JUDGMENT NO. 120 YEAR 2021

In this case, the Constitutional Court considered a referral order from the Provincial Tax Board for Venice, which raised questions as to the constitutionality of provisions related to the tax collection system. The provisions in question, initially established in 1999 and reproduced without significant alterations in 2009, established the compensation for tax collection agencies in the form of a commission to be paid by delinquent taxpayers, and calculated as a fixed percentage of the amount of arrears that the taxpayer paid in back taxes. The Court agreed with the referring court that these provisions are disproportionate. The court here cited the "paradox" of saddling "solvent," if late-paying, taxpayers with the excessive costs of sustaining the huge number of collections enforcement attempts that are unsuccessful, and the fact that tax collections are now carried out by centralized, public entities and no longer by private licensees in need of a commission separate and apart from the general State budget, as well as the general ineffectiveness of the collections system, which has failed to collect around 987 billion Euro over the past twenty years alone. However, the Court ultimately ruled that the questions as to constitutionality were inadmissible, since the referring court's request for an additive ruling (adding minimum and maximum limits to the commission amount envisaged by the provision, and by creating an inversely proportionate relationship between the amount of the arrears to be collected and the amount of the commission) did not propose the only Constitutionally acceptable solution, and the selection of a solution, from myriad constitutionally acceptable choices, fell within the exclusive discretion of the legislator. Thus, the Court called for the urgent attention of the legislator, in order to reform the system of collections.

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings on the constitutionality of Article 17(1) of Legislative Decree No. 112 of 13 April 1999 (Reorganization of the national tax collection service, implementing the delegation of powers envisaged by Law No. 337 of 28 September 1998), as replaced by Article 32(1)(a) of Decree-Law No. 185 of 29 November 2008 (Urgent measures in support of families, work, employment and business and to re-design the national strategic framework to confront the economic crisis), converted, with modifications, in Law No. 2 of 28 January 2009. Proceedings were initiated by the Provincial Tax Board for Venice in the midst of proceedings between the *Azienda unità locale socio sanitaria* (ULSS) *12 Veneziana* and *Equitalia Nord S.P.A.*, Venice collections agency, with a referral order of June 5 2019, registered as No. 85 of the 2020 Register of Referral Orders and published in the *Official Journal* of the Republic No. 29, first special series 2020.

Having regard to the entry of appearance filed by *Azienda ULSS 12 Veneziana*, as well as the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Luca Antonini at the public hearing of 25 May 2021;

after hearing Counsel Massimo Luciani and Loris Tosi for *Azienda ULSS 12 Veneziana* and State Counsel Gianni De Bellis for the President of the Council of

Ministers, who appeared remotely, in compliance with the Decree of the President of the Court of 18 May 2021, point 1);

after deliberations in chambers on 25 May 2021.

[omitted]

Conclusions on points of law

1.– With a referral order of 5 June 2019 (Referral Order No. 85 of 2020), the Provincial Tax Board [*Commissione tributaria provinciale*,] (CTP) for Venice has raised questions as to the constitutionality of Article 17(1) of Legislative Decree No. 112 of 13 April 1999 (Reorganization of the national tax collection service, implementing the delegation of powers envisaged by Law No. 337 of 28 September 1998), as replaced by Article 32(1)(a) of Decree-Law No. 185 of 29 November 2008 (Urgent measures in support of families, work, employment and business and to re-design the national strategic framework to confront the economic crisis), converted, with modifications, into Law No. 2 of 28 January 2009, with reference to Articles 3, 23, 24, 53, 76, and 97 of the Constitution.

The challenged provision, in the version considered applicable to the case under review, provided – in combination with the provisions of Article 5(1), first sentence, of Decree-Law No. 95 of 6 July 2012, containing "Urgent provisions for auditing public spending with no change to citizen services, as well as measures to stabilize the assets of companies in the banking sector," converted, with modifications, into Law No. 135 of 7 August 2012 (which lowered the commission by one percentage point) – that, "the activities of the collections agents is compensated with a commission, equal to nine [eight] percent of the assessed amounts collected and the related interest on arrears, and which must be paid by the debtor: *a*) in the measure of 4.65% of the assessed amounts, in the event payment is made within sixty days from the letter of deficiency notice. In that case, the remaining portion of the commission shall be paid by the creditor; *b*) in full, in the contrary case."

The referring court correctly states that the aforementioned challenged rule is applicable *ratione temporis* to the case in question, given the fact that the modifications did not have force of law due to the absence of the envisaged decree implementing them, which were later inserted into Article 17(1) of Legislative Decree No. 112 of 1999 by Article 10(13-*quater*) of Decree-Law No. 201 of 6 December 2011 (Urgent provisions to promote the growth, fairness, and stability of the public finances), converted, with modifications, into Law No. 214 of 22 December 2011.

1.1.– In the referring court's view, the challenged rules infringe upon Article 3 of the Constitution, in that the establishment of a collections commission, equal to a pre-established percentage of the collected amount, unreasonably fails to allow for collections agents to be compensated in a way that corresponds with the effective cost of the service, so much so that the commission is due even in the total absence of costs. Moreover, in cases of both small sums and of substantial sums, either significantly lower or significantly higher than the costs of collection, the remuneration would be much higher or much lower than the costs, respectively. And the mechanism is lacking even the reasonable corrective that could be provided by a maximum and a minimum threshold (like in the scenario this Court examined in Judgment No. 480 of 1993), which would anchor it to the costs of the service, or by an inversely proportionate relationship to the total amount to be collected.

The absence of any such anchoring allegedly causes the compensation for collections to lose its character as financial consideration, creating an unjustified

disparity of treatment between taxpayers who, for identical services rendered (for example the compilation of the letter of deficiency notice), are obliged to pay different commissions in relation to the amounts owed.

Starting from the interpretive assumption that the compensation for collections are not calculated in line with the costs of collections activities, the referring court then infers a violation of Article 23 of the Constitution, alleging that the commission amounts to forced payment of assets, which lacks, however, a legislative provision intended to determine its underpinnings and its extent and, therefore, to limit the discretion of the entity that imposes it.

The challenged scheme allegedly also infringes Article 24 of the Constitution, in that it does not require collections agents to specify, among the details of the bill, the enforcement actions carried out in each individual collections procedure, thus failing to allow for an evaluation of the proportionality and necessity of the activities performed by the agent and, as a result, limiting taxpayers' right to defense.

On the basis of the same assumptions, the referring court also alleges the violation of Article 53 of the Constitution, in that the envisaged collections commission amounts to a forced payment of assets that is not proportionate to the duty of the citizen to contribute to public expenses with their own income, and which, moreover, runs contrary to the progressiveness requirement.

The referring court also alleges the infringement of Article 76 of the Constitution, in that the challenged provision, in establishing a commission in the amount of a fixed percentage of the amount owed by the taxpayer, without envisaging any timely and precise verification of the costs actually sustained for the collection of the tax registers allegedly violates the principle of delegation provided by Law No. 337 of 28 September 1998 (Delegation to the Government for the reorganization of the rules on collections). That law had provided a system of compensation linked to the registered assessed amounts that were, in fact, collected, the speed of the collection, and the costs of collection, adjusted according to criteria laid out by the Ministry of Finance.

Finally, the challenged provision allegedly infringes the principles of impartiality and sound management of the public administration enshrined in Article 97 of the Constitution.

The absence of a specific legal text that lays out the precise procedure for collections, standard contents for the forms, and the relative costs, as well as the absence of any form of responsibility on the part of the licensee with regard to the choices made, allegedly exposes the taxpayer to the risk of being burdened with high costs for unnecessary or excessively costly actions.

Moreover, the challenged rules, because they envisage irrational collections criteria and methods, are allegedly not intended to ensure the efficiency of the service and, in any case, the collections agent, even if today it is a "public entity," would end up carrying out a business activity essentially lacking in any business risks, not experiencing "any financial loss as a result of the taxpayer's default."

2.– The President of the Council of Ministers, intervening in the case represented by State Counsel, and requesting a declaration that the questions as to constitutionality are unfounded on the merits, begins by raising various objections of inadmissibility.

In particular, among other things, State Counsel objects that the referring court's request aims at systemic reform in the absence of sufficient regulatory or judicial precedents (citing Judgment No. 99 of 2019).

2.1.– The objection is well founded for the reasons laid out here below.

2.1.1.– In the challenged rules, the commission is structured as the mechanism providing the regular financing for the entire collections activity, one of the principal "cost factors" of which is, as State Counsel has observed, the risk of a "failed exaction." This device remained substantially unchanged even under the scheme currently in force, following the reform effected by Legislative Decree No. 159 of 24 September 2015, containing "Measures to simplify and organize the rules on collections, implementing Article 3(1)(*a*) of Law No. 23 of 11 March 2014."

