

Advocate General holds Italian IRAP (Regional Tax on Productive Activities) incompatible with the Sixth Directive

On the 17th of March 2005 Advocate General Jacobs delivered his opinion in Case C-475/03 *Banco Popolare di Cremona*. A preliminary ruling from the European Court of Justice was requested by the Court of First Instance of Cremona on the 8th of October 2003. The Italian bank was assisted by our firm.

The following request was submitted to the European Court of Justice by the Italian judge: "Must Art. 33 of the Sixth VAT Directive be interpreted as meaning that it prohibits a charge to the IRAP in respect of the net value of production deriving from the regular exercise of an independent activity to produce or exchange goods or to provide services?"

Indeed, art. 33 of the Sixth Directive prohibits Member States from introducing or maintaining taxes, duties or charges in the nature of turnover taxes. According to the well established case law of the European Court of Justice, a tax can be deemed to have the same characteristics as VAT if: (i) it applies generally to transactions relating to goods or services; (ii) it is imposed on the added value of goods and services; (iii) it is charged at each stage of the production and distribution process; and (iv) it is proportional to the price of those goods or services, whatever the number of transactions carried out.

Considering that IRAP has such characteristics, the Advocate General affirmed in his opinion that IRAP is incompatible with Art. 33 of the Sixth Directive.

However, taking into due consideration the good faith of the Italian Government and the risk of serious financial difficulties that the reimbursement of all the potential claims could create for the Italian Government, the Advocate

General suggested to limit the effects of the decision of the European Court of Justice, postponing the effects of the eventual finding of incompatibility to a future date before which taxpayers may not rely on the incompatibility in any claims against the State. Given that the European Court of Justice never took such a position, the Advocate General suggested the ECJ to reopen the oral procedure to hear further arguments on the issue.

Therefore, even though it is likely that the European Court of Justice will hold IRAP incompatible with EC law, it is not at the moment foreseeable what position the Court will take on the possibility for claimant taxpayers to obtain the reimbursement for IRAP paid.



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