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

EIGHTIETH SESSION

In re AUGIER and GARDETTE

Judgment 1491

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Régine Andrée Marie Augier and Mr. Yves René Gardette against the European Organization for Nuclear Research (CERN) on 27 September 1993 and corrected on 16 June 1994, CERN's replies of 14 October 1994, the complainants' single rejoinder of 24 February 1995 and the Organization's surrejoinder of 22 May 1995;

Considering the applications to intervene filed by Mr. Michel Bonnet on 27 January 1995 and Mr. Pierre Loridon on 9 February 1995;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. CERN has its headquarters in Geneva and since being established in 1953 has had premises in Switzerland. In 1965 it extended them across the border into France. On 13 September 1965 it concluded an agreement with France about its status. According to Article XIV.2 of the agreement, as revised on 16 June 1972, the French Government is not bound to grant to French citizens and to permanent residents in France the exemption from taxation that CERN officials enjoy under Article XIV.1(a).

To determine the applicable rates of income tax the French inland revenue follow what is known as the method of the "effective rate" and take the figure of the taxpayer's aggregate income. For the international civil servant that means combining pay and, if any, private income and, since the rates of tax are progressive, applying a higher rate to the private income.

In keeping with Regulation R IV 2.02 of the CERN Staff Regulations and with the "effective rate" rule, CERN pays back to its employee any tax directly levied on pay and allowances, but in the last resort France bears the costs. What happens in practice is that the French inland revenue report directly to the Organization the amount due from each staff member in tax on CERN income; CERN makes the amounts over, and the French thereupon return them. The staff member pays the part of the tax levied on any private income.

Mrs. Augier, a French citizen, joined CERN on 1 February 1970 as a clerk. She held a fixed-term appointment that was regularly renewed until 1 February 1976, when she got an indefinite one. Mr. Gardette, who is also French, started at CERN as an administrative officer on 16 February 1974. After several fixed-term appointments he was granted an indefinite one on 16 February 1980. Both the complainants are resident in France.

Mrs. Augier wrote on 24 March 1993 and Mr. Gardette on the 25th to the Leader of the Personnel Division claiming refund of the tax they said they had overpaid in 1990 and 1991 because the French inland revenue had counted their earnings from CERN in determining the rate to be applied to their private income. They pleaded breach of the principle of equal treatment for French and other CERN staff living in France. They cited the case of an Italian employee of CERN resident in France who in 1990 had won an appeal to the French inland revenue against the counting of his international earnings in determining the rate of tax on his private income and had got tax relief. They also argued that the system amounted to indirect taxation of their earnings from CERN.

In letters of 8 April 1993 the Leader of the Personnel Division replied that it was on the strength of figures supplied by the French inland revenue that CERN paid back the tax levied on international earnings; it had no authority to

determine the amount of national tax; the only matter at issue was the taxation of private income; and the claims to reimbursement therefore failed.

On 7 June 1993 the complainants addressed to the Director- General requests for review of the Leader of Personnel's decision of 8 April and sought leave to go straight to the Tribunal. By letters of 30 June - the impugned decisions - the Director-General answered that he would not review the Leader of Personnel's decision but gave them leave to appeal directly to the Tribunal.

B. In the complainants' submission the dispute has arisen over CERN's failure to abide by the material rules and by the principle of equal treatment for all members of its staff. It may not eschew liability by pleading French law and its own lack of authority to set tax rates.

On the merits the complainants plead breach of R IV 2.02. According to that provision and the rule of exemption from tax on international earnings, pay and allowances from CERN should not incur any national tax. But what actually happens is that their earnings from CERN count in determining the rate of tax to be applied to their private income and so are being taxed indirectly. Though R IV 2.02 does require CERN to refund the tax according to the "effective rate" rule, it should not apply, say the complainants, to them. For one thing, there is no allusion to the rule in the English version of R IV 2.02; for another, the Finance Committee of CERN has never approved it, as Rule I 1.04 requires.

Their second plea is breach of the precept, which the Tribunal has enforced on more than one occasion, that an organisation must put all its staff on a par. For a staff member who is living in France, but is not French, earnings from CERN do not count in determining the rate of tax to be applied to any private income. So the French citizen living in France is at a disadvantage. Yet the whole point of exemption from tax is to make for equality between members of the staff.

The complainants ask the Tribunal to set aside the decisions of 30 June 1993 and order CERN to refund to them the sums they overpaid in tax in 1990 and 1991: 24,552 French francs for Mrs. Augier and 7,733 for Mr. Gardette. They seek costs.

C. CERN replies that the complainants have no case. It paid France the amounts of tax levied on their earnings and discharged its obligation under Regulation R IV 2.02 to refund those amounts to its staff. French staff living in France are not exempt from tax on their earnings from the Organization and are mistaken in relying on some rule of exemption to impute to it breach of Regulations R IV 2.01 and 2.02.

In any event the methods of taxation that member States may apply are no business of CERN's. And whatever the effect of French tax law may be lies with its author. So the complainants' quarrel is not with CERN, but with the French. Their charge of discrimination is likewise unsound: French law alone lays down the tax liabilities of the French and the other CERN staff living in France. Besides, the two groups are not in like case in law, only the staff of other nationalities being exempt from tax on their CERN earnings. Equal treatment holds good only where staff are in the same position in fact and in law; so there is no breach of the principle even in French law.

D. In their rejoinder the complainants enlarge on their pleas, maintaining that the rule whereby CERN refunds the tax levied by France is based on the principle of exemption for the earnings of international officials. CERN is paying mere lip service to that principle if it acquiesces in the counting of CERN earnings for the purpose of setting the rate for taxable income. In a ruling of 16 December 1960 (in re Humblet) the Court of Justice of the European Communities held that to apply to staff of the Communities employed in Belgium a rule of Belgian tax law that was comparable to the "effective rate" rule was tantamount to indirect taxation of their earnings as such staff and was contrary to the law of the Communities. And in a memorandum of 16 October 1969 the office of the Legal Counsel of the United Nations expressed the view that a State that was party to the United Nations Convention on Privileges and Immunities might not reckon the amount of international earnings in working out the rate of tax on private income.

E. In its surrejoinder CERN insists that it did observe the rules and has no authority to check or alter methods of levying national tax. In its submission the ruling by the European Court and the opinion of the Legal Counsel of the United Nations are neither here nor there.

CONSIDERATIONS:

1. The complainants are employees of CERN and French citizens living in France. The Leader of the Personnel Division of CERN refused to refund to them part of the taxes that the French inland revenue had levied on their income. On 30 June 1993 the Director-General upheld that refusal in decisions that they are now impugning. Since the complaints raise the same issues they are joined to form the subject of a single ruling.

2. The Director-General granted the complainants leave not to appeal to the Joint Advisory Appeals Board and they have come straight to the Tribunal. Their complaints are therefore receivable.

3. The salient facts are that, though CERN's headquarters are in Geneva, it has premises in France as well. Under an agreement that the Organization has concluded with France its staff are exempt from any direct levy by that country of tax on CERN pay and allowances. French citizens who are resident in France are not so exempt: they must declare their full income to the French inland revenue and pay tax thereon in accordance with French law. But they recover any tax levied on their CERN earnings on the strength of Regulation R IV 2.02 of the CERN Staff Regulations, which says:

"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 a receipt for a demand for such taxes."

The practice is for the French inland revenue to report directly to CERN the amounts of tax that French citizens must pay on earnings from the Organization, the relevant text being headed "Refund to CERN staff resident in France of taxes levied on international earnings". Tax on any income from other sources is of course not refundable.

4. The complainants have their earnings from CERN and draw income from other sources as well. They have been recovering the amounts of tax reported by the French inland revenue as levied on their international earnings, but they are challenging the manner of reckoning. Since rates of income tax in France are progressive the effect of counting earnings from CERN in their total income is to put the rest of their income in higher tax brackets. By their reckoning the Organization should therefore have paid them back also further amounts they had to pay in taxes for 1990 and 1991, the figures being 24,552 French francs for Mrs. Augier and 7,733 for Mr. Gardette. The Leader of the Personnel Division rejected their claims on the grounds that CERN had no authority to set the rates of tax on their private income, that such income was none of its concern, and that in such circumstances it merely acted on the figures supplied by the French inland revenue.

5. The complainants' case boils down to two pleas. One is that the impugned decisions offend against Regulations R IV 2.01 and 2.02; and 2.02 is partly unlawful anyway because the French text prescribes reimbursement "according to the rule of the effective rate". Their second plea is breach of the rule that an international organisation must put all its staff on a par.

6. Their first plea fails. CERN has but one obligation under R IV 2.02: to refund taxes paid by officials "on remuneration and benefits received from the Organization". It has no way of checking the rates of tax that France may apply to such sums in the exercise of its sovereign authority. It is true that the French approach does not fully discount earnings from CERN for the purposes of taxation since they count towards the figure of total taxable income. But CERN is not to blame for the resulting increase in the rates of taxation of the complainants' total income. All it can do is pay back to French citizens on its staff the amounts they have paid in tax on their international earnings: it exerts control neither over the tax brackets and rates set by French law, nor over the method of reckoning their total income, which is just a feature of the French manner of processing income tax.

7. The complainants question under this head the lawfulness of R IV 2.02, which says that refunds must be made according to the rule of the "effective rate", and it may be a pity that CERN offers no explanation on that score. But the issue is immaterial. Whether the provision is lawful or not, the rules on the rates and reckoning of tax in France fall outside the ambit of CERN's competence.

8. The complainants' second plea - that they fare less well than CERN staff who are not French - must fail too. The rule against discrimination is a cardinal one and borne out by a long line of precedent: see for example Judgment 1182 (in re Mirmand). But, as was explained in Judgment 1189 (in re Pinto de Magalhaes No. 3), it holds good only where staff who are in like case both in law and in fact have not been treated alike. Under CERN's agreement with France its staff are exempt in that country from direct taxation on their earnings from the Organization. But

the provision does not apply to French citizens, who do not enjoy exemption from tax on their earnings from CERN and are therefore, by reason of the terms of an agreement that CERN is bound by, not in the same position in law as staff of other nationalities. As to earnings from CERN, such staff are exempt from all tax, whereas CERN employees who are French citizens are entitled to repayment of tax actually paid. As to other income, the staff who are not French do fare better because only their other income counts for the purpose of reckoning rates of income tax and it therefore falls within lower tax brackets, whereas for the French citizens the whole of their income counts for that purpose. But the difference in treatment is not of the Organization's making: it is due solely to the working of French tax law.

9. Since the complainants' pleas are unsound their claims, including claims to costs, must fail.

10. Since the complaints fail, so too do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner

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