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

111th Session **Judgment No. 3020**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. M. against the World Trade Organization (WTO) on 26 June 2009 and corrected on 12 and 20 October, the Organization's reply of 22 December 2009, the complainant's rejoinder of 15 March 2010 and the WTO's surrejoinder of 17 May 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1957, entered the service of the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT), the predecessor of the WTO, in 1990. At the material time she held a grade 10 post, the equivalent of a P-5 post in the United Nations system.

The complainant and her husband, who is not an international civil servant, reside in the Canton of Geneva. As the complainant considered that her WTO salary was being indirectly taxed, because it

was being included in the assessment of her husband's rate of income tax, on 9 April 2008 she sent the Director of the Administration and General Services Division a memorandum in which she asked for a retroactive "reimbursement" of what she described as "over-taxation by the Swiss tax authorities" since 1990. She based this request on Staff Rule 106.11, which provides that "[n]ational income tax on salaries, allowances, indemnities or grants paid by the WTO shall be refunded to the staff member by the WTO". She also asserted that the Agreement between the World Trade Organization and the Swiss Confederation (hereinafter referred to as the "Headquarters Agreement") had been breached, in particular Article 31 thereof relating to the privileges and immunities granted inter alia to officials at grade P-5. On 15 April she received a reply stating that the Staff Rule cited above was inapplicable because no national income tax had been levied on her salary. On 11 June the complainant requested a review of this decision. In a memorandum of 17 June the Director-General confirmed that no reimbursement was possible and then stated the following:

> "I can accept your argument that your WTO income is subjected to disguised taxation, in that it results in a calculation different from the one normally applied to married couples, and this difference is due to the fact that the [Genevan] tax authorities take account of your status as an international civil servant. The WTO has asked the [Permanent] Mission of Switzerland [to the United Nations Office and other international organizations in Geneva] for an explanation of the mechanisms applied, *inter alia,* in taxing the income of natural persons who are married to international civil servants, and if necessary, will ask for a revision in order to avoid any disguised taxation of WTO income."

When the complainant referred the matter to the Joint Appeals Board on 15 July 2008 she stated that her husband was being "fiscally penalised", because had she not worked at the WTO, he would have been liable to only half as much income tax as he had had to pay since 1990. In its report, issued on 6 March 2009, the Board recommended that the Administration should enter into good faith negotiations with the complainant on the issue of reimbursement under Staff Rule 106.11 and that it should take up, as a matter of priority, the issue of indirect taxation and its consequent discriminatory features with the

Swiss authorities. By a memorandum of 30 March 2009, which constitutes the impugned decision, the Director-General informed the complainant that the Organization was going to "pursue its efforts", through the good offices of the Permanent Mission of Switzerland, to obtain an amendment of the Genevan tax rules applied to international civil servants' spouses, but that he had decided to reject the Board's first recommendation, since he considered that, although the rules in question did result in indirect taxation of the income of international civil servants married to a person who did not have that status, "that d[id] not alter the fact that Staff Rule 106.11 ma[de] provision for the reimbursement of national income tax only when it [was] directly levied on an official's income from the WTO".

B. The complainant contends that taxing her husband's income at a higher rate because she has the status of an international civil servant increases the tax burden that they bear as a couple and is tantamount to indirect taxation of her salary. Relying mainly on Judgment 2032, she asserts that, in these circumstances, she is entitled to reimbursement under Staff Rule 106.11 because, in her opinion, this rule should apply whenever income from the WTO is taxed.

The complainant further submits that, by refusing to apply the above-mentioned provision, the Organization infringed the principle of tax exemption set forth in the Headquarters Agreement. In this connection she emphasises that even the federal authorities take the view that including an international civil servant's non-taxable income in the calculation of the tax which that person's spouse must pay in the Canton of Geneva is contrary to the terms of the Agreement. She also contends that she suffers unequal treatment compared, for example, with colleagues who do not reside in that canton, or who reside there but are not married to a person who does not have the status of an international civil servant.

Lastly, the complainant contends that the WTO has not shown due diligence in dealing with this case. Once again citing Judgment 2032, she draws attention to the fact that an international organisation has the duty to "protect [its officials] against the claims of the authorities of a member State" and to "employ its own considerable

power, authority and influence to have the [national] authorities change their position". In her opinion, the Director-General's undertaking "to pursue […] efforts" through the good offices of the Permanent Mission of Switzerland is inadequate.

The complainant asks the Tribunal to set aside the decision of 30 March 2009 and to order the Organization to reimburse her for the amount of tax which has been overpaid since 2002, plus interest, and to "employ its authority and power" to persuade the competent Swiss authorities to end the indirect taxation of her salary. She also claims costs in the amount of at least 8,000 Swiss francs.

C. In its reply the Organization first draws the Tribunal's attention to the entry into force on 1 January 2010 of a new Act on the taxation of natural persons in the Canton of Geneva. It states that this Act abolishes the special rate of withholding tax applied to the income of international civil servants' spouses and puts an end to the former discriminatory treatment of tax returns filed by couples when one of the spouses was an international civil servant. It therefore considers that the Tribunal should rule only on the issue of whether, until 2009, it was obliged to reimburse the complainant for the excess income tax paid by her husband. In this respect it adds that, according to Staff Rule 106.10, where a staff member has failed to claim a payment to which he/she is entitled, such payment "shall not be paid retroactively unless a written claim is made within one year following the year in which the initial payment would have fallen due". As the complainant did not submit her first written claim for reimbursement until April 2008, the WTO considers that any obligation to reimburse her that it might have could only concern tax paid since 2007. In addition, the Organization holds that the complainant cannot claim reimbursement of the tax levied in 2009 since she may appeal directly to the Swiss tax authorities against the rate applied that year.

On the merits, the Organization states that the complainant is not entitled to any reimbursement because Staff Rule 106.11 applies only in cases where the international civil servant is himself/herself subject to tax on income received from the WTO. In this case the taxable income is not that of the complainant but that of her husband. The

Organization maintains that neither the pertinent international instruments nor the Tribunal's case law appear to settle the question of whether the "'over-taxation' of a staff member's spouse" due to the application of a specific rate of income tax results in the indirect, unlawful taxation of the income which the staff member receives from the international organisation employing him/her. It further contends that since it has not been established that the taxation at issue was unlawful, or that there is an obligation to reimburse where tax has been paid by an international civil servant's spouse, the question of a possible breach of the principle that international civil servants must receive equal treatment does not arise.

The WTO considers that it has acted in accordance with the duty laid upon it by Judgment 2032. It explains that in 2001 it embarked on consultations with the other international organisations headquartered in Geneva and the Permanent Mission of Switzerland with a view to determining whether or not the rules governing the taxation of the income of international civil servants' spouses in the Canton of Geneva were consistent with Switzerland's obligations under the Headquarters Agreement. Since it received no support and was the only organisation which had regularly initiated fresh rounds of discussions with the Swiss authorities, it considers that it can hardly be accused of failing to show due diligence.

D. In her rejoinder the complainant reiterates her pleas. She submits that income received from an international organisation must be exempt from all forms of taxation and in this connection she again relies on Judgment 2032. She states that, even if it transpires that she can file an appeal with the Swiss tax authorities against the rate of taxation applied to her husband's income in 2009, this possibility does not release the WTO from its obligation to reimburse. In her opinion, the Organization cannot rely on the time limit laid down in Staff Rule 106.10, because she has been challenging the indirect taxation of her salary since 2001.

E. In its surrejoinder the Organization maintains its position. It states that it should not be held responsible for the impact that the

application of a Swiss act had on the taxation of the income of the spouse of one of its staff members, and that this dispute is in reality a dispute between the complainant's spouse and the cantonal tax authorities, over which the Tribunal has no jurisdiction. It draws attention to the fact that it must respect the elementary principle of non-interference in the internal affairs of a State and explains that, when it embarked on a "constructive dialogue based on persuasion" with the Swiss authorities, it was under no obligation to achieve a result, but only an obligation to use its best endeavours. Since this dialogue led, however, to the adoption of a new act on the taxation of natural persons, which amended the tax scale applied to international civil servants' spouses, it considers that it fulfilled its duty of care.

CONSIDERATIONS

1. The complainant, a French national, entered the service of ICITO/GATT in 1990. Since 1995 she has been a staff member of its successor, the WTO, where she holds a post at grade 10, the equivalent of the P-5 grade in the United Nations system. She is married and resident in Geneva, where she lives with her Italian husband who is not an international civil servant.

2. Tax on the income of natural persons, as defined by the current tax law of the Republic and Canton of Geneva, is a tax on all income in cash and in kind, including earned income, unless it is exempt from taxation.

On 9 April 2008 the complainant, relying on WTO Staff Rule 106.11, asked the Organization to reimburse the excess amount of income tax paid by her husband since 1990, owing to the fact that the income she had earned as an international civil servant, which is in principle exempt from all national taxation, had been taken into account when the rate of this tax was calculated.

As this request was refused, the complainant submitted a request for a review of this decision, which the Director-General rejected on 17 June 2008 on the grounds that the complainant's earned income was

not being taxed "as such". He stated, however, that the Organization had asked the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva "for an explanation of the mechanisms applied, *inter alia,* in taxing the income of natural persons who are married to international civil servants, and if necessary, w[ould] ask for a revision in order to avoid any disguised taxation of WTO income".

The complainant filed an appeal against this decision with the Joint Appeals Board which, in its report of 6 March 2009 recommended that the Administration should: (i) enter into good faith negotiations with her on the issue of reimbursement under Staff Rule 106.11; and (ii) take up as a matter of priority the issue of indirect taxation of income from the WTO with the Swiss authorities, at the same time drawing their attention to the discriminatory consequences of this taxation. By a decision of 30 March 2009 the Director-General refused to follow the first recommendation, but he explained that the WTO would pursue its efforts to give effect to the second recommendation. While he acknowledged that the tax rules at issue – for which there were historical and practical explanations – constituted indirect taxation of the income of international civil servants married to persons who did not have that status, he considered that the provision in question had been interpreted correctly because it requires the Organization to reimburse only the national tax levied directly on a staff member's earned income. That is the decision challenged before the Tribunal.

3. (a) Under the Constitution of the Swiss Confederation in matters of taxation cantons enjoy original sovereignty which may be limited only by a federal constitutional provision adopted by the majority of the people and of the cantons. The levying of federal, cantonal and communal taxes is governed by the principles of universality, uniformity and economic capacity established in Article 127, paragraph 2, of the Federal Constitution of 18 April 1999 and, explicitly or implicitly, embodied in cantonal constitutions.

The Confederation and the cantons exercise joint competence over the taxation of natural persons' income. Federal tax on natural persons'

income is governed by the Federal Act of 14 December 1990 on direct federal taxation. Cantonal and communal income tax is established by cantonal law, save where otherwise provided by federal law.

(b) In accordance with Article 129 of the Federal Constitution, the Confederation sets out the principles for the harmonisation of the direct taxes levied by the Confederation, the cantons and the communes. This provision is implemented by another Federal Act, likewise adopted on 14 December 1990, which provides that the cantons are responsible for establishing scales, rates and allowances.

Under this Act the income of a married couple living together is aggregated irrespective of the matrimonial regime. As far as procedure is concerned, couples who live together must exercise their rights and discharge their tax obligations jointly.

(c) The Genevan legislature gave effect to these principles in the Act of 22 September 2000 on the taxation of natural persons, which was applicable at the material time. This Act was repealed on 1 January 2010 by an Act of 27 September 2009 bearing the same title. In both texts natural persons' income is taxed progressively on the basis of income bands, and the income of couples living together is added together for the purpose of determining the taxable amount. Their tax burden is reduced by the deduction of social insurance contributions. Couples living together are jointly liable to pay the total amount of tax due, unless one spouse is insolvent, in which case each person is responsible for the amount corresponding to his/her share of the total amount of tax.

4. (a) The Federal Act on the harmonisation of cantonal and communal direct taxes defines the personal link forming the basis for subjecting natural persons to cantonal direct taxation and, where appropriate, to communal direct taxation. The usual criterion is that of tax domicile. A taxpayer is domiciled in a canton when he/she resides there with the intention of settling there permanently, or where it is his/her legal domicile.

(b) On 2 June 1995 the Swiss Confederation signed a Headquarters Agreement with the WTO. Under Article 31, paragraph 2,

of this agreement, officials at grade P-5 are exempt from all federal, cantonal and communal taxes on salaries, emoluments and allowances paid to them by the Organization. This tax exemption regime, which has long been practised by Switzerland as the host State to numerous international organisations, is embodied in autonomous federal law, particularly in Article 15 of the Act on direct federal taxation and Article 4a of the Act on the harmonisation of cantonal and communal direct taxes, which refer to the Federal Act of 22 June 2007, the Host State Act, which mainly concerns institutional beneficiaries such as international organisations. The Swiss Federal Council's order relating to the latter Act lists categories of natural persons who enjoy the privilege of exemption from federal, cantonal and communal direct taxes. The officials of international institutions constitute one of these categories.

(c) The Genevan legislature has always respected this principle of exemption under public international law, and indeed Article 16 of the new Act on the taxation of natural persons retains the tax privileges created by this regime. But unlike the practice followed by the Federal Government pursuant to the Act on direct federal taxation, the Genevan Government's practice consists, or consisted at the material time, in including an international civil servant's tax-free earned income in the assessment of a couple's tax rate, at least when the spouse's earned income was not exempt from taxation. The progressive system based on income bands means that this practice increases the couple's tax burden in proportion to the size of the tax-free income, and results, as the WTO acknowledges, in the indirect partial taxation of earned income which is in principle exempt from taxation.

Despite the impression given in a letter which the Permanent Mission of Switzerland sent to the WTO on 18 December 2009 and which the latter has produced before the Tribunal, it does not appear that this cantonal practice has been entirely abolished. Article 16(2) of the new Act on the taxation of natural persons refers to another provision of this Act which, in order to abide by the principle of taxpayers' economic capacity, lays down that in the case of persons

who are liable to cantonal tax on only part of their income, the rate of tax must be that which would apply to the taxpayer's total income.

5. It does not lie within the Tribunal's competence, as defined in Article II, paragraph 5, of its Statute, to examine whether the practice followed by the Genevan tax authorities in this case was compatible with the provisions on the exemption enjoyed in principle by the complainant as a grade P-5 official employed by an international organisation which has concluded a headquarters agreement with Switzerland – nor do the parties ask it to do so.

It is, however, incumbent upon it to examine whether the Organization correctly applied Staff Rule 106.11, on which the complainant relies, and which reads as follows:

"*Taxes*

National income tax on salaries, allowances, indemnities or grants paid by the WTO shall be refunded to the staff member by the WTO."

The main purpose of this provision is to give effect, in this context, to the principle of equality, which signifies that staff members of an international organisation must receive equal pay for work of equal value. It is plain that, because of the direct impact of progressive tax rates, the aggregation of a couple's income and their joint tax liability, the rules applied by the Genevan tax authorities in this case entailed a reduction in the complainant's economic capacity compared with that of an international civil servant at the same grade and in the same family situation but domiciled in a Swiss canton where the rate of income tax of a taxpayer living with his/her spouse who is an international civil servant would be calculated without reference to the latter's salary.

6. A question therefore arises as to whether Staff Rule 106.11 obliges the WTO to compensate for this inequality. The Organization argues that it does not, mainly on the grounds that this provision concerns only tax paid directly by an official and not the indirect taxation of that person's income, such as occurred in this case as a result of the Genevan tax authorities' practice, which it nevertheless considers to be unacceptable.

On reading the French version of the above-mentioned provision, this objection does not at first sight appear to be unfounded.[*] Indeed, the taxpayer directly concerned by the disputed practice is not the complainant but her husband, who is not an official to whom the Organization might be bound to make the "reimbursement" mentioned in this version of the provision. Before reaching a final decision on the merits of this objection, it is, however, necessary to refer to the English version of the provision in question which is cited above.

Unlike the French version, the English version of Staff Rule 106.11 does not speak of "reimbursing" an official, which would imply that he or she must have personally paid too much tax, but of a "refund", which is apt to include financial compensation for an undue tax burden which he/she has borne, even through a third party, due to a fiscal practice that contravenes the rules on the exemption of his/her earned income from taxation.

Furthermore, although in principle Staff Rule 106.11 must be applied to the letter, its prime purpose cannot be ignored, this being to respect the principle of equality among officials. Having regard to all the circumstances of the case, the interpretation of this provision in accordance with that higher principle is therefore justified. The refusal to provide compensation for the additional amount of tax unfairly levied on the couple's income solely because of the complainant's earned income, although it was exempt from taxation, would have a paradoxical effect. A rule designed to guarantee equal wages would lead to unjustifiable inequality between an official whose earned income was unduly taxed although it was by law exempt from taxation and an official whose tax-exempt salary was taken into account for assessment purposes, thus reducing his/her spouse's disposable income after tax and therefore his/her economic capacity from which the official living with him/her naturally benefits.

The impugned decision is therefore unlawful.

[*] The French version of Staff Rule 106.11 reads: "Lorsque les traitements, indemnités ou primes payés par l'OMC sont assujettis à l'impôt national sur le revenu, l'OMC rembourse celui-ci aux fonctionnaires" (emphasis added).

7. The complainant is asking the Organization to refund the excess tax paid by her and her husband as a couple since 2002. The WTO submits subsidiarily that this refund may only concern excess tax paid in 2007 and 2008. In this connection it cites Staff Rule 106.10, which reads:

> "Where a staff member has not been receiving or has failed to claim an allowance, grant or other payment to which the staff member is entitled, such allowance, grant or payment shall not be paid retroactively unless a written claim is made within one year following the year in which the initial payment would have fallen due."

The objection is well founded. This provision applies to situations where a staff member fails to submit a claim; it is of no importance that the amounts claimed cannot be obtained immediately because the Organization disputes them. The payment which must be made by the WTO will therefore be confined to the period following the first claim submitted by the complainant.

For this reason the Organization must refund the complainant the excess amounts paid to the Genevan tax authorities in respect of 2007 and 2008.

8. To that extent the complaint therefore succeeds. On the other hand, there is no need to entertain the claim that the WTO should be ordered to "employ its authority and power" to persuade the competent Swiss authorities to abandon the practice giving rise to this dispute, since the Tribunal has no jurisdiction to issue such an order.

9. The complainant, who succeeds in part, is entitled to costs, which the Tribunal sets at 3,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside inasmuch as it denied the complainant's request for a refund in respect of 2007 and 2008.

2. The WTO shall pay the complainant the excess amounts paid to the Genevan tax authorities in respect of 2007 and 2008.

3. It shall also pay her costs in the amount of 3,000 Swiss francs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, Mr Claude Rouiller, Judge, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Dolores M. Hansen
Patrick Frydman
Catherine Comtet