NINETY-FIFTH SESSION

Judgment No. 2256

The Administrative Tribunal,

Considering the complaint filed by Mr M. L. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 24 August 2002, the Organisation's reply of 25 November 2002, the complainant's rejoinder of 24 January 2003 and the OPCW's surrejoinder of 25 March 2003;

Considering Articles II, paragraph 5, and VII 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 is a national of the United States of America born in 1957 who has been employed by the Organisation since July 1998 at its headquarters in the Netherlands. As a staff member of the Organisation, he enjoys immunity from taxation on the salaries and emoluments paid to him by the OPCW. Nevertheless, like other non-resident US nationals, he is required by the laws of his home country to file annual US tax returns declaring his OPCW income as well as any other income he may have received. Income tax paid on OPCW income is refunded by the Organisation in accordance with Staff Regulation 3.3 which in the version of 2 July 1999 provides as follows:

"(a) In the event a staff member is subject to national income taxation with respect to the net salaries and emoluments paid by the Organisation to staff members, the Director-General is authorised to refund to him or her the amount of those taxes paid. The Director-General will make arrangements with the States Parties concerned for the reimbursement to the Organisation.

(b) If taxes are levied by States Parties on the salaries and emoluments paid by the Organisation to staff members who are citizens of those States Parties, the Organisation shall, however, only refund the amounts of taxes to the extent that such amounts are reimbursed to the Organisation by the States Parties concerned."

Pursuant to those provisions, a Tax Reimbursement Agreement (TRA) was concluded on 25 February 1999 between the US Government and the OPCW.

On 8 March 2001 the complainant submitted an initial tax reimbursement claim form to the Organisation in respect of his income for 2000, together with amended claim forms for 1998 and 1999. In each of these claims the complainant included as a component of his salaries and emoluments the employer contributions paid by the Organisation into the Provident Fund on his behalf, and referred to as Provident Fund part B contributions. Having received no formal response, he resubmitted a claim for 2000 on 20 June 2001 and requested a written response. Again he sought reimbursement of taxes paid on Provident Fund part B contributions, and he treated his OPCW income as last rather than first income.

By a memorandum of 3 July 2001 the Head of the Organisation's Budget and Finance Branch informed the complainant that his claim for 2000 would have to be revised to comply with the TRA. Specifically the Provident Fund part B contributions were not to be included in his earnings, and his deductions and exemptions were to be "apportioned on a pro-rata basis between OPCW and other income". The complainant asked the Director-General to review that position, but the Director-General upheld the decision in a letter of 23 July. On 25 July the complainant filed an internal appeal with the Appeals Council claiming that the Provident Fund part B contributions were not taxable and that his non-OPCW income should be considered as "first income" when calculating his tax liability.

On 27 August 2001 he submitted a further amended claim for 1998, prepared in the same manner as his previous claims, which was rejected on 4 October 2001. The complainant filed an internal appeal against this second decision on 2 November 2001. In a report of 15 May 2002 covering both appeals, the Appeals Council expressed its concern that the Organisation's tax reimbursement system resulted in unequal treatment of staff members. However, it found no legal basis for the complainant's claims and recommended that the appeals should therefore be dismissed. The Acting Director-General endorsed this recommendation and informed the complainant accordingly by a letter of 28 May 2002. That is the impugned decision, although the date cited by the complainant for the decision under challenge is that of 15 May.

B. The complainant contests the exclusion of Provident Fund part B from his income for the purpose of calculating his entitlement to reimbursement of income tax. In his view, these employer contributions form part of his salary and emoluments and should be subject to the normal rules of tax reimbursement. He also contests the Organisation's use of the "first-income" method in assessing his taxable income and relies on the Tribunal's case law in support of his argument. He considers that both of these measures are illegal, firstly because they violate his right to immunity from taxation on his OPCW income, and secondly because they result in unequal treatment of similarly-situated staff members.

The complainant points out that the TRA was not in force at the time of his 1998 tax reimbursement claim, which should therefore have been honoured in full.

