



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/016

Judgment No.: UNDT/2012/022

Date: 14 February 2012

Original: English

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**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

McCLOSKEY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat  
Sarahi Lim Baro, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 7 February 2012, the Applicant requests the Tribunal to suspend the implementation, pending management evaluation, of the decision whereby the Income Tax Unit, United Nations Secretariat, billed him USD52,596 for the tax year 2007 and required him to use his foreign income tax credits in filing his US tax return for 2011.

## **Facts**

2. The Applicant is a national of the United States of America (“US”) serving at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), The Hague, since October 2006. He currently works at the P-5 level on the basis of a fixed-term appointment due to expire on 31 December 2013.

3. On 17 August 2010, the Applicant received from the Income Tax Unit a Statement of 2007 Tax Settlement, indicating an overpayment of USD52,596 and stating that, if he was not eligible to receive 2008 Federal tax advances, he should remit this amount to the Income Tax Unit.

4. The Applicant entered then into informal discussions with the personnel from the ICTY Finance Section, on the one hand, and from the Income Tax Unit in New York, on the other hand, which did not lead to a change in the Administration’s position.

5. On 29 December 2011, the Applicant received an email from the Income Tax Unit enclosing his Statement of 2010 Tax Settlement. The attached Statement, again, reflected a USD52,596 overpayment and requested remittance of this amount, should the Applicant not be eligible to receive 2011 Federal tax advances.

6. On 7 February 2012, the Applicant submitted a request for management evaluation, both to the Management Evaluation Unit, United Nations Secretariat, and to the Under-Secretary-General for Management, of the Statement of 2010 Tax Settlement emailed to him on 29 December 2011, and of the decisions of the

Income Tax Unit in 2007, 2008, 2009 and 2010 requiring the use of his wife's foreign income tax credit to offset his US tax liability for those years.

7. On the same day, he filed the present application for suspension of action. Following the Tribunal's directions, the Respondent transmitted his reply on 13 February 2012.

### **Parties' contentions**

8. The Applicant's contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. In 2007 the Organization has forced the Applicant to use his wife's foreign income tax credit to offset his US tax liability, in violation of the applicable rules and of the standard agreement with all US tax payers to pay their tax liability to the US. Hence, the Applicant does not owe USD52,596, as this amount represents the value of his wife's foreign income tax credits that they were forced to use in filing their 2007 US tax return;

b. The Tribunal ruled in *Johnson* UNDT/2011/144 that US staff members cannot be required, under administrative instruction ST/AI/1998/1, to use their foreign income tax credits, earned privately in non-United Nations employment, to offset their US tax liability, for the result would be placing staff members of different nationalities on an unequal footing, and the Under-Secretary-General for Management, who issued the said administrative issuance, lacked authority to impose such a duty;

#### *Urgency*

c. The requirement to pay such an important amount of money is alarming and stressful for him and his wife. Obtaining USD52,596 in the near future would require them to take drastic financial steps, which would

severely undercut his ability to support his family and may well cause damage to his credit rating;

d. The Applicant has requested for management evaluation of the decision requiring him to use his wife's foreign tax credits in 2007, 2008, 2009 and 2012. However, the demanded payment will undoubtedly become due prior to the outcome of this request;

*Irreparable damage*

e. The financial hardship placed upon the Applicant and his family could well cause a devaluing of his credit rating, and of his ability to acquire loans for his daughter's education or to cover the difference between the sales price of his house in the Netherlands and the mortgage on it;

f. Being 59 years old, and his wife 63, the above would likely delay their ability to retire in good conditions;

g. The above-mentioned *Johnson* judgment is currently under appeal and its resolution will be determinative to the outcome of his complaint. Suspending this action and awaiting the final decision of the *Johnson* case would avoid unnecessary and unfruitful discussions and litigation, which would cause irreparable financial harm in personnel and resources for both parties.

9. The Respondent's contentions may be summarized as follows:

*Receivability*

a. The statement of tax settlement for the 2010 tax year is not a new administrative decision, but merely a reiteration of the decision taken on his 2007 tax return, which was communicated to him on 17 August 2010. Subsequent tax settlement statements have carried forward the overpaid amount and also requested remittance thereof;

b. In view of the above, the Applicant did not submit his request for management evaluation within the statutory time limit. The application is therefore time-barred;

c. Whilst the Applicant claims that he “contested this conclusion and entered into lengthy informal discussions with people from the ICTY Financial Section and personnel from the UN Income Tax Unit in New York”, the Tribunal has made clear that informal resolution may result in the extension of the deadlines for filing an application with the Tribunal only if such informal resolution is conducted by the Office of the Ombudsman, which was not so in the case at hand. Moreover, as per article 8.3 of its Statute, the Tribunal may not waive the deadlines for management evaluation;

*Urgency*

d. Any urgency in this case was self-created, since the Applicant has been aware of the determination concerning overpayment of his 2007 taxes for some 18 months, but requested management evaluation only recently; even after receiving the Statement of 2010 taxes, he waited 40 more days to do so;

e. In addition, the Income Tax Unit has indicated that it has no objection to delay the recovery of the overpayment for six months, that is, well beyond the timeframe required for a response by the Management Evaluation Unit on his request;

*Irreparable damage*

f. The Applicant will not be irreparably harmed by the contested decision. Firstly, the Respondent and the Tribunal are not to involve themselves on how staff members arrange their personal finance; secondly, mere financial loss is not enough to satisfy the test of irreparable harm; lastly, any financial loss to the Applicant due to recovery of overpayment may be compensated, if appropriate.

## Consideration

10. The Applicant seeks suspension of the implementation of two different decisions, to wit: (1) the Statement of his taxes for year 2010, emailed to him by the Income Tax Unit on 29 December 2011, inasmuch as it indicates an overpayment of USD52,596 and requests him to remit such amount, and (2) the alleged requirement by the Administration to use his foreign tax credits in filing his US tax return for 2011.

11. Regarding the first decision, as per the documents on file, the Applicant's Statement of 2007 Tax Settlement, which was communicated to him on 17 August 2010, already reflected the same overpayment and also requested its remittance to the Organization. This fact is not contested by the Applicant.

12. Therefore, the contested statement conveys an identical determination as the one for tax year 2007 and, to this extent, is simply confirmatory in nature.

13. The Tribunal has consistently held that confirmatory decisions do not have the effect of reopening the time limits for formal contestation, but that the said time limits run from the time the original decision was notified to the concerned staff member (see, e.g., *Johnson* UNDT/2009/037, *Borg-Olivier* UNDT/2010/155). In the instant case, this principle implies that the deadline for requesting management evaluation started counting as from 17 August 2010.

14. The time limit to this effect is sixty days, as laid down in staff rule 11.2, whereas it took over a year for the Applicant to submit his request for management evaluation, on 7 February 2012. It is thus plain that the Applicant largely exceeded the mandatory time limit to request management evaluation, which renders the present application time-barred.

15. Without prejudice to the above, it should also be noted that the contested statement does not constitute an instruction from the Organization to the Applicant to pay the litigious amount back by a certain date, even less the announcement of the actual recovery of the same. In fact, the Income Tax Unit stated that it is ready to postpone the recovery of the said amount by six months.

16. Article 2.2 of the Tribunal's Statute provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

17. Under the circumstances described in paragraph 15, it cannot be said that there is any particular urgency in suspending the first contested decision. Consequently, at least one of the three cumulative conditions required by article 2.2 of the Statute to grant suspension of action is not met in the present case.

18. As to the second decision, the application is not receivable either. Indeed, it is related to the Applicant's next tax statement, i.e., that for tax year 2011. The latter hence concerns a future dispute on the use of foreign tax credits. In this regard, it is not incumbent on the Tribunal to pronounce itself on forthcoming disputes. In any case, this decision has not been challenged in the Applicant's request for management evaluation.

19. In light of the foregoing, the Tribunal cannot but conclude that the present application is irreceivable in its entirety.

### **Conclusion**

20. In view of the foregoing, the application for suspension of action is rejected.

*(Signed)*

Judge Jean-François Cousin

Dated this 14<sup>th</sup> day of February 2012

Entered in the Register on this 14<sup>th</sup> day of February 2012

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry