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

NINETY-NINTH SESSION

Judgment No. 2450

The Administrative Tribunal,

Considering the complaints filed by Ms N.M. and Mr P.R.-G. against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 3 May 2004 and corrected on 11 June, the Federation's reply of 20 October, the complainants' rejoinder of 26 November 2004 and the Federation's surrejoinder of 28 January 2005;

Considering the applications to intervene filed by Ms M.-C.J., Mr F.R. and Mr M.W. on 26 November 2004, the Federation's comments of 28 January 2005 on those applications, the interveners' reply of 4 April to those comments, the Federation having made no final comments;

Considering the application to intervene filed by Mr P.S. on 22 April and the Federation's comments of 4 May 2005 on that application;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. One of the complainants, a French national born in 1963, has been working at the Federation's headquarters in Geneva since 1 April 1991. The other, a British national born in 1955, has been working there since May 1993. Both have been residing in France, the latter since October 1997 and the former all her life.

In 1966 France and Switzerland signed a double taxation treaty whereby the salaries of French residents working in Geneva were taxable only in Switzerland. According to the Headquarters Agreement signed in November 1996 by the Federation and the Swiss Federal Council, Federation employees who do not have Swiss nationality "are exempt from all federal, cantonal and communal taxes on salaries, emoluments and indemnities paid by the Federation", which confirms a previous agreement of 1952. Under the terms of that Headquarters Agreement, moreover, the Swiss Federal Council recognises the international legal personality of the Federation.

The double taxation treaty was amended with effect from 1 January 1998. As the French tax authorities consider the Federation "not as an international organisation but as a non-governmental organisation", the second complainant has been paying tax on his salary since 1998 and the first complainant since 1999.

On 5 May 2003 the Staff Association Committee, on behalf of three staff members, namely the complainants and one of the interveners, filed a "settlement demand" calling on the Federation to refund them the taxes they had to pay on their salaries. In a memorandum dated 11 July, the Director of Support Services informed the Committee that the demand had been rejected. On 17 September the three aforesaid staff members lodged an appeal with the Secretary General. The Joint Appeals Commission issued its report on 17 December 2003. On the grounds that the appeal lay beyond its terms of reference, that it was not satisfied that all individual grievance procedures had been exhausted, and especially that the appeal in its view amounted to a "class action", the Commission concluded that the appeal was irreceivable. By a memorandum of 6 February 2004 the Secretary General stated that, if they wished the case to be considered, the appellants should individually transmit to the Head of the Human Resources Department a formal request for reimbursement. That is the impugned decision.

B. With regard to receivability, the complainants argue that internal remedies have been exhausted and that the Joint Appeals Commission was clearly empowered to rule on the case. They submit that they filed a "collective action" which, according to the Tribunal's case law, could not be debarred on account of its collective nature.

On the merits, they contend that they were not given clear warning by the Federation that their salaries would be

taxed if they opted to reside in France. They allege that the defendant is estopped from reneging on the undertaking it gave in an information note communicated to all staff members on 7 June 1996 which, according to them, stated that staff members working in Switzerland and domiciled outside Switzerland would be exempt from taxes. They maintain that it was "based on" that information note in particular that they decided to take up residence in France.

According to the complainants, the Federation is liable for the payment of the tax imposed on their salaries. Referring to Judgment 2032, they point out that exemption from taxation is a fundamental feature of employment as an international civil servant.

The complainants further submit that the Federation is liable, "on the basis of acquired rights", for the reimbursement of the amounts of tax they have already paid. If it fails to do this, it will be unjustly enriched and the principle of equal treatment will be violated. They point out that their colleagues residing in Switzerland are treated differently and that the Federation reimburses the tax that staff of Swiss nationality residing in France pay on their salary. They add that the only remedy put forward by the defendant, namely relocating to Switzerland, is not practicable for several reasons, especially financial.

The complainants ask the Tribunal to quash the impugned decision and to instruct the Federation to reimburse the income tax they have paid and continue to pay on their salary, as well as the costs incurred in borrowing funds to make the tax payments. They also ask the Tribunal to instruct the defendant to enter into negotiations with the appropriate French authorities in order to end the assessment of income tax on their salaries as soon as possible. They claim damages for the moral injury they have suffered, interest at the annual rate of 10 per cent calculated from 19 February 2001 on all sums awarded by the Tribunal, such other relief as the latter feels is equitable, and costs. They also call for the defendant to produce various documents relating to the case.

C. In its reply the Federation considers that the complaint is irreceivable on the grounds that the impugned decision is not final and that the complainants are trying to obtain a "decision in principle" and not an individual decision.

The defendant contends furthermore that the complainants' arguments are ill-founded. The information note stated that staff members residing in France would be exempt from income tax on their salaries as long as legislation and French practice remained the same. The Federation submits that it is not responsible for the fact that the complainants' salaries have been taxed; this is due to the entry into force, on 1 January 1998, of an amendment to the French-Swiss double taxation treaty which altered the tax status of French residents drawing a salary in Switzerland.

Stressing the fact that it is a non-governmental organisation, the Federation contends that the judgments cited by the complainants are not really precedents for this case, chiefly because the organisations concerned were intergovernmental. In its view, exemption from tax on Federation salaries would be possible only if the French Government would agree to grant such exemption under an agreement with the Federation, but the organisation's efforts to that end have so far remained unsuccessful. France is not bound by the provisions of the 1996 Headquarters Agreement, according to which salaries paid to non-Swiss staff are not subject to federal and cantonal tax in Switzerland. Since the Federation cannot complain that France is breaking any duty in international law, it considers that it cannot be called upon to reimburse the tax levied lawfully by France. It adds that it would face financial difficulties if it were ordered to reimburse the complainants.

The Federation denies the charge of inequality of treatment on the grounds that, under Article 7.5 of the Staff Regulations for staff working at the Secretariat in Geneva, it has the duty to reimburse taxes collected by the Swiss tax authorities only. In accordance with French law and the provisions of the French-Swiss double taxation treaty, staff members of Swiss nationality residing in France do not pay taxes in that country. If the complainants are treated differently compared to their colleagues living in Switzerland, this is due to their choice of residence and they have to accept the consequences thereof. In the defendant's view, the complainants have not shown why it would be "impossible" for them to move to Switzerland and in that respect they even tend to exceed the limits of good faith. It rejects the argument that they chose to reside in France on the basis of its representations and maintains that it kept them duly informed of all developments.

The Federation deduces from the Tribunal's case law that in the present proceedings the conditions for establishing a breach of acquired rights are not met. Lastly, none of the complainants' arguments shows that the Federation violated their conditions of employment.

D. In their rejoinder the complainants reject the pleas put forward by the Federation regarding receivability.

According to them, the Federation should never have represented to them that they would be exempt from income tax on their salaries if they resided in France without first making sure that such was in fact the case. They do not blame the defendant for its alleged failure successfully to negotiate tax-free status with the French authorities, but they submit that it is still the defendant's responsibility to do so rather than leave staff members to attempt to negotiate on their own behalf.

They argue that although the Federation is a non-governmental organisation, it has an international character and its staff members have the status of international civil servants; this means that all States have an obligation to grant them the privileges and immunities conferred on all international civil servants and not to tax their salaries. They point out that nowhere is it stated in the Tribunal's case law that non-governmental organisations are to be treated differently from intergovernmental organisations.

E. In its surrejoinder the defendant rejects the complainants' arguments and presses its pleas.

CONSIDERATIONS

1. The complainants are two staff members of the International Federation of Red Cross and Red Crescent Societies residing in France who, while not subject to taxation in Switzerland in accordance with the Headquarters Agreement signed on 29 November 1996 by the Federation and the Swiss Federal Council, have been considered by the French tax authorities as liable to income tax on their salary since 1998. The complainants, and a third staff member who has not filed a complaint but who has submitted an application to intervene, have asked the Secretary General to ensure that the Federation reimburses the amounts of income tax they have paid in France on their salary and those which they are still under an obligation to pay. In their complaints they ask the Tribunal to set aside the Secretary General's decision of 6 February 2004, which was based on the recommendation of the Joint Appeals Commission of 17 December 2003 whereby the appeal filed with the Federation was irreceivable. They also claim damages in respect of the moral injury they have allegedly suffered and ask the Tribunal to instruct the organisation to enter into negotiations with the French authorities in order to end the levying of income tax on the salaries paid to them by the Federation.

2. The first point to consider is the receivability of the complainants' internal appeals, which originated from a "settlement demand" of 5 May 2003 submitted by the Staff Association Committee on behalf of the three above-mentioned staff members. This demand very clearly set out the arguments which were further developed later and which were rejected in a memorandum dated 11 July 2003 from the Director of Support Services. It was stated therein that there was no legal reason why the Federation should agree to the demands presented to it, that it had clearly informed its staff members of the risks they were taking with regard to French tax liability if they decided to live in France, and that it was aware of the inconvenience the changes in French law and practice had caused to staff members. It was also said that the Federation would like to clarify, with a view to exploring possible options, the amounts of taxes actually paid for fiscal years 1998 and 1999 and that in the event of disagreement the staff members concerned could bring a claim before the Joint Appeals Commission.

In a memorandum dated 28 August 2003 the Director of Support Services informed the Staff Association that staff members wishing to lodge appeals should submit a full request to him, including all supporting documentation, and that the resulting decision could be appealed to the Secretary General, on the understanding that such appeals had to be filed by the individuals concerned and not by the Association. It was against this background that the three staff members mentioned in the "settlement demand" of 5 May 2003 lodged substantiated appeals on 17 September 2003. Those appeals were examined by the Joint Appeals Commission, which on 17 December 2003 issued a recommendation to the effect that the organisation's senior management should reopen contacts through diplomatic channels and should adopt a policy regarding the problem of tax-free status, based on sound legal advice, but concluded that the appeals should be rejected as irreceivable. According to the Commission, the case involved a class action, whereas only individual appeals were admissible, while the documentation put forward by the staff members was "disproportionate" and in any case disparate. Apart from the complex nature of the case, the Commission considered that it had insufficient evidence to reach a valid and fair conclusion for all the staff members concerned and, lastly, that it did not appear that the grievance had been submitted to the Intake Group before the appeal stage.

3. Without mentioning the need to consult that Intake Group, the Secretary General stated in the impugned decision that the staff members concerned should individually transmit to the Head of Human Resources a formal request for reimbursement with all supporting documentation, so that the organisation would be able to evaluate each specific case individually and to reach individual decisions which could be appealed.

4. Before the Tribunal, the Federation contends that the impugned decision is not a final decision, since it merely asks the appellants to supply the necessary documentation, and that the complainants are trying to obtain a "decision in principle" and not the settlement of their individual cases.

5. This objection to receivability fails. The complainants did file individual appeals, as requested in the memorandum of 11 July 2003, and the appeals were filed before the Joint Appeals Commission on an entirely individual basis. The Secretary General's decision, taken after he had consulted the Commission, must be regarded in this case as rejecting the claims of the appellants, whose complaints before the Tribunal are therefore receivable.

6. On the merits, the complainants argue that they are entitled to tax exemption owing to their status as staff members of an international organisation and that the Federation must reimburse the income tax they pay in France on their salary, since otherwise it would be unjustly enriched and would be violating the principle of equal treatment of its staff. They also consider that the Federation should bear the consequences of the inaccurate and inadequate information it gave to its staff and that it should be compelled to make the necessary arrangements with the French authorities concerned to ensure that the acquired rights of its staff are not infringed.

7. In order to appreciate these arguments, it may be recalled that the Headquarters Agreement between the Federation and the Swiss Federal Council stipulates in Article 17 that non-Swiss staff members of the Federation are exempt from all federal, cantonal and communal taxes on salary, emoluments and indemnities paid by the Federation. In that respect, the Headquarters Agreement did not change the situation of the staff members concerned that resulted from an agreement signed in 1952, since it merely extended the exemption to tax collected by other cantons apart from Geneva. The Staff Regulations of the Federation apply the effects of the Headquarters Agreement by repeating, in Article 7.5.1, that non-Swiss staff members of the Secretariat staff are exempted from Swiss communal, cantonal and federal income tax on all Federation income. Article 7.5.2 of those Regulations adds that Swiss staff members shall receive a contribution equal to an estimation of the communal, cantonal and federal income taxes on their Federation salaries.

8. Non-Swiss staff members residing in France formerly enjoyed the same benefits, since in accordance with the French-Swiss double taxation treaty of 9 September 1966 in the version which remained in force until 31 December 1997, their salaries were not taxable in France but were simply taken into account for the purpose of calculating the effective rate of tax applicable to taxable income in France. But following an amendment of 22 July 1997 to that treaty, the income of employees residing in France and receiving salaries in Switzerland has become taxable both in France and in Switzerland, subject to possible entitlement to a tax credit on the French tax where the income is "subject to Swiss taxation". As the income of non-Swiss staff members of the Federation who are resident in France is not subject to Swiss tax under the terms of the Headquarters Agreement, the French tax authorities have concluded that "in the absence of provisions to the contrary, [the] income [of the persons concerned] is taxable in France without a tax credit".

9. The first point to consider is whether there has been a breach of the terms of the applicable agreements and regulations. The answer in this case is no: in the first place, the provisions of the Headquarters Agreement between the Federation and Swiss Federal Council, according to which the remuneration paid to non-Swiss Federation staff is exempted from taxation by the Swiss authorities, obviously do not concern – and could not legally concern – tax due under non-Swiss regulations. In the second place, according to the French-Swiss double taxation treaty, remuneration received in Switzerland by persons residing in France is subject to French income tax, with only those persons whose income is subject to Swiss tax – which is not the case of the complainants – being eligible for a tax credit. Lastly, Article 7.5 of the Federation's Staff Regulations provides that non-Swiss staff members of the organisation are exempted from Swiss income tax and that Swiss staff members shall receive the reimbursement of income tax due in Switzerland on their Federation salaries for so long as the Headquarters Agreement remains in force.

