SEVENTY-SECOND SESSION

In re ROSEN

Judgment 1140

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Morris Rosen against the International Atomic Energy Agency (IAEA) on 30 April 1991, the Agency's reply of 30 August, the complainant's rejoinder of 18 October and the IAEA's surrejoinder of 8 November 1991;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Article 18 of the Rules of Court, Regulation 5.02(a) and Rules 5.02.1 and 12.01.1 of the Agency's Provisional Staff Regulations and Staff Rules;

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. The complainant, a citizen of the United States, joined the Agency in 1974 and is an Assistant Deputy Director General. Under Regulation 5.02(a) of the IAEA's Provisional Staff Regulations salaries and post adjustment paid to Agency officials are deemed to be exempt from national income tax. The regulation goes on:

"Should such taxes be levied on the salaries or allowances paid by the Agency, they will, unless otherwise specified in the letter of appointment, be reimbursed by the Agency."

United States citizens in the Agency's employ are liable for tax on "institutional income", including salary and post adjustment and other allowances, and on any outside income. The Agency has always refunded tax that United States citizens are liable for on sums it pays them. In keeping with a practice recommended in 1952 by the United Nations Consultative Committee on Administrative Questions, Agency practice up to 1965 was to refund tax payable on institutional income alone, taking into account all exemptions and deductions attributable to such income. That is known as the "first income" method. In 1965 the Director General approved Staff Rule 5.02.1, which embodied the Agency's "first income" method.

In 1970 the United Nations announced that it would refund the difference between the amount paid in taxes when institutional income was included and the amount payable when institutional income was excluded. That is the so-called "last income" method. By an amendment to Staff Rule 5.02.1(B) which took effect at 29 December 1970 the Agency adopted the "last income" method, setting an upper limit of 26,000 United States dollars on taxable outside income.

In 1974 the Agency reached an agreement with the United States Government under which it would repay any amounts the Agency refunded against United States tax payments. The agreement did not say how the amounts were to be calculated.

In 1975 the Agency amended Rule 5.02.1(B) to remove the $26,000 limit.

In 1981 the United States Government announced a new policy of repaying tax refunds on condition that institutional income was treated as "first income" and any outside income as "last income". On 20 October 1981 it said it would cease to honour its tax agreement with the Agency, though it continued to repay sums to the Agency until tax year 1983. While waiting for the United Nations Administrative Committee on Co-ordination (ACC) to negotiate a new agreement the Agency continued to refund according to the "last income" method the amounts of United States tax paid by its officials.

Attempts to work out a "common-system" approach through the ACC having come to naught, the Agency concluded a new agreement with the United States on 5 April 1989. It is based on a modified "first income" method and allows for the "pro-rating" of exemptions and deductions. By circular SEC/NOT/1263 of 5 May 1989 the Agency informed its staff that the new approach would apply as from 1 January 1989 and that "in view of its

limited applicability to US taxpayers" the repeal of Rule 5.02.1(B) did not entail adopting any new rule. There followed correspondence between the complainant and the Deputy Director General in charge of Administration (DDG/AD) in which the former criticised and the latter defended the new system. On 9 April 1990 the complainant told the Deputy Director General that he intended to appeal against "the change in the long standing approach to tax exemption". By a minute of 3 May 1990 the Deputy Director General referred him to the provisions on appeal in the Staff Regulations and Staff Rules.

By a memorandum of 12 June 1990 to the Director General the complainant appealed against the changes in Agency policy announced in SEC/NOT/1263, but said that he would await the outcome of his appeal before applying for refund of the Agency's share of his income tax for 1989. The acting Director General rejected his appeal on 12 July. On 26 July he appealed to the Joint Appeals Committee and on 6 August applied to the Director General for leave to go directly to the Tribunal. The acting Director General granted him such leave on 8 August 1990.

By a memorandum of 2 January 1991 to the Division of Budget and Finance he applied for the refund of the United States tax levied on his Agency income for 1989. A routing slip dated 24 January from the Division told him of the reckoning of the Agency's share of the amount according to the "first income" method. On 26 February he appealed to the Director General against the decision to make the reckoning according to the new method. By a memorandum of 26 March, the decision under challenge, the Director General rejected his appeal. On 18 April he asked the Director General to waive the Joint Appeals Committee's jurisdiction and on 19 April 1991 the Director General did so.

