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

TWENTY-SIXTH ORDINARY SESSION

In re WALTHER and ZIMMERMANN

Judgment No. 177

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United International Bureaux for the Protection of Intellectual Property (BIRPI) and the World Intellectual Property Organization (WIPO) drawn up jointly by Mr. Roland Walther and Mr. Rudolf Zimmermann on 24 June 1970, the reply of the Organisation dated 12 August 1970, the rejoinder of the complainants dated 1 December 1970 and the surrejoinder of the Organisation dated 5 February 1971;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 3.17 of the BIRPI Staff Regulations;

Having examined the documents in the dossier, oral proceedings having neither been requested by the complainants nor ordered by the Tribunal;

Considering the Order made by the President of the Administrative Tribunal on 14 January 1971 instructing the Registrar of the Tribunal to make inquiries of the intergovernmental organisations with headquarters at Geneva concerning the practice followed by them in respect of reimbursement of tax paid on earned income by members of their staff, and the information obtained by the Registrar in compliance with the aforesaid Order, together with the observations of the parties on the subject;

Considering that the material facts of the case are as follows:

A. In 1960 the United International Bureaux for the Protection of Intellectual Property (BIRPI), which had hitherto had its headquarters in Berne, established itself in Geneva. The complainants, who are both of Swiss nationality and had been employed by the Organisation for a number of years, thereupon also established themselves in Geneva, but left their families in Berne where their children were being educated. They therefore continued to pay, on their income from their employment with BIRPI, the federal tax, the cantonal tax (Canton of Berne) and the local tax (for the locality in which their families lived) to which the earnings of Swiss citizens are liable. This was in contrast with the position of their Swiss colleagues who had settled in Geneva with their families and were liable only for the payment of the federal tax, since the Canton of Geneva had exempted them from the cantonal and local taxes payable in the canton. The federal tax was reimbursed by the Organisation both to them and to Mr. Walther and Mr. Zimmermann.

B. On 12 July 1963 a new set of Staff Regulations came into force with retroactive effect to 1 April 1963 in respect of salaries. Article 3.17 of these new Regulations is in the following terms:

"National income taxes levied on BIRPI salaries and allowances shall be reimbursed in accordance with the practice followed by other intergovernmental organisations with headquarters located in Geneva."

Relying on this provision, on 24 July 1964 the complainants applied to the Director of the Organisation for reimbursement of the cantonal and local taxes for which they were liable in the Canton of Berne. As the Director did not grant their application, they addressed themselves to the Organisation's Appeals Committee on 4 February 1965. The proceedings before the Appeals Committee were, however, suspended pending a decision by the Finance Department of the Canton of Berne, to which the complainants had applied meanwhile for tax exemption; such exemption was granted on 30 May 1967 but only in respect of half the amount due. The proceedings were then again suspended to enable the complainants to obtain information on the practice followed in respect of tax reimbursement by the intergovernmental organisations having their headquarters in Geneva. The complainants obtained an opinion on the subject from the BIRPI Staff Association which they regarded as favourable, and which they communicated to the Director of the Organisation; the latter nevertheless maintained his earlier decision by a letter dated 22 December 1969. The matter was then dealt with by the Appeals Committee, which on 3 March 1970 recommended that the Director should reject the appeal. On 1 April 1970 the Director informed the complainants

that he accepted the Appeals Committee's recommendation, thus once again confirming his decision, which thereupon became final.

C. In their complaint to the Administrative Tribunal Mr. Walther and Mr. Zimmermann pray that the Tribunal may be pleased to quash the decision of 1 April 1970, to order reimbursement of the Berne cantonal and local income tax already paid and payable in future on the salaries, allowances and other emoluments already paid or payable in future by BIRPI, as from 1 April 1963 (the date on which the new Staff Regulations came into force), and to order the payment of interest at 5 per cent on the sums reimbursable by BIRPI.

D. The Organisation prays that the complaint be dismissed.

CONSIDERATIONS:

1. The complaint is drawn up against the United International Bureaux for the Protection of Intellectual Property (BIRPI) and against the World Intellectual Property Organization (WIPO). The Stockholm Convention of 14 July 1967 provides for the replacement of BIRPI by WIPO. All BIRPI officials became WIPO officials, and the liabilities of BIRPI are assumed by WIPO as and when the member States of the former Organisation join the new one. Consequently BIRPI and WIPO are joint respondents in the present case. For the sake of simplicity they are henceforth referred to as the Organisation.

2. Under Article 3.17 of the Staff Regulations and Rules of the Organisation, "national income taxes levied on BIRPI salaries and allowances shall be reimbursed in accordance with the practice followed by other intergovernmental organisations with headquarters located in Geneva". The effect of this provision depends on the nationality of the various staff members of the Organisation.

(a) In accordance with the agreements concluded between the Swiss Federal Council and the Organisation (in particular, Article 16(f) of the Agreement of 9 December 1970), officials who are not of Swiss nationality are exempted from all federal, cantonal and local taxes on the salaries, emoluments and allowances paid by the Organisation. In the absence of liability for taxes levied on income in Switzerland they cannot claim the benefit of Article 3.17 in that respect. On the other hand, if in their country of origin they pay tax on the income covered by Article 3.17 they are entitled to claim reimbursement of the sums they have paid to the taxation authorities in accordance with the above-mentioned article. Thus the Organisation repaid to a United States national the taxes he had paid in his own country in 1964, 1969 and 1970.

(b) The rules governing the position of Swiss officials are more complicated.

In the past they were liable for direct federal tax which was reimbursed by the Organisation under Article 3.17. Following the adoption by the Organisation of a system of internal taxation, however, the Swiss Federal Council decided to apply to them its Order of 26 June 1964 concerning tax liability of Swiss officials of international organisations. In consequence they are now exempt from payment of direct federal taxes.

In respect of cantonal and local taxes levied in Switzerland a distinction must be made. On the one hand, under the Agreement of 5 April 1957 between the Canton of Geneva and the Organisation, officials of the Organisation enjoy the same privileges and immunities as are granted to the staff of the other intergovernmental organisations established in Geneva, i.e. they are exempt from Genevese taxes, both cantonal and local. The other Swiss cantons, however, have not exempted those officials of Swiss nationality who fall within their taxation area. Thus the complainants were obliged to pay cantonal and local taxes in the Canton of Berne where their families had retained their residence. The Organisation refuses to reimburse these taxes for two main reasons. First, it contends that the taxes in question are not national taxes within the meaning of Article 3.17, since it claims that the article applies to federal taxes only and not to cantonal and local taxes. Secondly, the Organisation denies that reimbursement of taxes paid by the complainants in the Canton of Berne corresponds to the practice of the intergovernmental organisations having their headquarters in Geneva.

3. First, it should be considered whether the cantonal and local taxes paid by the complainants are "national income taxes" within the meaning of Article 3.17. The term "national income taxes", as used in that provision, should be interpreted according to the law of the country in which the taxes whose reimbursement is claimed are levied. It will not therefore necessarily have the same meaning in respect of taxes levied in unitary and in federal States. In the present case, which concerns Swiss cantonal taxes, the interpretation should be based on the usual terminology

of Swiss tax law. That terminology, which is expressly reproduced in the Agreement concluded on 9 December 1970 between the Swiss Federal Council and the Organisation, distinguishes three kinds of taxes: federal, cantonal and local. Hence it is federal taxes, not national taxes, that are contrasted with cantonal and local taxes. In other words, as the Federal Tax Department itself states, national taxes in Switzerland include cantonal and local taxes as well as federal taxes. It follows that the taxes paid by the complainants should be regarded as "national income taxes" within the meaning of Article 3.17 and that their cantonal or local character is no bar to the application of that provision.

4. Instead of simply requiring the Organisation to reimburse "national income taxes", Article 3.17 states that reimbursement should be made "in accordance with the practice followed by other intergovernmental organisations with headquarters located in Geneva".

(a) In interpreting this phrase two possibilities may be considered.

One possibility is that the officials of the Organisation may be in a position identical with or similar to that of officials of other intergovernmental organisations situated in Geneva who, according to the "practice" of those organisations, are reimbursed the national taxes for which they are liable. In that event the "practice" amounts to a rule, that is, the officials of the Organisation are entitled to reimbursement as provided, to the extent that it accords with the practice of the other organisations.

Alternatively, the organisations other than the respondent Organisation may have no relevant "practice" or may have adopted a "practice" in cases which are not identical with or even similar to those of officials of the respondent Organisation. On this hypothesis it cannot be asserted either that the officials of the Organisation are always entitled or that they are never entitled to reimbursement of the taxes paid by them. Neither of these extreme possibilities would fulfil the purpose of Article 3.17. Depending on circumstances, the former would put the officials of the Organisation in a more favourable position than that which they would enjoy if able to rely on the "practice" of other organisations, while the latter might deprive Article 3.17 of all meaning. A less categorical conclusion is therefore necessary, namely, that the Organisation has a duty to reimburse the taxes paid by its officials to the extent warranted by their status as international officials, particularly in the light of the obligations inherent in that status. As a general rule an international official may be expected to reside with his family in the locality where he works. Accordingly, if he or his family resides elsewhere, and if on that account he is liable to tax, he cannot as a rule insist upon reimbursement. Exceptions to this rule are allowable only in special circumstances, for example where the international official is appointed on a temporary contract or is unable to find suitable accommodation in the locality where he works.

(b) In the present case it appears from the inquiries which the Tribunal has made of the intergovernmental organisations situated in Geneva that the complainants cannot rely upon any "practice" within the meaning of Article 3.17.

It is true that international officials who are United States nationals and do not fulfil certain special conditions laid down by the legislation of their own country are liable for certain United States taxes which have been reimbursed by several of the intergovernmental organisations. Although there may be a "practice" with regard to such officials, the complainants cannot, however, rely on it since their position is entirely different.

It is also true that the Intergovernmental Committee for European Migration (ICEM) has reimbursed cantonal or local taxes paid by officials domiciled in the Canton of Vaud, and even by temporary officials domiciled in the Cantons of Zurich and the Grisons whose work was performed mainly outside Switzerland. Similarly, in accordance with its Staff Rules, the European Organization for Nuclear Research (CERN) has reimbursed compulsory taxes paid by officials domiciled in the Canton of Vaud; while this measure was originally adopted for the benefit of officials who were already living in the Canton of Vaud at the time of their appointment and were authorised to remain there, since 1968 it has been extended to officials authorised to live in the Canton of Vaud because of the housing shortage in Geneva, and also to two temporary officials who for reasons regarded as valid had continued to live in the Cantons of Zurich and Schafthausen. Even assuming, however, that this evidence is sufficient to establish a "practice", the position of the complainants is not identical with or similar to that of the officials to whom cantonal or local taxes have been reimbursed by these two Organisations. They are not employed on a temporary basis nor do they reside near Geneva, and they do not claim that it was impossible for them to find accommodation there with their families, nor that they were resident at a place other than the headquarters of the Organisation at the time of their appointment.

(c) In these circumstances, since they are unable to rely on the "practice" of organisations other than the respondent Organisation, the complainants would be entitled to the reimbursement they claim only if, in accordance with the rule set out under (a) above, their families' residence in Berne, and consequently their liability to taxation in Berne, were justified for special reasons. That is not the case. In particular, as the Tribunal has found, the complainants were not employed on a temporary basis and do not claim that they were unable to find accommodation for their families in Geneva. Moreover, although the Organisation's headquarters was in Berne at the time of their appointment, they could not expect this situation to continue indefinitely, nor consider themselves entitled to retain the residence of their families in Berne as an acquired right. It is true that they imply that if they had removed their families from Berne to Geneva when the headquarters of the Organisation was transferred, their children would have been handicapped by having to learn a new language. This temporary circumstance, however, is not decisive. Most international officials have no hesitation in settling with their families in the place where they work, although this may sometimes involve more serious disadvantages than those to which the complainants were liable. There is no reason to suppose that the complainants would have met with exceptional difficulties if they had done the same. The complainants must therefore take the consequences of a situation which was not forced upon them.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Vr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 May 1971.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

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