

The Administrative Tribunal,

Considering the complaint filed by Mr E. F. against the European Patent Organisation (EPO) on 14 August 2002, the Organisation's reply of 6 November 2002, the complainant's rejoinder of 17 January 2003 and the EPO's surrejoinder of 17 April 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, who was born in 1927 and has Swiss nationality, joined the European Patent Office - the EPO's secretariat - in 1982 and retired on 1 July 1992. The pension he receives from the EPO is supplemented by a tax adjustment, which is intended to compensate to some extent for the fact that it is taxed in his home country, since the income tax exemption enjoyed by staff members ceases upon retirement. The calculation of the tax adjustment is carried out on behalf of the EPO by the Inter-Organisations Study Section on Salaries and Prices (hereinafter the IOS), which determines a provisional tax adjustment on the basis of previous years' tax rates. This provisional tax adjustment is paid to the pensioner in monthly instalments. Once the final tax rates for a given tax year have been determined by the authorities of the pensioner's country of residence, the IOS supplies final tax adjustment figures to the EPO, which then corrects the provisional adjustments by paying or recovering the difference between the final tax adjustment and the provisional adjustment.

With effect from June 1994 the complainant's provisional tax adjustment was set at 150 Swiss francs per month. The EPO was informed of the final tax rates for 1993 and 1994 in August 1995. The complainant's combined provisional tax adjustments for 1993 and 1994 fell short of the final amount by 562 francs, which the EPO paid him in two instalments of 281 francs in November and December 1995. However, the defendant then mistakenly continued to pay him 281 francs per month as his provisional tax adjustment until February 2000, whereas the amount he ought to have received during that period was approximately 161 francs per month.

This mistake was not noticed by the EPO until December 1999, when it received the final tax adjustment figures for the period 1995 to 1999. By a letter of 18 February 2000 the Office informed the complainant that he had received an overpayment of 4,125.32 francs for the period from 1996 to 1999, which it proposed to recover by deductions from his pension over a period of four months. In a letter of 27 February 2000 the complainant objected to the recovery of this sum and asked the EPO to provide details of how the final tax adjustment had been calculated by the IOS. The EPO sent him an explanation of the calculation on 13 April 2000 based on an IOS letter and informed him that deductions from his pension would begin in May 2000, but the complainant requested further information by letters dated 16 and 19 April 2000. On 12 May 2000 he filed an internal appeal in which he challenged the adjustment figures and also the recovery of the alleged overpayment.

In its opinion of 20 March 2002 the Appeals Committee found that the complainant's tax adjustments for the period from 1995 to 1999 had been calculated in accordance with the Pension Scheme Regulations. However, it considered that the EPO was not entitled to recover the claimed amount, because the requirements of Article 88 of the Service Regulations for Permanent Employees of the European Patent Office, governing the recovery of undue payments, were not satisfied.<sup>(1)</sup> By a letter of 15 May 2002 the Principal Director of Personnel informed the complainant that the President of the Office had rejected his internal appeal. That is the impugned decision.

B. The complainant submits that the EPO was not entitled to recover its overpayment because the requirements of Article 88 of the Service Regulations were not satisfied. He refers expressly to the opinion of the Appeals

Committee, which considered that he was not aware of the Organisation's mistake and that the mistake was not so obvious that he ought to have noticed it.

He criticises the EPO for the excessive duration of the internal appeal procedure, given that 27 months elapsed between the Office's initial decision to recover the overpayment and the President's final decision confirming it. He asserts that this delay amounts to a breach of the defendant's duty of care towards its pensioners.

The complainant also disputes the calculation of his tax adjustment for the period from 1996 to 1999, and particularly the fact that his income from other sources, which causes his EPO pension to be taxed at a higher rate, is not taken into account in the calculation of his tax adjustment. As a result, his tax adjustment amounts to approximately 27 per cent of the tax actually incurred on his EPO pension. The complainant believes that the application of Article 42(2) of the Pension Scheme Regulations should result in a tax adjustment covering 50 per cent of the tax incurred. He puts forward an alternative interpretation of the relevant provisions which, in his view, reflects the *ratio legis* of Article 42.

He seeks the annulment of the impugned decision; reimbursement of 4,125.32 francs recovered from him by the Organisation in respect of "tax adjustment paid in the period 1995-1999"; recalculation of his tax adjustment for the period 1996 to 1999; reimbursement with interest of the difference between the tax adjustment he has actually received since 1996 and that which he would have received on the basis claimed; moral damages for delays and mistakes attributable to the EPO in its handling of his internal appeal; and travel and legal costs.

C. The Organisation replies that the overpayment, which represented an increase of some 60 per cent in the complainant's tax adjustments, was patently in excess of what he had been receiving previously and was therefore recoverable under Article 88 of the Service Regulations.

It denies responsibility for the delays and points out that the internal appeal itself followed a normal time frame, but that delays were incurred as a result of the complainant's numerous requests for information which had to be obtained from the IOS. It considers that it exercised due care in handling his case.

The Organisation asserts that the complainant's final tax adjustment for the period in question was correctly calculated in accordance with the applicable provisions, emphasising that under Article 42(3) of the Pension Scheme Regulations any non-EPO income is excluded from the tax adjustment calculation. It submits that the calculation method advocated by the complainant is clearly contrary to that provision in that it is based on a tax rate resulting from the consolidation of his EPO and non-EPO income.

D. In his rejoinder the complainant maintains that the overpayment was not obvious to him. On the contrary, based on his interpretation of Article 42 of the Pension Scheme Regulations, the increased tax adjustment appeared to be correct, since it represented roughly 50 per cent of the income tax levied on his EPO income, whereas the previous adjustment of approximately 150 francs per month had always seemed too low to him.

He also submits a subsidiary claim for a recalculation of his tax adjustments for 1996-99 on the basis of the method used by the IOS for 2001 and 2002, which had resulted in an increase of some 40 per cent in his tax adjustment.

E. In its surrejoinder the defendant maintains its position on all issues.

## CONSIDERATIONS

1. The complainant is a Swiss national, born in 1927. He worked at the EPO from 1982 to 1992. He contests the recovery of provisional tax adjustments paid to him under Article 42 of the Pension Scheme Regulations.
2. The complainant's monthly provisional tax adjustment was set at 150 Swiss francs from June 1994. The EPO transferred the sums outstanding to the complainant from the final tax adjustments for 1993 and 1994, by paying a "Settlement of Tax Adjustment" of 281 francs in November and December 1995. These payments were retrospective instalments. The EPO mistakenly continued to pay 281 francs monthly as a provisional tax adjustment to the complainant from January 1996 to February 2000. The total overpayment was 4,125.32 francs. On 18 February 2000 the complainant was informed that there had been an overpayment, which would be recovered from him in four instalments. He was not at that time informed that the overpayment was due to the

EPO's error. From March 2000, the complainant's monthly provisional tax adjustment was set at 161 francs.

3. On 27 February 2000 the complainant objected to the recovery of 4,125.32 francs and requested clarification of the basis for the different tax adjustment calculations. By a letter dated 13 April 2000, the EPO informed the complainant that, pursuant to Article 42(3) of the Pension Scheme Regulations, a first-income method would be applied. This meant that only the complainant's EPO pension income was taken into account when calculating the adjustments. As such, the national tax rate of 8 per cent was applied to his EPO pension income, rather than 15.48 per cent being applied to his entire income. The complainant was not satisfied by this explanation and requested further clarification.

4. On 12 May 2000 the complainant lodged an internal appeal against the 18 February 2000 decision. He objected to both the adjustment figures and the recovery claim.

5. It was only by reading the EPO's position paper for the Appeals Committee, dated 16 October 2001, that the complainant learned that the provisional payments for 1996 to 1999 were not based on a deliberate calculation, but rather were paid out of error by the EPO.

6. On 20 March 2002 the Appeals Committee recommended that the appeal should succeed with regard to the recovery claim, since the requirements of Article 88 of the Service Regulations had not been met. It recommended that all the complainant's other claims should be dismissed. By letter dated 15 May 2002, the President of the Office informed the complainant that he had decided not to follow the Appeals Committee's recommendation to allow part of the appeal. That is the impugned decision.

7. The complainant argues that there was inappropriate delay in the appeals process and that the EPO breached its duty of care to its pensioners in the way it dealt with the issues. He states that both of these violations justify his request for moral damages.

8. On the merits of his case, the complainant argues that the overpayment is not recoverable because the fact of the overpayment was not patently such that he should have been aware of it, as required by Article 88 of the Service Regulations. In his view, the tax adjustment, pursuant to Article 42(2) of the Pension Scheme Regulations, should be approximately 50 per cent of the taxes paid on his EPO pension income. While he acknowledges that Article 42(3) stipulates that, in calculating tax adjustment, no account shall be taken of income other than that arising under the Pension Scheme Regulations, he submits that, since he paid taxes at 14.9 per cent on his total income, he also paid 14.9 per cent on his pension income. His adjustment should therefore be 50 per cent of 14.9 per cent of his pension income. However, the Organisation calculated his tax adjustment using what the complainant states is a broader interpretation of the Regulations: they used the marginal tax rate of 8.2 per cent that would have been applied had his EPO pension been his only income.

9. In the complainant's view, the application of the higher tax rate to his EPO pension income is consistent with the Regulations. He argues that the method used to calculate his tax adjustment discriminates against pensioners with small EPO pensions.

10. In his rejoinder the complainant acknowledges that he noticed the increased tax adjustment in 1995. He explains, however, that the higher provisional tax adjustment appeared to comport with the amount he understood was owing to him, based on his understanding of Article 42(2) and (3). When he received his pension payments for those months, he conducted what he called a "plausibility check", which gave him a monthly adjustment of about 300 francs. This amount, he says, just barely exceeded the new amount he was receiving, and therefore it appeared to the complainant that the previous amount of 150 francs, which to him had seemed low, had been corrected.

11. The complainant explains that he did not know, and in fact could not have known, that the higher payments in November and December 1995 were meant to be applied only to those months. He states that he only found out that the subsequent payments were made in error when he read the EPO's position paper at the end of 2001.

12. The complainant points out that his tax adjustment for 2001 increased by some 40 per cent compared with the previous year. He therefore asks that, if his request for the application of a last income method is not granted, the EPO be ordered to recalculate with retroactive effect his tax adjustment for the years 1996-99 in accordance with the method applied to his 2001 and 2002 tax adjustments.

13. In its reply the EPO essentially argues that it was entitled to recover the overpayment, since the requirements in

Article 88 of the Service Regulations were met. It also argues that its method for calculating tax adjustments is mandated by Article 42(3) of the Pension Scheme Regulations.

14. The relevant provisions of Article 42 of the Pension Scheme Regulations read as follows:

"(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, were 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.

[...]

(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.

[...]

No account shall be taken:

[...]

- of income other than that arising under these Regulations,

[...]"

15. Article 88 of the Service Regulations restricts the EPO's right to recover sums paid in error. It reads:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

16. The EPO argues that the requirements of Article 88 of the Service Regulations have been satisfied. That text sets out two conditions: either the complainant must be aware that there was no reason for the payment, or the fact of overpayment must be patently such that the complainant should have been aware of it. The first test is subjective, the second test is objective. The complainant has demonstrated that neither test has been met.

17. The complainant has carefully explained his impression of the tax adjustment calculations. Based on his understanding of the adjustments, the original adjustment of 150 francs appeared too low to him. This is why he assumed that the original amount had been corrected when he noticed a substantial jump in the tax adjustments.

18. The Appeals Committee was satisfied the complainant had adequately explained why he was not surprised by the additional tax adjustments from November 1995 on, and why he could not have known that they were made in error. It said:

"23. The Office is correct in stating that the onus is on (former) employees to check payments and communications carefully. There is also no doubt that the appellant received the calculation of 6 November 1995, indicating that the CHF 281 transferred in November and December 1995 were retrospective payments. However, the information supplied by the Office was unclear and contradictory in places. The pension advice slip of 14 November 1995 clearly indicated that the CHF 281 payment represented the provisional monthly tax adjustment [...] there were only handwritten comments to explain the retrospective payments [...]. Even exercising the usual care, it was not 100% clear that the payments from January 1996 were undue. The appellant also submitted that he had thought that the higher payments related to corrected IOS figures. They did not appear too high to him in view of the taxes he had paid.

24. The Office has a responsibility - particularly in a field as complex as tax adjustments - to issue clear, comprehensible communications. If, in this case, the error were obvious, the employee's duty of care would be

higher than that of the Office. In addition, the Office did not notice the error for more than four years. Even the communication concerning recovery of 18 February 2000 did not indicate how the overpayments had arisen."

19. Those findings of fact made by the Committee were reasonable and based on the material before it. In the impugned decision, the President gives no adequate reason for disagreeing with the Committee and the decision on that point cannot stand.

20. On the other hand, however, the complainant's argument fails with regard to his proposed calculation method. Article 42(3) clearly stipulates that only the complainant's EPO pension income can be taken into account when calculating the tax adjustment. This means that the tax rate applied will assume that the complainant's only income is his EPO pension income. While this method of calculating the complainant's tax adjustment does in fact create a distinction between him and other EPO pensioners, for example, those whose EPO pensions constitute their whole income, or those whose countries of residence impose a flat tax rate, a distinction does not always constitute discrimination. Distinctions between persons can be valid. A distinction will be invalid when it is based on an irrelevant characteristic. In this case, Switzerland's decision to apply progressive taxation, in combination with the EPO's method of calculating tax adjustments, while creating a distinction, does not constitute discrimination. There is no principle of international law which requires the EPO to ensure that all of its pensioners are treated the same vis-à-vis the taxes they pay in their home countries. While the policy of offering tax adjustments to pensioners recognises that they were once entitled to income exempt from taxation, the principle of tax exemption does not apply to former staff members. As a result, there is no requirement that the EPO calculate the tax adjustments differently than they are currently calculated.

21. In the alternative, the complainant states that his tax adjustment was raised by around 40 per cent for 2001 and 2002. He therefore requests that the calculations used to arrive at the increased adjustment be applied retroactively and that the EPO be ordered to pay him the difference. This claim was not (and could not have been) made in the original internal appeal and is therefore irreceivable.

22. With regard to the complainant's preliminary arguments, while the appeals procedure took over two years, the matter was complex and the delay was not in the circumstances egregious. As well, the correspondence annexed to the parties' submissions indicate that the EPO dealt with this case in a serious and respectful manner. There is no evidence that it breached any duty of care owed to the complainant.

23. The complaint will be allowed in part and the EPO will be ordered to reimburse the complainant the sum of 4,125.32 francs with interest at 8 per cent per annum. The complainant's other claims will be dismissed. He is entitled to costs in the amount of 1,000 francs.

## DECISION

For the above reasons,

1. The complaint is allowed in part.
2. The EPO is ordered to reimburse the complainant the sum of 4,125.32 Swiss francs, with interest at 8 per cent per annum.
3. It shall also pay him costs in the amount of 1,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 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

1. Article 88 provides as follows: "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

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