B. The complainant submits that the Agency's new tax reimbursement procedure is discriminatory. He has four main pleas.

He contends, first, that the procedure is in breach of his contract under which emoluments are deemed exempt from national tax. By putting institutional income first the Agency has allowed an increase in a staff member's tax liability for non-Agency income. The "last income" method in Rule 5.02.1(B) having been deleted, the new method has been left to contractual arrangements, and how they affect staff depends on nationality.

His second plea is that the new approach breaks with the common system. The "last income" method, which is fairer, holds good at the United Nations and the United Nations Industrial Development Organization (UNIDO) and has the support of the ACC.

His third point is that the Agency made the new method retroactive: it told staff of the change on 5 May 1989 but applied it as from 1 January 1989.

Lastly, he submits that the Agency has given in to pressure from the United States Government. The "first income" method requires much smaller repayments from the United States, and the Agency has taken other measures to settle conflict over the "large, and so far unpaid, tax reimbursement obligation by the US Government to the Agency".

He asks the Tribunal to order the IAEA to go back to the "last income" method of reckoning the refund to staff of United States income tax.

C. In its reply the Agency submits that the complaint is time-barred. First, there being written evidence to show that the complainant had notice of the new method by 18 May 1989, he had until 18 July 1989 to appeal to the Director General under Rule 12.01.1(D)(1). He failed to appeal in time. Secondly, after his unsuccessful appeal of 12 June 1990 to the Director General against the change in method he applied for and on 8 August 1990 got leave to go straight to the Tribunal. Even supposing he had duly exhausted the internal remedies Article VII(2) of the Statute required him to file a complaint by 6 November 1990. In order to get round the time limit he has challenged a decision which he wilfully delayed by failing to submit in 1990 a copy of his 1989 reimbursement claim. In any event he had all the material facts and arguments at his disposal when he first sought to appeal in June 1990.

On the merits the IAEA submits that the Director General may adopt new methods and that the new rule squares with the complainant's contract and Regulation 5.02(a). Besides, it is fairer than the "last income" method since it relieves the Agency of taking on a greater share of the tax burden of officials with higher outside income. There is no "common-system" approach to tax refund: organisations apply either the "first income" method, with or without

pro-rata sharing of exemptions and deductions, or the "last income" one. The Agency did not apply retroactively the method it announced on 5 May 1989: it could not take action on tax year 1989 until tax returns and final reimbursement claims for that year had been filed, and that was a year later. Although it does make advances to staff members required to pre-pay tax estimates, it never makes final settlements until the tax year is over.

D. In his rejoinder the complainant answers the Agency's objections to receivability. If the Agency regarded his appeal as time-barred it ought to have warned him since he had made clear from the outset his intention of challenging the measure.

As to the merits he submits that the Agency's reply is incomplete and misleading. He maintains that he had a right to equal treatment in respect of pay, whatever the United States Government might decide to do about tax refund: the Agency's yielding to pressure from the Government means that the United States citizens it employs are treated differently from all other international civil servants in Vienna and most officials at other duty stations.

E. In its surrejoinder the Agency develops its two main objections to the receivability of the complaint and its contention that the change in method was neither in breach of the complainant's terms of appointment nor retroactive.

CONSIDERATIONS:

1. As in other intergovernmental organisations, salaries paid by the International Atomic Energy Agency are deemed to be exempt from income tax. The Provisional Staff Regulations and Staff Rules stipulate that any such taxes that are levied shall be refunded by the Agency unless the employee's letter of appointment states otherwise.

2. The United States recognises no exemption from income tax for its citizens, and so the Agency has from the outset refunded to staff any income tax levied by the United States. At first its practice was to refund tax payable on Agency earnings alone, taking into account all exemptions and deductions attributable to such income. That is known as the "first income" method, and in 1965 the Agency introduced a rule - Rule 5.02.1(B) - providing for refund according to that method.

3. In 1970 the United Nations broke away from the "first income" method and decided to refund the difference between the total tax payable on income including United Nations earnings and the total tax payable on income excluding such earnings. That is the "last income" method. In December 1970 the Agency amended Rule 5.02.1(B) to incorporate the "last income" method, setting a maximum limit of 26,000 United States dollars on taxable outside income.

4. Up to 1974 the Agency paid refunds out of its regular budget. In that year the United States agreed to repay to the Agency any sums it had paid to its staff in reimbursement of United States tax. In 1975 the Agency removed the limit of $26,000.

5. The United States unilaterally terminated in 1981 that agreement on repayment and did not conclude a new one until 5 April 1989. It was based on a modified "first income" method and took effect from 1 January 1989. The new method was notified to the staff by a circular, SEC/NOT/1263, of 5 May 1989.

6. From 11 October 1989 until 19 February 1990 there was correspondence between the complainant and the Deputy Director General in charge of Administration (DDG/AD) in which the complainant criticised the new method and the Deputy Director General gave him explanations.

7. On 9 April 1990 he again wrote to the Deputy Director General stating:

"As to the new methodology effective for tax year 1989, I will appeal in accordance with Agency procedures the change in the long-standing approach to tax exemption. Pending a final resolution, I will not request any reimbursement from the Agency of my tax liability for 1989."

In a reply of 3 May 1990 the Deputy Director General noted his intention of appealing with respect to tax year 1989 and referred him to the appropriate Provisional Staff Regulations and Staff Rules on the appeals procedure.

8. On 12 June 1990 the complainant appealed to the Director General stating:

"I wish to appeal against the change in the long standing approach to tax exemption and reimbursement of US tax payments as spelled out in SEC/NOT/1263 dated 1989/05/05. As stated in my [inter-office memorandum] to DDG-AD dated 1990/04/09 pending a final resolution of this appeal, reimbursement for the Agency portion of my 1989 US tax which was required to be filed by 16 April 1990, has not been requested."

He put forward the same arguments in his appeal as in this complaint.

9. The acting Director General turned down his appeal on 12 July 1990 and he appealed to the Joint Appeals Committee on 26 July. He did not pursue this appeal but wrote asking the Director General to waive the Committee's jurisdiction so that he might appeal directly to the Tribunal. He was granted waiver on 8 August but failed to prosecute the matter by filing a complaint with the Tribunal within the time limit in Article VII(2) of its Statute.

10. On 2 January 1991 he applied to the Agency for refund of the United States tax he had paid for 1989 and was given the reckoning of his entitlement. On 26 February he appealed against the decision to reckon the sum by the new method. The Director General rejected his appeal on 26 March 1991, and that is the decision he is now impugning.

11. He again applied to the Director General for waiver of the jurisdiction of the Joint Appeals Committee so that he might appeal directly to the Tribunal. Waiver having been granted on 19 April, he has pursued the matter by lodging this complaint.

12. The Agency submits that his complaint is time-barred, first, because he should have appealed against the change in method within two months of the date of notification to him of SEC/NOT/1263, i.e. by 18 July 1989 at the latest; secondly, because after the Director General's rejection of his appeal of 12 June 1990 against the change in method he failed to make the further direct appeal to the Tribunal.

13. The complainant contests, first, the Agency's right to object to receivability on the grounds that it agreed on 19 April 1991 to his lodging a complaint when it waived the Joint Appeals Committee's jurisdiction. He submits that it should have warned him at the time. Secondly, he observes that his failure to prosecute his earlier appeal and to meet the deadline for filing a complaint was due to his heavy workload. Thirdly, he points out the Agency's delay in filing its reply to his complaint.

14. The answer to his first argument is that the Agency's consent to letting him go straight to the Tribunal may not be construed as waiver of any objections or pleas it was entitled to put forward in its reply.

Secondly, the time limit for filing a complaint must be strictly respected and may be waived neither by the parties nor by the Tribunal: a heavy workload affords no valid excuse for failing to meet it. Since the complainant failed to lodge a timely complaint with the Tribunal in 1990 his claim became time-barred. He may not artificially extend the time limit for appeal against the new method by bringing a new appeal on exactly the same issue.

Thirdly, as to the alleged delay on the Agency's part in entering its reply, the extensions of time limits granted to both parties for filing pleadings were duly allowed in accordance with Article 18 of the Rules of Court.

15. The complaint fails because it is irreceivable. Since the Agency's second objection to receivability is upheld it is not necessary to entertain the first one stated in 12 above, nor, for that matter, the parties' pleas on the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux

Mella Carroll
William Douglas
A.B. Gardner

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