Supreme Court of Cassation
Civil Judgment Sec. 5 No. 26432 Year 2024
Rapporteur: FRACANZANI MARCELLO MARIA
Publication date: 10/10/2024

JUDGMENT

on the appeal registered under No. 24289/2016 R.G. brought by:
ILAPARK ITALIA SPA, electively domiciled in ROME VIA F. CONFALONIERI 5, at the office of lawyer COGLITORE EMANUELE (CGLMNL42C04H501Z) who represents and defends it together with lawyers BRUZZONE MARIAGRAZIA (BRZMGR65C50D969K), MATTEI GIORDANA (MTTGDN73R45D332K)
-appellant-
against
AGENZIA DELLE ENTRATE, *ex lege* domiciled in ROME VIA DEI PORTOGHESI 12, at the AVVOCATURA GENERALE DELLO STATO
(ADS80224030587) representing and defending it
-counterclaimant-
against JUDGMENT OF COMM.TRIB.REG. PER LA TOSCANA no. 523/2016 filed on 15/03/2016.
Hearing the report delivered at the public hearing on 10/07/2024 by Co: Marcello Maria Fracanzani;
Hearing of the Public Prosecutor in the person of the Deputy Attorney General Dr. Michele Di Mauro who concluded for the rejection of the appeal;
Hearing on behalf of the parties, Gianluca Calderara, by proxy of Mr Bruzzone and Alessandro Maddalo, Avvocato dello Stato.

FACTS OF THE CASE

The taxpayer soc. Ilapak Italia s.p.a. manufactures machines for the packaging of food products in the countryside of Arezzo and is the only production unit of the Ilapak Group, of which all the other foreign companies are involved in the distribution and marketing of the product on the markets of the various countries to which they belong.
For the tax year 2008, the taxpayer was affected by a notice of assessment articulated on three tax recoveries, respectively for deductible costs not inherent and relating to the remuneration of managers, for intercompany *transfer pricing* , for payment of*royalties*. For the purposes of this case, the first profile, relating to managers' remuneration, is not relevant, as it has already been the subject of administrative self-assessment at first instance, while the most conspicuous aspect remains transfer pricing and, in particular, the accounting criterion or statistical model with which to represent the "normality" of prices referred to in Article 109 of the Consolidated Income Tax Law (Presidential Decree No. 917/1986).
In these respects, the instances of merit were unfavourable to the defendant company, which reacted by submitting four cassatory means before this Court, to which the defendant replied with a timely counter-appeal.
Near the public hearing, the Public Prosecutor, in the person of Deputy Attorney General Dr. Michele Di Mauro, filed an indictment in the form of a pleading, concluding that the appeal should be dismissed, while the taxpayer filed a pleading to illustrate its reasons.

GROUNDS FOR THE DECISION

Four grounds of appeal are put forward.
The first ground of appeal alleges, pursuant to Article 360(4) of the Code of Civil Procedure, infringement of Article 36(2)(4) of Legislative Decree No 546 of 1992 also in relation to Article 111(6) of the Constitution and Article 6 of the European Convention on Human Rights, as well as Article 118 of the implementing provisions of the Code of Civil Procedure pursuant to Article 62(1) of Legislative Decree No 546 of 1992.
In other words, it is alleged that the statement of reasons is merely apparent because it did not take a substantive position on the issues to be decided or on the criterion for the analysis of profitability, referring the judgment under review to the judgment at first instance, the content of which it declares to agree with in full.
The second ground of appeal alleges, pursuant to Article 360(3) of the Code of Civil Procedure, infringement or misapplication of Article 110(7), in conjunction with Article 9(3), of Presidential Decree No 917 of 1986, for failure to find that among the various criteria for assessing the normality of the price, there is a primacy of the CUP method over the TNMM method. While the justifications offered by the taxpayer affected are calibrated on the first criterion, the Office acted on the second method.
The third plea alleges a further complaint under Article 360(4) of the Code of Civil Procedure alleging infringement and misapplication of Article 112 of the same Code of Civil Procedure and infringement and misapplication of the general principles on the precedence of European Union law over domestic national law; in the alternative, a question of the constitutionality of Article 1(281) of Law No 147 of 27 December 2013 with reference to Articles 3 and 53 of the Fundamental Charter also in relation to Article 1(2) and 3(1) of Law No 212 of 2000.
The fourth ground of appeal alleges a further complaint under Article 360(4) of the Code of Civil Procedure for infringement or misapplication of Article 112 of that code, for failure to rule on the question and ground of appeal concerning the remodelling of the penalties on account of the participation of the taxpayer affected.

The first plea cannot be upheld. The judgment under review, in fact, goes into great length in reconstructing the positions of the parties during the course of the two levels of merit to finally reach the argumentative conclusions in the last two pages, where, moreover, it compares the two different methods of representing the normality of the price (TNMM and CUP), in order to arrive at a balance that gives prevalence to the criterion adopted by the Office.
Moreover, the ground of complaint is reduced to complaining of a failure to assess the accounting elements used as the basis of its statistical representation and is thus beyond the scope of this Court's review.
It must be stated at the outset that it is now a consolidated principle in the jurisprudence of this Court that (Court of Cassation VI-5, no. 9105/2017) the judgement is vitiated by an omitted or apparent motivation when the judge of the merits omits to indicate the elements from which he drew his own conviction or indicates them without an in-depth logical and legal examination, thus making it impossible to check the accuracy and logicality of his reasoning. In such cases, the judgment lacks the so-called 'constitutional minimum' referred to in the well-known pronouncement of the United Sections of this Court (Cass. S.U, no. 8053/2014, followed by Cass. VI - 5, no. 5209/2018). In these terms, see also what has been established in another case (Court of Cassation, Section L, Judgment No. 161 of 08/01/2009) in which this Court held that the judgment is null and void pursuant to Article 132, paragraph 2, no. 4, of the Code of Civil Procedure, where it lacks any statement of the grounds on which the decision is based or where the grounds are only apparent, being expressed in arguments that are not capable of revealing the *ratio decidendi* (see Court of Cassation V, No. 24313/2018). In another respect, it has been reaffirmed that an appeal in cassation is inadmissible if, under the apparent allegation of breach or misapplication of the law, absolute failure to state reasons and failure to examine a decisive fact, the appeal in fact seeks to re-evaluate the historical facts of the case by the trial court (see Court of Cassation S.U. no. 34476/2019).
The first plea must therefore be rejected.
Nor can the second ground of appeal be upheld, alleging breach of Article 110 of Presidential Decree No 917/1986, as interpreted in the light of the OECD rules, for giving precedence to the TNMM (*Transactional Net Margin Method*) criterion over the CUP (*Comparable Uncontrolled Price*) method, which is considered more appropriate, together with the RPM (*Resale Price Method*), for identifying the 'normality' of prices indicated by the rule in order to establish whether there is tax avoidance in intra-group activities spread over several countries.
Said differently, the violation of the law derives from the application of a calculation method that does not adhere to reality, which has been held to be yielding by the jurisprudence of this Court, whose coeval pronouncements nos. 22005 and 22010 of 2013 are cited.
The censure requires a reconstruction of the orientation of this Supreme Court of legitimacy on the subject of mathematical, statistical and actuarial methods according to the OECD observations, their nature and their place in the hierarchy of sources.
As is well known, the OECD (Organisation for Economic Co-operation and Development) is a supranational body of a conventional nature with the task of drawing up recommendations, best practices, accounting principles, mathematical models and cognitive tools in general to harmonise the *modus operandi* among member countries, thus making operating systems comparable - even with unchanged national legislation - so as to favour procedural homogeneity on which real competition is based, which requires transparency and 'parity of starting points'. On the basis of market trends, the decisions of sovereign or supranational monetary institutions, changed or consolidated practices in the various sectors, and available technological innovations, the OECD regularly issues updates to its recommendations. For what is of most interest here, the reference is to the 1995 edition and the 2010 edition with updates on *transfer pricing*. Also on the basis of these recommendations, several provisions of law have been amended, with the intention of strengthening cooperation between States, harmonising the regulatory sources and, among these, undoubtedly includes Article 110 of the aforementioned Presidential Decree No. 917/1986, entitled 'General Valuation Rules', which dedicates the seventh paragraph to income components for transactions with entities based in foreign countries.
With the aforementioned contemporaneous pronouncements of 2013, nos. 24005 and 24010, this Court recalled the priority of criteria established by the normative datum of Article 3, paragraph nine, of the aforementioned Presidential Decree no. 917/1986, giving prevalence -but according to a logic of tendential possibility- to the price lists of those who supplied the goods, then to the mercurial or professional tables, to the cases of use or to the domestic market, as residual criteria. The price comparison is therefore an appropriate criterion, but not in the abstract and in every case, but on the basis of the specifics of the comparison operation to be performed and in the presence of sufficient objective parameters of reference (the *tertium comparationis* well known already to the ancients), to which the model to be applied should be pegged.
With respect to these jurisprudential arrests, which made reference to the 1995 OECD model, this Court proceeded to refine its approach when it was called upon to apply the 2010 OECD criterion, having observed that on the subject of 'transfer pricing', for the purposes of identifying the 'normal value' of transfer prices applied pursuant to Art. 110, para. 7, T.U.I.R. ('ratione temporis' in force), as supplemented by the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the transactional profit split method (cd. '(transactional profit split method, TPSM or PSM) can be used just as reliably as the other pricing methods provided that, after the accurate delimitation of the transaction, including the functional analysis, it is possible to identify a strong correlation between the costs incurred and the value added created during the transaction and provided that the selected allocation keys - for which the accounting classification of the intra-group costs and the existence of any differences ("higt labour-cost

