Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/54
Judgment No.: UNDT/2012/199
Date: 14 December 2012
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

McCLOSKEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. By application filed with the Registry of the Tribunal on 18 June 2012, the Applicant requests the rescission of the decision whereby the Income Tax Unit, United Nations Secretariat, required him to remit the amount of US$52,595 that he had allegedly been paid by mistake in respect of the staff assessment deducted from his salary and other emoluments received in 2007.

2. He also requests the Tribunal to order the Income Tax Unit to refund the amount due to him on account of the Income Tax Unit's illegal decisions, by which he was forced to use his wife's foreign income tax credits in 2008, 2009 and 2010.

Facts

3. The Applicant serves as Senior Trial Attorney at the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY").

4. In 2007, the United Nations made an advanced payment to the United States tax authorities, the Internal Revenue Service ("IRS"), in the amount of US$52,595 corresponding to an estimate of the Applicant's tax liabilities for 2007. In order to reduce his tax liabilities for the same period, the Applicant was also required to use his wife's foreign income tax credits; which he did, and, as a result, the IRS refunded him the amount of US$52,595.

5. On 17 August 2010, the Income Tax Unit sent the Applicant his statement of 2007 tax settlement, indicating that there had been an overpayment of taxes for that year. That information was once again communicated to him via an e-mail dated 20 January 2011 (Applicant's statement of 2009 tax settlement) and an e-mail dated 28 December 2011 (Applicant's statement of 2010 tax settlement).

6. On 7 February 2012, the Applicant filed a request for management evaluation of the Income Tax Unit's decision of 28 December 2011, which was communicated to him on 29 December 2011, concerning his 2010 tax settlement,

and the Income Tax Unit's decisions whereby he was required to use his wife's foreign tax credits to reduce his tax liabilities in 2007, 2008, 2009 and 2010.

7. Also on 7 February 2012, the Applicant submitted to the Tribunal an application for suspension of action, pending management evaluation, of the decision communicated to him on 29 December 2011 and the decision whereby he was required to use his wife's tax credit in 2011. In its Judgment dated 14 February 2012 (UNDT/2012/022), the Tribunal rejected the request.

8. On 16 March 2012, the Applicant, through his Counsel, filed a supplementary request for management evaluation of the same above-mentioned decisions.

9. On 20 March 2012, the requests for management evaluation were rejected on the grounds that they were time barred.

10. On 18 June 2012, the Applicant submitted his application to the Tribunal.

11. On 25 June 2012, the Respondent submitted to the Tribunal a request for leave to file a reply limited to the issue of receivability of the application, which was granted by Order No. 121 (GVA/2012) of 26 June 2012.

12. On 23 July 2012, the Respondent submitted his reply on the receivability of the application and, on 6 August 2012, the Applicant submitted a replication on the Respondent's observations.

13. By Order No. 158 (GVA/2012) of 12 November 2012, the Judge assigned to the case invited the parties to submit their comments as to whether the case could be decided without an oral hearing and to submit any complementary observations they deemed useful.

14. By Order No. 166 (GVA/2012) of 22 November 2012, the Judge assigned to the case requested the Respondent to provide the Tribunal with all of the documents sent by the Income Tax Unit to the Applicant with respect to the years 2007, 2008, 2009 and 2010.

15. On 26 November 2012, the Respondent and the Applicant responded to Order No. 158 (GVA/2012) of 12 November 2012. The Applicant specified that he wished for an oral hearing to be held and suggested that the Tribunal should refer the case to mediation. The Respondent did not provide a response concerning the question of an oral hearing and provided only one supplementary document for the case file.

16. On 29 November 2012, the Respondent submitted to the Tribunal the documents requested by Order No. 166 (GVA/2012) of 22 November 2012.

17. By Order No. 169 (GVA/2012) of 30 November 2012, the Judge assigned to the case requested the Applicant to provide the Tribunal with all correspondence exchanged in relation to his income taxes concerning the years 2007 to 2010, as well as all of his income statements and tax returns for the same period.

18. On 7 December 2012, the Applicant provided the Tribunal with the documents requested by the above-mentioned Order.

Parties' submissions

19. The Applicant's contentions are:

a. Contrary to what was stated in the response to his request for management evaluation, the said request was not late, as the contested decision had been communicated to him by e-mail of 29 December 2011, not by the e-mail of 17 August 2010. A decision regarding the reimbursement of such a large sum as US$52,595 cannot be contained in an ordinary e-mail; which led him to not read the e-mail in question;

b. If the decision of 17 August 2010 had been definitive, there would have been no need to confirm it on 29 December 2011. In the period between 17 August 2010 and 29 December 2011, he had continued to engage in informal discussions with the Administration, which had been initiated well before that time. In addition, the e-mail of 17 August 2010 should have indicated the formal recourse procedures. No proper notification had been given regarding the request to reimburse the

overpayment. When the Administration wishes to base its argument on the failure to observe prescribed time limits, it shall not engage in informal discussions;

c. The Administration should have extended the time period for the management evaluation in view of the exceptional circumstances, and it was for the Tribunal to decide whether it should have done so;

d. With regard to the Income Tax Unit's requirement that he uses his wife's foreign income tax credit for the years 2008, 2009 and 2010, the final decision was communicated to him by an e-mail dated 29 December 2011, and informal discussions on the matter had commenced in 2007;

e. Concerning the merits of the case, in the Judgment *Johnson* UNDT/2011/144 the Tribunal had considered a similar dispute and ruled entirely in the Applicant's favour. The Administration must therefore implement this jurisprudence and the instant case should be referred to mediation by the Tribunal or, with the concurrence of the Secretary-General, the Tribunal could apply article 10.4 of its Statue and remand the case for correction of the procedure.

20. The Respondent's contentions are:

a. The application is not receivable, as the Applicant was informed on 17 August 2010 that he shall remit the amount of US$52,595 that had been mistakenly paid to him in respect of his staff assessment for 2007. The statement of tax settlement that was sent to him on 29 December 2011, as well as the other statements that followed, merely confirmed the first decision. The Applicant should have made his request for management evaluation of the first decision within the time limit, but he did not do so;

b. The time period to request management evaluation starts when the staff member receives notification of the decision and not when he reads the e-mail, which had been very clear with regard to the request for

reimbursement. The Administration has no obligation to set out in its decisions the recourse procedures to appeal such decisions;

c. The fact that the Applicant had engaged in informal discussions with the Administration had not prevented him from initiating the formal procedure;

d. The Applicant's request for management evaluation of the decisions whereby the Income Tax Unit forced him to use his wife's foreign tax credits for the years 2008, 2009 and 2010 was not made within the established time limits.

Consideration

21. By the above-mentioned Orders, the Tribunal, on the one hand, gave leave to the Respondent to file a reply limited to the issue of the receivability of the application, and on the other, requested that the parties submit their observations on the need for an oral hearing on the issue of the receivability of the application. Although the Applicant stated that he wished for an oral hearing to be held, the Judge assigned to the case believes that the documents on file provide sufficient information to rule on the case and that oral deliberations and proceedings would in no way change the outcome of this case. Therefore the Tribunal decides that this Judgment will only make a ruling on the receivability of the application, without conducting an oral hearing.

On the staff assessment deducted in 2007

22. The Applicant requests, first, the rescission of the decision, of which he was notified on 29 December 2011, by which the Income Tax Unit required him to remit the amount of US$52,595 which he had allegedly been overpaid in respect of the refund of staff assessment paid in 2007. The Respondent claims that the application is irreceivable on the grounds that the contested decision was merely a confirmation of a decision notified on 17 August 2010 for which no request for management evaluation was made within the time limit established by staff rule 11.2, which provides that:

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
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> ...
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> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General

23. The Appeals Tribunal has consistently reaffirmed, in particular in *Sethia* 2010-UNAT-079, that decisions confirming a previous decision do not restart the time period in which to contest the first decision. The Tribunal must therefore determine whether the decision of 29 December 2011 is confirmative of the decision notified on 17 August 2010. The latter consisted of the Applicant's statement of 2007 tax settlement, which indicates an overpayment of US$52,595. The statement also requests the staff member to examine the statement and notes that, if he is not eligible to receive 2008 federal tax advances, the amount received from the IRS should be remitted to the Income Tax Unit.

24. The decision notified on 29 December 2011 is contained in the statement of 2010 tax settlement and includes the same sum of overpayment as the statement of 2007 tax settlement. It therefore presents the same information as the statement of 2007 tax settlement. The Tribunal thus considers that the second decision is confirmative of the first notification of 17 August 2010 with regard to the overpayment. The Applicant's argument that the first decision should have made clear that it constituted a final decision which could be appealed through a formal procedure must be rejected, as the Staff Rules do not contain any provision requiring the Administration to provide such information. Also, the Appeals Tribunal has ruled and rejected, in particular in *Abu-Hawaila* 2011-UNAT-118, the claim that engaging in informal discussions with the Administration would

have the effect of extending the time limit for the initiation of formal recourse procedures.

25. The application is therefore declared not receivable in respect of refunding assessments deducted for the year 2007.

On the staff assessments deducted in 2008

26. The Applicant requested the Tribunal to order the Income Tax Unit to refund the sum due to him on account of the Income Tax Unit's decisions requiring him to use his wife's foreign income tax credits for the year 2008.

27. The Tribunal can only note that, as regards the year 2008, the Applicant did not submit any sort of request to the Income Tax Unit to refund the staff assessment deducted from his salary. Furthermore, the Applicant cannot contest a decision that was never taken to refuse reimbursement.

28. The application is therefore declared not receivable in respect of refunding assessments deducted for the year 2008.

On the staff assessments deducted in 2009

29. The documents in the case file indicate that the Applicant requested the return of funds on 13 January 2011 and that the statement of his tax settlement for 2009 was sent to him on 17 January 2011. The statement indicates, on the one hand, that he does not have the right to receive any reimbursement and, on the other, recalls that an overpayment of US$52,596 was made. Though the Tribunal requested the Applicant and the Respondent to provide all tax documents relating to 2009, none of these documents establishes that the Applicant has contested the statement of his tax settlement either with the Income Tax Unit or with the ICTY. Nor is there any document from the Income Tax Unit requesting the Applicant to adjust his tax return so as to use his and his wife's tax credits. The Applicant did not request the management evaluation of the decision regarding his 2009 tax settlement until 7 February 2012, that is after the 60-day time period allowed to submit a request for management evaluation, as set out in staff rule 11.2 cited

earlier. As noted above, informal discussions with the Administration do not extend the time limit for the initiation of a formal recourse procedure.

30. The application is therefore declared not receivable in respect of refunding assessments deducted for the year 2009.

On the staff assessments paid in 2010

31. On 21 November 2011, the Applicant submitted to the Income Tax Unit a request for reimbursement of assessments deducted from his salary in 2010. On 12 December 2011, the Income Tax Unit sent him his statement of 2010 tax settlement, which made clear that he would not receive any reimbursement in respect of that year.

32. On 7 February 2012, the Applicant requested a management evaluation of the decision of 12 December 2011, claiming, *inter alia*, that by being forced to use his wife's tax credit, he was deprived of a refund. The submission was within the 60-day time limit set out in staff rule 11.2 cited earlier. After his request for management evaluation was rejected on 20 March 2012, on 18 June 2012, the Applicant filed his application with this Tribunal. Therefore, the application is receivable with regard to the prescribed time limits only with respect to the contested decision of the refusal to reimburse assessments deducted for the year 2010.

Conclusion

33. In view of the foregoing, the Tribunal DECIDES:

a. Before ruling on the merits, the application is declared receivable only in respect of the contested decision of the refusal to reimburse assessments deducted in 2010;

b. The Respondent is therefore requested to submit observations on the merits, particularly taking into consideration Judgement *Johnson* 2012-UNAT-240 of the Appeals Tribunal, within a time limit of 15 days from the notification of the present this Judgment. The Applicant will have 15 days

from the submission of the Respondent's response to submit his own observations, if any;

c. All other requests of the Applicant are hereby rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 14th day of December 2012

Entered in the Register on this 14th day of December 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva