Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2012/054
Judgment No.:	UNDT/2013/057
Date:	22 March 2013
	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 Judgment No. UNDT/2012/199, entered in the register on 14 December 2012, this Tribunal declared the Applicant's claims not receivable in so far as they sought to obtain reimbursement of the staff assessment deducted from his salary for 2007, 2008 and 2009. However, the same application was declared receivable in so far as it sought to contest the refusal to reimburse the 2010 staff assessment and, before ruling on the merits of the case, the Tribunal requested the Respondent to submit observations on the merits, particularly taking into consideration the Judgment of the Appeals Tribunal in *Johnson* 2012-UNAT-240.

Facts

2. With regard to the facts of this application, in its interlocutory Judgment No. UNDT/2012/199 of 14 December 2012, the Tribunal outlined the facts prior to that Judgment.

3. Following that Judgment, on 27 December 2012, the Respondent submitted observations.

4. On 14 January 2013, the Applicant requested the Tribunal to grant him additional time to explore the possibility of a settlement with the Respondent.

5. By Order No. 5 (GVA/2013) of 15 January 2013, the Tribunal suspended proceedings until 21 February 2013 in order for the parties to attempt to reach a settlement and asked that they keep the Tribunal informed.

6. On 21 February 2013, the Applicant informed the Tribunal that he had not reached an agreement with the Respondent and on 8 March 2013, the Tribunal, by Order No. 32 (GVA/2013), reminded the Respondent that he had not complied with Order No. 5 (GVA/2013) of 15 January 2013 and requested him to file a response to the Applicant's latest submission.

7. The Respondent submitted his observations on 15 March 2013.

Parties' submissions

8. The Applicant's principal contentions are:

a. Concerning the merits of the case, in its Judgment *Johnson* UNDT/2011/144, the Tribunal considered a similar dispute and ruled entirely in the Applicant's favour; that Judgment was confirmed in its entirety by the Appeals Tribunal in *Johnson* 2012-UNAT-240 of 29 June 2012;

b. The Respondent, who now accepts that the Applicant was not required to use his wife's foreign tax credit in 2010, cannot ask him to submit an amended tax return to the United States Internal Revenue Service and the Tribunal must decide in the present case as it did in the *Johnson* case and order the Income Tax Unit to reimburse him USD34,920;

c. Should the Tribunal not order such reimbursement, it must order the Administration to pay all penalties and interest imposed on him by the Internal Revenue Service;

d. With regard to 2007, 2008 and 2009, the Tribunal must rule on the legality of the decision to recover the overpayment should the Respondent demand it of him;

e. With regard to 2011, a clear ruling from the Tribunal would prevent another dispute from arising.

9. The Respondent's principal contentions are:

a. The United Nations Income Tax Unit has taken into account the jurisprudence of the Appeals Tribunal in its *Johnson* judgment and has rescinded the contested decision requiring the Applicant to use his wife's foreign tax credit; he is accordingly no longer required to do so in order to reduce his tax liability for 2010. The issue of the request for reimbursement is therefore rendered moot;

b. It is therefore incumbent on the Applicant to contact the Internal Revenue Service in order to file an amended 2010 tax return, which will allow him to use the tax credit at a later date;

c. Any tax reimbursement paid to the Applicant will be offset against the amount that was overpaid to him. Should the applicant incur any penalties or interest as a consequence of filing an amended tax return, the Income Tax Unit will reimburse them;

d. Reimbursing the value of the tax credits directly to the Applicant would convert tax credits into a cash equivalent, which would give the staff member an unfair advantage. The tax credit belongs not to the staff member but to his wife, who is not a staff member;

e. With regard to 2007, 2008 and 2009, the Tribunal has already ruled on the matter and the Applicant cannot rely on administrative instruction ST/AI/2009/1 (Recovery of overpayments made to staff members) in claiming that the request to recover the overpayment was unlawful;

f. With regard to 2011, the application is not receivable since, as no administrative decision has been taken, there is no dispute with respect to that year;

g. With regard to 2012, the Income Tax Unit will update the annual circular and staff members will no longer be required to use their foreign tax credits.

Consideration

10. By Judgment No. UNDT/2012/199 of 14 December 2012, this Tribunal declared the Applicant's claims not receivable in so far as they sought to obtain reimbursement of his staff assessment for 2007, 2008 and 2009 and declared the application receivable only in so far as it contested the refusal to reimburse the 2010 staff assessment. The Tribunal must therefore rule only on the dispute concerning the income earned in 2010.

11. After the parties had been notified of Judgment No. UNDT/2012/199 of 14 December 2012, they submitted observations, specifically with regard to the Appeals Tribunal's Judgment of 29 June 2012 in *Johnson* 2012-UNAT-240, which confirmed in its entirety the Judgment in *Johnson* UNDT/2011/144. In his latest submission, the Respondent admits that he was wrong in asking the Applicant to apply his wife's tax credit of USD34,920 to his 2010 tax return. Therefore, there is no further need for the Tribunal to rule on that matter.

12. Nevertheless, the Respondent contests the Applicant's request that the Tribunal order reimbursement of the assessment wrongfully deducted for 2010. The Tribunal is compelled to note that the Respondent is attempting to challenge a point of law that was clearly established by the Appeals Tribunal's Judgment in *Johnson* 2012-UNAT-240 of 29 June 2012, which states:

> 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. 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.

13. Notwithstanding the Respondent's observations, this Tribunal sees no good reason to depart from this jurisprudence.

14. The Respondent first maintains that, in practice, the Income Tax Unit does not reimburse staff members directly for the assessments deducted from their salaries but pays them to United States Treasury. The Tribunal considers that there is no need to dwell further on this question, which has been settled conclusively by the aforementioned Judgment.

15. The Respondent further maintains that it is the Applicant's responsibility to submit to the Internal Revenue Service an amended tax return, in which he would not apply his wife's foreign tax credit, and that the Income Tax Unit would then deal with the consequences. He also claims that reimbursing the staff member the value of tax credits used would in effect convert tax credits into a cash equivalent, giving him an unfair advantage over other staff members. The Respondent's argument demonstrates a complete misunderstanding of the present case and of a legal ruling. In this case, the Applicant requested the Tribunal to award compensation for the errors committed by the Income Tax Unit in forcing him to use his wife's foreign tax credit for 2010. In light of the Judgment of the Appeals Tribunal, the Respondent no longer contests that the Unit committed an error and the Tribunal's role is now limited to awarding the Applicant compensation for the financial losses that he suffered therefrom and to impute the cost of that compensation to the Unit that committed the error, thus causing the harm. There is therefore no reason for the Tribunal to require the Applicant to take any action whatsoever with regard to the Internal Revenue Service.

16. It follows from the above that this Tribunal considers that the jurisprudence of the Appeals Tribunal must be fully applicable to the present case, which concerns the Applicant's 2010 staff assessment. Thus, for the same reasons as those set out in *Johnson* UNDT/2011/144 and *Johnson* 2012-UNAT-240, the Secretary-General should be ordered to reimburse the Applicant for the staff assessment deducted from his salary and other emoluments for 2010. The amount to be reimbursed to the Applicant shall be calculated by the United Nations

Income Tax Unit, bearing in mind that it is not contested that, in paying the taxes that he owed to the United States Treasury for 2010, the Applicant applied a tax credit of USD34,920. The Income Tax Unit may not use the amount calculated in this manner to reduce the Applicant's overpayment for previous years. While the Tribunal, by its Judgment No. UNDT/2012/199 of 14 December 2012, declared the application not receivable in so far as it contested the statement of tax settlement sent to the Applicant on 29 December 2011, which showed an overpayment of USD52,595, the Administration has not yet decided whether to recover this overpayment and such a decision, if taken, will be a different administrative decision from those that have already been contested before the Tribunal and may give rise to another dispute.

17. Lastly, while the Applicant requested the Tribunal to rule on any disputes that may arise in respect of 2011 and 2012, it is not for the Tribunal to rule on potential future disputes.

Conclusion

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

a. The case is referred to the Income Tax Unit, United Nations Secretariat, in order for that Unit to proceed, in accordance with the principles set out above, with the calculation of the amounts to be refunded to the Applicant in respect of 2010;

b. The amounts awarded shall bear interest at the United States Prime Rate with effect from the date on which the Applicant should have received the refund until payment of the said amounts. An additional five per cent shall be added to the United State Prime Rate 60 days from the date on which this Judgment becomes executable;

c. All the Applicant's other claims are rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 22nd day of March 2013

Entered in the Register on this 22nd day of March 2013

(*Signed*)

René M. Vargas M., Registrar, Geneva