



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-259

Johnson
(Appellee/Appellant in the cross-appeal/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Appellee in the cross-appeal/Respondent)

JUDGMENT

Before: Judge Jean Courtial, Presiding
Judge Sophia Adinyira
Judge Inés Weinberg de Roca

Judgment No.: 2012-UNAT-240

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellee/Appellant in the cross-appeal/Applicant: Sarah Jane Hunt

Counsel for Appellant/Appellee in the cross-appeal/Respondent: Amy Wood

JUDGE JEAN COURTIAL, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations on 3 October 2011 against Judgment No. UNDT/2011/144 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in the case of *Johnson v. Secretary-General of the United Nations* in Geneva on 17 August 2011.

Synopsis

2. The case raises the question of whether a staff member who is a national of the United States of America is entitled to claim reimbursement of a staff assessment on salaries and emoluments when she utilized foreign tax credits accrued prior to the tax year in dispute while working abroad in a private company to discharge her income tax obligation for the year in dispute.

3. The Appeals Tribunal upholds the UNDT judgment.

4. A foreign tax credit corresponds to the amount taxed on income paid by a national or permanent resident of the United States of America to another State. For purposes of relieving double taxation, the payment of United States income tax is made in the form of a foreign tax credit. In that connection, neither the fact that such a tax credit is non-refundable under the Internal Revenue Service Code and must be utilized within a certain time period for the payment of taxes, nor the fact that the 1040 tax return makes no mention of foreign tax credits in the lines in the section entitled “Payments” can change the nature of these tax credits, which constitute a form of payment to settle a tax liability in whole or in part. Administrative instruction ST/AI/1998/1 does not contain any substantive provision that calls this finding into question.

5. The Controller is not competent to “add” substantive provisions, in information circular ST/IC/2010/10, that would contravene the principle of equal treatment among staff members if United States staff members are deprived of the benefit of reimbursement for utilizing tax credits that have nothing to do with income earned at the United Nations in order to obtain relief from the effects of double taxation but also the principle of equity among Member States, irrespective of whether they choose to grant, or not to grant, income tax exemptions to their nationals, as both principles form the basis for the staff assessment system in respect of taxation on income.

6. The Secretary-General’s appeal and the cross-appeal of Ms. Moira Louise Johnson are dismissed.

Facts and procedure

7. Ms. Johnson is a national of the United States of America. From December 2002 to February 2006, she worked for a consulting firm in Switzerland. Since, at the time, she paid taxes to the Swiss authorities and the United States authorities, she accrued foreign tax credits under the Internal Revenue Service Code.

8. In June 2006, Ms. Johnson was recruited by the Office of the United Nations High Commissioner for Refugees (UNHCR) in Geneva as a Senior Treasury Office at the P-4 level.

9. In April 2007 and March 2008, Ms. Johnson submitted her United States tax returns (1040 form) for 2006 and 2007, respectively, to the Income Tax Unit in the Secretariat, which informed her that, as she did not owe taxes to the Internal Revenue Service on salaries and emoluments paid by the United Nations for those two years, she was not entitled to claim reimbursement from the Organization. On 10 September 2008, the Unit confirmed its decision and informed Ms. Johnson that she could appeal it before the former United Nations Administrative Tribunal, which she did on 2 November 2008. Her case was subsequently transferred to the new internal justice system. On 14 October 2009, the Dispute Tribunal ruled that Ms. Johnson's application was not receivable because it was time-barred.

10. In March 2010, Ms. Johnson submitted her 1040 form for the year 2009 to the Income Tax Unit. On lines 44 (Taxes) and 47 (foreign tax credit), she had entered \$15,239.

11. On 7 April 2010, the Unit wrote to Ms. Johnson, asking her to correct some errors in the 1040 form for 2009, which she did on 16 May 2010.

12. Ms. Johnson requested reimbursement from the Tax Unit on the grounds that the utilization of foreign tax credits to reduce her tax liability constituted payment. The Tax Unit, however, rejected her request, claiming that utilization of foreign tax credits had reduced her tax liability for 2009 to zero, and that she had not paid any taxes to the Internal Revenue Service on income she had earned at the United Nations that year.

13. On 1 June 2010, Ms. Johnson sent a request for a management evaluation to the Deputy High Commissioner for Refugees for the purpose of contesting the decision not to reimburse her for the staff assessment on her salary and other emoluments earned in 2009.

14. On 27 September 2010, Ms. Johnson appealed to the Dispute Tribunal in Geneva. In its Judgment No. UNDT/2011/144 of 17 August 2011, the UNDT held that the reason given by the Income Tax Unit for refusing to make the refund requested by Ms. Johnson was incorrect. “Publication 514 of the United States Internal Revenue Service, concerning foreign tax credits granted to individuals, clearly shows that these credits are a payment method like others and that [Ms. Johnson] must therefore be regarded both as having been subject to United States taxation on income received from the Organization, and as having discharged that tax obligation”. Without ruling on the issue of knowing whether the terms “exemptions, adjustments to income and deductions” used in administrative instruction ST/AI/1998/1 included tax credits of United States nationals, the UNDT considered that it would be unlawful if they did, as that would modify the will of the General Assembly as expressed in staff regulation 3.3 (f)(i). The UNDT ordered the Secretary-General to refund Ms. Johnson the amount of the staff assessment on her salaries and emoluments for 2009 without taking into account the foreign tax credits in dispute. It further decided that the amounts awarded would “bear interest at the United States Prime Rate with effect from the date on which [Ms. Johnson] should have received the refund until payment of the said amounts”.

15. On 3 October 2011, the Secretary-General appealed that judgment. Ms. Johnson answered on 17 November 2011. That same day, she filed a cross-appeal, which the Secretary-General answered on 22 December 2011.

Submissions

Secretary-General’s appeal

16. The Secretary-General submits that the Dispute Tribunal erred on a question of fact and law in holding that, for the Internal Revenue Service, the utilization of foreign tax credits was equivalent to making a tax payment. Nothing to that effect is contained in Publication No. 514. On the contrary, the 1040 form makes it clear that when a tax credit granted in respect of foreign tax payments is utilized to reduce tax liability, the Internal Revenue Service does not treat that credit as a payment but solely as a form of credit which will not be refunded if it is not used within the prescribed time period.

17. The Secretary-General further submits that the Income Tax Unit was justified in declining to refund Ms. Johnson the amount she had paid in federal taxes in 2009, as her tax liability was zero. United Nations regulations authorize the Secretary-General to refund income tax payments that States levy on staff members’ United Nations salaries and emoluments. In order to obtain this refund, staff members, in turn, have the obligation to use all available means, including tax credits, to reduce their tax liability. If that tax

liability is zero, as in this case, the Secretary-General is not authorized to reimburse staff members from the Tax Equalization Fund.

18. The Secretary-General affirms that under the United States Tax Code itself, foreign tax credits are non-refundable. Articles 904 and 26(b) provide that such credits may not be refunded to the taxpayer if they exceed the amount of the tax liability. They can only be deferred and utilized in subsequent taxable years. This non-refundable credit is not treated as a payment. In that connection, the Secretary-General points out that the Income Tax Unit does not require staff members to reduce their tax liability through credits that the Internal Revenue Service classifies as refundable.

19. The Secretary-General further states that the finding of the Dispute Tribunal concerning Ms. Johnson's disadvantageous situation after she was instructed to apply her foreign tax credits toward discharging her tax obligation in respect of her United Nations salaries and emoluments was based on a misunderstanding of how the United Nations tax reimbursement system works. Ms. Johnson is in the same financial situation as other staff members who do not pay income tax or who have no tax credits. The Secretary-General notes that the UNDT did not examine whether Ms. Johnson will utilize her credits before they expire.

20. The Secretary-General submits that the UNDT erred on a question of law in considering that information circulars lack legal authority and that circular ST/IC/2010/10 was contrary to staff regulation 3.3(f).

21. The Secretary-General is of the view that the UNDT erred on a question of law and exceeded its competence by ordering the Organization to reimburse Ms. Johnson for the foreign tax credits in the form of a direct cash payment. If the Appeals Tribunal felt compelled to rule that the Administration wrongly obligated Ms. Johnson to reduce her tax liability by using her foreign tax credits, it should authorize her to amend her 2009 tax return to show her total tax liability without applying the foreign tax credits.

Ms. Johnson's answer

22. Ms. Johnson claims that her foreign tax credits are associated with income earned prior to her entry on duty at the United Nations.

23. Tax credits granted by the United States Government in respect of income not paid by the United Nations cannot be utilized to reduce tax liability on United Nations salaries. The tax credits, which will expire between 2013 and 2016, are hers alone. They are not the property of the Organization.

24. Ms. Johnson further submits that by requiring her to bear the financial impact of losing her tax credits, the Administration has placed her in a disadvantageous financial situation. As her tax credits were not associated with her income from the United Nations, they cannot be utilized to reduce tax liability on that income. As a result of that unlawful appropriation, she had to waive the benefit of her foreign tax credits in order to settle her tax liability on income earned abroad, which means that she is bearing the entire financial obligation without compensation, in violation of United Nations rules. Ms. Johnson is therefore carrying the double burden of having to relinquish her tax credits and having to pay her staff assessment.

25. Neither the General Assembly nor the Staff Regulations or Rules in any way empower the Income Tax Unit to make claims on income that has not been earned at the United Nations.

26. The Dispute Tribunal correctly determined that in adopting information circular ST/IC/2010/10, the Administration had exceeded the powers conferred on it by the General Assembly in its resolutions, as the Administration is seeking to take control of income that was not earned at the United Nations.

27. Before her entry on duty at the Organization, Ms. Johnson had not been warned that the United Nations would instruct her to utilize up to \$58,795 in tax credits that she had already accrued. Had she known this, she might not have agreed to work at UNHCR.

Ms. Johnson's cross-appeal

28. The Dispute Tribunal erred in denying Ms. Johnson's request for a full refund of tax credits confiscated from her since 2006 because it was time-barred. Throughout the time that she was attempting to settle the case amicably, Ms. Johnson was never informed of the risk of exceeding the prescribed time limit.

The Secretary-General's answer to the cross-appeal

29. The Secretary-General submits that the Dispute Tribunal was correct in dismissing Ms. Johnson's claim for the year 2008, as she had requested neither a review of the administrative decision nor a management evaluation for 2008.

30. The Secretary-General further submits that Ms. Johnson's request for a tax refund for 2006 and 2007 had exceeded the time limit.

Considerations

31. Section 18 (article V) of the Convention on the privileges and immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, provides that: “Officials of the United Nations shall [...] (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations”. Nonetheless, when, in 1970, the United States of America acceded to the Convention, it did so with the reservation that nationals and permanent residents of the United States shall not be exempt from taxation.

32. In its Judgment No. 237 *Powell*,¹ the former United Nations Administrative Tribunal considered at length the question of tax exemption in respect of possible reservations to section 18(b) of the Convention on the privileges and immunities of the United Nations, which forms the basis for the system outlined by the General Assembly to deal with this problem. It noted that under General Assembly resolution 973(X), a Tax Equalization Fund had been established to which assessments on staff members’ salaries and emoluments were to be credited in lieu of a national income tax. The amounts credited to the Fund are entered in the accounts for each Member State’s assessment. Conversely, when a staff member paid from the budget of the Organization is subject to both a staff assessment and national income tax on salaries and emoluments earned at the United Nations, that staff member is reimbursed for the national tax paid and payable on salaries and emoluments in order to relieve the effect of double taxation. The refund is deducted from the account of the State that has levied the tax.

33. The objective of General Assembly resolutions, cited in Judgment No. 237, was to ensure both equality of treatment among staff members and a form of equity among Member States irrespective of whether they choose to grant, or not to grant, an income tax exemption to their nationals.

34. As expressed in staff regulations 3.3, which is applicable to the subject of the dispute:

(a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary (...)

(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that:

(i) The amount of such refund shall in no case exceed the amount of his or her income taxes paid and payable in respect of his or her United Nations income;

¹ The former United Nations Administrative Tribunal, Judgment No. 237 *Powell* (1979) XI.

(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund.

35. In paragraph 18 of the contested Judgment, the UNDT considered that the utilization of foreign tax credits by United States taxpayers constitutes “a payment method” to settle tax obligations and that Ms. Johnson, having discharged her tax obligation on income she earned in 2009 by means of a foreign tax credit, “must be regarded both as having been subject to United States taxation on income received from the Organization, and as having discharged that tax obligation”. The Appellant submits that this finding of the UNDT characterizing a foreign tax credit as a payment method is an error of law and of fact.

36. The tax conventions based on the Organisation for Economic Cooperation and Development (OECD) model tax convention provide that taxpayers subject to double taxation may choose between a tax credit and a deduction to relieve the effects of double taxation. In that connection, Publication 514, which simply implements tax conventions and the United States Internal Revenue Code, in particular its sections 901 to 904, authorizes United States taxpayers subject to payment of income tax abroad in a given tax year to elect either a tax credit or a deduction.

37. A foreign tax credit corresponds to income tax paid by a national or permanent resident of the United States to another State. For the purpose of relieving the effects of double taxation, the payment to settle the United States income tax obligation is made by means of a foreign tax credit. In that connection, neither the fact that such a tax credit is not refundable under the Internal Revenue Service Code and must be utilized within a certain time period to pay taxes nor the fact that the 1040 tax return does not mention foreign tax credits in the lines of the section entitled “Payments” cannot change the nature of these tax credits as a payment method for discharging tax liability in whole or in part.

38. In view of the foregoing, the UNDT did not err on questions of law or fact in ruling that Ms. Johnson discharged her tax liability towards the United States authorities by means of foreign tax credits granted in respect of income earned in Switzerland as a consultant in a private firm before her entry on duty at the United Nations in June 2006.

39. The Appellant also refers to administrative instruction ST/AI/1998/1 in which:

2.3 A staff member claiming reimbursement is required to make maximum use of all exemptions, adjustments to income and deductions in order to minimize his or her tax liability(...).

40. Foreign tax credits accrued by Ms. Johnson in connection with income she earned prior to her entry on duty at the United Nations cannot be regarded as “exemptions, adjustments to income and deductions” in respect of income earned in 2009 but rather, as indicated above, constitute a payment method for the purposes of relieving the effects of double taxation that she would have incurred.

41. We do not see in this administrative instruction any substantive provision on the effects of the utilization of foreign tax credits on the staff assessment system, and *a fortiori* any provisions that would counter the above statements.

42. As for procedure, section 3 of the administrative instruction provides that:

Procedures that set out the requirements incumbent on staff members making applications for tax reimbursement or advances to pay estimated taxes are announced on a yearly basis by the Controller in an information circular.

43. Information circular ST/IC/2010/10 concerning the payment of income tax in 2009, applicable at the time of the facts, states in paragraph 27 on the computation of reimbursement:

All tax credits available on the actual tax returns with United Nations income, such as (...) foreign tax credits (...) are also applied to reduce the total income tax liability without United Nations income (...)

44. As seen above, administrative instruction ST/AI/1998/1 refers to the information circular only with respect to procedure. It does not authorize the Controller to add substantive provisions to the administrative instruction or, *a fortiori*, to staff regulation 3.3.

45. In any case, moreover, to include foreign tax credits would not only contravene the principle of equality of treatment among staff members if staff members from the United States were deprived of the benefit of reimbursement for using such tax credits not associated with income earned at the United Nations to relieve the effects of double taxation, but also the principle of equity among Member States irrespective of whether they choose to grant, or not to grant, an income tax exemption to their nationals, as these two principles form the basis for the staff assessment system in respect of taxation.

46. The Appellant further submits that, in practice, staff members are never personally reimbursed for staff assessments, as reimbursement is made in the form of a cheque from the Organization remitted to the United States Treasury and, consequently, the Organization could not pay anything at all directly to a staff member whose tax liability, like Ms. Johnson’s, was zero.

47. We nonetheless note that the aforesaid information circular provides for an exception to the practice of issuing cheques payable to the United States Treasury if the staff member establishes that the income tax has already been paid in full (cf. paragraph 17 of the circular). Since the utilization of foreign tax credits constitutes a tax payment method, this exception is fully applicable.

48. In view of the foregoing, the UNDT has not erred on a question law or fact in determining that Ms. Johnson is entitled to claim reimbursement of her staff assessment against her 2009 earnings.

Regarding Ms. Johnson's cross-appeal

49. The UNDT noted that the decisions rejecting Ms. Johnson's claims for reimbursement of staff assessments on her 2006, 2007 and 2008 earnings became final as they were not contested within the prescribed time period. In her cross-appeal, Ms. Johnson invokes her efforts to negotiate with the Administration but she recognizes that the claims were filed late. Therefore, there is no choice but to dismiss her cross-appeal.

Judgment

50. The Secretary-General's appeal and Ms. Johnson's cross-appeal are dismissed. The contested judgment is thus reconfirmed in its entirety.

Original and Authoritative Version: French

Done this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar
