

ECJ to Determine Characterization of Italy's IRAP

by Alessandro Adelchi Rossi

Reprinted from *Tax Notes Int'l*, December 6, 2004, p. 830

TAX NOTES INTERNATIONAL

Copyright 2004, Tax Analysts

ISSN 1048-3306

Editor: Cathy Phillips

Special Reports Editor: Alice Keane Putman

Managing Editor: Maryam Enayat

Deputy Editor: Doug Smith

Production: Paul M. Doster

Chief of Correspondents: Cordia Scott (cscott@tax.org)

Executive Director and Publisher: Chris Bergin

Senior Executive Editor: Robert Manning

Editor-in-Chief, International: Robert Goulder

Founder: Thomas F. Field

Correspondents

Africa: Zein Kebonang, University of Botswana, Gaborone

Albania: Adriana Civici, Ministry of Finance, Tirana

Angola: Trevor Wood, Ernst & Young, Lisbon

Anguilla: Alex Richardson, Anguilla Offshore Finance Centre, Anguilla

Antigua: Donald B. Ward, PricewaterhouseCoopers Center, St. John's

Argentina: Cristian E. Rosso Alba, Rosso Alba, Francia & Asociados, Buenos Aires

Armenia: Suren Adamyan, Association of Accountants and Auditors of Armenia, Yerevan

Australia: Graeme S. Cooper, University of Sydney, Sydney; Richard Krever, Deakin University, Melbourne.

Austria: Markus Stefaner, Vienna University of Economics and Business Administration, Vienna

Bahamas: Hywel Jones, Canadian Imperial Bank of Commerce Trust Company (Bahamas) Ltd., Nassau

Bangladesh: M. Mushtaque Ahmed, Ernst & Young, Dhaka

Barbados: Patrick B. Toppin, Pannell Kerr Forster, Christ Church

Belgium: Werner Heyvaert, Nauta Dutilh, Brussels; Marc Quaghebeur, Vandendijk & Partners, Brussels

Bermuda: Wendell Hollis, Ernst & Young, Bermuda

Botswana: I.O. Sennanyana, Deputy Director, Tax Policy, Ministry of Finance & Development Planning, Gaborone

Brazil: David Roberto R. Soares da Silva, Farroco & Lobo Advogados, São Paulo

British Virgin Islands: William L. Blum, Solomon Pearl Blum Heymann & Stich LLP, St. Thomas, USVI and New York

Bulgaria: Todor Tabakov, Interlex, Sofia

Cameroon: Edwin N. Forlemu, International Tax Program, Harvard University, Cambridge

Canada: Brian J. Arnold, Goodmans, Toronto, Ontario; Jack Bernstein, Aird & Berlis, Toronto, Ontario; Martin Przynski, Srinil Lalapat, and Hendrik Swaneveld, Transfer Pricing and Competent Authority Services, BDO Dunwoody, Toronto (Markham) Ontario

Caribbean: Bruce Zagaris, Berliner, Corcoran, and Rowe, Washington, D.C.

Cayman Islands: Timothy Ridley, Maples & Calder Asia, Hong Kong

Chile: Alex Fischer, Carey y Cia Ltda., Santiago; Macarena Navarrete, Ernst & Young, Santiago

China (P.R.C.): Jinyan Li, York University, Toronto; Lawrence Sussman, O'Melveny & Myers LLP, Beijing

Cook Islands: David R. McNair, Southpac Trust Limited, Rarotonga

Croatia: Hrvoje Zgombic, Zgombic & Partners, Zagreb

Cyprus: Theodoros Philippou, PricewaterhouseCoopers, Nicosia

Czech Republic: Michal Dlouhy, White & Case, Prague

Denmark: Nikolaj Bjørnholm, Bech-Bruun Dragsted Law Firm, Copenhagen

Dominican Republic: Dr. Fernando Ravelo Alvarez, Santo Domingo

Eastern Europe: Jurie Lungu, Graham & Levintsa, Chisinau

Egypt: Farouk Metwally, Ernst & Young, Cairo

Estonia: Helen Pahapill, Ministry of Finance, Tallinn

European Union: Joann M. Weiner, Facultés Universitaires Saint-Louis, Brussels

Fiji: Bruce Sutton, KPMG Peat Marwick, Suva

Finland: Marjaana Helminen, University of Helsinki in the Faculty of Law, Helsinki

France: Olivier Delattre, Latham & Watkins, Paris

Gambia: Samba Ebrima Saye, Income Tax Division, Banjul

Germany: Jörg-Dietrich Kramer, Ministry of Finance, Berlin/Bonn; Rosemarie Portner, Meilicke Hoffmann & Partner, Bonn; Klaus Sieker, Flick Gocke Schaumburg, Frankfurt

Ghana: Seth Terkper, Chartered Accountant/Tax Expert, Accra

Gibraltar: Charles D. Serruya, Baker Tilly, Gibraltar

Greece: Alexandra Gavrieliades, Athens

Guam: Stephen A. Cohen, Carlsmith Ball LLP, Hagatna

Guernsey: Neil Crocker, PricewaterhouseCoopers, St. Peter Port

Guyana: Lancelot A. Atherly, Georgetown

Hong Kong: Colin Farrell, PricewaterhouseCoopers, Hong Kong

Hungary: Daniel Deak, Budapest University of Economics, Budapest

Iceland: Indridi H. Thorlaksson, Reykjavik

India: Nishith M. Desai, Nishith Desai Associates, Mumbai; Sanjay Sanghvi, RSM & Co., Mumbai

Indonesia: Freddy Karyadi, Karyadi & Co Law and Tax Office, Jakarta

Iran: Mohammad Tavakkol, Maliyat Journal, College of Economic Affairs, Tehran

Ireland: Kevin McLoughlin, Ernst & Young, Dublin

Isle of Man: Richard Vanderplank, Cains Advocates & Notaries, Douglas

Israel: Joel Lubell, Teva Pharmaceutical Industries, Ltd., Petach Tikva; Doron Herman, S. Friedman & Co. Advocates & Notaries, Tel-Aviv

Italy: Alessandro Adelchi Rossi and Luigi Perin, George R. Funaro & Co., P.C., New York; Gianluca Queiroli, Cambridge, Massachusetts

Japan: Gary Thomas, White & Case, Tokyo; Shimon Takagi, White & Case, Tokyo

Jersey: J. Paul Frith, Ernst & Young, St. Helier

Kenya: Glenday Graham, Ministry of Finance and Planning, Nairobi

Korea: Chang Hee Lee, Seoul National Univ. College of Law, Seoul, Korea

Kuwait: Abdullah Kh. Al-Ayoub, Kuwait

Latin America: Ernst & Young LLP, Miami

Latvia: Andrejs Birums, Tax Policy Department, Ministry of Finance, Riga

Lebanon: Fuad S. Kawar, Beirut

Libya: Ibrahim Baruni, Ibrahim Baruni & Co., Tripoli

Lithuania: Nora Vitkuniene, International Tax Division, Ministry of Finance, Vilnius

Luxembourg: Jean-Baptiste Brekelmans, Loyens & Loeff, Luxembourg

Malawi: Clement L. Mononga, Assistant Commissioner of Tax, Blantyre

Malaysia: Jeyapalan Kasipillai, University Utara, Sintok

Malta: Dr. Antoine Fiott, Zammit Tabona Bonello & Co., and Lecturer in Taxation, Faculty of Law, University of Malta, Valletta

Mauritius: Ram L. Roy, PricewaterhouseCoopers, Port Louis

Mexico: Jaime Gonzalez-Bendixsen, Baker & McKenzie, Juarez, Tijuana, Monterrey, and Guadalajara; Ricardo Leon-Santacruz, Sanchez-DeVanny Eseverri, Monterrey

Middle East: Aziz Nishtar, Nishtar & Zafar, Karachi, Pakistan

Monaco: Eamon McGregor, Moores Rowland Corporate Services, Monte Carlo

Mongolia: Baldangiin Ganhuleg, General Department of National Taxation, Ulaanbaatar

Morocco: Mohamed Marzak, Agadir

Myanmar: Timothy J. Holzer, Baker & McKenzie, Singapore

Nauru: Peter H. MacSparran, Melbourne

Nepal: Prem Karki, Regional Director, Regional Treasury Directorate, Kathmandu

Netherlands: Eric van der Stoel, Otterspeer, Haasnoot & Partners, Rotterdam; Dick Hofland, Freshfields, Amsterdam; Michaela Vrouwenvelder, Amsterdam; Jan Ter Wisch, Allen & Overy, Amsterdam

Netherlands Antilles: Dennis Cijntje, KPMG Meijburg & Co., Curaçao; Koen Lozie, Deurle

New Zealand: Adrian Sawyer, University of Canterbury, Christchurch

Nigeria: Elias Aderemi Sulu, Lagos

Northern Mariana Islands: John A. Manglona, Saipan

Norway: Frederik Zimmer, Department of Public and International Law, University of Oslo, Oslo

Oman: Fudli R. Talyarkhan, Ernst & Young, Muscat

Panama: Leroy Watson, Arias, Fabrega & Fabrega, Panama City

Papua New Guinea: Lutz K. Heim, Ernst & Young, Port Moresby

Peru: Italo Fernández Origgí, Yori Law Firm, Lima

Philippines: Benedicta Du Baladad, Bureau of Internal Revenue, Manila

Poland: Dr. Janusz Fiszer, Warsaw University/White & Case, Warsaw

Portugal: Francisco de Sousa da Câmara, Morais Leitao & J. Galvão Teles, Lisbon; Manuel Anselmo Torres, Galhardo Vilão, Torres, Lisbon

Qatar: Finbarr Sexton, Ernst & Young, Doha

Romania: Sorin Adrian Anghel, Senior Finance Officer & Vice President, The Chase Manhattan Bank, Bucharest

Russia: Scott C. Antel, Ernst & Young, Moscow; Joel McDonald, Salans, London

Saint Kitts-Nevis: Mario M. Novello, Nevis Services Limited, Red Bank

Saudi Arabia: Fauzi Awad, Saba, Abulkhair & Co., Dammam

Sierra Leone: Shakib N.K. Basma and Berthan Macaulay, Basma & Macaulay, Freetown

Singapore: Linda Ng, White & Case, Tokyo, Japan

Slovakia: Alzbeta Harvey, Principal, KPMG New York

South Africa: Peter Surtees, Deneys Reitz, Cape Town

Spain: José M. Calderón, University of La Coruña, La Coruña

Sri Lanka: D.D.M. Waidyasekera, Mt. Lavinia

Sweden: Leif Mutén, Professor Emeritus, Stockholm School of Economics

Taiwan: Keye S. Wu, Baker & McKenzie, Taipei; Yu Ming-i, Ministry of Finance, Taipei

Trinidad & Tobago: Rolston Nelson, Port of Spain

Tunisia: Lassaad M. Bediri, Hamza, Bediri & Co., Legal and Tax Consultants, Tunis

Turkey: Mustafa Çamlıca, Ernst & Young, Istanbul

Turks & Caicos Islands, British West Indies: Ariel Misick, Misick and Stanbrook, Grand Turk

Uganda: Frederick Ssekandi, Kampala

United Arab Emirates: Nicholas J. Love, Ernst & Young, Abu Dhabi

United Kingdom: Trevor Johnson, Trevor Johnson Associates, Wirral; Eileen O'Grady, barrister, London; Jefferson P. VanderWolk, Baker & McKenzie, London

United States: Richard Doernberg, Emory Univ. School of Law, Atlanta GA.; James Fuller, Fenwick & West, Palo Alto

