



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/104

Judgment No.: UNDT/2011/144

Date: 17 August 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

JOHNSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sarah Hunt

Counsel for Respondent:

Shelly Pitterman, UNHCR

Elisabeth Brown, UNHCR

Introduction

1. By application filed with the Registry of the Tribunal on 27 September 2010, the Applicant contests the decision whereby the Income Tax Unit, United Nations Secretariat, refused to refund the staff assessment deducted from her salaries and other emoluments for 2009.

2. She requests the Tribunal to order the Income Tax Unit to refund the staff assessment deductions, namely the amounts of USD4,511 for 2006, USD16,618 for 2007, USD13,213 for 2008 and USD12,769 for 2009. She further requests that interest at the prevailing rate be added to these amounts, such interest being computed as from the date on which the amounts should have been refunded. The Applicant requests the Tribunal to issue an order whereby the Income Tax Unit will in the future no longer require her to utilize her foreign tax credits. She also claims reimbursement of the costs that she has had to incur in respect of the present proceedings, as well as the payment of USD20,000 in compensation for incidental and consequential damages and for the delay in resolving the dispute.

Facts

3. From 2003 to February 2006, the Applicant, a national of the United States of America, earned a tax credit in her country of origin while she was working in Switzerland for a consulting company.

4. In June 2006, the Applicant entered the service of the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in Geneva on a fixed-term appointment that was subsequently extended.

5. In May 2007, she informed the Income Tax Unit that her tax credit totalled USD58,381.

6. In March 2010, the Applicant, who wished to obtain from the Organization the reimbursement of the staff assessment deducted from the salary she had received in 2009, submitted her 2009 income tax return to the Income Tax

Unit. On that tax return, the amount of USD15,239 appeared under the “foreign tax credit” heading.

7. On 7 April 2010, the Income Tax Unit wrote to the Applicant to request her to correct the errors that it had identified in her tax return and send it a copy of the corrected return, which the Applicant did on 16 May 2010.

8. On 1 June 2010, the Applicant submitted a request for management evaluation to the Deputy High Commissioner for Refugees. In her request, she contested the calculation method used by the Organization to determine that she was not entitled to any refund of the staff assessment deducted from her salary for 2009. On 20 July 2010, she was informed that she would not receive a response to her request within the time limit.

9. On 27 September 2010, the Applicant filed her application with this Tribunal.

10. On 8 August 2011, the Respondent filed a written statement by the Chief of the Income Tax Unit.

11. On 15 August 2011, a hearing was held in the presence of the Applicant, her Counsel and Counsel for the Respondent.

Parties’ contentions

12. The Applicant’s contentions are:

- a. When she signed her appointment letter with UNHCR, staff regulation 3.3(f)(i) led her to believe in good faith that the United Nations would refund to her the staff assessment deducted from her United Nations income. The said regulation provides that, where a staff member is subject both to staff assessment and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her;

b. The foreign tax credit of USD58,381 that she had accumulated before entering the service of UNHCR does not form part of the salary she receives from the Organization, and the Income Tax Unit exceeded its authority in taking the said tax credit into account in order to determine that she was not eligible for reimbursement of the staff assessment that had been deducted from her salary;

c. She was not advised at any time that she would lose her foreign tax credits and, when she entered the service of UNHCR, she was only given a copy of the Staff Regulations and Rules. She never waived her right to the tax credits that she had earned between 2003 and 2006, nor did she assign them to the Tax Equalization Fund, which receives the revenue derived from staff assessment not otherwise disposed of;

d. According to Publication 514 of the United States Internal Revenue Service, a United States taxpayer is not obliged to utilize a foreign tax credit in the years immediately following the year in which it was earned but is free to utilize it when he or she so wishes. By virtue of information circular ST/IC/2010/10 from the Controller, regarding the payment of 2009 income taxes, the Income Tax Unit forced her to utilize this credit to the benefit of the Tax Equalization Fund, which violated her rights;

e. The above-mentioned information circular does not include tax credits among the adjustments, deductions and exemptions that are intended to reduce the tax liability. Furthermore, it benefits the Tax Equalization Fund to the detriment of the taxpayer and goes against the spirit of the Staff Rules which provide for the equal treatment of all staff members of the Organization. Information circulars are merely guidance on the application of rules and are therefore subject to exceptions;

f. The Income Tax Unit definition of “tax payable” does not correspond to that of the United States Internal Revenue Service, which calls into question the validity of the calculation method used by the Organization;

g. The United States Internal Revenue Service allows the taxpayer to apply accumulated foreign tax credits but cannot reimburse them. By choosing to pay her income tax with her tax credit, the Applicant therefore derived a direct financial benefit that she could exercise within the following ten years. While, pursuant to information circular ST/IC/2010/10, it is the staff member's responsibility to pay national income tax, he or she is free to meet that obligation however he or she wishes. The Organization subverted the correct purpose of the tax credit by depriving the Applicant of a direct financial benefit and the right to determine when the use of her tax credit would be best for her;

h. Without reimbursement by the Organization, the Applicant is carrying the burden of both the staff assessment and national income tax;

i. UNHCR has illegally enriched itself to the detriment of the Applicant by the sum of USD47,111 between 2006 and 2009, and she has the right to be reimbursed;

j. She is the victim of unequal treatment relative to other staff members and relative to those United States taxpayers who have been able to benefit from a foreign tax credit;

k. The failure of UNHCR, the Income Tax Unit and the Management Evaluation Unit to participate in negotiations with her merely added to the Applicant's frustration.

13. The Respondent's contentions are:

a. The rationale for the system of reimbursement, by the Organization, of staff assessment deducted from staff members' salaries is to establish equal treatment for all staff members and to place those among them who are subject to national income tax in the position they would have been in if their income was not taxed. This system has been consistently applied to all United States staff members subject to double taxation;

b. Section 2.3 of the Under-Secretary-General for Management's administrative instruction ST/AI/1998/1 entitled "Payment of income taxes to United States tax authorities", dated 28 January 1998, stipulates that "[a] staff member claiming reimbursement is required to make maximum use of all exemptions, adjustments to income and deductions in order to minimize his or her tax liability". Paragraph 11 of information circular ST/IC/2010/10 recalls this principle. The Applicant was therefore required to reduce her tax liability to the United States by utilizing her foreign tax credit, since the applicable rules make no distinction between tax credits accumulated before employment with the United Nations and those gained during employment with the Organization. Furthermore, the fact that staff members cannot earn tax credits while they are employed by the United Nations necessarily implies that the above-mentioned provisions refer to foreign tax credits earned before the staff member entered the Organization's service;

c. The purpose of requiring staff members of United States nationality to utilize their tax credits in order to reduce their tax liability is to minimize the burden on the Tax Equalization Fund;

d. Staff regulation 3.3(f)(i) provides that the amount of the refund shall in no case exceed the amount of income tax paid by the staff member. The Applicant paid no income tax to the United States Internal Revenue Service for 2009 because she had her tax credit. Since no tax was payable, there was no refund to be made;

e. With regard to the Applicant's claim that she had not been informed that she must utilize her foreign tax credit to reduce the tax owed to the United States Internal Revenue Service, the Appeals Tribunal has ruled that staff members cannot claim ignorance of the law applicable to them. Information circular ST/IC/2010/10 had been issued in January 2010, in other words, four months before staff members resident outside the United States were required to submit their request for reimbursement of 2009 taxes;

f. Publication 514 of the United States Internal Revenue Service provides that United States taxpayers may take either a deduction on taxes payable in the United States or a tax credit. There is no rule to determine whether one option is more advantageous than the other. Consequently, the Organization has not deprived the Applicant of the right to utilize her foreign tax credit when she deemed it most appropriate;

g. Foreign tax credits are not expressly covered by the Staff Rules. The Secretary-General, as chief administrative officer of the Organization, has discretion in applying the Staff Regulations. He was thus competent to issue the disputed information circular and the former United Nations Administrative Tribunal had already ruled that information circulars had the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations. Furthermore, the Secretary-General's bulletin ST/SGB/2009/4 of 18 December 2009, which replaced bulletin ST/SGB/1997/1, gives the Secretary-General the authority to prescribe procedures for the implementation of the Financial Regulations and Rules, the Staff Regulations and Rules or the Secretary-General's bulletins. Administrative instruction ST/AI/1998/1 and information circular ST/IC/2010/10 were issued for the purpose of implementing staff regulation 3.3(f)(i) and, while both recognize the obligation of staff members to make maximum use of all deductions in order to minimize the taxes for which they are liable, the latter explicitly refers to tax credits as a means of minimizing the tax liability. Foreign tax credits fall into the category of deductions and information circular ST/IC/2010/10 does not contradict administrative instruction ST/AI/1998/1.

Consideration

14. The Applicant contests the decision by which the Income Tax Unit refused to refund to her the staff assessment deducted from the salaries and other emoluments that she had received for 2009.

15. The relevant part of staff regulation 3.3 in force at the time of the events provided as follows:

(a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary ... provided that the Secretary-General may, where he or she deems it advisable, exempt from the assessment the salaries and emoluments of staff members engaged at locality rates.

...

(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that:

(i) The amount of such refund shall in no case exceed the amount of his or her income taxes paid and payable in respect of his or her United Nations income;

(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund...

16. In taking the contested decision, the Income Tax Unit considered that the Applicant had paid no tax to the United States Department of the Treasury on the income she had received from the Organization for 2009. The Applicant contests this reason, maintaining that she had discharged her tax obligation by means of a foreign tax credit that she had earned before she joined UNHCR.

17. Therefore, the Tribunal must first determine whether the Applicant was, under the above-mentioned provisions of the Staff Regulations, liable for United States tax on the income received from the Organization for 2009, the only year at issue in the current proceedings. It must then establish whether she paid the said tax. Since the answer to the first question can only be affirmative, only the second is in dispute.

18. It is for the Tribunal to consider whether the utilization of a tax credit by a United States taxpayer constitutes a payment method to settle tax obligations arising in respect of income received abroad. Publication 514 of the United States Internal Revenue Service, concerning foreign tax credits granted to individuals, clearly shows that these credits are a payment method like others and that the Applicant must therefore be regarded both as having been subject to United States taxation on income received from the Organization, and as having discharged that tax obligation. Thus, the reason given by the Income Tax Unit for refusing to make the requested refund, namely the assertion that the Applicant had not paid tax to the United States, is incorrect.

19. In defence of the decision, it is maintained that the texts cited below require staff members of the Organization to minimize the national tax they pay by using all applicable deductions and exemptions “in order to minimize the burden on the Tax Equalization Fund”. The Respondent further maintains that foreign tax credits are explicitly mentioned among the said deductions.

20. In taking the contested decision, the Administration relied in particular on the above-mentioned staff regulation 3.3(f)(i) and on administrative instruction ST/AI/1998/1 of 28 January 1998, section 2.3 of which specifies that:

A staff member claiming reimbursement is required to make maximum use of all exemptions, adjustments to income and deductions in order to minimize his or her tax liability.

21. It further relies on paragraphs 11 and 27 of ST/IC/2010/10 which, respectively, provide as follows:

11. In order to minimize the burden on the Tax Equalization Fund, of which the Secretary-General is the trustee, and on voluntary funds from which tax reimbursements may be made, a staff member claiming reimbursement is required to make maximum use of all adjustments to income, deductions and exemptions in order to minimize his or her tax liability. In claiming a reimbursement from the United Nations in form F.65, a staff member, inter alia, certifies and agrees that he or she will minimize his or her taxes ...

27. ... Additional deductions such as moving expenses may also reduce the United Nations income used in the calculation noted in

paragraph 26 above. All tax credits available on the actual tax returns with United Nations income, such as ... foreign tax credit ... are also applied to reduce the total income tax liability without United Nations income, which does not affect the calculations noted in paragraph 26 above.

22. However, the Applicant contests the legality of such provisions, contending that they are contrary to the principle of equal treatment of staff members placed in the same situation.

23. It is not contested that the previously mentioned provisions of the Staff Regulations, which were adopted by the General Assembly, aim to ensure equal treatment among those staff members who, by virtue of their national legislation, are not subject to national tax on their income from the United Nations and those who, like the Applicant as a United States national, are subject thereto.

24. This aim is clear from General Assembly resolution 13 (I) of 13 February 1946, in which the Assembly:

.... concurs in the conclusion ... that there is no alternative to the proposition that exemption from national taxation for salaries and allowances paid by the Organization is indispensable to the achievement of equity among its Members and equality among its personnel.

Therefore the General Assembly resolves that:

12. Pending the necessary action being taken by Members to exempt from national taxation salaries and allowances paid out of the budget of the Organization, the Secretary-General is authorized to reimburse staff members who are required to pay taxation on salaries and wages received from the Organization...

25. In order to rule on the legality of the provisions on which the Administration is relying, the Tribunal must consider whether the principle of equal treatment of staff members has been respected and whether the United Nations Administration, and in particular the Income Tax Unit, has placed the Applicant in the same situation as staff members who are not liable for income tax in their country of origin, and as other staff members who are United States nationals.

26. In order to pay the tax levied by the United States Department of the Treasury on her income from the Organization, the Applicant utilized part of the foreign tax credit that she held. She was therefore clearly placed at a financial disadvantage since staff members not subject to income tax in their country of origin have, like the Applicant, been subject to staff assessment but have not paid tax on their income from the Organization; the situation of those staff members, at the same level of income, is therefore much more advantageous.

27. Moreover, if the situation of the Applicant is compared to that of another staff member of United States nationality who does not hold a tax credit, that staff member will pay both the tax owed on income from the Organization and the staff assessment, but the staff assessment will be reimbursed by the Organization as it has not been in the Applicant's case.

28. Consequently, the Applicant is entitled to claim that, with regard to tax, she has not been placed in the same situation as other staff members.

29. If it is assumed that the intention of the Under-Secretary-General for Management in issuing administrative instruction ST/AI/1998/1 was to include tax credits held by staff members of United States nationality among the above-mentioned deductions, which is not clear from the wording of the said instruction, it appears to the Tribunal that this instruction is illegal since, first, the effect of its implementation as stated above is to place staff members of different nationalities on an unequal footing, contrary to the intention of the General Assembly, and, second, this provision was established by an authority that lacks competence.

30. In the United Nations, as in most national systems, only the deliberative assembly has the authority to establish rules governing taxation. While the executive is charged with establishing the procedural rules that allow tax to be collected, it is in no way responsible for taking decisions that have the effect of modifying the amount of taxes as decided by the deliberative assembly.

31. In the present case, the effect of administrative instruction ST/AI/1998/1, as interpreted by the Income Tax Unit on the basis of information circular

ST/IC/2010/10 of 28 January 2010 from the Controller, is to modify the will of the General Assembly as expressed in staff regulation 3.3(f)(i).

32. It should be recalled in this regard that Secretary-General's bulletin ST/SGB/1997/2 dated 28 May 1997, concerning information circulars, specifically provides that:

1.1 Information circulars shall contain general information on, or explanation of, established rules, policies and procedures, as well as isolated announcements of one-time or temporary interest.

1.2 Information circulars shall not be used for promulgating new rules, policies or procedures.

...

3.1 The central registry established pursuant to the Secretary-General's bulletin (ST/SGB/1997/1) shall be responsible, *inter alia*, for reviewing any proposed new information circular and ensuring:

(a) That it is not inconsistent with any administrative issuance;

(b) That it is not used for promulgating new rules, policies or procedures.

33. The Tribunal furthermore specified in *Villamorán* UNDT/2011/126: "Information circulars, office guidelines, manuals and memoranda are at the very bottom of th[e] hierarchy [of the Organization's internal legislation] and lack the legal authority vested in properly promulgated administrative utterances." *A fortiori*, the Controller was not competent to add to administrative instruction ST/AI/1998/1, as he did in information circular ST/IC/2010/10, by specifying that United States staff members should minimize their United States tax liability by using their foreign tax credits.

34. It follows from the foregoing that the Applicant is entitled to claim that the Income Tax Unit was wrong in refusing to refund to her the staff assessment deducted from her salaries and other emoluments for 2009, up to the amount of the income tax payable to the United States Internal Revenue Service in respect of her United Nations income.

35. Consequently, the Tribunal orders the Secretary-General to refund to the Applicant the amount of staff assessment deducted from her salaries and other emoluments for 2009. This amount shall be calculated by the United Nations Income Tax Unit on the basis established by this Judgment, in other words, without taking into consideration the disputed tax credit.

36. The Applicant has requested the Tribunal to order the refund of her staff assessment deductions in respect of 2006, 2007 and 2008. However, it is beyond dispute that the decisions rejecting the said refund have become final because they were not contested within the imposed deadlines, and the Tribunal is therefore obliged to reject this request.

37. While the Applicant requests the Tribunal to issue an order requiring the Administration to modify its future practice with regard to tax credits, it is not for the Tribunal to rule on potential future disputes.

38. The Applicant further requests compensation for the damages resulting from the delay in resolving the dispute. However, the compensation for such delay is sufficiently covered by the interest awarded on amounts paid late and it cannot seriously be claimed that the Applicant suffered moral damage as a result of the contested decision.

39. Lastly, while the Applicant claims reimbursement of the costs that she has had to incur in respect of these proceedings, it should be recalled that article 10, paragraph 6, of the Tribunal's Statute authorizes the Tribunal to award costs against a party only if that party has manifestly abused the proceedings before it, which is not apparent in this case. The Applicant's claim must therefore be rejected.

Conclusion

40. In view of the foregoing, the Tribunal DECIDES:

- a. The case is referred to the Income Tax Unit, United Nations Secretariat, in order for that Unit to proceed, in accordance with the

principles set out above, with the calculation of the amounts to be refunded to the Applicant in respect of 2009;

b. The amounts awarded shall bear interest at the United States Prime Rate with effect from the date on which the Applicant should have received the refund until payment of the said amounts. An additional five per cent shall be added to the United States Prime Rate 60 days from the date this Judgment becomes executable;

c. All the other claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 17th day of August 2011

Entered in the Register on this 17th day of August 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva