Case C-427/05

Agenzia delle Entrate – Ufficio di Genova 1

v

Porto Antico di Genova SpA

(Reference for a preliminary ruling from the

Commissione tributaria regionale di Genova)

(Structural Funds – Regulation (EEC) No 4253/88 – Second subparagraph of Article 21(3) – Prohibition of deduction – Calculation of taxable income – Taking account of Community grants received)

Opinion of Advocate General Mazák delivered on 8 May 2007

Judgment of the Court (Fourth Chamber), 25 October 2007

Summary of the Judgment

Economic and social cohesion – Structural assistance – Community financing – Grant of financial assistance

(Council Regulation No 4253/88, as amended by Regulation No 2082/93, Art. 21(3), second subpara.)

The second subparagraph of Article 21(3) of Regulation No 4253/88 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Regulation No 2082/93, must be interpreted as not precluding a national tax provision which includes grants paid by the Community Structural Funds in the assessment of taxable income. Deductions or retentions which have the effect of reducing the amount of the Community grants received by the beneficiary which do not have a direct and inseparable link with the latter, do not obstruct the effective application of the mechanism established by Regulation No 4253/88.

Moreover, the differences which exist between the beneficiaries of the Structural Funds, by reason of the different rates of taxation imposed in the Member States on amounts received by way of Community assistance, cannot be regarded as likely to infringe the principle of equal treatment. For that to be the position, it would be necessary for the situations of the beneficiaries of Community aid to be comparable. That cannot be the case since those beneficiaries receive that aid in a socio-economic context specific to each Member State and, in the absence of Community harmonisation on the assessment of taxable income, objective disparities between the rules in Member States still exist in that field, thereby inevitably creating such differences between those beneficiaries.

(see paras 18-21, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

25 October 2007 (*)

(Structural Funds – Regulation (EEC) No 4253/88 – Second subparagraph of Article 21(3) – Prohibition of deduction – Calculation of taxable income – Taking account of Community grants received)

In Case C?427/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Commissione tributaria regionale di Genova (Italy), made by decision of 31 January 2005, received at the Court on 1 December 2005, in the proceedings

Agenzia delle Entrate – Ufficio di Genova 1

v

Porto Antico di Genova SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta, G. Arestis (Rapporteur) and J. Malenovský, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 February 2007,

after considering the observations submitted on behalf of:

– Porto Antico di Genova SpA, by I. Vigliotti, avvocato,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by M. Massella Ducci Teri, avvocato dello Stato,

– the French Government, by G. de Bergues and J.?C. Gracia, acting as Agents,

– Ireland, by D. O'Hagan and N. O'Hanlon, acting as Agents, and A. Aston SC,

– the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

– the Swedish Government, by A. Kruse, acting as Agent,

– the United Kingdom Government, by C. White, acting as Agent, and J. Stratford, Barrister,

– the Commission of the European Communities, by E. Traversa and L. Flynn, acting as Agents, and A. Colabianchi, avvocato,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2007,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 21(3) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) ('Regulation No 4253/88').

2 The request has been made in the course of proceedings between the Agenzia delle Entrate – Ufficio di Genova 1 (Genoa 1 Tax Office) ('the Agenzia') and Porto Antico di Genova SpA ('Porto Antico') following the rejection of a claim made by the latter for reimbursement of sums paid by it for the year 2000 as tax on the income of legal persons (IRPEG) and as regional tax on production (IRAP).

Legal context

Community legislation

3 Under the title 'Payments', the second subparagraph of Article 21(3) of Regulation No 4253/88 states:

'The payments shall be made to the final beneficiaries without any deduction or retention which could reduce the amount of financial assistance to which they are entitled.'

National legislation

4 Article 55(3) of Decree of the President of the Republic No 917 of 22 December 1986 (ordinary supplement to GURI No 302 of 31 December 1986) ('Presidential Decree No 917/86') in the version in force at the time of the facts in the main proceedings, stated:

'[The following items] shall also be regarded as extraordinary income:

(a) ...

(b) income, in cash or in kind, obtained by way of contribution or donation, with the exception of the payments referred to in points (e) and (f) of Article 53(1) and those for the purchase of depreciable assets, whatever the type of financing used. Such items of income shall count towards earnings either in respect of the tax year in which they are received or, on a straight line basis, in respect of the tax year in which they are received and of the tax years thereafter, but not beyond the fourth tax year thereafter. ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 It is apparent from the order for reference that, as regards the tax on income of legal persons and regional tax on production, Porto Antico, in accordance with Article 55(3)(b) of Presidential Decree No 917/86, included grants paid by the Community Structural Funds and the Ligurian Region in respect of the 1994 to 1999 programming period in its tax return for the year 2000.

6 On 22 April 2002, taking the view that it had been wrong to include those grants in its assessment of its taxable income for the year 2000, Porto Antico brought a claim before the Agenzia seeking the reimbursement of the sums that the company had, according to it, paid in error. In its claim, it submitted that Article 55(3)(b) of Presidential Decree No 917/86 was contrary to the provisions of the second subparagraph of Article 21(3) of Regulation No 4253/88.

7 In view of the Agenzia's failure to respond, which was an implied rejection of Porto Antico's claim, the latter brought an appeal before the Commissione tributaria provinciale di Genova (Provincial Tax Court, Genoa) which, by judgment of 10 April 2003, granted that claim and ordered the repayment of the sums wrongly paid by the company.

8 On 10 March 2004 the Agenzia brought an appeal against that judgment before the Commissione tributaria regionale di Genova (Regional Tax Court, Genoa). That court, querying the compatibility of Article 55(3)(b) of Presidential Decree No 917/86 with Regulation No 4253/88, considered it necessary to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 55 of [Presidential Decree No 917/86] (in the version in force in the year 2000), under which Community grants are taken into account for the purpose of determining taxable income, compatible with [the second subparagraph of] Article 21(3) of Regulation No 2082/93 …?

2. If there is a finding of incompatibility, will it apply solely to funds granted and payable by Community bodies or will it also apply to funds that are described in the SPD (Single Programming Document) as being payable by national bodies?'

The questions referred for a preliminary ruling

The first question

9 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 21(3) of Regulation No 4253/88 should be interpreted as meaning that it precludes a national tax provision, such as Article 55(3)(b) of Presidential Decree No 917/86, which includes grants paid by the Community Structural Funds in the assessment of taxable income.

10 As a preliminary point, it should be pointed out that, according to settled case-law, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19). In particular, the national provision must not obstruct the functioning of the mechanism established by Regulation No 4253/88 (see, to that effect, Joined Cases C-36/80 and 71/80 *Irish Creamery Milk Suppliers Association & Others* [1981] ECR 735, paragraph 15).

11 In that regard, the second subparagraph of Article 21(3) of that regulation provides that 'the payments shall be made to the final beneficiaries without any deduction or retention which could reduce the amount of financial assistance to which they are entitled'.

12 It is clear from the wording of that provision that it precludes any taxation of the grants paid to beneficiaries of the Structural Funds. It must be held that that same wording does not preclude

the income, of which the grants are a part on the basis of Presidential Decree No 917/86, from being subject to taxation.

13 The Court has already ruled on the scope of the second subparagraph of Article 21(3) of Regulation No 4253/88, in the context of sums paid under the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). It held that the prohibition of deductions set out in that provision could not be interpreted in a purely formal manner as covering only deductions which are actually made on the occasion of payments and thus that the prohibition on any deduction must of necessity extend to all charges which are directly and inseparably linked to the amounts disbursed (Case C-84/04 *Commission* v *Portugal* [2006] ECR I-9843, paragraph 35).

14 It follows that, in order to determine whether the second subparagraph of Article 21(3) of Regulation No 4253/88 precludes a provision such as that at issue in the main proceedings, it is necessary to examine whether the charge to tax laid down under Presidential Decree No 917/86 is directly and inseparably linked to the payment of the grants made by the Community Structural Funds.

15 In the present proceedings, as the Advocate General stated at point 28 of his Opinion, the amount of the Community grants received by Porto Antico constitutes an asset of that company which is, together with any other income it may have, taken into account in the calculation of the payable income tax, thus taxing that amount in accordance with the general tax system brought in by the presidential decree, in the same way as all the other income of Porto Antico.

16 Yet the fact remains that the taxation provided for by Presidential Decree No 917/86 is separate from the amount of the Community grants paid to Porto Antico. That taxation does not represent a specific levy linked to the financial aid from which the company has benefited, but applies without distinction to all of the income of that company.

17 Consequently, it cannot be claimed that the tax at issue in the main proceedings, as laid down under the presidential decree, constitutes a deduction or retention within the meaning of the second subparagraph of Article 21(3) of Regulation No 4253/88, reducing the sums paid by the Community Structural Funds and having a direct and inseparable link with them, even if it is possible, as Porto Antico point out, to determine precisely the amount of the national tax which is imposed on those sums.

18 It follows that deductions or retentions which have the effect of reducing the amount of the Community grants received by the beneficiary which do not have a direct and inseparable link with the latter, such as those resulting from taxation of the kind laid down under Presidential Decree No 917/86, do not obstruct the effective application of the mechanism established by Regulation No 4253/88, and, therefore, that the regulation does not preclude the imposition of such deductions or retentions.

19 In addition, it should be added that, contrary to what Porto Antico contend, the differences which exist between the beneficiaries of the Structural Funds, by reason of the different rates of taxation imposed in the Member States on amounts received by way of Community assistance, cannot be considered as being liable to breach the principle of equal treatment, which precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified (see, inter alia, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 129, and Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraph 68).

20 For that to be the position, it would be necessary for the situations of the beneficiaries of Community aid to be comparable. That cannot be the case since those beneficiaries receive that aid in a socio-economic context specific to each Member State and, in the absence of Community

harmonisation on the assessment of taxable income, objective disparities between the rules in Member States still exist in that field, thereby inevitably creating such differences between those beneficiaries.

21 Having regard to the foregoing, it is necessary to reply to the first question that the second subparagraph of Article 21(3) of Regulation No 4253/88 must be interpreted as meaning that it does not preclude a national tax provision such as Article 55(3)(b) of Presidential Decree No 917/86 which includes grants paid by the Community Structural Funds in the assessment of taxable income.

The second question

22 Having regard to the reply to the first question, there is no need to reply to the second question put by the referring court.

Costs

23 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The second subparagraph of Article 21(3) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, must be interpreted as meaning that it does not preclude a national tax provision such as Article 55(3)(b) of Decree No 917 of the President of the Republic of 22 December 1986, which includes grants paid by the Community Structural Funds in the assessment of taxable income.

[Signatures]

* Language of the case: Italian.