country vs. low labour-cost country‘) - are compliant (’compliant") in terms of the reliability of the results (OECD Guidelines, 2010, § 2.116) (see Cass. V, no. 11837/2020).
More precisely, with respect to the TNMM method that is relevant here, it has been said that with respect to the determination of business income, the regulations set forth in Article 110, paragraph 7, of Presidential Decree no. 917 of 1986, aimed at repressing the economic phenomenon of ‘transfer pricing’, i.e., the shifting of taxable income following transactions between companies belonging to the same group and subject to different national regulations, requires the determination of the weighted transfer prices for similar transactions carried out by companies competing on the market, for which purpose it is possible to use the method developed by the OECD that is based on the determination of the net margin of the transaction (so-called ‘TNMM’), which is based on the determination of the net margin of the transaction. ‘TNMM"), provided that the period of investigation is selected, the comparable companies are identified, the appropriate accounting adjustments are made to the financial statements of the tested party, due account is taken of the differences between the tested party and the comparable companies in terms of risks assumed or functions performed, and a reliable indicator of the level of profitability is assumed (see Cass. V, no. 15668/2022, followed by Cass. T, n. 2853/2024).
From the unravelling of the jurisprudential strand under examination, there is a continuous reference to the actual comparability in the specific case, to the need for the model to adhere to the concrete case in point, which deserves more systematic and in-depth study here. There is no doubt that the OECD recommendations are outside the hierarchy of sources. They are in fact technical standards, systems derived from mathematical, accounting and actuarial models that are traditionally subsidiary to legislative or regulatory provisions. Their very nature, therefore, rules out a system of primogeniture, except in cases where preference is expressly established in regulatory form, which is, however, done directly by the legislator, never by the OECD. It follows that it is misleading to look for one method in the OECD recommendations as prevailing in the abstract over the other, because it is alien to the institutional structure of that Organisation, nor does it pertain to its conventional task to set priorities, but only to propose models. On the contrary, it is up to the individual contracting countries - as an expression of that ‘hard core’ of state sovereignty that is the power of taxation - to possibly set an order of precedence that, moreover, is not in the area of concern here.
And in fact, the continuous reference to the ‘normality’ of prices, forms a reference to the choice of the method that is - in concrete terms - more adherent to represent the case under examination. If it is not a question of hierarchical order (of the sources), as has been said, the phenomenon of multi-qualification materialises instead, i.e. the possibility that the same phenomenon may be categorised under several legal figures, i.e. - according to traditional dogmatic terminology - the same concrete case may be subsumed under several competing abstract cases. Hence the interpreter is called upon to choose -motivatedly- the one considered most appropriate to the case, according to the purpose (*tèlos*) of the rule.
For administrative acts in general, and for tax acts in particular, the choice of the applicable model must be justified with the forms proper to the motivation of the provvedimental acts to which they refer, with the consequence that the adherence of the proposed model to the concrete case under examination can be scrutinised before the court of merit, and the application of a model or calculation method that is not coherently motivated in relation to the concrete case in point becomes reviewable in the court of legitimacy, by means of the complaint of violation of the law, the application of a model or calculation method that is not coherently motivated in relation to the concrete case in point. In fact, since, as stated in the introduction, these are technical standards, we are dealing with operational tools (*tekne*, *sive* mezzo per un fine) functional to the pursuit and specific implementation of a regulatory provision that refers to them or provides for them.
The following principles of law can therefore be expressed:
-OECD Recommendations do not fit into the hierarchy of regulatory sources, but provide aids and operational methods (technical standards) for the specific implementation of far-reaching legislative or regulatory provisions (elastic rules) such as the expression of ‘customary conditions’, ‘normal price’ and other similar ones.
-From among the various criteria provided by the technical standards, it is for the interpreter to identify the one most suited to the concrete case, bearing in mind the purpose pursued by the standard.
-The motivation on the choice of the calculation criterion or mathematical model is scrutinised by the judge of merit on the basis of the canons proper to the measure (assessment, taxation, taxation) to which it relates, while it can be reviewed in the court of legitimacy through the censure of the violation of the law, identifying with precision the subsumption defect of the judge of merit and indicating at the same time the alternative criterion deemed more adherent to the concrete case.
In the present case, the CUP (*Comparable Uncontrolled Price*) criterion was correctly excluded. It is not disputed and, indeed, it is confirmed by the taxpayer's own reconstruction of the facts, that the group is structured around a single manufacturing company based in Tuscany, and then articulated into many companies, each operating exclusively in one or more countries of reference, collecting orders and ensuring the supply of the requested machine. The structure involves the sale of intra-group goods at low risk, with reduced risk due to the uniqueness of the production centre, which essentially operates on orders that have already been confirmed. It is therefore not an open market with a price that cannot be controlled, so the TNMM method is more closely aligned than the CUP, because the profit margin is a more indicative criterion than the price, which is not the result of a free market. As also recalled in the judgment under scrutiny (p. 11, second paragraph), the Office identified similar operators, excluded others (because they had an eccentric structure, apart from the similarity of goods), and therefore drew conclusions on the differences and articulated the consequent recovery of taxation.

The correctness of the Office's actions, as well reasoned by the board of appeal, therefore leads to the dismissal of the second ground of appeal.
The third ground of appeal alleges infringement of the precedence of European Union law over national law, and also raises an objection of constitutional legitimacy of Article 1(281) of Law No 147 of 27 December 2013 with reference to Articles 3 and 53 of the Constitution, also in relation to Article 1(2) and Article 3(1) of Law No 212 of 2000. In essence, the complaint alleges a retroactive scope of the calculation for IRAP taxable purposes of the aforementioned provision, to which the grievance was not answered at the appeal instance.
The issue has already been examined by this Court in a similar case, in which it held that the substantive complaint was unfounded, so that the alleged failure to rule would be of no use to the appellant. In fact, the issue of the constitutionality of Article 1(281) of Law No 147 of 2013, which extended the application of transfer pricing to tax periods prior to its entry into force, is manifestly unfounded, since it is an authentic interpretation provision that allowed the application of the rules set out in Article 110(7) of the Italian Income Tax Code for tax periods from 2008 onwards. This provision does not violate Articles 3 and 41 of the Constitution, as it is not manifestly unreasonable or contrary to the freedom of economic initiative to provide for a more serious effect for the violation of a rule compared to the previous rules; nor does it violate Articles 111 and 117 of the Italian Constitution (in relation to Article 6 of the European Convention on Human Rights), as the taxpayer cannot place a reasonable expectation in relation to an issue (the relevance of transfer pricing for IRAP purposes) that is controversial due to the various repeals that have occurred in the matter and, therefore, deserving of authentic interpretation (see Court of Cassation V, no. 18436/2021).
Moreover, a failure to rule on an objection on the merits raised on appeal does not constitute a defect if, even if not expressly examined, it is incompatible with the ruling upholding the plaintiff's claim, leading to an implicit rejection of the objection, so that the failure to examine the objection cannot be considered a failure to rule, and therefore a violation of a rule of procedure (art. 112 c.p.c.), but as a violation of the law and failure to state reasons, so as to bring the review of legitimacy on the conformity with the law of the implied decision and on the decisiveness of the point not taken into consideration (Court of Cassation III, no. 24953/2020).
The third ground of appeal cannot therefore be upheld either.
The fourth ground of appeal alleges a failure to rule on the complaint alleging failure to remodel the penalties, notwithstanding the cooperative conduct of the taxpayer affected.
More specifically, it is complained that the judgment at first instance limited itself to stating that the penalties were to be applied at the legal minimum, without specifying whether with legal or material cumulation or with the institution of continuation, while the appellate court did not decide on the matter, although it was ritually addressed to it on p. 73 of the appeal and also invoked the reference to the *ius superveniens* more favourable to the taxpayer set out in Legislative Decree No 158/2015.
The plea is well founded and must be upheld. Leaving aside the relevance of the *ius superveniens* and the judge's duty to assess its application in concrete terms where a profile of advantage is also indicated in the abstract (Cass. T. no. 577/2024), what is at issue here is a failure to rule on a specific complaint and ground of appeal expressly formulated. In view of the indication of the passage in the procedural documents where the complaint was formulated, it must be noted that the judgment under review did not take into consideration that relevant and specific aspect.
Accordingly, the appeal is well founded for the reasons set out in the fourth plea in law, with regard to the remodulation of the penalties on the basis of the new rules, the judgment must be set aside and the case remitted - on this specific aspect - to the court of the merits, which will rule on the point in accordance with the above-mentioned principles.

P.Q.M.

The Court upholds the fourth ground of appeal, sets aside the judgment under appeal in relation to the ground upheld, and refers the case back to the Court of Second Instance for Tuscany, in a different composition, to which it also refers the regulation of the costs of the present appeal.
Thus decided in Rome, on 10/07/2024.