

The Administrative Tribunal,

Considering the twelfth complaint filed by Mr W. E. B. against the European Patent Organisation (EPO) on 21 April 2006 and corrected on 30 June, the Organisation's reply of 12 October, the complainant's rejoinder of 5 November 2006, the EPO's surrejoinder of 15 February 2007, the complainant's additional comments of 25 February and the Organisation's observations thereon of 24 April 2007;

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, a German national born in 1938, joined the European Patent Office, the secretariat of the EPO, in November 1980 as an Examiner. On the date of his retirement, 1 May 2003, the complainant was resident in Germany.

The following provisions of the Pension Scheme Regulations of the European Patent Office are relevant to the present case:

## **“Chapter X**

### **PROVISIONS RELATING TO ADJUSTMENT OF PENSIONS**

#### **Article 42**

##### **Pensions which are subject to national tax legislation**

(1) The recipient of a pension under these Regulations shall be entitled to the adjustment applying to the Member State of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that State.

(2) The adjustment shall equal 50% of the amount by which the recipient's pension would theoretically need to be increased, [in order for] the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Regulations.

For such purpose, there shall be drawn up, for each MemberState, in accordance with the implementing provisions referred to in paragraph 6, tables of equivalence specifying, for each amount of pension, the amount of the adjustment to be added thereto. The said tables shall determine the rights of the recipients.

(3) In calculating the theoretical amount of income tax or taxes referred to in paragraph 2 of this Article, account shall be taken only of the provisions of tax legislation and regulations affecting the basis of liability and the amount of income tax or taxes for all pensioner-taxpayers in the country concerned.

Pensioners without spouse or dependants shall be deemed to be in the position of a pensioner without entitlement to any tax reliefs or allowances for family responsibilities, all other recipients being deemed to be pensioners enjoying the tax reliefs and allowances of a person who is married without children.

No account shall be taken:

- of individual factors related to the personal circumstances or private means of a particular pensioner,

- of income other than that arising under these Regulations,
- of the income of the spouse or dependants of the pensioner.

[...]"

Furthermore, paragraphs 1 and 2 of Rules 42/1 and 42/2 of the Implementing Rules to the Pension Scheme Regulations read as follows:

#### **“Rule 42/1**

##### **Scope and calculation of the adjustment**

(1) Article 42 of the Pension Rules shall apply only if the pension and the adjustment relating to it are subject to taxes on income levied in a Member Country of the Organisation. The family allowances provided for in Article 28 of the Pension Scheme Rules shall be assimilated to pensions in determining the tax adjustment in so far as similar allowances are taxable under the national tax legislation of the Member Country.

(2) The adjustment referred to in Article 42 of the Pension Rules shall be determined on the basis of the legal provisions relating to taxes on income in force in the Member Country in which the pensioner is legally subject to such taxation. It shall be established in respect of pensions paid during the tax period as determined in that country.

#### **Rule 42/2**

##### **Establishment of tables of equivalence for payment of the adjustment**

(1) Tables of equivalence for payment of the adjustment shall be established for each tax year by the Inter-Organisations Section, hereinafter referred to as ‘the Section’.

(2) The tax authorities of Member Countries shall provide the Section, at its request, with the details of legislation and regulations necessary for establishing the tables. The tables shall be checked and confirmed by the tax authorities of the Member Country concerned. In the event of disagreement between such authorities and the Section on the content of the tables, the Secretaries-General and the Co-ordinating Committee shall consider the matter on the basis of Article 42 of the Pension Rules and of these Implementing Instructions.”

On 24 April 2003 the Administration sent the complainant a provisional statement of his pension rights, indicating that the tax adjustment he would receive pursuant to Article 42 of the Pension Scheme Regulations would amount to 525 euros per month for 2003 and 872 euros with effect from 2004. In a letter dated 29 April 2003, the complainant pointed out that he would pay more tax in 2003 than in the following years because he had received a salary from January to April as well as compensation for accrued leave. He requested that that fact be taken into account in calculating the adjustment or, alternatively, that he be paid in 2003 the adjustment calculated for 2004. If his request was turned down, his letter was to be treated as an internal appeal. On 13 November 2003 the Acting Director of Employment Law informed him that the matter had been referred to the Appeals Committee. In its opinion of 7 March 2006, the Committee unanimously recommended that the appeal be dismissed. By a letter dated 23 March 2006, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to reject the appeal.

B. The complainant points out that the German tax scale takes account of the salary payments that he received from the EPO for the period from January to April 2003. He argues that this is a case of “force majeure”, which should be taken into consideration in determining the tax adjustment due to him under Article 42, paragraph 2, of the Pension Scheme Regulations. He accuses the Organisation, on the one hand, of failing to comply with that provision since it does not pay retired officials “50% of the tax” when their date of retirement is not 1 January and, on the other, of disregarding the German taxation system since it uses tables of equivalence drawn up by the Co-ordinated Organisations\*, which apply a different system. Moreover, the EPO treats the total amount of pension paid over a period of eight months as though it were the amount paid for the whole year, thereby reducing the monthly value of the pension taken into account in applying the tables and hence also the value of the tax adjustment. The complainant concludes that the Office does not even pay half of “50% of the tax”. He puts the proportion received in his own case at 19 per cent.

The complainant requests the Tribunal to quash the President's decision dated 9 March 2006, to oblige the EPO to apply the provisions of Article 42, paragraph 2, of the Pension Scheme Regulations in accordance with the taxation rules in force in Germany, and to award him 7,735 euros in arrears due pursuant to those provisions, plus interest at an annual rate of 10 per cent, as well as 2,000 euros in costs.

C. In its reply the Organisation asserts that the complainant's claims in respect of the payment of arrears and interest are irreceivable since they were not filed in the internal appeal.

The Organisation refers to the Appeals Committee's opinion, particularly the paragraphs in which the tax adjustment procedure is explained in detail, stating that the case raises the issue of the "well-known" consequences of retiring during the year instead of on 1 January. It notes, however, that its interpretation of Article 42, paragraph 3, was endorsed by the Tribunal in Judgment 2257 (see consideration 20). The Tribunal held that "there [was] no requirement that the EPO calculate the tax adjustments differently". The EPO contends that the method proposed by the complainant for calculating the alleged arrears is plainly wrong. It holds that the amount of the tax adjustment due to the complainant in respect of the pension paid between May and December 2003 was calculated in accordance with the rules in force.

D. In his rejoinder the complainant asserts that the Appeals Committee clearly understood the problem during the hearings, but that this is not reflected in the opinion rendered on 7 March 2006. Noting that a statement by one of the Committee's members is likewise not reflected in the opinion, he concludes that the chairman of the Committee drafts a text that is approved by the other members without discussion. He therefore advises that it be treated with the utmost caution. In his view, the provisions of the Pension Scheme Regulations are clear: a tax adjustment must be paid to offset half of the income tax payable on the retirement pension. Yet the Office not only fails to calculate the correct amount of the adjustment but arbitrarily reduces the amount of the pension taken into account. The complainant repeats that the impact of such a practice differs sharply according to the time of year at which an official retires and that this constitutes discrimination based on date of birth.

E. In its surrejoinder the EPO reaffirms its arguments and stands by its submissions. It rejects the complainant's allegations regarding the functioning of the Appeals Committee. It points out that the Committee's opinion was unanimous and that every member is free to draft a dissenting opinion.

F. In his additional comments the complainant reiterates his criticism of the Appeals Committee. He claims that its chairman refused to hear a witness because he feared that it might have worked "against his game plan". He criticises what he terms manipulation, that is applying, from the first year of retirement, tables of equivalence drawn up by the Co-ordinated Organisations for full years although the pension is paid for only part of the year.

G. In its final observations the Organisation states that it has no specific comments to make since the complainant has adduced no new argument in support of his case. It regrets "the complainant's conception of the procedure before the Tribunal" and some of his remarks.

## CONSIDERATIONS

1. The complainant served as a patent examiner at the EPO from 1 November 1980 and has drawn a retirement pension since 1 May 2003. Having received a provisional statement of his pension rights dated 24 April 2003, according to which the tax adjustment he would be paid pursuant to Article 42 of the Pension Scheme Regulations would amount to 525 euros per month for the year 2003, he protested on 29 April 2003 against the method used to calculate this sum. His claim was regarded as an appeal and was referred to the Appeals Committee, which held, in an opinion dated 7 March 2006, that the method of calculation used was in keeping with the provisions of Article 42, paragraph 2, of the Pension Scheme Regulations and Rule 42/1 of the Implementing Rules thereto, and recommended that the appeal be dismissed. By a decision of 23 March 2006, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to follow that recommendation.

2. The complainant argues that the method used to calculate his tax adjustment overlooks the fact that he received a pension for eight months of 2003 and not for the whole year, and that the reference to the tables of equivalence drawn up by the Co-ordinated Organisations as the basis for this calculation failed to take account of that fact, so that the amount of the adjustment was very substantially reduced. In addition to asking that the

President's decision be quashed, he requests that he be awarded the sum of 7,735 euros, of which he claims to have been deprived owing to the method of calculation, and that the Office be ordered to comply with the provisions of its Pension Scheme Regulations, taking into account the taxation rules in force in Germany.

3. The Organisation submits that some of these claims are irreceivable, arguing that they fall outside the scope of the internal appeal filed by the complainant. Basically, however, the claims merely expand on the initial appeal, the main aim of which was to challenge the method of calculation of the disputed adjustment on the grounds that it violated the applicable rules.

4. The complainant's claims, though admissible, are unfounded. The provisions that the Office was required to apply, which should be referred to in order to assess the validity of the claims, are cited under A, above.

5. In its reply the defendant describes the method of calculation used to fix the amount of the tax adjustment to which the complainant was entitled for 2003 at 4,660 euros: the complainant received 44,976.24 euros in pension payments from May to December; according to the table of equivalence applicable to Germany in 2003, the tax adjustment corresponding to this annual total amounts to 4,660 euros.

6. The complainant challenges this calculation, pointing out that the method used disregards the fact that he did not receive his pension for a full year but only for eight months. It follows that the amount of the adjustment was calculated as though he had received a monthly pension of 3,748.02 euros, liable to German tax, for 12 months, while he had actually received a monthly pension of 5,622.03 euros for the said period of eight months. Given the specific characteristics of German tax law, in particular the so-called progression clause (*Progressionsvorbehalt*) and the basis on which taxpayers are assessed, the adjustment granted to him for 2003 represents considerably less than half the income tax corresponding to his pension alone and hence breaches Article 42 of the Pension Scheme Regulations.

7. Notwithstanding the ostensible logic of this argument, the Tribunal notes that the defendant rigorously applied the rules to which it is subject and the method recognised as appropriate in Judgment 2257: even though the German tax authorities took into account the remuneration paid to the complainant during the first four months of 2003 in setting the rate of taxation and subsequently the amount of income tax that he owed, the tax adjustment must be calculated solely on the basis of the pension he received, without taking other income into account. It was incumbent on the Administration to refer to the tables of equivalence in force and it committed no error of law in basing itself on the amount of the pension effectively paid to the complainant during the reference year – i.e. the German fiscal year – even though the said pension was paid only from May 2003 onwards. Contrary to the complainant's allegation, the calculation method does not discriminate between pensioners according to their date of birth and the month in which they retire.

8. The complainant presents no argument that casts doubt on the appropriateness of the calculation that was made by the Office and approved unanimously by the Appeals Committee, and there are no grounds for believing that the Committee's opinion was not in conformity with its deliberations.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

---

\* [The North Atlantic Treaty Organisation \(NATO\)](#), the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

Updated by PFR. Approved by CC. Last update: 19 July 2007.