

## EIGHTY-FIRST SESSION

### *In re* DELOS

#### Judgment 1506

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Milan Delos against the United Nations Industrial Development Organization (UNIDO) on 2 May 1995 and corrected on 2 June, UNIDO's reply of 7 September, the complainant's rejoinder of 5 October and the Organization's surrejoinder of 30 November 1995;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a citizen of the United States, was on UNIDO's staff from 1 January 1968 until 30 September 1992, when he retired. Under the rules of the United Nations Joint Staff Pension Fund, in which he was a participant, he chose to take part of his pension entitlements in a lump sum. It was UNIDO's policy at the time to reimburse the amounts any former officials owed to the inland revenue of the United States

by way of income tax on such payments.

Under an agreement of 26 March 1993 between UNIDO and the Government of the United States lump sums the Fund paid as from 1 January 1992 were no longer treated as "institutional income" subject to tax refunds from the Organization.

By a letter of 27 July 1994 the complainant asked the Director-General to pay the tax to be levied on the lump sum he had been paid in 1993. In ensuing correspondence the Administration informed him of its efforts to reach a solution with the Government of the United States and the complainant expressed worry about mounting interest on the tax yet unpaid and about the penalty fees he was incurring for the delay in meeting his obligations.

By a memorandum dated 10 March 1995 he asked the Director-General for leave to put his case directly to the Tribunal. Having later learned from a letter that the Managing Director of the Division of Administration had written him on 8 March that the Organization wanted to "seek a solution" quickly, he asked the Director-General in a letter dated 2 April to review his case under Staff Rule 112.02(a).

By a letter of 3 April 1995 the Managing Director told him that the Organization was willing to refund the tax as soon as he gave the Administration "details". That is the decision he impugns.

B. The complainant submits that UNIDO has a duty to pay not only the amounts he owes as tax on the lump sum but also the accrued interest and the sums imposed by way of penalty. The delay was, he contends, of UNIDO's own making. He also alleges breach of equal treatment since the Organization has reimbursed other retired officials in like case.

He wants the Tribunal to set aside the impugned decision and order UNIDO to pay the tax on his lump-sum payment from the Pension Fund as well as interest, penalties and costs he has incurred.

C. In its reply UNIDO argues that his complaint is irreceivable because the challenged decision is not a final one and he failed to exhaust the internal remedies open to him by awaiting review of the decision he objects to. The "final administrative decision", UNIDO says, was in a letter it sent him on 3 May 1995 offering to settle the dispute amicably. In any event the Director-General did not grant him leave to go directly to the Tribunal.

UNIDO refutes his pleas on the merits and observes that it did its utmost to settle his case. He has only himself to blame for any interest and penalty fees he may owe the tax authorities: the Organization was not liable for his failure to file a tax return in time. Nor could it refund an amount of which he had given it no evidence of payment.

D. In his rejoinder the complainant disputes UNIDO's account of the facts and presses his pleas. He did not file a tax return for 1993 because he lacked the means to pay. Even if he had filed, the Organization had no right to information on his tax situation unless it was willing to settle his claim.

E. In its surrejoinder UNIDO maintains its earlier pleas on receivability and the merits.

#### CONSIDERATIONS:

1. The complainant retired from the staff of UNIDO on 30 September 1992, when he was at step 9 in grade D.1. He then opted for payment of one-third of his pension entitlements in the form of a lump sum from the United Nations Joint Staff Pension Fund, of which he was a participant, and he was paid the amount in March 1993. The Organization used to reimburse any income tax levied by the Government of his country, the United States, on such lump-sum payment.

2. On 26 March 1993 the Organization and that Government entered into an agreement under which lump-sum payments from the Fund would not as from 1 January 1992 qualify for reimbursement of tax from the Organization. Having been so informed by the Organization in March 1994, the complainant wrote on 27 July 1994 asking the Director-General to take a decision on his own case. He got an interim reply in a letter of 4 August 1994 from the Managing Director of UNIDO's Division of Administration. On 10 November 1994 the Managing Director wrote a letter to the Permanent Representative of the United States to UNIDO asking the Government to make an exception in favour of the complainant and of another citizen of the United States who was in a similar position. The Government refused the Managing Director's request by a letter of 28 February 1995 and the Managing Director so informed the complainant by a letter of 8 March 1995 which said that the Organization would "now endeavour to seek a solution as a matter of priority".

3. By a letter of 10 March 1995 the complainant asked the Director-General to waive the requirement of appeal to the Joint Appeals Board and let him put his case directly to the Tribunal. His request was never granted. On 2 April 1995 he wrote to the Director-General referring to the letter of 8 March 1995 and asking under Staff Rule 112.02(a) for review of the decision.

4. Rule 112.02(a) reads:

"A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The complainant's letter of 2 April met that deadline.

5. The Managing Director wrote to the complainant the very next day referring to the letter of 8 March 1995 and saying that the Organization was prepared to pay him the amount of income tax levied by the United States on the lump-sum payment he had received from the Fund on retirement. But the complainant wrote to the Director-General on 8 April to say that he found UNIDO's offer unacceptable "as it makes no reference to payment of penalty, interest, legal and other costs which result from the late payment of tax". On 2 May 1995 he filed this complaint.

6. In a letter of 3 May the Managing Director acknowledged receipt of the complainant's letters. He said that the Organization wanted "an amicable settlement", asked the complainant to provide supporting documentary evidence and advised him to submit his tax return for 1993 to the United States Government. In answer to a further letter from the complainant dated 8 May the Managing Director wrote again on 23 May to confirm UNIDO's position as stated in his letter of 3 May, to which he said it had nothing to add.

7. The decision that the complainant is impugning is

the one in UNIDO's letter of 3 April 1995, to pay only the tax levied on the lump-sum payment, not the expenses he had incurred such as penalties and costs. The Organization objects that the complaint is irreceivable on the grounds that the decision impugned is not a final one: the complainant has, it pleads, failed to exhaust the internal means of redress because he did not appeal to the Joint Appeals Board.

8.The plea is upheld. The complainant wrote on 2 April 1995 asking the Director-General to reconsider the decision in the letter of 8 March. The answer was in the Managing Director's letter of 3 May. Staff Rule 112.02(b)(i) required him to appeal to the Joint Appeals Board within sixty days of the date of receipt of the answer, since his request for waiver in his letter of 10 March was never granted. He did not file an appeal with the Board in accordance with that Rule.

9.The conclusion is that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner