**SEVENTY-FOURTH SESSION**

# *In re* ARBUCKLE

**Judgment 1225**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ronald Martin Arbuckle against the Food and Agriculture Organization of the United Nations (FAO) on 12 February 1992, the FAO's reply of 20 May, the complainant's rejoinder of 15 June and the Organization's surrejoinder of 12 August 1992;

Considering Articles II, paragraphs 5 and 6, and VII, paragraphs 1, 2 and 3 of the Statute of the Tribunal, Rule 202.8 of the Financial Rules of the FAO, FAO Staff Rules 302.3021, 302.3151 and 303.1311 and FAO Manual paragraph 308.221;

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 Kingdom who was born in 1917, served on the staff of the FAO from 1965 to 1974. During that period the Organization deducted a total of 48,138.15 United States dollars from his gross salary by way of "staff assessment". It made the deductions under FAO Staff Rule 302.3021:

"A staff assessment, comparable to national income tax, shall be applied to the gross salaries and such other payments as are computed on the basis of salary, excluding post adjustment."

and under Manual paragraph 308.221:

"Staff assessment is a sum deducted from 'gross' emoluments on a graduated scale similar to a progressive national income tax."

Salaries of international civil servants are exempt from tax under Article V, Section 18(b), of the Convention on the Privileges and Immunities of the United Nations and Article VI, Section 19(b), of the Convention on the Privileges and Immunities of the Specialised Agencies. They were at first stated net. But several countries which had not ratified the Conventions went on levying tax on the income of their citizens from the United Nations or its agencies. The General Assembly of the United Nations accordingly adopted a resolution on 13 February 1946 which read:

"Pending the necessary action being taken by Members to exempt from national taxation salaries and allowances paid out of the budget of the Organization, the Secretary-General is authorized to reimburse staff members who are required to pay taxation on salaries and wages received from the Organization."

The United Nations thereafter paid back to staff members any tax they had to pay on salaries financed by its budget. That made for inequality between member States since it entailed further expenditure for those which did not tax the income of their nationals from the Organization. To restore equality the General Assembly decided by resolution 239 of 18 November 1948 that the salaries of all United Nations staff should be submitted to a form of internal taxation to be known as "staff assessment". Staff salaries were stated at both net and gross rates and the proceeds of the staff assessment were credited to the regular budget.

The new system did away with inequalities between staff but not between member States, some of which continued to tax the United Nations earnings of their nationals. On 15 December 1955 the General Assembly therefore established what is known as the Tax Equalization Fund, to be made up from the proceeds of staff assessment and recorded in "sub-accounts" in the name of each member State in proportion to its assessed contribution for the financial year. The Fund is used to reimburse any national taxes levied on United Nations earnings and any such reimbursement is charged to the sub-account either of the member State of his nationality or of the member State that has levied the taxes. The balance of the sub-account is subtracted from a member State's net yearly contribution to the budget of the United Nations.

By resolution 41 of 1961 the FAO Conference introduced the same devices - staff assessment and the Tax Equalization Fund - in the FAO so as to ensure equality in staff salaries, as provided for in Staff Rule 302.3151, and in the contributions of member States, as prescribed in Rule 202.8 of the Financial Rules.

By a letter of 14 July 1988 the complainant asked the FAO whether the deductions made from his earnings by way of staff assessment had been credited to Canada, the country from which he had been recruited. The Organization replied on 12 October 1988 that staff who paid staff assessment were exempt from tax on FAO earnings under Canadian law. It sent him a statement of his gross and net income for the period of his service.

On 14 August 1989 the complainant's representative wrote to the Chief of the FAO Payments Authorization Branch asking whether the complainant's staff assessment had been paid into the Tax Equalization Fund; if so, whether it had been credited to Canada or to the United Kingdom; and whether the recipient country was "obliged to reimburse the amounts to the employee under any bilateral agreement or convention". By a letter of 22 September 1989 the Chief of the Branch replied that neither Canada nor the United Kingdom had been credited with the staff assessment between 1965 and 1974, that only the United States Government taxed FAO earnings and that the Organization reimbursed income tax to United States citizens on its payroll.

The complainant wrote to the Director of the Finance Division on 23 November 1989 claiming reimbursement of the staff assessment deducted from his gross salary from 1965 to 1974 plus compound interest at 5 per cent a year from 1965 to 1988. The total came to $121,062.92. By a telegram of 28 June 1990 the FAO replied that his claim would be examined by its Legal Adviser. Having got no decision despite many reminders, he submitted this complaint to the Tribunal on 12 February 1992.

B. The complainant observes that the amounts deducted from his salary between 1965 and 1974 by way of staff assessment were not credited to Canada or to the United Kingdom, neither of which taxes FAO earnings. He contends that the FAO thus benefited twice over: from the deductions from his salary and from the full contribution of both those member States. He maintains that no government, nor for that matter the FAO, is entitled to obtain money from someone without giving him something in return.

He claims reimbursement of his staff assessment payments plus compound interest at the rate of 5 per cent a year up to 1988, or a total of $121,062.92.

C. In its reply the FAO submits that the complaint is time-barred because the complainant failed while in its employ or afterwards to appeal against the docking of staff assessment from gross salary. Under FAO Staff Rule 303.1311 an appeal must be lodged within ninety days of the date of receipt of the decision impugned.

The Organization further contends that the complaint is unfounded. The United Kingdom signed on 21 November 1947 Convention on the Privileges and Immunities of the Specialized Agencies and does not tax salaries of nationals in the service of the FAO. Though Canada has not signed that Convention it is a party to the Convention on the Privileges and Immunities of the United Nations and does not tax the earnings of Canadians who are international civil servants and not resident in Canada. After joining the FAO the complainant was no longer a resident in the country and Canada did not levy tax on his earnings. Had he been taxed by either the United Kingdom or Canada the FAO would have paid back the amounts under the applicable rules. Whether or not the tax equalization accounting procedures were applied to his case is immaterial because staff assessment and the distinction between gross and net salary do not mean any actual deduction from staff salary. So he shows no cause of action.

D. In his rejoinder the complainant points out that the FAO took two-and-a-half years to answer the claim he made on 23 November 1989, since that answer is in its reply to this complaint.

Summing up his career with the FAO, he observes that during his first posting, in Uruguay, a United Nations administrative officer explained in answer to a query from him about staff assessment that it was deducted for the purpose of payment of income tax to the Canadian Government. Only in 1988 did he learn that not being resident in Canada he was exempt from tax on his FAO earnings anyway. After asking the Organization and the Canadian Government about his tax status he claimed from the Government refund of the staff assessment on his FAO earnings but it refused on the grounds that it had not received staff assessment credits while he was with the FAO. He then turned to the FAO but got no answer. So there can be no time bar.

He enlarges on his original pleas.

E. In its surrejoinder the Organization submits that his rejoinder does not raise any new issue and reaffirms that he never appealed to the Director-General. He therefore disregarded the internal appeals procedure provided for in the Staff Rules.

The FAO further explains staff assessment and the Tax Equalization Fund and maintains the pleas in its reply.

CONSIDERATIONS:

1. As is explained in detail in A above, the General Assembly of the United Nations decided by resolution 239A and B of 18 November 1948 that the salaries of all United Nations staff should be submitted to an internal form of "taxation", called the staff assessment, bearing some resemblance to national income tax systems. Thus a distinction had to be drawn between gross and net salary, and the proceeds of the staff assessment were presented as a credit to the total appropriations of the regular budget.

With the introduction of this mechanism the General Assembly expected that member States of the United Nations would refrain, so as to avoid double taxation, from levying tax on the income of their nationals who were staff members of the Organization. By resolution 239C it asked the member States which had not accepted the Convention on the Privileges and Immunities of the United Nations, or which had done so with reservations, to enact legislation to avoid double taxation of their nationals employed by the United Nations.

Most member States agreed not to tax the income of their nationals. But a few did not, and one was the United States, which at the time had the highest number of nationals of any State in the United Nations secretariat. To avoid inequalities and discrepancies in the contributions of member States to the United Nations budget the staff assessment had to be supplemented by another mechanism.

By resolution 973A of 15 December 1955 the General Assembly established a special fund to be known as the Tax Equalization Fund and to be financed by the proceeds of the staff assessment deducted from salaries paid out of the regular budget. The Fund has a sub-account for each member State, the total proceeds of staff assessment being apportioned between member States in the proportion of their assessed contributions for the financial year. From the Fund came any payments necessary to reimburse staff required to pay national income taxes on salary. Any such reimbursement of tax on UN earnings is charged to the sub-account of the member State of nationality or of such other member State as levied the tax. In determining the net contribution of a member State to the budget of the Organization the balance of the sub-account is deducted from the country's assessed contribution.

The system ensures that all staff members enjoy effective tax exemption and equality of remuneration with others in the same grade or category and that member States suffer no disadvantage by granting tax exemption and, for that matter, gain no advantage by levying tax.

2. By Conference resolution 41 of 1961 the FAO adopted a staff assessment plan and a Tax Equalization Fund identical to those of the United Nations. The Conference agreed "with the Director-General's intention of adopting ... a system of gross salaries rather than net salaries, and of introducing the staff assessment scheme" and authorised "the establishment of a Tax Equalization Fund to which will be credited income from the Staff Assessment Plan and from which credits will be provided against the contributions assessed to Member Governments, on the same basis as applied in principle in the United Nations".

Rule 302.3151 reads:

"The policy of the Organization is to equalize the salaries of staff members by reimbursing the minimum legally-due national income tax on a staff member's FAO-derived income."

Rule 202.8 of the Organization's Financial Rules also seeks to maintain equality between member States. Since staff assessment is recovered from salary paid out of the FAO's regular budget it is borne, at least indirectly or notionally, by member States in proportion to their assessed contributions to that budget. Accordingly the proceeds of staff assessment, when credited to the Tax Equalization Fund, are recorded in member States' sub-accounts in the same proportion. If a State does not levy tax on FAO earnings its net contribution will be credited with the entire sum in its sub-account. If a State does levy tax, the amounts come out of the Fund and will, after adjustment, be debited to its sub-account. The net result is that equality is maintained between member States and there is no

advantage to those that levy taxes on FAO earnings.

3. The complainant is a citizen of the United Kingdom. Although he was resident in Canada when first appointed by the Organization in 1965, he thereafter ceased to live in that country. Neither Canada nor the United Kingdom levies tax on the earnings of the Organization's staff. In the period from 1965 to 1974 deductions totalling 48,138.15 United States dollars were made from the complainant's FAO earnings on account of staff assessment. By a letter dated 14 July 1988 he raised the matter with the Organization.

In a letter of 12 October 1988 to him it stated that "amounts deducted [by way of staff assessment] are not repaid to the various member Governments on behalf of staff members, but are offset on a proportionate basis against Government contributions" to the Organization's budget.

In a letter of 14 August 1989 to the Payments Authorization Branch his representative asked whether in respect of Canada or the United Kingdom, "the staff assessment fund was, in fact, offset against its contribution to FAO".

The Organization replied on 22 September 1989 that "neither Canada nor the UK was credited with a staff assessment between the years 1965 to 1974".

Whatever meaning is to be put on that reply, the Organization's position as stated in its pleadings is that "whether or not the tax equalization accounting procedures were brought into operation in his particular case is immaterial to the present complaint".

4. The levy of staff assessment on the complainant was initially lawful and equitable. If for any reason it had not been levied the basic objective of equality between him and other staff in like case would have been defeated. The question is whether the subsequent refusal to refund the staff assessments recovered from him was wrongful.

5. His main plea is that the amounts standing to the credit of Canada or the United Kingdom in their sub-accounts of the Tax Equalization Fund were not set off in determining the net amount of the contributions due from either of those countries, that one of them therefore contributed more than its due to the Organization, and that the Organization thereby derived unjust enrichment. He further contends that a government may not obtain money from an individual without providing a service in return and that the Organization, as an inter-governmental organisation or agent of governments, was applying a system of taxation at source without providing such a service. He concludes that the staff assessment should be refunded to him.

6. The Organization submits that the complaint is irreceivable, first, because the complainant did not appeal in time against the decision to deduct staff assessment from his gross salary and, secondly, because he failed to exhaust the internal means of redress. It further contends that the complaint is devoid of merit.

7. The complaint cannot succeed on the merits.

The adjustment of the net contribution to be made by a member State under Financial Rule 202.8 is a matter between that State and the Organization; if a State does not insist upon, or waives, its rights, that is no concern of the staff member as such in his relations to the Organization, whatever may be his rights as a citizen or resident of that State.

Any refund made to a staff member on the grounds that the member State has not claimed or received a credit from the Tax Equalization Fund would violate the basic principle of equality in regard to the net salaries of staff members in the same grade or category in the Organization.

Besides, staff assessment is not a system of taxation of staff earnings but a means of avoiding or eliminating the inequalities and discrepancies which would result from taxation by member States.

8. Since the complaint fails on the merits anyway, there is no need to rule on receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

Mella Carroll
Mark Fernando
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.