



**Italy's VAT Amnesty
Discriminatory, ECJ Advocate
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by Roberto Succio

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Italy's Law 289 of December 27, 2002 (the Finance Act 2003), provides for a VAT amnesty under which — if some declarations are made and some sums are paid immediately — the failure to account for unpaid VAT dating from the 1998 tax year (or in some cases 1997) through the 2001 tax year will not be pursued or subjected to scrutiny. (For prior coverage, see *Doc 2003-1935* or *2003 WTD 14-9*.)

Italy contends that the effect of the amnesty is not a general and indiscriminate renunciation of all tax verifications. On the contrary, only a limited number of persons liable for VAT have taken advantage of it. However, the program had been extremely productive in terms of tax recovered and of judicial use of limited resources, so in its Finance Act 2004, Italy extended the amnesty through the 2002 tax year.

However, the European Commission contends that absolving taxable persons from making full returns and keeping full VAT records and granting those persons special facilities to verify their VAT debts is contrary to the EU Sixth VAT Directive, and in March 2007, the commission brought Italy before the European Court of Justice for extending the VAT amnesty.

On October 25, ECJ Advocate General Eleanor Sharpston issued an opinion (C-132/06) that concurs with the view of the European Commission. Sharpston held that the legislative arrangement under which honest traders account for VAT in full while fraudulent and negligent traders can escape further scrutiny in exchange for a payment of at most half of the VAT actually due is not in compliance with the obligations imposed on EU member states by the Sixth VAT Directive. (For Sharpston's opinion in *Commission v. Italy* (C-132/06), see *Doc 2007-23784* or *2007 WTD 208-15*.)

In a striking example of the separation between the tax liability under normal VAT rules and the

amount payable to qualify for the amnesty, a taxable person that has failed to file any tax return at all (and consequently to pay the tax due) can regularize its position for each applicable tax year with a payment of €1,500 (for a natural person) or €3,000 (for an entity).

Further, the rules under Law 289 governing the tax amnesty allow taxpayers to discount any link to the basis of assessment for undeclared transactions. That advantage can be obtained by submitting a supplementary statement. The amount payable by the taxpayer is calculated as a percentage (2 percent) applicable to the VAT that would have been payable on the supply of goods or services effected in each tax year at issue, or to the VAT improperly deducted on purchases in those same tax years.

Such a general and preventive abandonment of any means of VAT verification is an evident distortion of the proper functioning of the common VAT system, Sharpston said. It undermines the principle of fiscal neutrality, which precludes the different VAT treatment of traders effecting the same transactions. Any exception to the rule that VAT should be levied and collected effectively inflicts serious damage both to Italian undertakings and to those in other member states that are subject to ordinary VAT rules, the advocate general said.

Member states' latitude in adjusting their controls on the basis of available resources is limited by the need to ensure that EU resources are collected efficiently and that there are no significant variations in the treatment of taxable persons either within a single member state or between member states, Sharpston said. Italy's VAT amnesty seriously undermines the principle of fair competition within the EU market as set out in the fourth recital to the preamble to the sixth directive, she said.

Sharpston recommended that the ECJ declare that by explicitly providing in Law 289 (articles 8

and 9) for a general waiver of verification operations on taxable transactions effected during a series of tax years, Italy has failed to fulfill its obligations under articles 2 and 22 of the sixth VAT directive, in conjunction with article 10 of the EC Treaty.

Article 10 imposes a general obligation on member states to “take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community,” to “facilitate the achievement of the Community’s tasks” and to “abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

Remarks

The need to prevent tax avoidance and tax fraud are justifiable reasons to breach the fundamental freedoms set forth in the EC Treaty. However, tax amnesties should be one-time opportunities, as repetition induces taxpayers to adapt their tactics in anticipation of future amnesties.

Further, tax amnesties should involve payments of at least what was due and generally some interest, too — or else taxpayers will get the impression that tax evasion is rewarded. And finally, tax amnesties should be accompanied by at least a credible announcement of enhanced auditing, or the trade-off between declaration and detection will not seem advantageous.

In fact, Italy’s disputed VAT amnesty does not appear to display any of those features. And its extension to the 2002 tax year creates an expectation of future amnesties, thereby decreasing the

likelihood of compliance. Actually, there is evidence that Italy has made abundant use of tax amnesties in the past.¹

Even if, as Italy stated at the hearing, VAT receipts have increased in later years, no evidence has been put forward to establish either a specific link with the amnesty itself, or any durable effect.

Possible Effects of Pending ECJ Judgment

One of the effects of the pending ECJ judgment could be that the Italian tax authorities can actually carry out tax assessments for the years covered by the tax amnesty. In that event, the sums paid would be considered undue payments.

Also, the ECJ could impose a penalty on the Italian government, although a request for the payment of damages to the European Union for lower VAT revenues seems unlikely if the government can prove that the tax amnesty did not damage EU revenues. This last scenario is the most likely one. ♦

♦ *Roberto Succio, tax attorney and professor of tax law, University of Turin, Cuneo*

¹A 1998 paper issued by the U.S. Congress states that “Italy has conducted more than a dozen tax amnesties, an average recently of about one every two years.” Also, an article cited by the European Commission in its application to the European Court of Justice (*Il condono fiscale tra genesi politica e limiti costituzionali*, E. De Mita, *Diritto e pratica tributaria*, 2004, Parte I, p. 1449) states that the 2003 amnesty was Italy’s 58th since 1900.