Corte costituzionale

JUDGMENT NO. 15 OF 2012

Alfonso QUARANTA, President

Alessandro CRISCUOLO, Author of the Judgment

JUDGMENT NO. 15 YEAR 2012

In this case the Court considered a referral order concerning an authoritative interpretation of legislation governing the payment of social security contributions where the taxpayer fell within the scope of different social security funds, arguing that the enactment breached the principles of legal certainty, the prohibition on retroactive legislation and the equality of the parties within the trial. The Court rejected the challenge as groundless, holding that "Parliament may ... enact retroactive legislation, including interpretation laying down authoritative interpretation, provided that the retroactivity is adequately justified by the requirement to protect principles, rights and interests of constitutional standing, all of which amount to 'imperative reasons of general interest' for the purposes of the ECHR", referring to the fact that the Strasbourg Court also did not consider the rule against retroactive legislation to be absolute

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 12(11) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness) converted, with amendments, into Article 1(1) of Law no. 122 of 30 July 2010, referred by the Genoa Court of Appeal, sitting as an employment appeal tribunal, in the proceedings pending between the National Institute for Social Security (*Istituto nazionale per la previdenza sociale*, INPS) and L. L. and another, by the referral order of 22 November 2010, registered as no. 59 in the Register of Orders 2011 and published in the Official Journal of the Republic no. 16, first special series 2011.

Considering the entry of appearance by the INPS and the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Alessandro Criscuolo at the public hearing of 13 December 2011;

having heard Counsel Lelio Maritato for the INPS and the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.— By the referral order mentioned in the headnote, the Genoa Court of Appeal, sitting as an employment appeal tribunal, questions the constitutionality of Article 12(11) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness) converted, with amendments, into Article 1(1) of Law no. 122 of 30 July 2010, with reference to Articles 3, 24(1) 102, 111(2) and 117(1) of the Constitution.

2.— The referring court states that it was seized of the main appeal, filed by the INPS, and the cross-appeal filed by Mrs L. L., against the judgment in which the court of first instance rejected the challenge by that private party to a final tax demand for payment of the contributions due in respect of registration with the social security fund for merchants [*gestione commercianti*], but accepted the subordinate request seeking annulment of registration in the separate social security fund for self-employed workers [*gestione separata*] pursuant to Article 2(26) of Law no. 335 of 8 August 1995 (Reform of the mandatory and complementary pension system), and ordered the INPS to reimburse the contribution concerned.

In the opinion of the Court the prerequisites were met for an obligation on the private party to register with the *gestione commercianti* on the grounds that she was at the same both the deputy chairperson of the board of directors of a company carrying on the retail sale of clothing, and the manager of a retail outlet for the same company, acting in her capacity as assistant family member (daughter of the shareholder B. L.).

It is therefore clear that, in respect of the performance of her activity as director, she is also registered with the *gestione separata* pursuant to Article 2(26) of Law no. 335 of 1995.

The referring court considers that the question is relevant since the entry into force of Article 12(11) of Decree-Law no. 78 whilst the appeal proceedings were pending would entitle the INPS to claim the two forms of contribution, since the principle of

predominance provided for under Article 1(28) of Law no. 662 of 23 December 1992 (Measures on the rationalisation of the public finances) must be precluded in cases in which the dual activities of director and shareholder (or the assistant family member of a shareholder) engaging in sales activity are carried on in parallel, even within the same undertaking.

The Genoa Court of Appeal also considers that the question of constitutionality is not manifestly groundless with reference to the parameters invoked.

In particular, Article 12(11) is claimed to breach: a) Article 3 of the Constitution, with regard to the general requirement that legislation be reasonable; b) Article 24(1) of the Constitution with regard to the efficacy of the right of private individuals to take court action in order to protect their legitimate rights and interests; c) Article 102 of the Constitution with regard to the integrity of the powers vested under constitutional law in the courts; and d) Article 111(2) of the Constitution with regard to the equality of the parties to court proceedings. According to the referring court, the limits set forth within the case law of the Constitutional Court (judgments no. 209 of 2010 and no. 397 of 1994) regarding laws with retroactive effect are claimed to have been breached since: 1) according to the account provided by the Joint Divisions of the Court of Cassation in judgment no. 3240 of 12 February 2010, the requirement that an individual register with the public insurance fund in relation to the activities carried out on a predominant basis was introduced precisely in order to address the provision set forth in the same Law stipulating the obligation for shareholders of limited liability companies (s.r.l.) to register with the *gestione commercianti* in order to ensure that self-employed activity on a modest scale and with modest income is not excessively encumbered; 2) the legislation, which impinged upon the powers vested under constitutional law in the courts, was enacted according to urgent procedures a few months after the judgment issued in relation to this issue by the Joint Divisions of the Court of Cassation (judgment no. 3240 of 2010, cited above), which had rejected the stance adopted by the INPS within the innumerable analogous proceedings pending before the courts.

In the opinion of the Court, the contested provision also breaches Article 117(1) of the Constitution due to violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), approved in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955, since the national

legislature adopted legislation with a stated interpretative purpose notwithstanding the fact that a significant number of cases involving litigation were pending and notwithstanding the resolution of the issue by the Joint Divisions of the Court of Cassation (in judgment no. 3240 of 2010), which ruled against the INPS, thereby violating the principle of "equality of arms" between the parties to the trial, without any "overriding reasons of general interest", but rather in order to increase the contribution revenue of the INPS, and despite the lack of any requirement for clarification of an objective ambiguity within the legislation.

3.— The question is groundless.

3.1.— It is appropriate to set out the principal reference framework of legislation and case law within which the issue is situated.

Article 2(26) of Law no. 335 of 1995 provided that "With effect from 1 January 1996, with the purpose of extending mandatory general insurance for invalidity, old age and survivors, any individual who carries on as a habitual profession, including on a non-exclusive basis, self-employed activity falling under Article 49(1) of the consolidated text on income taxes, approved by Presidential Decree no. 917 of 22 December 1986, as amended and supplemented, any individual who is a party to a contract for coordinated and continuous collaboration pursuant to Article 49(2)(a) of the consolidated text, and persons engaged in door-to-door sales pursuant to Article 36 of Law no. 426 of 11 June 1971, shall be required to register with the INPS in a dedicated *gestione separata*. This obligation shall not apply to individuals in receipt of a study grant, with respect solely to the relevant activities".

In replacing Article 29(1) of Law no. 160 of 3 June 1975 (Provisions on improvements in pensions and the establishment of a link between pensions and earnings), Article 1(203) of Law no. 662 of 23 December 1996 (Measures on the rationalisation of the public finances) provided that "The requirement for registration in the insurance fund for the operators of commercial activities pursuant to Law no. 613 of 22 July 1966, as amended and supplemented, shall apply in respect of individuals who comply with the following prerequisites: that they a) are the proprietors or managers on their own account of undertakings which, irrespective of the number of employees, are organised and/or directed predominantly through the work of such individuals and their family members, including relatives up to the third degree, irrespective of whether

related by blood, or are assistant family members responsible for a retail outlet; b) bear full responsibility for the undertaking and accept all liabilities and risks relating to its management. This prerequisite shall not apply in respect of family members with responsibility for a retail outlet, or to the shareholders of limited liability companies; c) personally participate in the company business on a habitual and predominant basis; and d) where required under law or regulations, hold licences or permits and/or are registered in professional registers, other registers or rolls".

Article 1(208) of Law no. 662 of 1996 in turn provided that "Any individuals referred to under the previous paragraphs who carry out various self-employed activities which are amenable to different forms of mandatory insurance for invalidity, old age and survivors at the same time, including within one single undertaking, shall be registered with the insurance fund stipulated for the activity to which they personally dedicate their professional efforts on a predominant basis. It shall be for the National Institute for Social Security to determine the insurance fund with which the individual is to be registered in accordance with the predominant activity. The interested person may appeal against this decision within 90 days of intimation of the measure to the Board of Directors of the Institute, which shall adopt a definitive decision, after hearing the administrative committees for the respective pension funds".

A significant body of litigation has emerged in relation to the interpretation of this legislation with regard to the following question: whether the shareholder of a commercial company having the form of a company limited by shares (s.r.l.) who participates personally in the company business on a habitual basis, and is at the same time also a director of that company, receiving a corresponding remuneration, is required to register with (and to pay the contribution to) the two corresponding social security funds, that is the *gestione commercianti* for the former activity and the *gestione separata* for the latter, or whether he is required to register only with one of the two funds, specifically the relevant fund for the predominant activity.

It should be pointed out in this regard that the situation at issue in the proceedings below the lower court does not coincide exactly with that referred to above, because in the case under examination the individual subject to the requirement of dual registration is not a shareholder but the assistant family member of a shareholder, a family member

who performs the duties of a company director (vice chairperson), whilst at the same time carrying on sales activity within the undertaking.

However, according to the reasons given by the lower court, which are not implausible, the question set out above also arises in the same terms with reference to the present case, "since the same prerequisites have been met and the same legislation is applicable". It is therefore necessary to examine the question.

Within the case law resulting from the litigation referred to above, the predominant position adopted by the merits courts (and endorsed by the INPS) has concluded that it is necessary to register with the two corresponding pension funds, whilst the case law of the Court of Cassation largely takes the opposite view, even though a conflict did arise within the employment division of the Court of Cassation, which resulted in judgment no. 3240 of 2010 of the Joint Civil Divisions.

Judgment no. 3240 asserted the following principle of law: "The rule laid down by Article 1(208) of Law no. 662 of 1996 – according to which any individuals who carry out various self-employed activities which are amenable to different forms of mandatory insurance for invalidity, old age and survivors at the same time, including within one single undertaking, shall be registered with the insurance fund stipulated for the activity to which they personally dedicate their professional efforts on a predominant basis – also applies to the shareholders of limited liability companies who engage in commercial activities within that company, whilst at the same time performing the duties of a director, including the sole director. In such cases, the choice over whether the individual is to register with the *gestione separata* pursuant to Article 2(26) of Law no. 335 of 1995 or with the *gestione commercianti* pursuant to Article 1(203) of Law no. 662 of 1996 shall be for the INPS, depending upon which activity is predominant. The contribution shall be established exclusively on the basis of the income earned from the predominant activity according to the rules applicable to the relevant social security fund".

The provision contested in the referral order, namely Article 12(11) of Decree-Law no. 78 of 2010, converted, with amendments, into Article 1(1) of Law no. 122 of 2010 – which entered into force after the judgment of the Joint Divisions referred to above – provides that "Article 1(208) of Law no. 662 of 23 December 1996 shall be interpreted to the effect that self-employed activities in respect of which the principle of subjection

to insurance of the predominant activity applies shall be those carried on through an undertaking by merchants, small businesses and farmers who are registered in one of the corresponding INPS social security funds. Therefore, Article 1(208) of Law no. 662 of 1996 shall not apply to employment relations for which there is a mandatory requirement of registration with the social security fund provided for under Article 2(26) of Law no. 335 of 8 August 1995".

By order no. 22557 of 13 October 2010, the employment law division of the Court of Cassation once again requested the intervention of the Joint Divisions, finding that the legislation referred to above had been enacted after judgment no. 3240 of 2010, "which re-opened the debate on interpretation".

The Joint Civil Divisions issued judgment no. 17076 of 24 May 2011 (filed on 8 August 2011), which asserted the following principles: "a) Article 12(11) of Decree-Law no. 78 of 31 May 2010, converted into law, with amendments, by Article 1(1) of Law no. 122 of 30 July 2010 – which provides that Article 1(208) of Law no. 662 of 23 December 1996 is to be interpreted to the effect that self-employed activities in respect of which the principle of subjection to insurance of the predominant activity applies shall be those carried on through an undertaking by merchants, small businesses and farmers who are registered in one of the corresponding INPS social security funds, whereas employment relations for which there is a mandatory requirement of registration with the social security fund provided for under Article 2(26) of Law no. 335 of 8 August 1995 shall remain outwith the scope of Article 1(208) of Law no. 662 of 1996 – is a provision with the stated and actual effect of providing an authoritative interpretation, intended to clarify the scope of the provision subject to interpretation and therefore, as such, does not violate the principle of a fair trial pursuant to Article 6 ECHR, as it amounts to the legitimate exercise of legislative powers guaranteed by Article 70 of the Constitution; and b) in the event that activities are carried on through an undertaking by merchants, small businesses and farmers at the same time as the conduct of self-employed activities in respect of which registration with the *gestione separata* pursuant to Article 2(26) of Law no. 335 of 8 August 1995 is mandatory, the contributions shall not be determined on a unitary basis with reference to the predominant activity carried on, as provided for under Article 1(208) of Law no. 662 of 23 December 1996".

3.2.— With reference to the framework summarised above, it must be recalled that, whilst the prohibition on the retroactivity of legislation does constitute a fundamental principle of the rule of law, it does not benefit from privileged protection pursuant to Article 25 of the Constitution (judgments no. 236 of 2011 and no. 393 of 2006). In accordance with this provision, Parliament may therefore enact retroactive legislation, including interpretation laying down authoritative interpretation, provided that the retroactivity is adequately justified by the requirement to protect principles, rights and interests of constitutional standing, all of which amount to "imperative reasons of general interest" for the purposes of the ECHR, which also subsist in this case.

Accordingly, a provision resulting from a law laying down an authoritative interpretation cannot be said to be unconstitutional where it is limited to ascribing a meaning to the provision subject to interpretation which is already inherent within it, and may be recognised as one of the possible readings of the original text (see *inter alia*, judgments no. 271 and no. 257 of 2011, no. 209 of 2010 and no. 24 of 2009).

In such cases in fact, the interpretative legislation has the purpose of clarifying "situations involving objective uncertainty within the legislation" resulting from an "unresolved debate within the case law" (judgment no. 311 of 2009), or of "re-establishing an interpretation which is more in keeping with the original legislative intention" (also judgment no. 311 of 2009) in order to protect legal certainty and the equality of private individuals, that is, principles of preeminent constitutional significance.

Within this framework, the case under examination does not involve any breach of Article 3 of the Constitution.

Indeed, the interpretative option chosen by Parliament did not introduce any foreign elements into the legislation subject to interpretation, but rather allocated them a meaning which was recognisable as one of the possible readings of the original text (see *inter alia* judgment no. 257 of 2011), that is rendered binding a solution which could nonetheless be ascribed to the literal wording of the provision subject to interpretation. This is clear from the finding that the interpretative option had been endorsed within the case law of the merits courts prior to the entry into force of Decree-Law no. 78 of 2010, as well as in the employment law division of the Court of Cassation, so much so as to result in the referral of the question regarding the interpretation of Article 1(208) of Law

no. 662 of 1996 to the Joint Divisions of the Court on two separate occasions within a short space of time.

It is also significant that in the most recent judgment (referred to above), after asserting that the provision challenged in these proceedings amounted to a rule "with the stated and actual effect of providing an authoritative interpretation, intended to clarify the scope of the provision subject to interpretation", the Joint Divisions applied it, thereby setting aside the previous line of case law.

It must also be added that precisely the contrast which emerged out of the case law regarding the interpretation of Article 1(208) of Law no. 662 of 1996 – a source of interpretative doubts which had the consequence of an increase in litigation – provides further justification for the enactment of the legislation intended to guarantee certainty of application within the legal system, which thus further excludes any aspect of unreasonableness.

3.3.— As regards the other grounds for challenge raised by the referring court with reference to Article 24(1) of the Constitution (the efficacy of the right of private individuals to take court action in order to protect their own rights and legitimate interests is claimed to have been violated), Article 102 of the Constitution (the integrity of the constitutional powers of the judiciary is claimed to have been violated) and Article 111(2) of the Constitution (the principle of the equality of the parties to a trial is claimed to have been violated), it is noted that: 1) the reference to Article 24 of the Constitution is not relevant because the legislation contested in this case does not impinge upon procedural rights, but rather operates on a substantive level, and hence does not violate the right to judicial relief protected by the provision of the Constitution invoked (see judgment no. 29 of 2002, section 4.4 of the Conclusions on points of law); 2) there has been no violation of Article 102 of the Constitution because, according to the arguments set out in the previous section, the legislation enacted must be deemed to be legitimate, whilst the courts are not guaranteed "an exclusive prerogative over the exercise of interpretative activity which is such as to preclude that vested in the legislature, since the allocation by statute of a specific meaning to a provision does not infringe the *potestas iudicandi*, but defines and delineates the legislative sphere which falls within that *potestas*" (judgment no. 234 of 2007, section 17 of the Conclusions on points of law); and 3) similarly there has been no violation of Article 111(2) of the

Constitution because – without prejudice to the point that the impact of an interpretative provision on pending proceedings is a structurally inherent phenomenon (see judgment no. 376 of 2004; order no. 428 of 2006) – the said provision does not impinge upon the exercise of judicial powers or on the quality of the parties within the specific trial, but rather enacts general and theoretical legislation on the interpretation of another provision, and hence operates on a different level to that of the application by the courts of provisions in specific cases (see order no. 428 of 2006, cited above).

Moreover, for the reasons set out above, the Court finds that there was no violation of Article 117(1) of the Constitution, in relation to Article 6 ECHR, as alleged.

After recalling the interpretative position stated by this Court in judgments no. 349 and 348 of 2007, the referring court considers that, insofar as they violate Article 6 of the Convention, the contested provision violates the parties' right to a fair trial before an independent and impartial court, with the meaning and scope clarified within the case law of the European Court in Strasbourg and absent any "overriding reasons of general interest" capable of justifying the enactment of legislation, which was in reality intended to increase the contribution revenue of the INPS (reference is made to judgment no. 36813/2007 of that Court in the case *Scordino v. Italy*).

The question is also groundless in this respect.

Without prejudice to the principles asserted in judgments no. 349 and 348 of 2007, in judgment no. 257 of 2011 this Court considered a question which is similar in various respects to that under examination here, holding as follows: "with regard to Article 6 ECHR it must be observed that, whilst it has on numerous occasions censured undue interference by the State legislatures in the administration of justice (for an overview of the cases considered, see judgment no. 311 of 2009 of this Court), the Strasbourg Court has not sought to assert an absolute prohibition on legislative interference, since on various occasions it has held that particular retroactive legislation enacted by national parliaments (see the judgment cited above, section 8 of the Conclusions on points of law) do not violate Article 6. The legal rule, which was asserted also recently in the judgment of the second section of 7 June 2011 in the case *Agrati and others v. Italy* states that "If, as a matter of principle, with respect to private law the legislature is not prevented from regulating the rights available under applicable legislation through new retroactive provisions, the principle of the pre-eminence of law and the concept of a fair

trial enshrined in Article 6 preclude any interference by the legislature in the administration of justice with the purpose of influencing the resolution of a dispute other than in cases involving imperative reasons of general interest. The requirement of equality of arms entails the obligation to offer each party the reasonable opportunity to present its case, under conditions which do not entail a substantial disadvantage compared to the other party".

Therefore, also according to the said rule there is scope, albeit limited, for legislative intervention with retroactive effect (without prejudice to the limits laid down under Article 25 of the Constitution), if this is justified by "imperative reasons of general interest", which are to be assessed first and foremost by the national legislature and by this Court, with reference to principles, rights and interests of constitutional standing, and within the limits of the margin of appreciation acknowledged to the individual state legal systems under the European Convention.

Conversely, if every initiative of this type were to be regarded as undue interference with the purpose of influencing the resolution of a dispute, the rule itself would be destined to remain a mere assertion without any substantive meaning" (see judgment no. 257 of 2011, section 5.1 of the Conclusions on points of law).

In this case, the contested provision was limited to laying down one of the possible interpretative options within the original text of the legislation, which had moreover already been endorsed by a significant part of the merits courts; the contrast which arose in relation to this issue was also examined by the Court of Cassation which, according to the approach most recently adopted (see judgment no. 17076 of the Joint Divisions of the Court of Cassation of 24 May 2011), endorsed the solution chosen by Parliament; this solution resolved a situation of objective uncertainty, thereby contributing to the fulfilment of principles of undoubted general interest and constitutional standing, such as legal certainty and the equality of all private individuals before the law.

The fact that the pursuit of these results may also have had ramifications in terms of the contributions revenue of the INPS amounts to an indirect circumstance and a mere fact which is not capable of impinging upon the legality of the legislative enactment.

In conclusion, the question of constitutionality raised by the referral order mentioned in the headnote must be ruled groundless.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 12(11) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted, with amendments, into Article 1(1) of Law no. 122 of 30 July 2010, raised by the referral order mentioned in the headnote by the Genoa Court of Appeal, sitting as an employment appeal tribunal, with reference to Articles 3, 24(1), 102, 111(2) and 117(1) of the Constitution, in the light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and ratified and implemented by Law no. 848 of 4 August 1955, is groundless.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 January 2012.

(omitted)