provided that they are not used for the carriage of persons or things"; c) "tourist aircraft, intended for purposes other than those mentioned in the previous sub-sections and without remuneration"; this distinction was provided for only under the version of Article 747 of the Navigation Code previously in force – that is, before its repeal by Article 5 of legislative decree No. 96 of 9 May 2005 – and was repeated almost to the letter by Article 137 of the Regulation for Air Transport, approved by royal decree no. 356 of 11 January 1925, as amended by Article 8 of the amendments approved by royal decree No. 1350 of 15 April 1938. Article 743(3) of the Navigation Code on the other hand provides, in its current form, that "Distinctions between aircraft,

in accordance with their technical characteristics and with their use, may be established by the National Civil Aviation Authority [ENAC – *Ente Nazionale per l'Aviazione Civile*] through its own regulations, or otherwise by special legislation in this area". Therefore, the correct meaning of the contested provision can only be arrived at through an examination of these regulations. In particular, Article 1 of the ENAC regulation of 30 June 2003 (entitled "All Weather Operations in National Airspace") defines the following operations according to the use of the aircraft: a) "commercial air transport operations": those which "involve the transport of passengers, cargo or mail for remuneration" (Article 1(1)); b) "aerial work operations": those carried out by an "aircraft used for specialist activities such as, for example, aerial photography, aerial publicity, surveillance and observation, the spraying of substances, the transportation of external cargo, etc.)" (Article 1(2)); c) "general aviation operations": those "other than commercial air transport and aerial work" (Article 1(3)). Similarly, the regulation of 21 October 2003 (entitled "Regulation governing the construction and management of airports") defines: a) "commercial air transport" as "traffic made for the carriage of persons or things for remuneration. It therefore includes scheduled flights, charter flights and air taxis"; and b) "non commercial air transport or general aviation" as "transport other than commercial air transport; it essentially includes the activities of flying clubs, flight schools, small private aircraft and aerial work services".

According to this reconstruction of the legislative framework, the "private air carriage of persons" by the general aviation aircraft mentioned in the contested provision is only that carried out by aircraft in "general aviation" operations, that is through operations made without remuneration and which are not "aerial work". Therefore, also transport without remuneration by an air transport company, which (as mentioned above) the repealed text of Article 747 of the Navigation Code by contrast classified as "public transport", involves the "private air carriage of persons", which is subject to the regional tax. It follows that, contrary to the assertions of the applicant, the application of the contested regional tax never presupposes the exercise of an air transport business, other than in the exceptional case mentioned above of transport carried out without remuneration by an air transport company, which falls under the

more general case, provided for under EC law, of “general business aviation” (see below, paragraph 8.2.8.4.).

8.2.8. – Finally, in point f) of its challenge, the applicant claims, with reference to individuals which carry on business activities, that Article 117(1) of the Constitution has been violated due to a breach of the EC Treaty, in particular Articles 49 (freedom to provide services), 81, “in conjunction with Articles 3(g) and 10” (the protection of competition), and 87 (the prohibition on state aids), and asks that a preliminary reference pursuant to Article 234 of the Treaty be made on this matter. This claim means that it is necessary to consider the following problems as a preliminary matter: 1) whether the complaint which invokes, by way of Article 117(1) of the Constitution, Community law as supplementary elements to the constitutional principle, is admissible; 2) within which limits Community law may be taken into consideration by this court as a supplementary element of a principle in constitutionality proceedings where the court is seized directly; 3) whether the prerequisites for this court to make a preliminary reference pursuant to Article 234 of the EC Treaty have been satisfied. Only after the resolution of these problems may the court move on to a consideration of the non manifest groundlessness and relevance of the said preliminary issue.

8.2.8.1. – As this court has found on various occasions, in providing that Italy “agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed”, Article 11 of the Constitution allows for the recognition of the binding efficacy of Community law within our legal order (see, *inter alia*, judgments No. 349 and No. 284 of 2007, and No. 170 of 1984). The new wording of Article 117(1) of the Constitution, introduced by constitutional law No. 3 of 2001 – which provides that “Legislative power shall be exercised by the state and the regions in accordance with the Constitution, and subject to the limits resulting from Community law […]” – again states that the obligations contained in Community law apply to the national legislature (including the national and regional Parliaments, as well as the legislatures of the autonomous provinces). It follows from this constitutional legislative framework that, by ratifying the Community treaties, Italy became part of an autonomous legal order, integrated and coordinated with internal law, and transferred, pursuant to Article 11 of

the Constitution, the exercise of powers, including legislative powers, over the matters covered by the Treaties. Community legislation binds the national legislature in various ways, subject only to the limit of the inviolability of the fundamental principles of the constitutional order and the inviolable rights of man guaranteed by the Constitution (see, *inter alia*, judgments Nos. 349, 348 and 284 of 2007, and No. 170 of 1984).

With specific reference to the case, which is of relevance here, of regional laws which are claimed to be incompatible with EC law (as interpreted and applied by Community institutions and organs), it should be pointed out that the inclusion of Italy in the Community legal order has two different consequences, depending on whether the proceedings in which the challenge is raised are pending before the ordinary courts or before the Constitutional Court following an application in which the court is seized directly. In the first case, the Community norms, provided that they are directly effective, require the courts to set aside national laws (including regional laws) where they are found to be incompatible. In the latter case, the provisions "operate as interposed rules capable of supplementing the parameters used in order to assess the conformity of the regional legislation with Article 117(1) of the Constitution" (judgments No. 129 of 2006; No. 406 of 2005; No. 166 and No. 7 of 2004) or, more specifically, apply *in concreto* the principle contained in Article 117(1) of the Constitution (as clarified, in general terms, by judgment No. 348 of 2007), which means that regional legislation found to be incompatible with EC law must be ruled unconstitutional.

These two different *modi operandi* of EC law reflect the different characteristics of the proceedings.

Before the ordinary courts the regional law must be applied to a specific case and the assessment of its conformity with the Community legal order must be carried out by that court as a preliminary matter before setting aside the law in question, following a preliminary reference to the European Court of Justice – where necessary – on the interpretation of EC law. Once the court has found that the law cannot be set aside, it may indeed seize the Constitutional Court, but on the grounds that the internal law does not comply with the constitutional order and not because it does not comply with Community law. It follows that, where the ordinary courts question the compatibility of

national law with EC law, the failure to make a preliminary reference to the European Court of Justice means that any question of constitutionality raised by it is not relevant and therefore inadmissible.

In cases in which the Constitutional Court is seized directly on the other hand, the assessment of the conformity of the regional law with Community legislation occurs, by way of Article 117(1) of the Constitution, in constitutional proceedings, and accordingly where it is found to be incompatible, the court does not set aside the law, but – as noted above – declares it unconstitutional *erga omnes* (see, *inter alia*, judgment No. 94 of 1995).

Therefore, in the light of the above, the court finds that the complaint under examination is admissible because the Community legislation was correctly invoked by the applicant in these proceedings, by way of Article 117(1) of the Constitution, as a supplementary element to the constitutional principle.

8.2.8.2. – Regarding the limits within which these provisions may be taken into consideration as a supplementary element to constitutional principles in constitutionality proceedings where this court is seized directly, it should be pointed out that the court cannot examine violations other than those averred by the applicant, which concern Articles 49, 81, "in conjunction with Articles 3(g) and 10", and 87 of the EC Treaty.

According to the settled interpretation of this court of the combined provisions of Articles 23, 27 and 34 of law No. 87 of 11 March 1953 (which provides that, also in proceedings in which the court is seized directly, the Constitutional Court may declare legislative provisions to be unlawful, subject to the limits of the constitutional principles invoked and of the grounds for the challenge contained in the application), constitutional proceedings have the special characteristic of being limited to the *thema decidendum* raised in the application, regarding the object of the dispute, the principles invoked and the grounds for the challenge. In particular, this court does not have the power to rule that a contested provision is unlawful on the grounds that it violates constitutional principles other than those mentioned in the application. It may on the other hand take into consideration constitutional provisions which were not invoked only where it considers them to provide a justification for the contested provision. This limitation of the principle *iura novit curia* (which is applied even more strictly before

the Community courts) also applies to provisions which supplement the constitutional principle invoked in support of the claim that the contested provision is unconstitutional – and hence, in the case before the court, in which the applicant avers the violation of the aforementioned Articles of the EC Treaty, with reference to Article 117(1) of the Constitution.

8.2.8.3. – In the light of the above, it is now necessary to consider whether the conditions have been satisfied for this court, as for the ordinary courts, to make a preliminary reference the ECJ – should the question of compliance with EC law not be manifestly groundless – on the interpretation of Community law pursuant to Article 234 of the EC Treaty (which provides that "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of this Treaty; […]. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon").

The court finds that the requirements are satisfied because, albeit within the context of its special role as a the guarantor of the Constitution, the Constitutional Court is indeed a court, and more specifically a court of last resort (since there may be no appeal against its decisions: Article 137(3) of the Constitution). Accordingly, in constitutional proceedings in which it is seized directly, it has standing to make a preliminary reference pursuant to Article 234(3) of the EC Treaty.

This conclusion is confirmed by the following arguments.

First, the concept of "national court", which is relevant for the purposes of the admissibility of preliminary references, must be inferred from Community law and not from the "internal" classification of the referring body. There is no doubt that the Italian Constitutional Court satisfies the prerequisites for the attribution of this status, as contained in the case law of the European Court of Justice.

Secondly, in constitutionality proceedings where the court is seized directly, the Constitutional Court is the only court called upon to rule on such disputes, since – as mentioned above – there is no lower court which has jurisdiction to rule on the dispute, that is directly to apply or set aside internal provisions which do not comply with Community law. Therefore, the preclusion in such judgments of the possibility of a

preliminary reference pursuant to Article 234 of the EC Treaty would result in an unacceptable violation of the general interest in the uniform application of Community law, as interpreted by the ECJ.

8.2.8.4. – As regards the violations of Community law averred by the applicant, this court considers it appropriate to make preliminary references to the European Court of Justice, pursuant to Article 234 of the EC Treaty, exclusively in relation to the violations of Articles 49 and 87 of the EC Treaty, reserving for subsequent proceedings any decision on the violation of Article 81 "in conjunction with Articles 3(g) and 10", also in relation to the relevance of these combined provisions for the contested provision.

Turning now to the examination of the non manifest groundlessness of the above preliminary references on the interpretation of the Community law provisions invoked, concerning the application of the tax on stopovers by aircraft and recreational craft, it is important to point out that, under the terms of the contested provision, the tax applies: a) to undertakings which operate recreational craft (or which are otherwise used for recreational purposes) not resident for tax purposes in Sardinia and, in particular, to undertakings the business activity of which consists in making the said craft available to third parties; b) to undertakings operating "general aviation aircraft […] intended for the private carriage of persons", that is to undertakings which carry on air transport operations (other than "aerial work") without remuneration, and therefore within the ambit of so-called "general business aviation", as defined by Article 2(i) of Council Regulation (EEC) No. 95/93 of 18 January 1993 (On common rules for the allocation of slots at Community airports) as a general aviation activity carried on by the operator, with transport without remuneration for reasons pertaining to its own business activity (the legislative framework for general aviation aircraft is set out above in paragraph 8.2.7.4.).

It cannot be precluded that the taxation of undertakings only where they are not resident for tax purposes in Sardinia is discriminatory and results in higher costs than those of undertakings which, even though they carry on the same activities, are not obliged to pay the tax for the sole reason that they are resident for tax purposes in Sardinia. In both cases – that is, in relation both to the broad market for the commercial

use of recreational craft, as well as the narrower market of undertakings which directly carry on the business air transport of persons without remuneration – it could be argued that the application of the contested regional tax on stopovers would give rise to a selective increase in the cost of the services provided by “non resident” undertakings, which is relevant for the purposes of Community law both as a restriction on the free provision of services (Article 49 of the EC Treaty), and also as a state aid to undertakings which are resident for tax purposes in Sardinia (Article 87 of the EC Treaty), with effects which are discriminatory and distort competition.

However, it could on the other hand contest this conclusion using the same arguments which, according to this court (paragraph 8.2.7.1.), justify the application of the tax on stopovers only to non-business subjects not resident for tax purposes in Sardinia (arguments which, as will be shown below in paragraph 9.1.2., also apply to the visitors tax). It could therefore be argued that the taxation only of “non resident” undertakings is justified, under the terms of the economic and fiscal policy of the region, by the fact that when such undertakings make stopovers, they use regional and local public services, but do not contribute – in contrast with “resident” undertakings – to their financing through the payment of taxes already existing. This justification for the regional levy is reinforced, according to the region, by that based on the need to compensate, through the taxation of undertakings not resident for tax purposes in Sardinia, the higher costs borne by undertakings with tax residence in Sardinia, due to the particular geographic and economic characteristics associated with the insular nature of the region.

The two above justifications are however based on arguments relating to the sustainability of regional tourist development and the need to rebalance the economic situation of “non resident” individuals compared to “residents”. Therefore, they do not take into account the fact that the region’s insular nature does not in itself appear to be a factor capable of inflating the costs borne by the undertakings in relation to tourist stopovers, nor above all the fact that, where the individual liable to pay the tax is an entrepreneur, the latter's contribution – on the grounds that his is not resident for tax purposes in Sardinia – to the additional costs created by tourism may not on the facts be sufficient to circumvent the Community law principle of non-discrimination and, fall

beyond the application of the related provisions of the EC Treaty on the freedom to provide services and the prohibition on state aids.

This principle in fact applies generally in the internal legal order and provides protection to "non resident" undertakings – in competition matters and concerning fundamental economic freedoms – the extent of which is a matter not for the rules of national law, but of Community law as interpreted by the Court of Justice of the EC with reference also to "infra-state bodies" which, as the respondent region, enjoy statutory, legislative and financial autonomy (Case C-88/03, *Portuguese Republic v. Commission* [2006] ECR I-7115).

There is an interpretative doubt over this question which must be resolved by the European Court of Justice, as is clear from an examination of the case law of that court. It has on various occasions considered situations similar to the contested stopover tax, finding there to be a restriction on the free provision of services where the particular measures in question rendered the cross-border provision of services more onerous than the comparable national services (Case C-269/05, *Commission* v. *Hellenic Republic* [2007] ECR I-4, p. 6; Case C-92/01, *Stylianakis* [2003] ECR I-1291; Case C-70/99, *Commission* v. *Portugal* [2001] ECR I-4845). These cases however concerned fees which discriminated between national flights and international flights, or between flights above and below a certain distance or, again, between domestic and international transport. There was therefore no question of possible discrimination – relevant albeit only in theory for Community law – between undertakings with or without tax residence in a particular region of a Member State.

As regards the breach of Article 87 of the EC Treaty averred, the issue also arises as to whether the economic competition advantage accruing to undertakings "resident" in Sardinia from their exemption from the regional tax on stopovers falls within the ambit of a state aid, given that such an advantage does not flow from the granting of a tax reduction, but indirectly from the lower costs borne by it compared to "non resident" undertakings (analogous to the case, materially similar on certain points, examined by the ECJ in Case C-53/00, *Ferring SA* [2001] ECR I-9067). On this point it is hardly necessary to point out that the above interpretative problem is clearly distinct from the assessment of the compatibility of the aid measures with the common market, which

falls under the exclusive jurisdiction of the European Commission, subject to review by the Community courts.

There is therefore a question over the correct interpretation – amongst those possible – of the Community provisions invoked, which means that it is necessary to make a preliminary reference to the Court of Justice pursuant to Article 234 of the EC Treaty in order for the latter to ascertain: a) whether Article 49 of the Treaty must be interpreted as a bar on the application of the contested provision only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out "general business aviation" activities (that is the transport without remuneration on grounds pertaining to its own business activity); b) whether, insofar as it provides that the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out general business aviation activities, the contested provision constitutes – within the meaning of Article 87 of the Treaty – a state aid to undertakings carrying on the same activity which are resident for tax purposes in Sardinia; c) whether Article 49 of the Treaty must be interpreted as a bar on the application of the contested provision only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties; d) whether, insofar as it provides that the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties, the contested provision constitutes – for the purposes of Article 87 of the Treaty – a state aid for undertakings which carry on the same activities and which are resident for tax purposes in Sardinia.

A preliminary reference, pursuant to Article 234 of the EC Treaty, concerning these questions is also appropriate in order to avoid the danger of interpretative differences between the Community courts and the Italian Constitutional Court, which would undermine legal certainty and the uniform application of Community law.

8.2.8.5. – Moreover, the above preliminary issues are relevant because: a) the interpretation requested from the Court of Justice is necessary in order for this court to

pass judgment, since the interpretative questions mentioned have arisen within the ambit of constitutionality proceedings in which the court is seized directly; b) this court has already held to be groundless the arguments of unconstitutionality submitted by the appellant in relation to questions other than those covered by the preliminary reference for the reasons set out in paragraphs 8.2.3. to 8.2.7., and therefore the constitutional legitimacy of the contested provision cannot be examined with reference to Article 117(1) of the Constitution without an examination of its conformity with Community law. As already held above in paragraph 8.2.8.4., the court reserves for subsequent proceedings any decision on the violation of Article 81 "in conjunction with Articles 3(g) and 10".

8.2.8.6. – As regards the above preliminary reference pursuant to Article 234 of the EC Treaty, it is appropriate, for the purposes of proceedings commenced by appeal No. 36 of 2007, to separate the proceedings concerning the question of the "regional tax on tourist stopovers by aircraft and recreational craft" – governed by Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007 – from that concerning the taxation of undertakings which operate aircraft or recreational craft. The court hereby stays proceedings concerning the question thus framed, and separated, pursuant to Article 3 of law No. 204 of 13 March 1958 pending the resolution of the preliminary questions of interpretation referred to the ECJ under the terms of the separate order No. 103 of 2008.

9. – It is now necessary to examine the questions concerning Article 5 of regional law No. 2 of 2007 raised in the second application (No. 36 of 2007). The contested provision introduces a regional visitors tax, destined for initiatives in the sustainable tourism sector, which the municipalities may apply within their own territorial jurisdiction starting from 2008 to persons not registered in the civil registry of a municipality in Sardinia, for visits between 15 June and 15 September, in firms which provide accommodation under the terms of regional law No. 22 of 14 May 1984 (Provisions regulating the classification of firms which provide accommodation), in non-hotel accommodation under the terms of regional law No. 27 of 12 August 1998 (Regulations governing non-hotel accommodation), in accommodation governed by regional law No. 18 of 23 June 1998 (New provisions governing the exercise of agri-

tourism), in housing units used as a main residence, as defined by Article 8(2) of legislative decree No. 504 of 1992, which are let or gratuitously loaned for use, or in housing units non used as a main residence (except, for the latter, for use by the owner, his or her spouse, direct blood relations, along with their spouses, cousins up to the third degree, and guests who visit together with at least one of the members of the owner's family). The following categories are exempt from the tax: employees who visit as part of their duties, certified by their employer, students resident for study purposes or for professional training certified by the respective universities, schools or training bodies, minors under age eighteen, and self-employed workers who visit on certifiable employment grounds. The tax applies, per person and per day of visit, at the modest level of o Euro, and for visits in hotels with four or more stars, at two Euro.

9.1. – In particular, the applicant claims that the contested provision violates three different constitutional principles: a) Article 8(h) of the Statute of Sardinia Region, because the region violated the prohibition on the introduction of municipal taxes, which is a principle underlying the system of state taxation; or, in the alternative Article 119 of the Constitution, in the light of Article 10 of constitutional law No. 3 of 2001, because the region may not introduce a municipal tax without leaving the municipalities any margin of autonomy, other than the choice as to whether to impose the tax or not; b) Article 3 of the Constitution, because it is unreasonable that persons resident in Sardinia should not be subject to the tax, in spite of the fact that, compared to non residents, their "position […] is identical as regards the prerequisite for the tax"; c) Article 117(1) of the Constitution, with reference both to Article 12 of the EC Treaty, because EU citizens are discriminated against compared to regional residents, as well as Article 49 of the Treaty, since "the freedom to provide services within the Community is also violated when obstacles are created to the enjoyment of services by citizens of the Member States". These complaints will be examined separately.

9.1.1. – As far as head a) of the challenge is concerned, the court finds as a preliminary matter that it is only necessary to examine the contested violation of the Regional Statute because – as already clarified in paragraph 5.3. – the legislation introduced by the reform of Title V of Part II of the Constitution does not provide for a broader form of autonomy than that provided for under the Statute of Sardinia Region.

Therefore, pursuant to Article 10 of constitutional law No. 3 of 2001, the Statute alone applies.

The complaint is groundless on the merits.

As regards the alleged existence, within the system of state taxation, of a principle that the region may not create municipal taxes, the court finds that there is no such principle. In fact, the Regional Statute confers legislative powers on the region to regulate its own taxes, provided that it guarantee the “compliance” of these taxes with the principles underlying the system of state taxation. Within the ambit of this power, the region may at its discretion regulate the tax autonomy of the municipalities, and hence may also limit itself to reserving to the latter the decision on whether or not to introduce such taxes. Moreover, the region's full discretion in setting the level of autonomy – more or less far-reaching – which it intends to leave as a matter to be regulated by sub-regional bodies justifies, in the case before the court, the region's choice to leave to the discretion of the municipalities the sole choice over whether or not to introduce a tax entirely governed by the regional law, without granting them the additional power to determine the tax bands within the minimum and maximum limits set by the law (as on the other hand occurs for most local taxes). Even adopting a purely literal approach, it should also be pointed out that the contested article expressly defines, in sub-section 1, the visitors tax as “regional” (and not “municipal”, as argued by the state representative). Sub-section 18 specifies that 50 percent of the tax revenue collected by each municipality shall be allocated to the region, “for the purposes of the creation of an equalisation and solidarity fund destined for investments in the tourism sector in inland areas”, and only the remaining 50 percent to the municipality which must use it, pursuant to sub-section 1, “for initiatives in the sustainable tourism sector with particular reference to the improvement of services provided for tourists and the use of environmental resources”.

9.1.2. – In head b) of its challenge, the applicant claims that Article 3 of the Constitution has been violated, asserting that the contested provision is unreasonable because it does not subject Sardinia residents to the tax, , in spite of the fact that, compared to non residents, their “position […] is identical as regards the prerequisite for the tax”.

This complaint is also groundless because the applicant mistakenly argues that the situation of individuals resident in Sardinia is similar to that of non residents.

The prerequisite for the contested regional tax is specified by the law as visits by persons not registered in the civil registry of the population resident in the municipalities of Sardinia (with certain exceptions), in the firms which provide accommodation or facilities or housing units specified in the law, during the period falling between 15 June and 15 September of each year starting from 2008. Precisely by virtue of the visit, the above persons liable to pay the tax of necessity make use of both local and regional public services, as well as Sardinia's cultural and environmental cultural heritage, without contributing the the financing of the former and the protection of the latter through taxation. By contrast, individuals resident in Sardinia already, generally speaking, contribute to the public costs associated with these services and goods through the payment of various taxes and contributions, which on various grounds flow into the regional budget and are earmarked for the enhancement of the potential of the environment and the optimisation of regional territorial government (consider for example the share of state taxes associated with the region that is reserved to Sardinia Region under Article 8 of the Statute).

It is therefore correct – from a fiscal point of view – to distinguish between these individuals and those not resident in Sardinia, because the latter, in contrast to residents, not only are not subject to any levy, the revenue of which is specifically destined for the above purposes, but also, by visiting the region during the tourist high season, cause additional public costs beyond those which the region is able to project on the basis of the tax revenue already paid by residents. Non resident visitors therefore also impinge on the overall sustainability of tourism in the island (see, in paragraph 8.2.8.5., the similar rationale for the tax on stopovers imposed only on individuals not resident in Sardinia for tax purposes). Therefore, in imposing the visitors tax at a level that is not disproportionate only on individuals not resident in Sardinia, the regional legislature treats differently – yet adequately – different legal situations and, therefore does not overstep the limits of the requirement of reasonableness laid down in Article 3 of the Constitution.

Moreover, it is not possible to question the reasonableness of these arrangements by arguing – as the applicant does – that the conferral on each municipality of the power to "apply", ascertain, levy and collect the visitors tax "within its own territory" means that they must apply the tax also to visitors resident in other municipalities in Sardinia. By contrast, the fact that the tax is regional in nature means that, although it is applied by the municipalities within the ambit of the autonomy conferred upon them by the regional law, it must be paid only by individuals who – as noted above – do not contribute to financing the public costs indicated relating to Sardinia's services and cultural and environmental heritage because they are not resident in the region; similarly, it need not be paid by those who are already resident in the region and have therefore already contributed to this financing.

It is important to point out that, in accordance with its regional nature, and as noted above, the purpose of the tax is to finance the overall costs associated with the protection of the environment and the promotion of sustainable tourism throughout the region through appropriate compensatory transfers between the various areas. It follows that the regional legislature did not act unreasonably in considering Sardinia Region as a whole as a single – albeit non homogeneous – cultural and environmental area, which was accordingly assessed as a whole within the regional budget, thereby justifying the imposition of a tax only on visitors not resident in the island.

9.1.3. – Finally, the applicant argues (in head c) of its complaint), that Article 117(1) of the Constitution has been violated, with reference both to Article 12 of the EC Treaty, because citizens of the European Union are discriminated against compared to regional residents, as well as Article 49 of the Treaty, because "the freedom to provide services within the Community is also violated when obstacles are created to the enjoyment of services by citizens of the Member States".

The complaints are groundless.

It must be noted as a preliminary matter that there is no specific Community legislation governing visitors taxes. Such taxes are or have been provided for under the national law of the various Member States of the European Union, for example: the German *Kurtaxe*; the French *taxe de séjour*; the *impuesto sobre las estancias en empresas turísticas de alojamiento* formerly in force in the autonomous community of

the Balearic Islands; the *impôt sur les chambres d'hôtels et de pensions* in Brussels; the visitors tax provided for under Trentino Alto-Adige law No. 10 of 29 August 1976, which still partially applies in the Autonomous Province of Bolzano; the visitors tax formerly applicable in Italy pursuant to decree-law No. 1926 of 24 November 1938, converted into law by law No. 739 of 2 June 1939, and repealed, with effect from 1 January 1989, by decree-law No. 66 of 2 March 1989, converted into law, with amendments, by law No. 144 of 24 April 1989. It must also be pointed out that, as has also been noted by the European Commission, visitors taxes have not been subject to European harmonisation measures and, therefore, the Member States may establish the criteria for their application, provided that they are compatible with the principles of Community law and, in particular, that measures which have discriminatory effects on the exercise of the fundamental freedoms provided for in the EC Treaty are not introduced.

In the case before the court, the discrimination averred between persons resident in Sardinia and other citizens of the European Union is groundless, because the applicant mistakenly argues that the situation of the former is similar to that of the latter. By contrast, for the same reasons mentioned above in paragraph 9.1.2., in relation to the alleged violation of Article 3 of the Constitution, the situations compared by the applicant are dissimilar and justify the exemption from the tax for individuals resident in Sardinia.

As far as the freedom to provide services is concerned (Article 49 of the EC Treaty), the court finds that the contested tax does not affect visitors in a discriminatory or disproportionate manner, thereby restricting the freedom of visitors to travel to other Member States in order to receive services. Moreover, the applicant itself has not specified wherein the averred discrimination subsists in relation to the enjoyment of or freedom to provide services, especially since the contested visitors tax has precisely the goal of making the influx of visitors at any given time who are not officially resident in Sardinia sustainable. This is sufficient to preclude a preliminary reference to the ECJ pursuant to Article 234 of the EC Treaty.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) *declares* that Article 2 of Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), both as originally enacted and as amended by Article 3(1) of Sardinia Region law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), is unconstitutional;

2) *declares* that Article 3 of Sardinia Region law No. 4 of 2006 as originally enacted, and as amended by Article 3(2) of Sardinia Region law No. 2 of 2007, is unconstitutional;

3) *rules* that the questions regarding the constitutionality of Article 4 of Sardinia Region law No. 4 of 2006, as originally enacted, commenced by the President of the Council of Ministers in the alternative by appeal No. 91 of 2006, with reference to Articles 117 and 119 of the Constitution in the light of Article 10 of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part Two of the Constitution), are inadmissible;

4) *rules* that the questions regarding the constitutionality of Article 4 of Sardinia Region law No. 4 of 2006, as originally enacted, commenced by the President of the Council of Ministers in appeal No. 91 of 2006, with reference to Article 8(i) (in the text in force prior to the amendment by Article 1(834) of law No. 296 of 27 December 2006) of the Statute of Sardinia Region and Articles 3 and 53 of the Constitution, are groundless;

5) *rules* that the questions regarding the constitutionality of Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, commenced by the President of the Council of Ministers by appeal No. 36 of 2007, with reference to the principles invoked in relation to the contested Articles 3 and 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(1) and (2) of Sardinia Region law No. 2 of 2007, Articles 117(2)(e) and 120 of the Constitution, as well as Article 3 of an unspecified legislative text, are inadmissible;

6) *rules* that the questions regarding the constitutionality of Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of

2007, commenced by the President of the Council of Ministers by appeal No. 36 of 2007, with reference to Articles 1, 3, 8(h) (as amended by Article 1(834) of law No. 296 of 2006) of the Statute of Sardinia Region and Articles 3 and 53 of the Constitution, are groundless;

7) *rules* that the questions regarding the constitutionality of Article 5 of Sardinia Region law No. 2 of 2007, commenced by the President of the Council of Ministers by appeal No. 36 of 2007, with reference to Article 8(h) (as amended by Article 1(834) of law No. 296 of 2006) of the Statute of Sardinia Region, Article 3 of the Constitution and Article 117(1) of the Constitution, due to violation of Articles 12 and 49 of the EC Treaty, are groundless;

8) *orders* that the proceedings concerning the constitutionality of Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, commenced by the President of the Council of Ministers by appeal No. 36 of 2007, with reference to Article 117(1) of the Constitution, due to violation of Articles 3(g), 10, 49, 81 and 87 of the EC Treaty, be separated from those concerning the taxation of undertakings operating aircraft or recreational craft;

9) *reserves* to the separate order No. 103 of 2008 the ruling on a preliminary reference to the Court of Justice of the European Communities, pursuant to Article 234 of the EC Treaty, concerning the following questions over the interpretation of Articles 49 and 87 of the Treaty: a) whether Article 49 of the Treaty must be interpreted as a bar on the application of a provision, such as that provided for under Article 4 of Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), as amended by Article 3(3) of Sardinia Region law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), according to which the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out general business aviation activities ; b) whether, insofar as it provides that the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons

when carrying out general business aviation activities, Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007 constitutes – pursuant to Article 87 of the Treaty – a state aid to undertakings carrying on the same activity which are resident for tax purposes in Sardinia; c) whether Article 49 of the Treaty must be interpreted as a bar on the application of a provision, such as that contained in Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, according to which the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties; d) whether, insofar as it provides that the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties, Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007 constitutes – pursuant to Article 87 of the Treaty – a state aid for undertakings which carry on the same activities and which are resident for tax purposes in Sardinia;

10) *reserves* to the order mentioned under paragraph 9 any decision to stay proceedings, as separated pursuant to the above, pending the resolution of the said preliminary references.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 13 February 2008.

Signed:

Franco BILE, President

Franco GALLO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 15 April 2008.

The Director of the Registry

Signed: DI PAOLA