State Counsel's point is correct: the aforementioned scheme effectively functions "to compensate the costs that the collections agent pays in relation to its operations that turn out to be fruitless." It does so, State Counsel argues, on the basis of the "specific fiscal policy choice" to place the overall burden of collections "on delinquent taxpayers, rather than letting it weigh entirely on the general tax pool (and, therefore, on taxpayers who have met their fiscal duties)."

On this logic, those taxpayers who, upon receiving a notice of deficiency letter, pay it within the deadline of sixty days from receiving notice, are also considered to be "in arrears," as well as those who decide to appeal, object to the tax claim, and satisfy the provisional enforcement attempt: these "solvent taxpayers" are thus made to bear the costs of the unsuccessful enforcement attempts by means of the commission.

2.1.2.– It is worth looking more deeply into the aspect of the unsuccessful enforcement attempts.

Indeed, the overall costs of collections constitute the factual premise on the basis of which the challenged provision establishes that the commission must be equal "to nine [eight] percent of the assessed amounts collected and the related interest on arrears and which must be paid by the debtor: *a*) in the measure of 4.65% of the assessed amounts, in the event payment is made within sixty days from the letter of deficiency notice. In that case, the remaining portion of the commission shall be paid by the creditor; *a*) in the amount of 4.65% of the registered amount where payment is made within sixty days from the notice of deficiency *b*) in full, in the contrary case" (percentages that, under the scheme currently in force, which do not apply to the present case, have only been reduced, respectively, to 3 percent and 6 percent).

Nevertheless, as laid out below, these costs are heavily impacted by the anomalous factor of unsuccessful enforcement attempts, which then have an equally powerful impact on the proportionality of the burden that falls to the taxpayer who, despite being in arrears, pays off the taxes they owe.

2.1.3.—The joint divisions of the Court of Auditors, exercising its auditing function, underscored in its Report on the General Statement of the State for the 2019 Fiscal Year that, "the overall volume of collections with reference to the tax register between 2000 and 2019 amounted to 133.4 billion, compared to a net amount of 1,002.8 billion, with a collections rate of 13.3%." It also specified that the "decline in forced collections actions" was likely incompatible with "meeting the objectives of opposing tax evasion and with the overall sustainability of the tax system" (Court of Auditors, Joint Divisions, exercising its auditing function, Judgment No. 10 of 24 June 2020, attached report, volume 1, part 1, p. 23 and 24).

Further confirmation of the insufficient rate of collections that has marked the past twenty years can be found in the recent audit carried out by the Director of the *Agenzia delle Entrate* [Revenue Agency] for the Chamber of Deputies (6th Finance Commission, Identifying priorities in using the Recovery Fund, with particular reference to possible reforms of the tax system and collections, Rome, 14 September 2020, p. 17). The audit

specifies that, "[a]s of 30 June 2020, the value of the residual accounting deficit, given by the various creditor agencies to the Collections Agent since 1 January 2000, amounts to around 987 billion Euro."

The same audit refers to the dimension of uncollected public revenue as the most striking "peculiarity" that "emerges from comparing the Italian tax collection system with the international landscape" (but perhaps serious anomaly would be more appropriate).

2.1.4.– On the basis of the well-established case law of the Supreme Court of Cassation, the commission must be understood as "intended not so much to remunerate the individual activities carried out by the subject tasked with the collection, but rather to cover the overall costs of the service (Supreme Court of Cassation, Fifth Civil Division, Judgment No. 27650 of 3 December 2020). It also takes on a "retributive rather than tax character" (Supreme Court of Cassation, Fifth Civil Division, Judgment No. 3416 of 12 February 2020), "since it has to do with compensation for the activities of tax collecting" (Supreme Court of Cassation, Fifth Civil Division, Judgment No. 8714 of 11 May 2020).

It is entirely clear, however, that this compensation must remain consistent with its function and not become arbitrary, as may easily happen in the case (the not infrequent case, for the reasons just stated) of shifting the excessively high costs of unsuccessful collections onto "solvent" taxpayers.

Indeed, in this scenario, the mechanism for funding collections functions degenerates into the paradox of shifting onto a limited group of taxpayers, identified on the basis of their solvency (which is belated with respect to the period of assessing tax payments), the weight of a solidarity that is neither proportionate nor reasonable, because it actually originates from the significant cost of the "essential powerlessness of the State to recover amounts owed to it" with regard to insolvent taxpayers (Court of Auditors, Joint Divisions, exercising its auditing function, Decision No. 4 of 8 April 2021, p. 9).

2.1.5.– It bears specifying that this situation of inefficient debt collection enforcement, which has a negative impact on an essential phase of the dynamic of the levying of public revenue, not only has a *de facto* impact on the reasonableness and proportionality of the commission, but also severely undermines the duty to pay taxes, in particular.

This Court has already explained that the purpose of this duty, which derives from the non-derogable value of solidarity enshrined in Article 2 of the Constitution, "is to finance the system of constitutional rights, which require massive resources in order to be effective" (Judgment No. 288 of 2019).

It bears repeating here that sufficient tax collection is essential not only for the protection of social rights, but for most civil rights, as well, given the enormous quantity of resources necessary to run the structures that grant both judicial protection and public safety, both of which are indispensable for guaranteeing said rights.

From this point of view, the severe inadequacy of the legislative debt collections mechanisms in our country, described above, contributes to "*de facto*" preventing the Republic from removing the obstacles described in Article 3(2) of the Constitution. The collections function is, indeed, an essential "life condition for the community," so much so that it expresses an interest that is "protected by the Constitution (Article 53) at the same level as every individual right" (Judgment No. 45 of 1963).

It is, therefore, urgent, that the State legislator take action to reform these

mechanisms.

2.1.6.– This could happen, however – overcoming the unreasonableness of the challenged commission scheme (the essential structure of which has been basically reproduced in the current scheme as well, as mentioned above) and guaranteeing adequate resources for public debt collection activities – in many different ways, and they fall, in the first instance, to the discretion of the legislator.

Moreover, the referring court is in no way requesting an ablative ruling on the challenged rule, but asks for an additive solution, that is, the provision both of a minimum and a maximum threshold, and of an inversely proportionate relationship to the amount to be collected. This is certainly not the only solution that is, in the abstract, compatible with the Constitution (even could they be determined in precise numeric terms, which, moreover, the referring court does not provide).

Nor does the CTP's suggestion indicate a sufficient point of reference (in the sense held in Judgment No. 222 of 2018, among many). This Court's Judgment No. 480 of 1993, relied upon by the referring court, pertained to a regional legislative mechanism that established only a minimum and a maximum, while an analogous solution to the one requested in the present case was only envisaged in the initial phase of the history of collections in Italy, in the so-called "Sella Law," No. 192 of 20 April 1871, second series (On the collection of direct taxes).

In that context, the provision of minimum and maximum limits on the percentage of the commission represented a substantial anchoring of the measure to the costs of the collections system. The contemporaneous provision requiring that the percentage be inversely proportional to the revenue from the delegated taxpayer lists was, on the other hand, justified for purposes of rendering functional the service of private licensees, which were organized on a competitive basis at the local level, and to reduce the gap between tax collectors who handled larger revenue and those handling smaller amounts.

It is clear that these reasons have entirely vanished today. This makes it impossible to endorse the solution proposed by the referring court as constitutionally appropriate.

2.1.7.– The fact that the collections service has now become essentially centralized, with few exceptions at the local level, in the hands of the public tax authority, the *Agenzia delle Entrate* – Collections (and, already at the time of the passage of the challenged scheme, in the hands of *Equitalia S.P.A.*, which has only public shareholders) could, moreover, be considered by the legislator for purposes of evaluating whether there are still reasons to maintain the institution of the commission in such a context – given that it runs the risk of shifting (or does currently shift, as we have seen) onto some taxpayers, in a disproportionate way, the overall costs of an activity that is now almost entirely carried out by the fiscal administration itself and no longer by private licensees – or whether, on the contrary, it has become obsolete and constitutes one of the causes of inefficiency in the system.

Indeed, if the financing of collections ends up both weighing primarily upon so-called "solvent taxpayers" and delivering insufficient resources for the correct exercise of the public tax collection function, then it effects a disincentive to combat so-called "collections evasion" with respect to people who manage to avoid their tax obligations completely, particularly those owing a relatively modest amount.

The number of tax registers compared with these amounts is enormous, and, in any case, contributes to the creation of the extremely high numbers that characterize the bulk of what is not collected (as shown in the memorandum of the President of the

Parliamentary Budget Office [*Ufficio Parlamentare del Bilancio*] on Draft Law AS 2144 of 8 April 2021, Joint Committees V and VI of the Senate of the Republic). Another contributor is the regulatory framework which requires that nearly identical activities be carried out for all the different types of registered assessed amounts. With regard to this aspect, this Court has already invited the legislator to revise the collection criteria so as to guarantee greater efficiency and timeliness (Judgment No. 51 of 2019).

Even a small amount of tax arrears, as those deriving from local duties often are, are a manifestation of the non-derogable duty of solidarity enshrined in Article 2 of the Constitution and, as such, must be valued by the system, which otherwise not only risks the loss of significant sums of revenue, but also faces the potential for "disorientation and bitterness on the part of those who pay promptly and a further incentive to avoid making spontaneous payments for many others" (Court of Auditors, Joint Divisions, exercising its auditing function, Decision No. 4 of 8 April 2021, p. 31).

Moreover, the need for "a broad and systematic revision of the entire collections system to find solutions suitable to bolster the efficiency of the administrative structure to adequately protect the interests of the State" was underscored again by the Court of Auditors, this time also with regard to the dimension of calculated amounts receivable, incorrectly designated as guaranteed cash inflows – including as a result of managerial and information communication errors – which have a negative impact even on the very trustworthiness of the public accounts (Court of Auditors, Joint Divisions, exercising its auditing function, Report on the coordination of public finances approved on 24 May 2021, p. 140).

2.1.8.– The debt collection services must, therefore, be put in the conditions to function correctly, according to the principles of efficiency and sound management, which were also invoked by the referring court. Nevertheless, the ways in which this may take place are significantly more complex and varied with respect to the solution the referring court proposes.

Incidentally, the principal European countries (Germany, France, Spain, and Great Britain) have long abandoned the institution of the commission, instead including the substantial resources necessary to properly carry out collections as part of the overall tax system.

This solution was even a part of our own system for about fifteen years, under Decree of the President of the Republic [d.P.R.] No. 603 of 29 September 1973 (Modifications and additions to the Consolidated text of the laws on collections services for direct taxes, approved with d.P.R. No. 858 of 15 May 1963). This decree, albeit in a context still characterized by granting concessions to private entities to carry out collections activities, provided at Article 3(1) that, "[f]or collections carried out both by means of direct deposits by the taxpayers and by means of tax registers, the tax collector shall be compensated with a commission to be paid by the recipient of the tax revenue."

It is not immaterial to point out that the most authoritative scholarly sources consider this solution to be particularly effective, both in terms of transparency of accounting, and for purposes of eliminating disparities in treatment between taxpayers.

2.1.9.– This Court cannot, as things stand, provide a remedy for this breach of the aforementioned constitutional values, given that, as mentioned above, choosing the method for the solutions falls within the realm of legislative discretion, and regards a spectrum of possibilities, which range from that of transferring the financial burdens of collections to the State (which, incidentally, already bears the costs of the activities of auditing and verification), potentially excluding the costs of letter of deficiency notices

and enforcement costs, to that of providing solutions, even mixed solutions, which provide adequate criteria and limits for establishing a proportionate "commission."

Thus, the questions as to constitutionality raised by the referring court must be declared inadmissible, because the needs described, despite meriting consideration (as described above), imply a modification that falls within the sphere of choices reserved to the discretion of the legislator (Judgment No. 219 of 2019).

In reaching this conclusion, this Court considers it opportune to state, yet again, the urgency of reform, in order both to overcome the concrete risk of a commission of disproportionate size, as well as to render the collections system more efficient.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the questions as to the constitutionality of Article 17(1) of Legislative Decree No. 112 of 13 April 1999 (Reorganization of the national tax collection service, implementing the delegation of powers envisaged by Law No. 337 of 28 September 1998), as replaced by Article 32(1)(a) of Decree-Law No. 185 of 29 November 2008 (Urgent measures in support of families, work, employment and business and to re-design the national strategic framework to confront the economic crisis), converted, with modifications, in Law No. 2 of 28 January 2009, raised in reference to Articles 3, 23, 24, 53, 76, and 97 of the Constitution by the Provincial Tax Court of Venice, with the referral order indicated in the headnote, are inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 25 May 2021.

Signed:

Giancarlo Coraggio, President

Luca Antonini, Author of the Judgment