Registry's translation, the French text alone being authoritative.

SEVENTY-THIRD SESSION

In re MIRMAND

Judgment 1182

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roger Mirmand against the European Organization for Nuclear Research (CERN) on 20 September 1991, CERN's reply of 25 November 1991, the complainant's rejoinder of 10 January 1992 and the Organization's surrejoinder of 14 February 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article XIV, paragraphs 1(a) and 2, of the Agreement concluded between CERN and the French Government on 16 June 1972, concerning the Organization's legal status in France, Articles VI 1.03 and VI 1.05 of the CERN Staff Rules and Articles R IV 2.01 and R IV 2.02 of the CERN Staff Regulations;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Though its headquarters are in Geneva, CERN has installations both in France and in Switzerland. Its international status is defined in agreements with each of the two host countries.

Under Article XIV.1(a) of the agreement CERN concluded with France in 1972 officials of the Organization shall be exempt in that country from "any direct taxation on salaries and emoluments paid by the Organization". Article XIV.2 says that the French Government shall not be obliged to grant the tax exemption to "its own nationals or persons permanently resident in France". The practice is for France to levy income tax on payments by CERN to such persons and pay the amounts back to the Organization.

Articles R IV 2.01 and 2.02 of the Staff Regulations, which are about taxation, say that staff shall comply with national tax law, but taxes levied directly on their earnings from the Organization shall be reimbursed on production of proof of payment, provided that they have informed the Director-General of the receipt of tax demands.

The complainant, a Frenchman, joined the Organization in 1974, and is subject to the above rules. In 1988 he noticed that the amount he had paid to the French inland revenue on his income for 1987 was greater than the amount CERN had refunded to him. There was also short payment in 1988 and 1989. The difference came to 1,122 French francs for 1987, 1,305 for 1988 and 423 for 1989. It was due to a special feature of French tax law. As the holder of transferable securities the complainant is entitled to "tax credit" in France. This is a form of tax relief which is calculated to foster investment in securities and consists in the partial refund of corporation tax to any holder of company shares or bonds. The amount of the tax credit is generally subtracted from the taxpayer's liability on total income.

The complainant first applied to the French inland revenue. Not having obtained satisfaction, he wrote a letter on 5 March 1991 to a senior administrative officer of CERN claiming refund of the material amounts. In his reply of 8 March the officer said he was sorry to have to refuse. On 25 March the complainant submitted an appeal under Article VI 1.03 of the Staff Rules asking the Director-General to consult the Joint Advisory Appeals Board. In its report of 10 June the Board acknowledged the loss to the complainant but held that CERN could not but act on the information it got from the French Government. It therefore recommended against allowing his appeal. By a letter of 24 June 1991 the Head of Administration told him that it had been decided to endorse the recommendation. That is the decision he impugns.

B. The complainant submits that the decision he impugns was ultra vires. Under Article VI 1.05 of the Staff Rules

it is the Director-General who must take the final decision on an appeal. But the letter of 24 June 1991 bears the signature of the Head of Administration.

On the merits he argues that the approach both of the Administration and of the Joint Advisory Appeals Board is misconceived. The sole issue is not whether the French Government actually pays the amount of the tax credit over to CERN but whether CERN has abided by its obligations towards him under Article R IV 2.02 of the Staff Regulations. That provision required CERN to make over to him, not just the 27,308 French francs it actually refunded, but the 28,430 francs he paid in taxes on his salary, his only taxable income, for 1987. Its failure to refund the 1,122 francs that correspond to his tax credit deprived him of an entitlement under French law which is irrelevant to his status as a CERN official. Whatever arrangements CERN and the French authorities may have agreed to are res inter alios acta as far as he is concerned, his rights as a CERN official being laid down in the Organization's own rules.

By refusing to refund to him and to other French citizens on its staff the full amounts levied in compulsory direct tax on income CERN is improperly discriminating against them. The very notion of tax exemption for international civil servants rests on the need for equal treatment of all members of an organisation's staff. There is indeed a duty in law to ensure it inasmuch as equal treatment is a basic principle of the international civil service and international administrative tribunals enforce it even where there is no text embodying it.

The complainant asks the Tribunal to set aside the impugned decision, order CERN to refund to him the amounts it wrongfully withheld from the tax payable by him to the French inland revenue on his CERN salary and allowances for 1987, 1988 and 1989, and award him costs.

C. In its reply CERN submits that any State has sovereign authority to levy tax within its jurisdiction and therefore the right to determine freely any matters relating to taxation. It has sole authority in such matters and no third party may be held liable for its decisions.

CERN denies that the impugned decision was ultra vires. In notifying it the Head of Administration acted under instructions from the Director-General.

As required by Article R IV 2.02 CERN refunded to the complainant the taxes he had paid on his earnings in the amount the French inland revenue stated. But it did not pay him the amount of his tax credit because it was irrelevant to his CERN earnings. It did not check whether his taxes had been properly reckoned, since it had no power or right to do so. The tax credit and the means of benefiting from it are a matter for the French Government alone to determine.

What the complainant is really objecting to is a decision by the French Government which may not form the subject of a complaint to the Tribunal. His complaint is for that reason irreceivable.

CERN rejects the charge of discrimination. The Staff Rules and Regulations provide for ensuring equal treatment and in line with them CERN has refunded to the complainant the amount the French authorities reported as having been paid by him in tax on his earnings. The Organization therefore put him on a par with the other staff.

D. In his rejoinder the complainant maintains that the issue is not whether France complied with its obligations towards CERN but whether the Organization's refusal to pay him back the amounts he is entitled to is in keeping with its obligations towards him. The Tribunal is therefore competent to hear the complaint under Article II, paragraph 5, of its Statute and there can be no objection to receivability.

Article R IV 2.02 of the Staff Regulations lays a duty on CERN to refund in full - however it may do so - the amount officials pay in tax on their earnings. Whatever information the French authorities may have officially conveyed, CERN may not disregard its own rules merely on the strength of a notice of tax liability.

CERN is mistaken in pleading that its Staff Rules and Regulations warrant the discrimination he is objecting to. Even if they did it would be immaterial since equal treatment is a fundamental principle of the international civil service.

E. In its surrejoinder CERN submits that the rejoinder brings no new elements to bear on the merits. It therefore merely reaffirms the case made out in its reply.

CONSIDERATIONS:

1. CERN, which has international status in law, has installations on the territory of two countries, France and Switzerland.

According to an agreement it signed with France in 1972 its officials are exempt from payment of any direct tax in that country on their earnings from the Organization. But the French Government is not bound to grant such exemption to French citizens and in fact such citizens employed by CERN pay the French exchequer the tax due on their earnings as well as any other tax they may be liable for under other heads.

The exercise is largely fictitious, however, since in accordance with a written understanding the French Government makes over to CERN any tax paid by French members of its staff on their earnings. In turn the Organization's Staff Regulations stipulate that any tax levied directly on a staff member's earnings shall be refunded to him on proof of payment.

2. The complainant, who is a French citizen and has an indefinite appointment with CERN, is subject to the rules described above. Every year he fills up an income tax return and files it with the French inland revenue and they reckon how much is due. What is at issue is the amount of such tax that CERN has to refund to him.

In the figures for tax years 1987, 1988 and 1989 the complainant noticed discrepancies between the amounts levied on his CERN earnings and the amounts refunded by the Organization. He had been paid 1,122 French francs short for 1987, 1,305 for 1988 and 423 for 1989.

3. It is common ground that the explanation lies in a peculiarity of French tax law. On conditions that there is no need to go into here the French Government refunds to a tax payer who holds transferable securities a portion of tax levied on company dividends. The amount is described as "tax credit" and subtracted from total income tax. Only where the amount of the tax credit exceeds that total figure will the Government make a refund. Otherwise all it need do is set the amount against the total.

4. The complainant has a share portfolio. The French inland revenue subtracted from the tax due on his CERN earnings the amount of the credit he was entitled to. Every year the Organization refunded to him the amount of tax due to the French Government, but discounted the portion paid by setting his tax credit against the total figure due from him.

He wrote to the inland revenue asking for a detailed statement. They refused. The Tribunal will not comment since plainly it may not rule on relations between State and citizen.

5. The complainant thereupon approached his employer and asked the Organization, but without success, to correct the amounts it had refunded to him. He seeks the quashing of a decision, notified to him by the Head of Administration on 24 June 1991, to reject his claim: the Administration acknowledged that the outcome was unfair but took the view that only the French Government could put things right.

6. CERN's case is that what the complainant is really challenging is decisions by the French inland revenue in the form of notices of tax liability and that it is not required to check the reckonings those decisions are based on. All it has to do is refund to the complainant the sums it has received from the French Government. In this instance it did so. There may be an anomaly, which indeed it is trying to solve by diplomacy, but the Tribunal is not competent in that area.

It is true that the Tribunal may not construe the headquarters agreement or the texts of implementing arrangements between the French Government and the Organization. But the Tribunal will consider the complaint from another aspect, namely compliance with CERN's own rules, that being an issue it is fully competent to rule on.

7. Article IV 2.01 of the CERN Staff Rules, the basic text, reads:

"The Staff Regulations shall lay down the conditions and terms under which taxes levied directly on remuneration and benefits paid by the Organization shall be reimbursed."

The relevant chapter of the Regulations, headed "Financial conditions", consists of Articles R IV 2.01 and 2.02, which read:

"Members of the personnel shall comply with national tax laws and regulations applicable to them.

Compulsory taxes levied directly on remuneration and benefits received from the Organization shall be reimbursed on production of proof of payment, provided that the member of the personnel concerned has informed the Director-General of the receipt of a demand for such taxes."

The meaning is clear. The State reckons tax liability and only its own courts may review the reckoning, which is no business of CERN's. But once liability has been determined the Organization shall refund to the staff member any tax due on his yearly earnings from CERN. After determining his liability the inland revenue sort out with the taxpayer how he is to discharge it, and he may do so in more than one way. Again, that is no business of CERN's and any figures that appear on tax returns or appended documents are mere information and so not binding on the Organization.

8. It appears on the evidence, and indeed it is not at issue, that the tax due from the complainant on his CERN earnings came to 28,430 French francs in 1987, 27,398 in 1988 and 29,355 francs in 1989.

The arrangements for payment are immaterial. Part was paid directly and part by using the tax credit the French Government had allowed him for reasons extraneous to his employment at CERN. Such set-off is a lawful means of payment and discharges the debt just as cash payment would. The proof of payment is to be found in the documents the French inland revenue have supplied. So there has been compliance with the above-quoted requirements of Chapter IV of the Staff Regulations, the only rules that govern relations between CERN and its staff in this area.

Any other ruling would produce an unfair result by offending against the principle - time and again affirmed by this Tribunal and by the United Nations Administrative Tribunal - that all the staff of an organisation shall enjoy equal treatment.

9. There being no need to consider the complainant's plea that the impugned decision was ultra vires, it must be set aside and the sums wrongfully withheld refunded. The complainant is also awarded 8,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.

2. CERN shall pay the complainant the sums wrongfully withheld from its refunds of tax for 1987, 1988 and 1989.

3. It shall pay him 8,000 French francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.