He also expresses reservations as to the impartiality of the internal appeal proceedings, in view of the fact that the Chairman of the Appeals Council was the Acting Head of the Human Resources Branch at the time when the Appeals Council issued its report, and there was therefore a conflict of interests.

He seeks the reimbursement of 17,221 United States dollars for tax paid on his OPCW income, plus interest; 5,000 dollars in moral damages; and an award of costs.

C. The Organisation submits that the complaint is unclear with respect to the administrative decisions that are being challenged and irreceivable on two grounds. Firstly, no "administrative decision" was taken on 15 May 2002, nor one that could be considered "final" within the meaning of Article VII of the Tribunal's Statute. Secondly, the complainant's claims concerning his tax reimbursement for 1999 are irreceivable for failure to exhaust the internal remedies.

On the merits, it points out that since its tax reimbursement method implements decisions taken by the States Parties, and particularly Staff Regulation 3.3 and the TRA, it cannot be considered to be illegal. The Organisation has tried to obtain the United States' agreement to include Provident Fund part B in the TRA's definition of "institutional income", but its efforts have so far proved unsuccessful.

It rejects the complainant's reference to the case law as irrelevant and argues that it has no option but to refund taxes in accordance with the applicable statutory provisions. Consequently, it is bound by the current definition of "institutional income", and indeed by the first-income method of calculation used by the United States tax authorities and endorsed by the Tribunal in Judgment 1224. The reimbursements claimed by the complainant go beyond the scope of the TRA and can therefore not be granted.

It points out that where a State Party does not provide for reimbursement of the taxes it levies, the Organisation has neither a legal obligation nor the financial means to reimburse the staff members concerned.

The Organisation denies responsibility for the unequal treatment of the complainant, which it views as resulting solely from the laws of his home country. It denies the complainant's allegation of a conflict of interests and submits that the official concerned did not act as the Organisation's representative before the Appeals Council.

D. In his rejoinder the complainant points out that Staff Regulation 3.3 should be applied by the Organisation in a manner consistent with the Chemical Weapons Convention, which establishes the right of staff members to tax exemption on all organisational income, including Provident Fund part B. He also queries the validity of the TRA insofar as it was not submitted to the Conference of the States Parties for approval prior to its adoption.

E. In its surrejoinder the OPCW maintains its objection to receivability and likewise its arguments on the merits. Regarding the validity of the TRA, it submits that the Director-General has the authority under Staff Regulation 3.3 to conclude tax reimbursement agreements with States Parties.

CONSIDERATIONS

1. The complainant challenges the OPCW's decision not to reimburse him in respect of part of the income tax levied by his home country, the United States, on his income for 1998, 1999 and 2000. The disputed measures result from the application of the Tax Reimbursement Agreement (TRA) of 25 February 1999 between the Organisation and the United States. His claim has two main branches: firstly, he received no refund in respect of the tax he paid on the contributions paid into the Provident Fund on his behalf by the Organisation, although these employer contributions were treated as part of his taxable income. Secondly, the US tax authorities treated his income from the Organisation as "first income", as a result of which he was obliged to offset his various exemptions and benefits against that part of his income, rather than against his taxable income from other sources, where they would have been more advantageously employed.

2. The complainant's service with the OPCW began on 1 July 1998. At the material time he was an Inspector at grade P-5 and a Team Leader.

3. On 8 March 2001 the complainant submitted an initial claim form to the OPCW, covering 2000, as well as amended claim forms for 1998 and 1999. The complainant included the Provident Fund part B contributions as a part of his salaries and emoluments and requested that taxes paid on these contributions be reimbursed.

4. On 20 June 2001 the complainant resubmitted his 2000 claim and requested a formal written response. He included Provident Fund part B contributions and also used the last-income method to calculate the reimbursement owed. On 3 July 2001 the Organisation stated that taxes on Provident Fund part B contributions were not subject to reimbursement, and that deductions and exemptions should have been applied on a *pro rata* basis between OPCW and other income and not on a last-income basis. No issue was taken with the calculations; nor was it disputed that the amounts claimed resulted from taxes actually paid by the complainant.

5. On 25 July 2001, after the complainant's request to the Director-General for a review of the decision was refused, he lodged an internal appeal with the Appeals Council.

6. On 27 August 2001 the complainant submitted an amended claim form for 1998. On 4 October 2001 the complainant received a denial of this claim. On 2 November 2001, after requesting the Director-General's review, the complainant presented a second internal appeal to the Appeals Council relating to the 1998 tax year.

7. The Appeals Council merged both appeals and issued its report on 15 May 2002. It recommended that the Director-General uphold the original decision. On 28 May 2002 the Acting Director-General accepted the Appeals Council's recommendation in a letter to the complainant. That is the impugned decision.

8. The Organisation raises various arguments with regard to its refusal to reimburse all of the taxes that staff members pay on OPCW income. It relies specifically on the terms of the TRA which it has negotiated with the United States. It also invokes Staff Regulation 3.3(b) which, it says, prohibits it from reimbursing the complainant unless and until it has itself received an equivalent payment from the United States Government. These arguments beg the question: if the Organisation is under a duty to protect its employees from national taxation of their earnings as international civil servants, it cannot rely on the TRA and the provisions of its Staff Regulations as an excuse for abdicating its responsibilities to its staff members under international law. In Judgment 2032,the Tribunal made it abundantly clear that the principle of tax exemption is fundamental; that it is ultimately the Organisation's responsibility to ensure that staff members are fully reimbursed for any income tax paid on their OPCW income; and that the last-income method is the only appropriate method for determining tax reimbursements.

9. As can be seen from the Tribunal's decision rendered concurrently herewith in Judgment 2255, the holding in Judgment 2032 has been examined and confirmed at the present Session. A previous holding, apparently to the contrary, in Judgment 1224 (also cited and relied on by the OPCW in the present case) has been determined to be based on a finding of fact for which there was no support in the evidence. As is mentioned in Judgment 2255:

"21. It is to be noted that these passages [from Judgment 1224], although treated by [the defendant organisation] as being statements of law, are in reality grounded in a finding of fact implicitly made by the Tribunal. That finding is

that the first income method provided for a refund of tax paid on 'Agency earnings only'. It seems apparent that the Tribunal had no evidence before it to support such finding for there is no mention of it anywhere in the Judgment, including the summary of the arguments of both parties."

10. By contrast, Judgment 2255 shows not only that the facts in Judgment 2032 conclusively demonstrate that the first-income method can result in the direct taxation of organisational earnings, but also that this result has been confirmed in a recent authoritative UN study (see report dated 15 February 2002 by the High Level Committee on Management of the United Nations System Chief Executives Board for Coordination (CEB/2002/HLCM/R.6)).

11. While the existence of a Tax Reimbursement Agreement with the United States makes the present case marginally different from Judgment 2032, it is impossible to see how the Organisation could be said to have acted in conformity with the fundamental principles of tax exemption and non-discrimination in concluding such an agreement. Paragraphs 3 and 5 of the TRA, and its Annex excluding Provident Fund part B contributions as income, in combination with Staff Regulation 3.3(b), make the Organisation's position clear: it does not accept that it should include Provident Fund contributions as income for the purpose of tax reimbursements. It will calculate the reimbursements using the first-income method. It will not reimburse the staff member more than it itself is reimbursed by the State Party. These positions have not been forced upon the Organisation; it has voluntarily embraced them, and this, notwithstanding the Tribunal's clear holding in Judgment 2032 to which the Organisation was itself a party.

12. The Organisation does not dispute the principle of tax exemption or that such principle is fundamental to the law of the international civil service. It nonetheless argues that, despite its acknowledged submission to that principle, it can derogate from its obligations by creating limiting provisions in bilateral agreements and in its Staff Regulations. The argument is unacceptable and if adopted would lead to anarchy and the destruction of the rule of law.

13. In Judgment 2032, the Tribunal stated the following:

"If the Organisation does not (and clearly now it cannot) contest the exempt status of the complainant, it is its duty to protect him against the claims of the authorities of a member State, to reimburse him the amount of tax he has paid to the State, and to employ its own considerable power, authority and influence to have the [national] authorities change their position. Exemption from national taxes is an essential condition of employment in the international civil service and is an important guarantee of independence and objectivity. It cannot be made to depend upon the whim of national taxing authorities who will be understandably reluctant to admit any exceptions to their claims."

14. With regard to the role of a tax reimbursement agreement, the Tribunal stated the following:

"It would be strange indeed if the absence of such an agreement could be invoked by an international organisation or its member States to deprive some staff members and not others of their tax-exempt status. If a member State in breach of its international obligations taxes the exempt income of a staff member, the reimbursement of that tax cannot be made to depend upon the grace and favour of that State."

15. The evident corollary of that statement is that it would similarly be strange if the existence of an agreement could be invoked by an international organisation to deprive some staff members and not others of their tax-exempt status. Such an agreement is meant to set the terms of a member State's commitment to refund an organisation for tax reimbursements. It must, however, conform with international law and cannot be used to undermine the fundamental principles of tax exemption recalled by the Tribunal. Thus, even if the text of the TRA had the reach which the Organisation contends for it, which may be doubted, it would simply be unenforceable as being contrary to law.

16. It is likewise with the provisions of the Staff Regulations which, in the Organisation's submissions, would limit the complainant's right to tax reimbursement to the amounts actually paid to the Organisation by the United States under the TRA. Like the TRA itself, the Staff Regulations must be in conformity with the requirements of the law and where they are not, they are simply unenforceable.

17. The Director-General recognised that the Organisation's position is inherently problematic in a document entitled "Note by the Director-General [regarding] OPCW Staff Regulation 3.3", dated 25 June 2001, which was

submitted to the Executive Council and apparently distributed to the staff at large. In that document, he concluded as follows:

"If no action is taken, the Director-General will, in some cases, not legally be able to pay tax refunds, and the OPCW can anticipate the loss of considerable financial resources, in terms of both legal costs and settlements which it is required to pay, as the Secretariat argues losing cases before the ILO Administrative Tribunal."

18. The only real issues in this case are whether Provident Fund part B contributions should be included as income subject to tax reimbursement, and whether it is open to the Organisation to use a first-income method to calculate reimbursements. Both can be disposed of rather easily.

19. First, with regard to whether taxes on Provident Fund contributions should be reimbursed, it is clear that they should. In the above-mentioned Note, the Director-General acknowledges this:

"From the point of view of the OPCW, all emoluments paid to an OPCW staff member because of his/her work for the Organisation are deemed to be tax exempt. If a given State Party decides to tax any such income or emoluments, that tax attracts a reimbursement. If the State Party does not reimburse the OPCW for any national taxation which it has levied, the OPCW will be compelled by international administrative law to reimburse the affected staff member for that amount. In such a situation, the burden of the reimbursement cost will naturally fall on all States Parties, including those that have granted exemptions to their citizens employed by the OPCW."

20. The Tribunal can only agree, but it does not accept that the problem of states which refuse to recognise their legal obligations can be dealt with by organisations at the expense of their own staff and in violation of the law.

21. To put the matter shortly, since the United States considers the Provident Fund part B contributions to be taxable income, and in fact taxes such contributions in the year that they are paid, Provident Fund contributions should be included as income and the taxes must be subject to reimbursement.

22. Although not essential to the complainant's case, he also asserts that, as of the 2001 tax year, the Organisation has begun refunding taxes on Provident Fund part B contributions. He does not offer any clear proof of this; however, neither does the Organisation convincingly refute his assertion. If the OPCW is in fact currently reimbursing taxes paid on Fund contributions, its position that such action is prohibited by the TRA and the Staff Regulations is especially suspect.

23. With regard to the issue of income methodology, Judgment 2032 stands for the proposition that the last-income method must be used. The Director-General recognised that using the first-income method to calculate reimbursements violates international law. In his Note of 25 June 2001, he pointed out the absurd position in which he finds himself:

"The State Party concerned insists that [the first-income method] is its national law, which must therefore be reflected in its tax reimbursement agreement. The State Party has also recently confirmed to the Director-General that the OPCW contribution to the staff member's Provident Fund will be taxed annually, and that it will not reimburse the OPCW for taxes on that category of income. If OPCW staff members apply international civil service law as it stands now, they are entitled to a refund on such taxation from the Organisation. However, because of the current wording of Staff Regulation 3.3(b), the Director-General cannot refund those taxes."

24. The Director-General quotes Judgment 2032 which clearly sets out the appropriate income method:

"Where a State imposes tax upon its nationals who are international civil servants in receipt of income - some of which is tax exempt and some of which is not - the only proper method of determining how much tax should actually be paid is to calculate the hypothetical amount which would be due if the exempt income had not been received."

25. Before concluding, the Tribunal must dispose of some relatively minor points raised by both parties.

26. First, the Organisation pretends not to know which decision is impugned by the complaint, but that is of no consequence in this instance. While the complainant refers on the complaint form to a decision of 15 May 2002, which was the date of the Appeals Council's report, this was obviously an error. It is more than clear throughout his submissions that the complainant impugns the Director-General's decision of 28 May 2002 and that is the very

decision which the Organisation attempts to defend.

27. Second, since there was never any administrative decision with regard to the complainant's 1999 tax reimbursement, the Organisation's plea that this part of the claim is irreceivable is clearly well founded. Having said that, since the situation in 1999 was identical to the situation in 2000, the Tribunal's decision with regard to the 2000 claim should be a helpful guide to the Organisation with regard to any receivable claim for a 1999 tax reimbursement.

28. Third, before the Tribunal - but notably not before the Appeals Council, nor during the administrative proceedings leading up to the internal appeal - the Organisation maintained, for the first time, that the complainant had not proved the fine detail of his US tax payments and refunds for each of the tax years in question. It is difficult to believe that this position was taken in good faith. The Tribunal's proceedings are not the proper venue to debate matters of accounting. In any event, the complainant appears to have adequately discharged his burden of proof in his rejoinder, by annexing several of his US tax returns. If the Organisation needs further detail, it is up to it to make the necessary request.

29. Likewise, the Organisation pretends to see confusion between the figures given on pages 2 and 12 of the complaint. The figures reflect different calculations: Table 1, on page 2, demonstrates the effects of the two different income methods in calculating taxes owed. On page 12, on the other hand, the complainant lists the taxes paid solely on Provident Fund part B contributions for the purpose of demonstrating the amount of such taxes. The amount claimed in this complaint is the total figure shown in the bottom line of Table 1. That figure is the same as the amount claimed on the complaint form. Again, if more detail is needed, the Organisation should deal directly and in good faith with its own staff member.

30. Lastly, the complainant raises a serious point regarding an apparent conflict of interests in the position of the person who was Chairman of the Appeals Council during the hearing of this matter as well as Acting Head of Human Resources in May 2002. The Tribunal does not find it necessary to deal with the point in the circumstances but wishes to make it clear that it does not want to be understood as approving the way the matter was handled.

31. For the above reasons, the complaint will be allowed and the Organisation will be ordered to reimburse the complainant for all US taxes paid on his OPCW earnings, including Provident Fund employer contributions, in the 1998 and 2000 taxation years using the "last-income" method. In view of the Organisation's apparent disregard of the Tribunal's previous ruling, it shall pay the complainant moral damages in the amount of 5,000 euros as well as 2,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Organisation shall reimburse the complainant for all US taxes paid on his OPCW earnings, including Provident Fund employer contributions, in the 1998 and 2000 tax years using the "last-income" method.

3. It shall pay the complainant moral damages in the amount of 5,000 euros and costs in the amount of 2,000 euros.

4. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.