10. As the defendant's position is thus anchored on a strict application of the relevant provisions, it must be considered whether, owing to the fact that they belong to an international organisation, the staff members concerned should not enjoy tax exemption and whether the organisation might not be obliged to reimburse the tax

they have paid in France on their salaries, failing which it would be violating both their acquired rights and the principle of equality among staff.

11. The complainants believe that as international civil servants they are entitled to certain fundamental conditions of employment, among which the Tribunal has included “exemption from national taxes” in Judgment 2032 delivered on 31 January 2001. However, the Federation is an association under Swiss law whose international legal personality has been recognised by Switzerland and which is not an intergovernmental organisation. That is why the Statute of the Tribunal was amended at the 86th Session of the International Labour Conference in June 1998 in order to extend the Tribunal’s jurisdiction to the staff members of the Federation. At any event, States which are not bound by a Headquarters Agreement providing for tax immunity are not under any obligation arising either from international custom or from international treaties.

12. Nor can the complainants object that their acquired rights have been violated. Before the French-Swiss treaty was amended – which the Federation was not involved in – the complainants enjoyed tax exemption both in Switzerland and in France, but the alteration of that situation did not stem from changes either in their status or in their contracts.

13. In order to prove that the principle of equality has been violated, the complainants basically argue that non-Swiss staff members residing in Switzerland and Swiss staff members residing in France are covered by a tax regime that entitles them either to tax exemption or to the reimbursement of their tax liabilities. The Tribunal accepts that the complainants may view these differences of regime as being hard to justify, but they do not result from the application of rules lying within the authority of the Federation. Although Article 7.5 of the Staff Regulations allows only Swiss staff members the right to be reimbursed the tax they have paid, this concerns only Swiss tax, to which the complainants are not liable, regardless of where they live. Non-Swiss staff members who have decided to live in France and who must pay income tax in that country are not in the same situation as Swiss staff members who pay federal, cantonal and communal taxes, and there is no rule or general principle that obliges an international organisation to reimburse its staff for taxes payable outside the host country pursuant to legislation which is not that of the host country.

14. The plea whereby the organisation may be enriching itself unjustly at the expense of the staff members concerned also fails. The complainants refer in this respect to Judgment 2256 delivered on 16 July 2003, in which the Tribunal in accordance with constant precedent (see for example Judgment 2032) recalled that international organisations have a duty to protect their staff against the claims of the authorities of a member State and cannot evade this obligation on the grounds of the member State’s reluctance. In this case, the Federation is not made up of member States and, as was pointed out above, case law concerning intergovernmental organisations cannot be purely and simply transposed to the Federation. The application of rules that are in force cannot in any case give rise to unjust enrichment.

15. The complainants lastly accuse the Federation of having failed to warn them of the change of tax regime which their residence in France would entail. They are convinced that an information note from the Human Resources Department circulated to staff on 7 June 1996 guaranteed that their salaries would not be taxed in France and that the Federation cannot validly renege on its undertaking arising from that official position. In actual fact, although the information note did mention that staff members residing in France were exempt from all taxes on salaries paid by the Federation, it was careful to add in the same paragraph that those conditions applied as long as legislation and French practice remained the same, “with no guarantee from the Federation”. It appears from the submissions that, subsequently, as soon as the defendant became aware of the new policy pursued by the French tax authorities following the amendment to the French-Swiss double taxation treaty, it informed its staff and made considerable efforts to ensure that the situation of its staff members residing in France would remain the same as before. It did not falsely inform staff members who wished to move to or keep their residence in France in that respect, contrary to the allegation made by the complainants, who cannot complain that they were deceived in their choice of residence, which they made in full awareness of the situation.

16. The complainants want the Federation to produce documents and information concerning in particular the numbers of staff members actually concerned by the new tax regime instituted by the French authorities. The Tribunal is of the view that the documents and information in question do not need to be produced in order to arrive at a settlement of the dispute. For the same reasons, it also rejects the complainants’ requests for hearings.

17. It is not for the Tribunal to order the Federation to enter into negotiations with the appropriate authorities.

18. Since the Federation is not guilty of any unlawful act, it cannot be ordered to compensate the complainants for losses incurred as a result of the payment of income taxes in France on their salaries.

19. As the complaints must be dismissed, so must the applications to intervene, without any need to rule on their receivability.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 5 May 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.