U.S. Virgin Islands: Marjorie Rawls Roberts, Attorney at Law, St. Thomas, USVI

Uruguay: Dr. James A. Whitelaw, Whitelaw Attorneys, Uruguay

Uzbekistan: Ian P. Slater, Arthur Andersen, Almaty

Vanuatu: Bill L. Hawkes, KPMG, Port Vila

Venezuela: Ronald Evans, Baker & McKenzie, Caracas

Vietnam: Frederick Burke, Baker & McKenzie, Ho Chi Minh City

Western Samoa: Maiava V.R. Peteru, Kamu & Peteru, Apia

Yugoslavia: Danijel Pantic, European Consulting Group, Belgrade

Zambia: W Z Mwanza, KPMG Peat Marwick, Lusaka

Zimbabwe: Prof. Ben Hlatshwayo, University of Zimbabwe, Harare

ECJ to Determine Characterization of Italy's IRAP

by *Alessandro Adelchi Rossi*

A public hearing before the European Court of Justice was held November 16 for *Banca Popolare di Cremona v. Agenzia Entrate Ufficio Cremona* (C-475/03), which addresses the issue of whether Italy's regional tax on productive activities (IRAP) violates article 33 of the Sixth VAT Directive (77/388/EEC of May 17, 1977). That directive prohibits EU member countries from adopting domestic turnover taxes that are similar to VAT. In the taxpayer's view, the IRAP is indeed a turnover tax similar to VAT. Italian authorities, however, argue that the IRAP is an income tax.

Because its tax base is computed without considering labor costs or — for certain taxpayers, such as manufacturing companies — interest costs, U.S. tax authorities have questioned since its introduction in 1998 whether the IRAP can be considered an income tax.

The U.S. Internal Revenue Service has argued that the IRAP was neither a tax imposed on net income nor a tax “in lieu of an income tax” under the relevant U.S. statutory and regulatory language and therefore could not be credited against U.S. income tax. Italy solved the problem with the United States by way of a mutual agreement between the competent authorities of the two countries.

In *Banca Popolare di Cremona*, the IRAP's characterization as an income tax is still being questioned. In this case, however, the taxpayer is raising the issue of its similarity to a VAT. According to the taxpayer, the IRAP, like a VAT:

- applies to transactions involving both goods and services;
- is proportional to the price of goods or services;
- is charged at each stage of both the production and the distribution processes; and

- is imposed on the added value of goods and services.

Much to the concern of the Italian government, a 1992 case (C-200/90) involving a dispute between Danish tax authorities and Danish corporations Dansk Denkavit ApS and P. Poulsen Trading ApS over the nature of the Danish employment market contribution — set a precedent that, if followed, could have a potentially devastating effect on Italy's public finances.

In *Dansk Denkavit*, the ECJ held that it is not necessary for a tax to resemble VAT in every respect to be characterized as a turnover tax; rather, it is sufficient for it to reveal the “essential characteristics” of VAT. Accordingly, in the ECJ's view, European law precluded the introduction or maintenance of a tax of the same type as the Danish employment market contribution. In light of the serious consequences that such a decision would have had for Denmark's fisc, the Danish government asked the court not to make the judgment effective retroactively. Despite that request, the judges concluded that it would have been inappropriate to limit the effects of the judgment *ratione temporis*.

If the ECJ finds for the taxpayer in *Banca Popolare di Cremona* as it did in *Dansk Denkavit*, it is unclear whether the judgment will have retroactive effect. Furthermore, if the ECJ concludes that the IRAP is incompatible with EU law, it is unclear what measures the Italian government will adopt to replace the substantial annual revenue of about €32 million generated by that tax.

Under the ECJ's rules of procedure, the case now will be analyzed by an ECJ advocate general, with a final decision by the full court expected in early 2005.

♦ *Alessandro Adelchi Rossi,*
George R. Funaro & Co., P.C., New York