Corte costituzionale

JUDGMENT NO. 338 OF 2011

Alfonso QUARANTA, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 338 YEAR 2011

In this case the Court considered a reference from the Court of Cassation regarding legislation which provided that, in cases in which no declaration had been made by a property owner for the purposes of the municipal property tax, or if an excessively low level had been declared, then in the event of expropriation the indemnity due could be reduced on such a significant scale as to result essentially in the non-payment of compensation. The Court struck down the legislation as unconstitutional on the grounds that payment of compensation with no reasonable link to the value of a property amounted to an unlawful encroachment upon property rights, both under the Italian Constitution as well as the ECHR. Whilst the State enjoys a margin of appreciation over the enactment of measures to combat and punish tax evasion, this was subject to the proviso that any measures could not impose an excessive burden or entail an excessive penalty essentially resulting in substantive expropriation without compensation.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 16(1) of Legislative Decree no. 504 of 30 December 1992 (Rearrangement of the finances of the local authorities pursuant to Article 4 of Law no. 421 of 23 October 1992), replaced by Article 37(7) of Presidential Decree no. 327 of 8 June 2007 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest), initiated by the Joint Civil Divisions of the Court of Cassation by two referral orders of 14 April 2011, registered as nos. 158 and 159 in the Register of Orders 2011 and published in the *Official Journal of the Republic* no. 30, first special series 2011.

Considering the entries of appearance by the Consorzio per l'Area di Sviluppo Industriale Sassari-Porto Torres-Alghero [Consortium for the Sassari-Porto Torres-Alghero Industrial Development Area] and Astaldi S.p.A., as well as the interventions by the President of the Council of Ministers;

having heard the Judge Rapporteur Giuseppe Tesauro at the public hearing of 8 November 2011 and in chambers on 9 November 2011;

having heard Counsel Federico Isetta for the Consorzio per l'Area di Sviluppo Industriale Sassari-Porto Torres-Alghero, Counsel Vittorio Biagetti for Astaldi S.p.A. and the State Counsel [*Avvocato dello Stato*] Giuseppe Albenzio for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.- By two referral orders with largely identical content (no. 158 and no. 159 of 2011) – the latter considered at the public hearing of 8 November 2011 and the former in chambers on 9 November – the Joint Divisions of the Court of Cassation raised a question concerning the constitutionality of Article 16(1) del Legislative Decree no. 504 of 30 December 1992 (Rearrangement of the finances of the local authorities pursuant to Article 4 of Law no. 421 of 23 October 1992) subsequently, with effect from 30 June 2003, enacted in analogous terms by Article 37(7) of Presidential Decree no. 327 of 8 June 2007 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest), with reference to Articles 42(3) and 117(1) of the Constitution, in the light of Article 6 and Article 1 of the First Additional Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms, insofar as, in the event no declaration/report has been made for the purposes of the municipal real estate tax (*imposta comunale sugli immobile*, ICI) or if entirely negligible values have been declared/reported it does not specify a limit on the reduction of the expropriation indemnity such as to prevent the total negation of any reasonable relationship between the "venal value" [i.e. the replacement value] of the expropriated land and the amount due as indemnity, thereby causing detriment to the right of the expropriated party to genuine redress.

1.1.- Since the questions are identical, the proceedings should be joined in order to be treated together in one single judgment.

2.- According to both of the referral orders, the interpretation provided by this Court in judgment no. 351 of 2000 cannot be followed since the judgment concluded that, in the event that no declaration was made for ICI purposes, the expropriation indemnity

could only be paid after the tax situation had been resolved. However, such an interpretation was claimed not to be permitted by the wording of that provision and a systematic interpretation, amongst other things because it would render irrelevant the original conduct of the taxpayer, and would also breach the principle of the reasonable length of trials.

2.1.- After a detailed examination of the case law of the Court of Cassation subsequent to the aforementioned judgment, the lower court concluded that Article 16 of Legislative Decree no. 504 of 1992 should be interpreted to the effect that, in cases in which a false statement has been made, the "penalty" of the reduction of the expropriation indemnity should apply with reference to the last statement or report filed before the indemnity was formally set, whilst any later amendments or voluntary adjustments should remain irrelevant, and that such arrangements should necessary also apply in cases in which no ICI statement/report was filed, with the consequence that in such cases no expropriation indemnity would be due to those who had evaded the full amount of tax.

2.2.- According to the Joint Divisions, such an interpretation of the contested provision, adopted as the sole possible interpretation, would however violate the principles of constitutional law invoked on the grounds both of their partial amendment – with regard to Article 117(1) of the Constitution, as replaced by Article 3 of Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), in the light of Article 42(3) of the Constitution – as well as the development of the case law of the Constitutional Court. According to that case law, any provision which does not guarantee "genuine redress" for the harm suffered as a result of the occupation or expropriation of building land will violate Article 42(3) of the Constitution, and the international law obligations enshrined under Article l of the Additional Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms, with which Parliament is required to comply pursuant to Article 117(1) of the Constitution.

After concluding that it was not possible to interpret the contested provision in such a manner as to specify any form of "minimum guaranteed value" including in cases of non-declaration or the declaration of a negligible value, the lower court held that the legislation altered the relationship between the scale of the penalty and the seriousness

of the violation. Therefore, in providing for expropriation indemnity based on facts and circumstances which are not in any way associated with the harm resulting from the expropriation and the criteria of the reasonable level of the indemnity due to the expropriated party, Article 16 is claimed to be unconstitutional as it may even result in the negation of any redress.

3.- As a preliminary matter, with regard to the judgment in case no. 158 of 2011, it should be noted that the referring court in actual fact limits itself to recalling that the main proceedings were initiated by appeal to the Court of Cassation against judgment no. 928 of 5 October 2004 issued by the Catania Court of Appeal, though without specifying the date of the expropriation or the payment of the indemnity which is relevant in order to determine the applicability *ratione temporis* of the contested provision, which was replaced by Article 37(7) of Presidential Decree no. 327 of 2001.

The question is therefore manifestly inadmissible since, as has been asserted on various occasions in the case law of this Court, the lacking or inadequate description of the facts of the case, which is precluded by the principle of the self-sufficiency of the referral order and cannot be remedied by subsequent cognisance, precludes the required review of the relevance of the question (see *inter alia* orders nos. 6 and 3 of 2011, nos. 343, 318 and 85 of 2010 and nos. 211, 201 and 191 of 2009).

4.- On the merits, the question raised by referral order no. 159 of 2011 is well founded.

5.- In raising the question of constitutionality, the referring court starts from the interpretation of Article 16 regarded by it as the only one possible. In its opinion, the terms of that provision and ordinary canons of interpretation do not enable the provision to be interpreted in a manner compatible with the Constitution.

Accordingly, this premise requires a preliminary examination of the case law on the applicability of the provision to situations in which no statement/report of the value of building land for ICI purposes has been made.

5.1.- Article 16(1) of Legislative Decree no. 504 of 1992, entitled “expropriation indemnity”, provides as follows: “In cases involving the expropriation of building land the indemnity shall be reduced by an amount equal to the value stated in the last statement or report filed by the expropriated party for the purposes of the application of the tax where the value declared is lower than the expropriation indemnity determined

in accordance with the criteria set forth under applicable legislation". This Article was then repealed by Article 58(1)(cxxxiv) of Presidential Decree no. 327 of 2001, as amended by Legislative Decree no. 302 of 27 December 2002, with effect from 30 June 2003 (in accordance with Article 3 of Decree-Law no. 122 of 20 June 2002, converted with amendments into Article 1(1) of Law no. 185 of 1 August 2002).

The provision accordingly stipulated, solely in respect of building land, a reduction in the expropriation indemnity when the venal value declared or reported by the expropriated party for ICI purposes was lower than the indemnity. As a further effect provision was made (without distinction between building land and other real estate) for an increase in the indemnity equal to the difference (plus interest) between the amount of tax (ICI) paid by the expropriated party or its successor for the same property during the last five years and that resulting from the calculation of tax on the basis of the indemnity liquidated.

5.2.- This Court examined the legislation enacted by the contested Article 16, *inter alia* with reference to Article 3 of the Constitution, in judgment no. 351 of 2000 and orders no. 401 of 2002, no. 539 of 2000 and no. 333 of 1999. According to these decisions, when interpreting the said provision, it is irrelevant whether or not it provided for a penalty, or whether a prerequisite for such a penalty was an intentional evasion or tax or an error. Indeed, this provision constituted the "reasonable application of the principle according to which, within their relations with the public administration, which are of necessity characterised by loyalty, correctness and collaboration in view of the fact that political, economic and social duties of solidarity are at issue (Article 2 of the Constitution), including those under tax law, private individuals cannot avoid the consequences of their declarations".

In particular, after identifying the purpose of the provision in the recovery of tax and creation of a deterrent against tax evasion, it has been asserted that "the fact as to whether evasion was full or partial, that is whether or not it depended on conscious intention or a mere error in the declaration, is of little import for the purposes of constitutionality", with the result that the "various situations of total or partial evasion formulated in the referral order are based on entirely mistaken prerequisites". The provision should therefore have been correctly interpreted to the effect that "full evasion is by no means favoured, as it is under all circumstances destined to incur penalties due

to non-declaration, as well as the charging of the ICI which the individual sought to evade". Above all, for our present purposes, the expropriation indemnity could only have been ascertained after establishing that it did not exceed the maximum limit compared against the "value" declare for ICI purposes, and hence only after submission of the relative ICI return and the resulting resolution of the tax situation, with the actual initiation of recovery of the tax and the imposition of penalties. In any case, this presupposed that the land concerned was building land (and was such at the time of the statement) and that the expropriated party was required to pay ICI at the time the indemnity was liquidated.

5.3.- The case law of the Court of Cassation after this Court's interpretative judgment, no. 351 of 2000, rejecting the question of constitutionality, took account in various ways of the arguments adopted by the Court, giving rise to various approaches which differed above all with regard to the manner of application of the corrective mechanism devised by this Court.

The Joint Civil Divisions provided a detailed account of those approaches in the referral order, recalling first and foremost that adopted in the aforementioned judgment which held that Article 16 of Legislative Decree no. 504 of 1992 did not apply in situations in which a report or statement for ICI purposes had not been filed.

Moreover, the court also acknowledged that the subsequent case law of the Court of Cassation had reasserted the previous interpretation of the provision, including in the light of the judgment of the Constitutional Court, and predominantly followed the interpretation provided by this Court, to the effect that those evading the full amount of tax would not lose their right to the expropriation indemnity, but would suffer exclusively the penalties due to non-declaration, as well as the charging of the ICI which they sought to evade, as the expropriation indemnity may only be paid after confirmation that it does not exceed the maximum level compared against the value ascertained for ICI purposes after the tax situation has been resolved.

6.- Thus, having been vested "with a question of principle of particular importance concerning the relationship between the liquidation of the expropriation indemnity and subjection to ICI", the Joint Civil Divisions state in the referral order that precisely this position must be reviewed, in the sense that the literal terms of and the rationale

underpinning the provision require a conclusion that it apply to full evaders, and that it is not possible to avoid the infringement of the constitutional parameters invoked.

Therefore, since the positions within the case law are not unequivocal, the Joint Divisions of the Court of Cassation concluded, exercising its role as the guarantor of the uniform interpretation of the law – which this Court must take into account – that it was necessary to resolve the contrast in that manner. This interpretation therefore constitutes part of the "living law" (i.e. uniform and settled case law), the compatibility of which with the constitutional principles invoked must be ascertained.

7.- In view of the above, having ascertained that the provision was applicable both to cases in which no declaration was made for ICI purposes as well as to cases in which a declaration of a negligible value was made, the referring court concluded that the original conduct adopted in relation to taxation necessarily impinged upon the quantification of the expropriation indemnity.

7.1.- When ruling on the challenges raised by the referring court, it is important to recall that both the case law of this Court as well as that of the European Court of Hunan Rights has stipulated a minimum core of protection of ownership rights in matters relating to the expropriation indemnity, which is guaranteed under Article 42(3) of the Constitution and Article 1 of the First Additional Protocol to the ECHR, according to which the expropriation indemnity may not disregard "any assessment pertaining to the specific requisite features of the property" and cannot reject a "reasonable link" with market value (see most recently judgment no. 181 of 2011, and previously judgment no. 348 of 2007).

According to that principle, any encroachment upon ownership rights must strike in the first place a "fair balance" between the requirements of general interest of the community and the prerequisite of safeguarding the fundamental rights of the individual. Secondly, whilst a broad margin of appreciation is left to ordinary legislation, the acquisition of property without payment of compensation which is reasonably related to its value will normally amount to disproportionate interference.

Therefore, whilst it is not subject to a duty to set the expropriation indemnity at the full market value of the property seized, legislation cannot refrain from striking a "fair balance" between the general interest and the safeguarding of the fundamental rights of individuals.

This principle also applies in relation to the measures which the State adopts in this area in order to "secure payment of taxes or other contributions or penalties" pursuant to Article 1(2) of the First Additional Protocol to the ECHR. This provision, interpreted also in the light of the approach adopted within the case law of the Strasbourg Court, grants broad discretion to national parliaments in setting their fiscal policies, yet nonetheless does not allow tax prevention and deterrent measures to be considered lawful where they are not foreseeable (or are merely contingent) or impose an excessive burden on the individual making the declaration, or finally entail an excessive penalty, as in cases which may result in substantive expropriation without compensation (judgment no. 13616188 of 22 September 1994 in *Hentrich v. France*).

Within the framework of these principles, the contested provision as interpreted by the Joint Civil Divisions violates both Article 42(3) of the Constitution as well as Article 117(1) of the Constitution in the light of Article 1 to the First Additional Protocol to the ECHR. The legislation set forth under Article 16 is not in fact compatible with the minimum core of protection for ownership rights mentioned above, since it does not make provision for any mechanism which, in cases in which no ICI declaration/report is made, makes it possible to impose a limit on the total denial of that indemnity, whilst in any case guaranteeing that there is a reasonable relationship between the venal value of the expropriated land and the amount of that indemnity. However, such an infringement will also occur in cases in which negligible values are declared/reported or values which could otherwise undermine the necessary relationship of reasonableness and proportionality between the unlawful conduct for tax purposes and the penalty, and hence the ruling of unconstitutionality must of necessity also cover the aforementioned aspect of the legislation. The foregoing is without prejudice to Parliament's discretionary power to impose penalties which, as the case may be, also impinge upon the expropriation indemnity, provided that they do not result in the substantial confiscation of the property, unlawfully sacrificing the right of ownership to the exclusive financial interest which was harmed by the taxpayer, taking account of the different nature of the proceedings and of the guarantees which apply to tax assessments and the relative penalties, which moreover have already been independently provided for under Legislative Decree no. 504 of 1992.

8.- Ultimately, Article 16(1) of Legislative Decree no. 504 of 1992 must be ruled unconstitutional.

9.- Pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), Article 37(7) of Presidential Decree no. 327 of 2001, which regulates the reduction of the indemnity with effect from 30 June 2003, must also be ruled unconstitutional on a consequential basis. Indeed, this legislation lays down provisions reiterating those ruled unconstitutional in this judgment.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) *declares* that Article 16(1) of Legislative Decree no. 504 of 30 December 1992 (Rearrangement of the finances of the local authorities pursuant to Article 4 of Law no. 421 of 23 October 1992) is unconstitutional;

2) *declares*, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), that Article 37(7) of Presidential Decree no. 327 of 8 June 2007 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest) is unconstitutional on a consequential basis;

3) *rules* that the question concerning the constitutionality of Article 16(1) of Legislative Decree no. 504 of 30 December 1992 (Rearrangement of the finances of the local authorities pursuant to Article 4 of Law no. 421 of 23 October 1992), raised by the Joint Civil Divisions of the Court of Cassation by the referral order of 14 April 2011 (no. 158 of 2011) with reference to Articles 42(3) and 117(1) of the Constitution, is manifestly inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 December 2011.

(omitted)