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Kent Case—Decision No. 144

9 April 1958

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sibility be affirmed for the sale of furniture, household goods, dental instruments, and personal effects contained in two liftvans and in a crate, unloaded in 1939 from the German steamer *Geierfels*, in the port of Naples;

Having seen the Answer of the Agent of the Italian Government dated 30 June 1954 denying the responsibility of the Italian Government both because the sale in question took place in accordance with the regulations of common law in order to cover the expenses of unloading, storage and insurance, and also because the claimants Mr. and Mrs. Rosten, are not qualified to avail themselves of the provisions of the Treaty of Peace, as, at the period to which the Treaty of Peace refers, they were German subjects, against whom no wartime measures were adopted.

Having seen the *Procès-verbal de Désaccord* dated 16 July 1954 whereby the Representatives of the two Governments decided to have recourse to the Third Member, in accordance with Article 83 of the Treaty of Peace;

Having concluded that, from the information contained in the pleadings, and filed by the Agent of the Italian Government on 27 February 1956, it has been established that the sale complained of by Mr. and Mrs. Rosten took place in order to recover the expenses of unloading, storage, and insurance, in accordance with the claim put forward by Mr. and Mrs. Rosten's creditors, without any intervention on the part of the Italian Government; and that therefore the sale cannot be considered as arising from the war, neither conferring the right on Mr. and Mrs. Rosten to avail themselves of the provisions of Article 78 of the Treaty of Peace, nor constituting war damages compensatable in accordance with the provisions of that Article;

DECIDES:

The Submission put forward by the British Government on behalf of Mr. and Mrs. Paul and Alice F. Rosten is rejected.

The present decision is definitive and obligatory.

Rome, 13 February 1957.

The Third Member

*The Representative of Great
Britain*

(Sgd.) G. G. HANNAFORD

The Representative of Italy

(Sgd.) A. SORRENTINO

KENT CASE—DECISION No. 144
OF 9 APRIL 1958

Claim, under paragraph 6 of Article 78 of Peace Treaty, for exemption from extraordinary proportional tax on property imposed by Italian legislation—Whether such tax established for specific purpose of meeting expenses resulting from war or from some consequences thereof—Reference to decision No. 32 rendered by Franco-Italian Conciliation Commission—Inapplicability of exemption provisions to tax in litigation—Rejection of claim.

Demande d'exemption présentée au titre du par. 6 de l'article 78 du Traité de Paix — Impôt extraordinaire progressif sur le patrimoine établi par la législation italienne — Question de savoir si cet impôt a été établi en vue de couvrir les dépenses entraînées par la guerre ou par ses conséquences — Rappel de la décision n° 32 rendue par la Commission de Conciliation franco-italienne — Inapplicabilité des dispositions d'exemption à l'impôt litigieux — Rejet de la demande.

The Anglo-Italian Conciliation Commission composed of Messrs. Antonio Sorrentino, Representative of the Italian Government and Plinio Bolla, former President of the Swiss Federal Tribunal, Third Member chosen by mutual agreement between the Italian Government and the British Government, sitting in Rome on 9 April 1958, in the dispute between the British Government, represented by its Agent, Mr. F. C. S. Bayliss and the Italian Government, represented by its Agent Avv. Francesco Agrò, concerning the claim presented by Miss Pauline Kent relating to the applicability to British subjects of the Extraordinary Proportional Tax on Property (4%) established by D.L. No. 143 of 29 March 1947, and comprised in part III of Consolidated Law No. 203 of 9 May 1950.

CONSIDERATIONS OF FACT:

A. Article 78, paragraph 6, of the Peace Treaty signed on 10 February 1947 between the Allied and Associated Powers and Italy states:

United Nations nationals and their property shall be exempted from any exceptional taxes levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between 3 September 1943 and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

The Peace Treaty came into force on 15 September 1947.

B. By Decree Law of the Provisional Head of the State No. 143 of 29 March 1947 an Extraordinary Progressive Tax on Property was imposed in Italy. The same D.L. (Articles 68-74) converted the ordinary tax on property, established by R.D.L.N. 1529 of 12 October 1939, into an Extraordinary Proportional Tax on Property at the rate of 4% on the values definitely assessed for the purpose of the ordinary tax, for the year 1947; in substance, the ordinary tax on property was abolished commencing from January 1948, and the payment of 0.40% per year for ten years was consolidated into one payment *una tantum* of 4%.

Article 77 of D.L. No. 143 of 29 March 1947 established that it would be presented for ratification to the Constituent Assembly.

On 1 September 1947 the Provisional Head of the State sanctioned and promulgated a law No. 828 dated 1 September 1947, to "ratify, with alterations and additions, D.L. of the Provisional Head of the State No. 143 of 29 March 1947, concerning the establishment of an extraordinary progressive Tax on property".

Among the additions which this law brought to D.L. No. 143 of 29 March 1947 were the provisions which establish an extraordinary proportional tax

on the property of legal bodies (Article 67 from paragraph (a) to paragraph (c).

Law No. 828 of 1 September 1947 was published in the Official Gazette of the Italian Republic No. 202 of 4 September 1947.

This law laid down, under Article 77, that the Government would arrange the co-ordination and codification in a sole text of the provisions contained in Legislative Decree No. 143 of 29 March 1947, and of the alterations made to same.

The *Testo Unico* (Consolidated Law) in question was sanctioned and promulgated by the Provisional Head of the State by D.L. No. 1131 of 11 October 1947 published in Official Gazette No. 246 of 25 October 1947. The Consolidated Law governs at part III the Extraordinary Proportional Tax on Property at the rate of 4%, imposed under Article 68-74 of D.L. No. 143 of 29 March 1947.

The various legislative acts quoted above have therefore:

(a) Established an Extraordinary Progressive Tax on the property of physical persons (hereinafter called more briefly the First Tax);

(b) Established an Extraordinary Proportional Tax on the property of Legal Bodies (hereinafter called more briefly, Second Tax);

(c) Substituted the ordinary tax on property, from 1 January 1948, by an Extraordinary Proportional Tax at the rate of 4 per cent (hereinafter called more briefly, Third Tax).

C. A dispute arose in the first place between the French Government and the Italian Government, the French Government upholding that its nationals and their property should be exempt, in application of paragraph 6 of Article 78 of the Peace Treaty, from the First and the Second of these taxes on their capital assets in Italy, whilst the Italian Government opposed, primarily, the exemption from the two taxes arguing as to their purpose which, in their opinion, was different from that laid down in paragraph 6 of Article 78 of the Peace Treaty, and, subordinately, the exemption from the Second Tax, it having been, in their opinion, imposed only by law of 1 September 1947, published on 4 September 1947, which came into force 15 days later, that is on 19 September 1947, when the time-limit established in paragraph 6 of Article 78 of the Peace Treaty had elapsed four days previously.

By Decision No. 32 of 29 August 1949 the Italo-French Conciliation Commission in its Three-Member stage, rejected the two arguments of the Italian Government, the principle and the subsidiary (*Recueil des décisions de la Commission de Conciliation franco-italienne, premier fascicule, pp. 95 à 105*)¹

The provisions of the Decisions are as follows:

1. The extraordinary taxes imposed in Italy:

(a) by D.L. No. 143 of 22 March 1947;

(b) by law No. 848 of 1 September 1947;

which were grouped into a consolidated text by D.L. No. 1431 of 11 October 1947, are not applicable to French citizens.

2. All the sums paid by French citizens relating to the above-stated taxes must be refunded to them within three months from the notification of the present Decision.

3. (omissis).

Though these provisions speak generally of the extraordinary taxes imposed in Italy by D.L. No. 143 of 22 March 1947, and by Law No. 848 of 1 September

¹ Volume XIII of these *Reports*.

1947, legislative acts grouped into one consolidated text by D.L. No. 1431 of 11 October 1947, and appear therefore to exclude the applicability to French citizens also of the so-called Third Tax, it appears clear from the grounds of the decision that it has a bearing only on the First and Second Tax, on Property of physical Persons, and the Extraordinary Proportional Tax on the property of Legal Bodies; the Third Extraordinary Tax was never mentioned in the case, the French Government having been already convinced at the start that it should be paid by French citizens despite paragraph 6 of Article 78 of the Peace Treaty. The French representative in the Italo-French Conciliation Commission later confirmed, in a letter to the Italian Representative in the Commission dated 17 July 1950 that the French Authorities also consider that the exemption decided by the Italo-French Conciliation Commission on 29 August 1949 refers exclusively to the two extraordinary taxes, the progressive on the property of physical persons (First Tax) and the proportional on the property of legal bodies (Second Tax), and not also to the Extraordinary Proportional Tax on Property comprised in part III of D.L. No. 1131 of 11 October 1947 (Third Tax).

D. In the relations between the British Government and the Italian Government, the former had at first opposed the applicability "of the extraordinary taxes on property to British subjects in Italy", whilst the latter had upheld that these extraordinary taxes on property had not been imposed for the specific purpose indicated in paragraph 6 of Article 76 of the Peace Treaty but only as deductions from wealth affected in order to give the State financial assistance from the wealthy classes, without the income from the Extraordinary Taxes being destined in any way for any specific purpose (*notes verbales* No. 29.726 of 22 September 1947 from the Ministry of Foreign Affairs to the British Embassy, No. 639 of 25 October 1947 from the British Embassy to the Ministry of Foreign Affairs, No. 299 of 3rd June 1948 from the same to the same).

The settlement of the dispute was postponed by mutual agreement as an analogous question (it was thought) had been deferred to the Italo-French Conciliation Commission.

As that Commission decided in the above sense on 29 August 1949, the British Embassy communicated on 30 December 1949 to the Ministry of Foreign Affairs, by *note verbale* No. 667, that, in their opinion, the decisions represented a correct interpretation of Article 78 of the Peace Treaty, and was therefore applicable to British subjects and their property, as also to all other United Nations nationals and their property; the Embassy requested confirmation that it was no longer necessary to defer the dispute to the Anglo-Italian Conciliation Commission.

In the exchange of notes which followed, the Ministry of Foreign Affairs expressly recognized "in the Anglo-Italian relations the applicability of paragraph 6 of Article 78 of the Peace Treaty to the Extraordinary Progressive Tax on Property and to the Extraordinary Proportional Tax on Property of Societies and Legal Bodies (letter No. 12011,115 of 13 June 1950) from Count Sforza to the British Embassy)". But, referring again to this letter, The British Embassy, in their *note verbale* No. 143 of 9 March 1953, pointed out that "it did not expressly mention the analogous Extraordinary Proportional Tax on Property comprised in Part III, Articles 83-90 of D.L. of the Head of the State No. 1131 of 11 October 1947", whilst the British point of view was "that all three of the taxes comprised in that Legislative Decree stand on the same footing as regards the applicability of Article 78 paragraph 6 of the Treaty of Peace, and that consequently the individuals, corporations and societies

entitled to exemption from the first two Extraordinary Taxes are similarly exempt from the Third Tax”.

This point of view was not shared by the Ministry of Foreign Affairs which, by *note verbale* No. 4481/13, informed the British Embassy: “The Extraordinary Proportional Tax on Property differs from the other two taxes . . . as it constitutes merely the exaction of ten yearly payments of the Ordinary Tax on Property established in 1939, that is prior to the commencement of the war. In the case of this tax, therefore, the specific purpose contemplated in paragraph 6 of Article 78 of the Peace Treaty ‘to meet charges arising out of the war’—which is essential in order that it may be declared non-applicable to United Nations nationals, cannot be found.”

In *note verbale* No. 290 of 16 June 1953 from the British Embassy to the Ministry of Foreign Affairs, the British Government stated that it must be considered that a dispute had arisen under the terms of Article 83 of the Peace Treaty.

E. The British Government deferred, therefore, to the Conciliation Commission the claim of Miss Pauline Kent, British subject, presented on 31 December 1949 by the British Embassy to the Ministry of Foreign Affairs, in so far as the claimant demanded refund of Lire 47,694 paid for the Extraordinary Proportional Tax on Property indicated in part III of D.L. No. 1131 of the Head of the State dated 11 October 1947.

F. The Agent of the British Government, after having referred again to his argument regarding the non-applicability of the First and Second Taxes to British nationals and their property in Italy, non-applicability which has been finally admitted by the Italian Government observes in his Submission of 28 November 1956, that there is no substantial difference between the Third Tax on one side and the First and Second Taxes on the other, all the three taxes, or in any case the First and Third having been established by the same legislative acts within the period indicated in paragraph 6 of Article 78 of the Peace Treaty. Should the Third Tax however be considered a continuation in a different form and with modifications of the Ordinary Tax imposed at the beginning of the aforesaid period, the United Nations nationals and their property would then have the right, by virtue of paragraph 6 of Article 78 of the Peace Treaty, to exemption *pro tanto* from the liability arising from Article 83 of the Consolidated Law (*Testo Unico*) to the extent by which the liability exceeds the amount of their liability under the previously existing Ordinary Tax; they would furthermore have the right, by virtue of paragraphs 1 and 2 of Article 78 of the Peace Treaty, to have their property freed *pro tanto* from this charge.

The Agent of the British Government therefore requested that the Conciliation Commission do:

- (a) Confirm that United Nations nationals in general, and the claimant in particular, are exempt from payment of the Extraordinary Proportional Tax on Property (the Third Tax) as being one of the exceptional taxes specified in Article 78 (6) of the Peace Treaty;
- (b) Order that the sum of Lire 47,694, paid by the claimant in respect of the Third Tax, be refunded to her by the Italian Government within 60 days from the date of this Honourable Commission’s Decision;
- (c) Provide for the costs of and incidental to this Submission;
- (d) Give such further or other relief as may be just and equitable.

G. The Agent of the Italian Government, in his Answer of 9 May 1957, called attention to the particular nature of the Third Tax which, in his opinion,

is extraordinary only in name and in the method of encashment; in fact, having to impose the two patrimonial taxes which are entirely extraordinary: the Progressive on physical persons and the Proportional on the property of companies and legal bodies (Part I and II of Consolidated Law No. 203 of 9 May 1950) it appeared necessary to abolish as from 1 January 1948 the *ordinary* tax on property established by R.D.L. No. 1529 of 12 October 1939, converted into Law No. 150 of 8 February 1940, ordering the recovery of 10 yearly payments of same. This was in fact done by establishing the Extraordinary Proportional Tax on Property based on the same financial values finally assessed in 1947 for the purpose of the Ordinary Tax on Property, at the rate of 4%, that is equivalent to ten times the rate of the Ordinary Tax which was 4 per 1000. And as the Ordinary Tax on Property, of an entirely real and general nature, did not establish exemptions of a subjective nature, it follows that, in the case of the 4% Extraordinary Proportional Tax, which has obviously the same characteristics, no exemptions may be granted which were not allowed in the case of the Ordinary Tax. The special nature of the Extraordinary Proportional Tax on Property is proved, besides by the above-quoted basic characteristics, also by parliamentary documents.

H. By *Procès-verbal de Désaccord* dated 21 November 1947 the representatives of the Italian Government and of the British Government in the Conciliation Commission, having established their disagreement on the point forming the subject of the dispute, decided to have recourse to the Third Member, whose intervention is laid down in Article 83 of the Peace Treaty, in order to settle the dispute, which is to be submitted to him as a whole.

The two Governments appointed as Third Member Dott. Plinio Bolla, former President of the Swiss Federal Tribunal, who accepted the assignment.

HAVING CONSIDERED IN LAW:

1. Miss Pauline Kent, a British subject, paid to the Italian Government the sum of Lire 47,694 for the Extraordinary Proportional Tax on Property established by D.L. No. 143 of 27 March 1947, and comprised in part III of Consolidated Law of 11 October 1947 (Third Tax). The British Government requests, in the first place, that the Conciliation Commission order the Italian Government to repay the aforesaid sum to Miss Pauline Kent. The liability on the part of the Italian Government as regards this repayment should be recognised in application of the last sentence of paragraph 6 of Article 78 of the Peace Treaty, if this sum was received by that Government under the title of any one of the taxes established in the said paragraph 6. This provision states: "United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between 3 September 1943, and the coming into force" (15 September 1947) "for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations."

2. The Italian Government and the British Government, after an initial disagreement, agree now that the Extraordinary Taxes indicated in paragraph 6 of Article 78 of the Peace Treaty, include, in any case, the Extraordinary Progressive Tax on the Property of physical persons (First Tax) and the Extraordinary Proportional Tax on the property of legal bodies (Second Tax). But, according to the British Government, they would include also the Extraordinary Proportional Tax on Property established by D.L. No. 143 of 29 March 1947, and comprised in Part III of Consolidated Law of 11 October 1947,

whilst, in the opinion of the Italian Government, United Nations nationals and their property should not be exempt from this tax in application of paragraph 6 of Article 78 of the Peace Treaty, even though it was established in the period contemplated in that provision, that is between 3 September 1943 and 15 September 1947.

The taxes from which United Nations nationals and their property are exempted by virtue of paragraph 6 of Article 78 of the Peace Treaty are those having the specific purpose of meeting expenses resulting from the war or meeting the cost of occupation forces or of reparations to be paid to any of the United Nations. This specific purpose would not logically have been contemplated in the case of taxes levied before the entry of Italy into the second World War. The so-called Third Tax was not established in D.L. No. 143 of 29 March 1947 as a new tax with the specific purpose of meeting the expenses resulting from the war or from some consequence thereof, but as the conversion of an ordinary tax on property already established by R.D.L. of 12 October 1939, that is before the second World War, and for which there was no specific purpose in view; by D.L. No. 143 of 29 March 1947 this ordinary tax on property was abolished as from 1 January 1948, the obligatory recovery of same being established by means of the payment *una tantum* (without prejudice to the legal possibilities of instalments) of ten yearly payments. The legislator's clear intention in this sense appears from the resolution submitted to the Constituent Assembly by the Honourable Mr. Pella, then Minister of Finance, at the time of the ratification of D.L. No. 143 of 29 March 1947. At the meeting held on 5 July 1947 (summary at page 5), he insisted on the fact that, in the case of the 4% Proportional Tax it was not a question "of a new Tax, but of the recovery, in advance, in view of it being abolished, of an already existing tax", which he repeated at the meeting held on 22 July 1947 (summary at page 2). At the meeting on 22 July 1947, the Minister of Finance, Mr. Pella, remarked "the rate of 4% merely means reducing to 12 years the average life of a tax which should have been perpetual (summary at page 11).

3. Neither can the Conciliation Commission accept the subordinate argument of the Honourable British Agent, according to which United Nations nationals who have paid the Third Tax would in any case have at least the right to repayment of the difference between what they would have paid as Proportional Tax on Property in accordance with R.D.L. No. 1929 of 12 October 1939, and what they have actually paid for the recovery of same in accordance with D.L. No. 143 of 29 March 1947 in the form of Extraordinary Proportional Tax on Property. The exemption laid down in paragraph 6 of Article 78 of the Peace Treaty is only in respect of extraordinary taxes imposed, within a given period, with certain specific purposes in relation to the war, and not in respect of extraordinary taxes the main purpose of which consisted in the recovery of ordinary pre-war taxes, even if the desire to bring as much money and as speedily as possible into the Treasury and so reduce the danger of inflation in view of the situation which had arisen as a result of the large war and post-war expenses, was not foreign to the decision as to this method of recovery.

But this concern, which contributed to the decision as regards recovery, is not sufficient to interrupt the link of causation between the Third Tax and the pre-existent proportional tax on property, or to substitute same by a specific link of causation as called for in paragraph 6 of Article 78 of the Peace Treaty. Neither can it be seen, on the other hand, how the difference between what the United Nations nationals had to pay for the Third Tax and what they would have had to pay if this tax had not substituted, in the form of recovery, the ordinary tax on property of pre-war origin, could be calculated on a definite basis; this because the latter tax should have been perpetual.

4. The Agent of the British Government argues furthermore regarding paragraphs 1 and 2 of Article 78 of the Peace Treaty. Paragraph 1 lays down the obligation for Italy to restore, if not already done, "all legal rights and interests in Italy of the United Nations and their nationals as they existed on 10 June 1940" and to return "all property in Italy of the United Nations and their nationals as it now exists".

Paragraph 2 of Article 78 of the Peace Treaty specified in its first sentence that "The Italian Government undertakes that all property rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connexion with their return". But paragraphs 1 and 2 referred to simply lay down general principles, the terms of application of which appear from the following paragraphs and especially from paragraph 6 as regards the subjecting of property of United Nations nationals to imposts, taxes or levies of an extraordinary nature imposed by the Italian Government or by other Italian authority during the period 3 September 1943 to 15 September 1947.

5. The British Submission also aims at getting the Conciliation Commission to decide "that United Nations nationals in general . . ." are exempt from the payment of the Extraordinary Proportional Tax on Property (Third Tax) it being one of the exceptional taxes specified in paragraph 6 of Article 78 of the Peace Treaty.

The question would then arise, prejudicially, as to whether the Conciliation Commission established in accordance with Article 83 of the Peace Treaty has jurisdiction to decide, and if so on what conditions, by abstract rulings questions of principle concerning the application of the Treaty to a whole series of real cases besides the one especially referred to by implication in the conclusions (see Bolla, *Quelques considérations sur les Commissions de Conciliation prévues par l'Art. 83 du Traité de Paix avec l'Italie*, in *Symbolae Verzijl* p. 85 and 86). But this question may be left undecided in view of the holding as to the merits of the case expressed by the Conciliation Commission as regards the claim for repayment in favour of Miss Pauline Kent. The question as to whether the British Government would anyhow have active *locus standi* to demand a special interpretation of the Peace Treaty in favour of "United Nations nationals in general" and not of British nationals only, may also remain undecided.

DECIDES:

- (1) The Submission is rejected as it cannot be heard.
- (2) The present Decision is definitive and obligatory.

UNITED AFRICA COMPANY LIMITED CASE—
DECISION No. 189 OF 15 JULY 1961

Compensation under Article 78 of Peace Treaty—War damages sustained by enemy property in Italy—Concession—Extension of—Whether considered as compensation in substitution for that provided by paragraph 4 (b) of Article 78—Agreement for extension of concession—Whether constitutes arrangement establish-