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Judgment of the Court of 9 November 1983. - Amministrazione delle Finanze dello Stato v SpA San Giorgio. - Reference for a preliminary ruling: Tribunale civile e penale di Trento - Italy. - Recovery of undue payment - Charges levied contrary to Community law - Passing on of such charges in the price of the goods in question. - Case 199/82.

European Court reports 1983 Page 03595

Spanish special edition Page 00963

Swedish special edition Page 00389

Finnish special edition Page 00373

Summary

Parties

Subject of the case

Grounds

Decision on costs

Operative part

Keywords

1 . QUESTIONS SUBMITTED FOR A PRELIMINARY RULING - REFERENCE TO THE COURT - RIGHT OF EVERY NATIONAL COURT - STAGE OF THE PROCEEDINGS BEFORE THE NATIONAL COURT - NATURE OF THE DECISION TO BE GIVEN BY THE NATIONAL COURT - IRRELEVANT

(EEC TREATY , ART . 177 , SECOND PARA .)

2 . COMMUNITY LAW - DIRECT EFFECT - NATIONAL CHARGES INCOMPATIBLE WITH COMMUNITY LAW - REPAYMENT - PROCEDURES - APPLICATION OF NATIONAL LAW - LIMITS

3 . COMMUNITY LAW - DIRECT EFFECT - NATIONAL CHARGES INCOMPATIBLE WITH COMMUNITY LAW - REPAYMENT - PROCEDURES - APPLICATION OF NATIONAL LAW - CONDITIONS - CONSIDERATION OF POSSIBLE PASSING ON OF THE CHARGE - PERMISSIBILITY

4 . COMMUNITY LAW - DIRECT EFFECT - NATIONAL CHARGES INCOMPATIBLE WITH COMMUNITY LAW - REPAYMENT - PROCEDURES - APPLICATION OF NATIONAL LAW - CONDITIONS - REQUIREMENT OF PROOF THAT THE TAXPAYER HAS NOT PASSED THE

Summary

1. EVERY COURT OR TRIBUNAL OF A MEMBER STATE IS ENTITLED TO ASK THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY , REGARDLESS OF THE STAGE REACHED IN THE PROCEEDINGS PENDING BEFORE IT AND REGARDLESS OF THE NATURE OF THE DECISION WHICH IT IS CALLED UPON TO GIVE .

2. ENTITLEMENT TO THE REPAYMENT OF CHARGES LEVIED BY A MEMBER STATE CONTRARY TO THE RULES OF COMMUNITY LAW IS A CONSEQUENCE OF , AND AN ADJUNCT TO , THE RIGHTS CONFERRED ON INDIVIDUALS BY THE COMMUNITY PROVISIONS PROHIBITING CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES OR , AS THE CASE MAY BE , THE DISCRIMINATORY APPLICATION OF INTERNAL TAXES . WHILST IT IS TRUE THAT REPAYMENT MAY BE SOUGHT ONLY WITHIN THE FRAMEWORK OF THE CONDITIONS AS TO BOTH SUBSTANCE AND FORM , LAID DOWN BY THE VARIOUS NATIONAL LAWS APPLICABLE THERETO , THE FACT NEVERTHELESS REMAINS THAT THOSE CONDITIONS MAY NOT BE LESS FAVOURABLE THAN THOSE RELATING TO SIMILAR CLAIMS REGARDING NATIONAL CHARGES AND THEY MAY NOT BE SO FRAMED AS TO RENDER VIRTUALLY IMPOSSIBLE THE EXERCISE OF RIGHTS CONFERRED BY COMMUNITY LAW .

3. COMMUNITY LAW DOES NOT PREVENT A NATIONAL LEGAL SYSTEM FROM DISALLOWING THE REPAYMENT OF CHARGES WHICH HAVE BEEN UNDULY LEVIED WHERE TO DO SO WOULD ENTAIL UNJUST ENRICHMENT OF THE RECIPIENTS . THERE IS NOTHING IN COMMUNITY LAW THEREFORE TO PREVENT COURTS FROM TAKING ACCOUNT , UNDER THEIR NATIONAL LAW , OF THE FACT THAT THE UNDULY LEVIED CHARGES HAVE BEEN INCORPORATED IN THE PRICE OF THE GOODS AND THUS PASSED ON TO THE PURCHASERS . THUS NATIONAL LEGISLATIVE PROVISIONS WHICH PREVENT THE REIMBURSEMENT OF TAXES , CHARGES AND DUTIES LEVIED IN BREACH OF COMMUNITY LAW CANNOT , IN PRINCIPLE , BE REGARDED AS CONTRARY TO COMMUNITY LAW WHERE IT IS ESTABLISHED THAT THE PERSON REQUIRED TO PAY SUCH CHARGES HAS ACTUALLY PASSED THEM ON TO OTHER PERSONS .

4. ANY REQUIREMENT OF PROOF WHICH HAS THE EFFECT OF MAKING IT VIRTUALLY IMPOSSIBLE OR EXCESSIVELY DIFFICULT TO SECURE THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW IS INCOMPATIBLE WITH COMMUNITY LAW , EVEN IF REPAYMENT OF A SUBSTANTIAL NUMBER OF , OR EVEN ALL , THE NATIONAL TAXES , CHARGES AND DUTIES LEVIED IN BREACH OF COMMUNITY LAW IS SUBJECT TO THE SAME RESTRICTIVE CONDITIONS .

THAT IS SO PARTICULARLY IN THE CASE OF PRESUMPTIONS OR RULES OF EVIDENCE INTENDED TO PLACE UPON THE TAXPAYER THE BURDEN OF ESTABLISHING THAT THE CHARGES UNDULY PAID HAVE NOT BEEN PASSED ON TO OTHER PERSONS OR OF SPECIAL LIMITATIONS CONCERNING THE FORM OF THE EVIDENCE TO BE ADDUCED , SUCH AS THE EXCLUSION OF ANY KIND OF EVIDENCE OTHER THAN DOCUMENTARY EVIDENCE . ONCE IT IS ESTABLISHED THAT THE LEVYING OF THE CHARGE IS INCOMPATIBLE WITH COMMUNITY LAW , THE NATIONAL COURT MUST BE FREE TO DECIDE WHETHER OR NOT THE BURDEN OF THE CHARGE HAS BEEN PASSED ON , WHOLLY OR IN PART , TO OTHER PERSONS .

Parties

IN CASE 199/82

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE PRESIDENT OF THE TRIBUNALE , TRENTO (ITALY), FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

AMMINISTRAZIONE DELLE FINANZE DELLO STATO (STATE FINANCE ADMINISTRATION)

AND

SPA SAN GIORGIO , A DAIRY IN LOCATE TRIULZI , WHOSE REGISTERED OFFICE IS IN MILAN ,

Subject of the case

ON THE PRINCIPLES OF THE EEC TREATY RELATING TO THE REPAYMENT OF NATIONAL CHARGES LEVIED IN BREACH OF COMMUNITY LAW AND ON THE INTERPRETATION OF COUNCIL REGULATION (EEC) NO 1430/79 OF 2 JULY 1979 ON THE REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES , HAVING REGARD TO NATIONAL LEGISLATION LAYING DOWN CERTAIN CONDITIONS FOR THE RECOVERY OF HEALTH INSPECTIONS CHARGES UNDULY LEVIED .

Grounds

1 BY AN ORDER DATED 23 JULY 1982 , WHICH WAS RECEIVED AT THE COURT ON 5 AUGUST 1982 , THE TRIBUNALE CIVILE E PENALE (CIVIL AND CRIMINAL DISTRICT COURT) , TRENTO , REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY CERTAIN QUESTIONS CONCERNING , FIRST , THE DETERMINATION OF THE PRINCIPLES OF THE EEC TREATY RELATING TO THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW AND , SECONDLY , THE INTERPRETATION OF COUNCIL REGULATION (EEC) NO 1430/79 OF 2 JULY 1979 ON THE REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES (OFFICIAL JOURNAL 1979 , L 175 , P . 1).

2 IT APPEARS THAT BETWEEN 1974 AND 1977 SPA SAN GIORGIO , THE PLAINTIFF IN THE MAIN PROCEEDINGS , WAS REQUIRED TO PAY HEALTH INSPECTION CHARGES WHICH WERE LEVIED CONTRARY TO COMMUNITY LAW ON THE IMPORTATION OF DAIRY PRODUCTS FROM MEMBER STATES OF THE EEC .

3 SPA SAN GIORGIO BROUGHT AN ACTION BEFORE THE TRIBUNALE DI TRENTO RECLAIMING THE AMOUNTS IN QUESTION . AFTER SUMMARY PROCEEDINGS THE PRESIDENT OF THAT COURT DIRECTED THAT THE STATE FINANCE ADMINISTRATION SHOULD REPAY SPA SAN GIORGIO LIT 65 160 585 AND AUTHORIZED PROVISIONAL ENFORCEMENT OF THAT ORDER .

4 THE STATE FINANCE ADMINISTRATION APPEALED AGAINST THE ORDER AND APPLIED FOR SUSPENSION OF THE ENFORCEMENT THEREOF . IN SUPPORT OF ITS APPLICATION IT RELIED ON ARTICLE 10 OF DECREE-LAW NO 430 OF 10 JULY 1982 LAYING DOWN PROVISIONS RELATING TO MANUFACTURING TAXES , THE MOVEMENT OF PETROLEUM PRODUCTS , DIRECT TAXES , VALUE-ADDED TAX AND RELATED CHARGES (GAZZETTA UFFICIALE NO 190 OF 13 JULY 1982) , WHICH PROVIDES AS FOLLOWS :

' ' A PERSON WHO HAS PAID IMPORT DUTIES , MANUFACTURING TAXES , TAXES ON CONSUMPTION , OR STATE TAXES WHICH HAVE BEEN UNDULY LEVIED , EVEN PRIOR TO THE ENTRY INTO FORCE OF THIS DECREE , IS NOT ENTITLED TO THE REPAYMENT OF THE SUMS PAID WHEN THE CHARGE IN QUESTION HAS BEEN PASSED ON IN ANY WAY WHATSOEVER TO OTHER PERSONS , EXCEPT IN CASES OF SUBSTANTIVE ERROR .

THE CHARGE IS PRESUMED TO HAVE BEEN PASSED ON WHENEVER THE GOODS IN RESPECT OF WHICH THE PAYMENT WAS EFFECTED HAVE BEEN TRANSFERRED , EVEN AFTER PROCESSING , TRANSFORMATION , ERECTION , ASSEMBLY OR ADAPTATION , IN THE ABSENCE OF DOCUMENTARY PROOF TO THE CONTRARY . ' '

5 SPA SAN GIORGIO QUESTIONED THE COMPATIBILITY OF THOSE PROVISIONS WITH THE PRINCIPLES OF COMMUNITY LAW AND , IN VIEW OF THE ' ' SERIOUS NATURE ' ' OF THE OBSERVATIONS MADE AND THEIR IMPORTANCE FOR THE DECISION ON WHETHER TO SUSPEND ENFORCEMENT OF THE ORDER , THE PRESIDENT OF THE TRIBUNALE DI TRENTO REQUESTED THE COURT TO ANSWER THE FOLLOWING QUESTIONS :

' ' 1 . WOULD THE COURT , IN ORDER TO CLARIFY AND , IF APPROPRIATE SUPPLEMENT ITS PREVIOUS DECISIONS , IN PARTICULAR ITS JUDGMENT OF 27 MARCH 1980 IN CASE 61/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V DENKAVIT (1980) ECR 1205) AND ITS JUDGMENTS OF 10 JULY 1980 IN CASE 811/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V ARIETE (1980) ECR 2545) AND IN CASE 826/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V MIRECO (1980) ECR 2559) , EXPLAIN :

(A) WHETHER A NATIONAL LAW WHICH , BY WAY OF EXCEPTION TO THE GENERAL PROVISIONS CONCERNING THE RECOVERY OF UNDUE PAYMENTS , PROVIDES THAT CERTAIN CHARGES (INCLUDING , IN PARTICULAR , HEALTH INSPECTION CHARGES) UNDULY LEVIED CONTRARY TO CERTAIN PROVISIONS OF COMMUNITY LAW , INASMUCH AS THEY ARE CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES , MAY BE REPAYED ONLY IF IT IS PROVED THAT THE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS , BUT DOES NOT SUBJECT THE REPAYMENT OF ANY OTHER TAX , CHARGE OR DUTY WRONGLY LEVIED TO THE SAME CONDITION , IS TO BE REGARDED AS DISCRIMINATORY , CONTRARY TO THE PRINCIPLES OF COMMUNITY LAW ; AND WHETHER IT IS SIGNIFICANT THAT THE CHARGES COVERED BY THE ABOVE-MENTIONED PROVISION HAVE BEEN WRONGLY LEVIED SOLELY INASMUCH AS THEIR COLLECTION CONFLICTS WITH A RULE OF COMMUNITY LAW ;

(B)WHETHER THE REQUIREMENT OF NEGATIVE DOCUMENTARY PROOF , THE SOLE CONDITION TO WHICH THE AFORESAID NATIONAL LAW SUBJECTS THE REPAYMENT OF CHARGES UNDULY LEVIED , RENDERS ' THE EXERCISE OF RIGHTS WHICH NATIONAL COURTS ARE UNDER A DUTY TO PROTECT VIRTUALLY IMPOSSIBLE ' .

2.WOULD THE COURT STATE WHETHER , AS FROM 1 JULY 1980 , THE DATE OF THE ENTRY INTO FORCE OF COUNCIL REGULATION (EEC) NO 1430/79 OF 2 JULY 1979 ON THE REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES , WHICH , ACCORDING

TO THE TERMS OF ARTICLE 1 (2), APPLIES TO CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT , A COMMUNITY SYSTEM WAS INTRODUCED FOR THE FIRST TIME GOVERNING THE REPAYMENT OF CHARGES UNDULY LEVIED , WITHOUT HOWEVER PROVIDING FOR ANY EXCEPTION WHERE THE CHARGES ARE PASSED ON TO OTHER PERSONS ; AND WHETHER THAT SYSTEM TAKES PRECEDENCE OVER ANY PREVIOUS OR SUBSEQUENT NATIONAL LAW . ''

6 IT SHOULD BE NOTED THAT DECREE-LAW NO 430 , WHICH WAS APPLICABLE WHEN THE PRESIDENT OF THE TRIBUNALE DI TRENTO DECIDED TO REFER THE CASE TO THE COURT OF JUSTICE , WAS NOT CONVERTED INTO A LAW BUT THAT PROVISIONS SUBSTANTIALLY IDENTICAL TO THOSE OF ARTICLE 10 THEREOF WERE SUBSEQUENTLY REPRODUCED IN ARTICLE 19 OF DECREE-LAW NO 688 OF 30 SEPTEMBER 1982 INTRODUCING URGENT REVENUE MEASURES , WHICH WAS CONVERTED INTO A LAW BY LAW NO 873 OF 27 NOVEMBER 1982 (GAZZETTA UFFICIALE NO 270 OF 30 SEPTEMBER 1982 AND NO 328 OF 29 NOVEMBER 1982). THAT PROVISION IS WORDED AS FOLLOWS :

'' ANY PERSON WHO HAS PAID IMPORT DUTIES , MANUFACTURING TAXES , TAXES ON CONSUMPTION OR STATE TAXES WHICH HAVE BEEN UNDULY LEVIED , EVEN PRIOR TO THE ENTRY INTO FORCE OF THIS DECREE , IS ENTITLED TO REPAYMENT OF THE SUMS PAID IF HE PROVIDES DOCUMENTARY PROOF THAT THE CHARGE IN QUESTION WAS NOT PASSED ON IN ANY WAY WHATSOEVER TO OTHER PERSONS , EXCEPT IN CASES OF SUBSTANTIVE ERROR .

THE DOCUMENTARY PROOF REFERRED TO IN THE PRECEDING PARAGRAPH MUST ALSO BE PROVIDED WHEN THE GOODS IN RESPECT OF WHICH THE PAYMENT WAS EFFECTED HAVE BEEN TRANSFERRED AFTER PROCESSING , TRANSFORMATION , ERECTION , ASSEMBLY OR ADAPTATION . ''

ADMISSIBILITY

7 THE ITALIAN GOVERNMENT CONTESTS THE ADMISSIBILITY OF THE QUESTIONS SUBMITTED TO THE COURT BY THE PRESIDENT OF THE TRIBUNALE DI TRENTO DURING THE PRELIMINARY PHASE OF THE PROCEDURE . IT SUBMITS THAT A REQUEST FOR A PRELIMINARY RULING IS NOT ADMISSIBLE IN SUMMARY PROCEEDINGS FOR THE RECOVERY OF A DEBT , SINCE THE JUDGMENT TO BE GIVEN , WITHIN THE MEANING OF THE SECOND PARAGRAPH OF ARTICLE 177 , FALLS WITHIN THE JURISDICTION NOT OF THE PRESIDENT , BUT OF THE FULL COURT .

8 ON THIS POINT THE COURT NEED ONLY REFER TO THE PREVIOUS CASES IN WHICH IT HAS CONSISTENTLY HELD THAT EVERY COURT OR TRIBUNAL OF A MEMBER STATE IS ENTITLED TO REQUEST A PRELIMINARY RULING UNDER ARTICLE 177 , REGARDLESS MOREOVER OF THE STAGE REACHED IN THE PROCEEDINGS PENDING BEFORE IT AND REGARDLESS OF THE NATURE OF THE DECISION WHICH IT IS CALLED UPON TO GIVE . (SEE IN PARTICULAR : CASE 43/71 , POLITI V MINISTRY FOR FINANCE , (1971) ECR 1039 ; CASE 162/73 , BIRRA DREHER V AMMINISTRAZIONE DELLE FINANZE DELLO STATO , (1974) ECR 201 ; AND CASE 70/77 , SIMMENTHAL V AMMINISTRAZIONE DELLE FINANZE DELLO STATO , (1978) ECR 1453).

9 IT FOLLOWS THAT BOTH THE SUMMARY ORDER MADE BY THE PRESIDENT OF THE TRIBUNALE DI TRENTO AND ANY DECISION TO SUSPEND ENFORCEMENT OF THAT ORDER FOLLOWING THE APPEAL LODGED BY THE STATE FINANCE ADMINISTRATION FALL WITHIN THE SCOPE OF THE SECOND PARAGRAPH OF ARTICLE 177 OF THE TREATY

10 THE PRELIMINARY OBJECTION RAISED BY THE ITALIAN GOVERNMENT IS THEREFORE WITHOUT FOUNDATION .

THE FIRST QUESTION

11 IN ESSENCE THE FIRST QUESTION ASKS WHETHER A MEMBER STATE MAY MAKE REPAYMENT OF NATIONAL CHARGES LEVIED CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW CONDITIONAL UPON PROOF THAT THOSE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS :

WHERE REPAYMENT IS SUBJECT TO RULES OF EVIDENCE WHICH RENDER THE EXERCISE OF RIGHTS WHICH THE NATIONAL COURTS ARE UNDER A DUTY TO PROTECT VIRTUALLY IMPOSSIBLE ; AND

WHERE THE SAME RESTRICTIVE CONDITIONS DO NOT APPLY TO THE REPAYMENT OF ANY OTHER NATIONAL TAX , CHARGE OR DUTY WRONGLY LEVIED .

12 IN THAT CONNECTION IT MUST BE POINTED OUT IN THE FIRST PLACE THAT ENTITLEMENT TO THE REPAYMENT OF CHARGES LEVIED BY A MEMBER STATE CONTRARY TO THE RULES OF COMMUNITY LAW IS A CONSEQUENCE OF , AND AN ADJUNCT TO , THE RIGHTS CONFERRED ON INDIVIDUALS BY THE COMMUNITY PROVISIONS PROHIBITING CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES OR , AS THE CASE MAY BE , THE DISCRIMINATORY APPLICATION OF INTERNAL TAXES . WHILST IT IS TRUE THAT REPAYMENT MAY BE SOUGHT ONLY WITHIN THE FRAMEWORK OF THE CONDITIONS AS TO BOTH SUBSTANCE AND FORM , LAID DOWN BY THE VARIOUS NATIONAL LAWS APPLICABLE THERETO , THE FACT NEVERTHELESS REMAINS , AS THE COURT HAS CONSISTENTLY HELD , THAT THOSE CONDITIONS MAY NOT BE LESS FAVOURABLE THAN THOSE RELATING TO SIMILAR CLAIMS REGARDING NATIONAL CHARGES AND THEY MAY NOT BE SO FRAMED AS TO RENDER VIRTUALLY IMPOSSIBLE THE EXERCISE OF RIGHTS CONFERRED BY COMMUNITY LAW . (SEE THE FOLLOWING JUDGMENTS OF THE COURT : CASE 33/76 , REWE V LANDWIRTSCHAFTSKAMMER FUR DAS SAARLAND , (1976) ECR 1989 ; CASE 45/76 , COMET V PRODUKTSCHAP VOOR SIERGEWASSEN , (1976) ECR 2043 ; CASE 68/79 , JUST V MINISTRY FOR FISCAL AFFAIRS , (1980) ECR 501 ; CASE 61/79 , AMMINISTRAZIONE DELLE FINANZE DELLO STATO V DENKAVIT ITALIANA , (1980) ECR 1205 ; CASE 811/79 , AMMINISTRAZIONE DELLE FINANZE DELLO STATO V ARIETE , (1980) ECR 2545 , AND CASE 826/79 , AMMINISTRAZIONE DELLE FINANZE DELLO STATO V MIRECO , (1980) ECR 2559 , THE LAST THREE OF WHICH WERE CITED BY THE NATIONAL COURT) .

13 HOWEVER , AS THE COURT HAS ALSO RECOGNIZED IN PREVIOUS DECISIONS , AND IN PARTICULAR IN THE AFORESAID JUDGMENT IN JUST V MINISTRY FOR FISCAL AFFAIRS , COMMUNITY LAW DOES NOT PREVENT A NATIONAL LEGAL SYSTEM FROM DISALLOWING THE REPAYMENT OF CHARGES WHICH HAVE BEEN UNDULY LEVIED WHERE TO DO SO WOULD ENTAIL UNJUST ENRICHMENT OF THE RECIPIENTS . THERE IS NOTHING IN COMMUNITY LAW THEREFORE TO PREVENT COURTS FROM TAKING ACCOUNT , UNDER THEIR NATIONAL LAW , OF THE FACT THAT THE UNDULY LEVIED CHARGES HAVE BEEN INCORPORATED IN THE PRICE OF THE GOODS AND THUS PASSED ON TO THE PURCHASERS . THUS NATIONAL LEGISLATIVE PROVISIONS WHICH PREVENT THE REIMBURSEMENT OF TAXES , CHARGES , AND DUTIES LEVIED IN BREACH OF COMMUNITY LAW CANNOT BE REGARDED AS CONTRARY TO COMMUNITY LAW WHERE IT IS ESTABLISHED THAT THE PERSON REQUIRED TO PAY SUCH CHARGES HAS ACTUALLY PASSED THEM ON TO OTHER PERSONS .

14 ON THE OTHER HAND , ANY REQUIREMENT OF PROOF WHICH HAS THE EFFECT OF MAKING IT VIRTUALLY IMPOSSIBLE OR EXCESSIVELY DIFFICULT TO SECURE THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW WOULD BE INCOMPATIBLE WITH COMMUNITY LAW . THAT IS SO PARTICULARLY IN THE CASE OF PRESUMPTIONS OR RULES OF EVIDENCE INTENDED TO PLACE UPON THE TAXPAYER THE BURDEN OF ESTABLISHING THAT THE CHARGES UNDULY PAID HAVE NOT BEEN PASSED ON TO OTHER PERSONS OR OF SPECIAL LIMITATIONS CONCERNING THE FORM OF THE EVIDENCE TO BE ADDUCED , SUCH AS THE EXCLUSION OF ANY KIND OF EVIDENCE OTHER THAN DOCUMENTARY EVIDENCE . ONCE IT IS ESTABLISHED THAT THE LEVYING OF THE CHARGE IS INCOMPATIBLE WITH COMMUNITY LAW , THE COURT MUST BE FREE TO DECIDE WHETHER OR NOT THE BURDEN OF THE CHARGE HAS BEEN PASSED ON , WHOLLY OR IN PART , TO OTHER PERSONS .

15 IN A MARKET ECONOMY BASED ON FREEDOM OF COMPETITION , THE QUESTION WHETHER , AND IF SO TO WHAT EXTENT , A FISCAL CHARGE IMPOSED ON AN IMPORTER HAS ACTUALLY BEEN PASSED ON IN SUBSEQUENT TRANSACTIONS INVOLVES A DEGREE OF UNCERTAINTY FOR WHICH THE PERSON OBLIGED TO PAY A CHARGE CONTRARY TO COMMUNITY LAW CANNOT BE SYSTEMATICALLY HELD RESPONSIBLE .

16 THE NATIONAL COURT ALSO ASKS THE COURT OF JUSTICE WHETHER RULES RESTRICTING THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW ARE COMPATIBLE WITH THE PRINCIPLES OF THE EEC TREATY WHEN THEY ARE NOT APPLIED IDENTICALLY TO EVERY NATIONAL TAX , CHARGE OR DUTY . IN THAT REGARD IT REFERS TO THE JUDGMENTS IN WHICH , AFTER STATING THAT THE EXTENT TO WHICH IT IS POSSIBLE TO CONTEST CHARGES UNLAWFULLY CLAIMED OR TO RECOVER CHARGES UNDULY PAID DIFFERS IN THE VARIOUS MEMBER STATES , AND EVEN WITHIN A SINGLE MEMBER STATE , ACCORDING TO THE TYPE OF TAX OR CHARGE IN QUESTION (SEE IN PARTICULAR THE JUDGMENT IN AMMINISTRAZIONE DELLE FINANZE DELLO STATO V DENKAVIT ITALIANA) , THE COURT EMPHASIZED THAT INDIVIDUALS WHO SEEK TO ENFORCE RIGHTS BY VIRTUE OF PROVISIONS OF COMMUNITY LAW MAY NOT BE TREATED LESS FAVOURABLY THAN PERSONS WHO PURSUE SIMILAR CLAIMS ON THE BASIS OF DOMESTIC LAW .

17 IT MUST BE POINTED OUT IN THAT REGARD THAT THE REQUIREMENT OF NON-DISCRIMINATION LAID DOWN BY THE COURT CANNOT BE CONSTRUED AS JUSTIFYING LEGISLATIVE MEASURES INTENDED TO RENDER ANY REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW VIRTUALLY IMPOSSIBLE , EVEN IF THE SAME TREATMENT IS EXTENDED TO TAXPAYERS WHO HAVE SIMILAR CLAIMS ARISING FROM AN INFRINGEMENT OF NATIONAL TAX LAW . THE FACT THAT RULES OF EVIDENCE WHICH HAVE BEEN FOUND TO BE INCOMPATIBLE WITH THE RULES OF COMMUNITY LAW ARE EXTENDED , BY LAW , TO A SUBSTANTIAL NUMBER OF NATIONAL TAXES , CHARGES AND DUTIES OR EVEN TO ALL OF THEM IS NOT THEREFORE A REASON FOR WITHHOLDING THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW .

18 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT A MEMBER STATE CANNOT MAKE THE REPAYMENT OF NATIONAL CHARGES LEVIED CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW CONDITIONAL UPON THE PRODUCTION OF PROOF THAT THOSE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS IF THE REPAYMENT IS SUBJECT TO RULES OF EVIDENCE WHICH RENDER THE EXERCISE OF THAT RIGHT VIRTUALLY IMPOSSIBLE , EVEN WHERE THE REPAYMENT OF OTHER TAXES , CHARGES OR DUTIES LEVIED IN BREACH OF NATIONAL LAW IS SUBJECT TO

THE SAME RESTRICTIVE CONDITIONS .

THE SECOND QUESTION

19 THE SECOND QUESTION ASKS WHETHER A SOLUTION TO THE PROBLEM SET OUT IN THE FIRST QUESTION CAN BE DERIVED FROM COUNCIL REGULATION (EEC) NO 1430/79 OF 2 JULY 1979 ON THE REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES (OFFICIAL JOURNAL 1979 , L 175 , P . 1).

20 THE ATTENTION OF THE NATIONAL COURT SHOULD BE DRAWN TO THE FACT THAT THAT REGULATION , WHICH DEALS WITH THE REPAYMENT OR REMISSION OF UNDULY LEVIED IMPORT OR EXPORT DUTIES , APPLIES , BY VIRTUE OF ARTICLE 1 (2) THEREOF , ONLY TO TAXES , CHARGES , LEVIES AND DUTIES CREATED BY VARIOUS COMMUNITY PROVISIONS AND COLLECTED BY THE MEMBER STATES ON BEHALF OF THE COMMUNITY . THEREFORE THAT REGULATION DOES NOT APPLY TO ANY NATIONAL TAXES , CHARGES AND DUTIES WHICH MAY BE LEVIED CONTRARY TO COMMUNITY LAW .

21 WHILST IT IS TRUE THAT THAT REGULATION IS INTENDED TO ENSURE THE REPAYMENT OF COMMUNITY CHARGES UNDULY LEVIED AND FOR THAT PURPOSE LAYS DOWN A SPECIFIC PROCEDURE , THE FACT NEVERTHELESS REMAINS THAT IT DOES NOT APPLY TO THE REPAYMENT OF NATIONAL CHARGES .

Decision on costs

COSTS

22 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . SINCE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , THESE PROCEEDINGS ARE IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT ,

IN REPLY TO THE QUESTIONS REFERRED TO IT BY THE PRESIDENT OF THE TRIBUNALE DI TRENTO BY ORDER OF 23 JULY 1982 , HEREBY RULES :

A MEMBER STATE CANNOT MAKE THE REPAYMENT OF NATIONAL CHARGES LEVIED CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW CONDITIONAL UPON THE PRODUCTION OF PROOF THAT THOSE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS IF THE REPAYMENT IS SUBJECT TO RULES OF EVIDENCE WHICH RENDER THE EXERCISE OF THAT RIGHT VIRTUALLY IMPOSSIBLE , EVEN WHERE THE REPAYMENT OF OTHER TAXES , CHARGES OR DUTIES LEVIED IN BREACH OF NATIONAL

LAW IS SUBJECT TO THE SAME RESTRICTIVE CONDITIONS .