

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]**
(CASE No: OSCE PoA 2/2017)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 29 June 2017 a letter dated 27 June 2017 from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by [REDACTED] (Applicant) which had been forwarded to him on 22 June 2017.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 3 July 2017 of the constitution of the Panel and asked them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 2 August 2017. The Respondent forwarded his reply on 2 August 2017 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a rebuttal by 22 August 2017. The Applicant filed remarks by email on 21 August 2017 which was transmitted to the Respondent for information. On the request of the Panel both parties submitted additional information. All documents were communicated to the parties.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 23 - 24 November 2017 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy Chairperson, Mr. Gennady Kuzmin, and Ms. Anna Csorba.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's relief claimed is for the full amount of national taxes incurred and paid to the government of [REDACTED] on the Applicant's OSCE income of 2015, while serving as an international civil servant.
5. The Respondent, pursuant to his reply, seeks a ruling authorizing the Secretary General to disregard the conditionality in Staff Regulation 5.05 (which prevents the Organization from refunding the Applicant the taxes paid in the circumstances of the case) is unenforceable as contrary to the law and practice of international organisations, of which the OSCE *de facto* forms part in practice, as mandated by its participating States.

Summary of facts

6. The Applicant, [REDACTED], is a former official who worked for the Organization on a contracted [REDACTED] between February 2015 and July 2016. Pursuant to [REDACTED] statement, [REDACTED] payed [REDACTED] tax to [REDACTED] for the income earned from OSCE in 2015.
7. On 20 July 2016 the Applicant submitted a request to the OSCE Secretary General to refund the income tax [REDACTED] had paid [REDACTED] for 2015, quoting Staff Regulation 5.05 which deals with refund of income tax for OSCE officials who are subject to national income taxation. Also, the Applicant referred to OSCE's dedication to the standards of remuneration established in the United Nations common system as well as to the 1951 Equal Remuneration Convention of the International Labor Organization (ILO).
8. By letter dated 15 March 2017, the Secretary General rejected this request, arguing that he had not been successful in sourcing the Applicant's refund from the taxing State, as required by Staff Regulation 5.05. Indeed, in a Note Verbale of the same day, i.e. 15 March 2017, the Secretary General seeked reimbursement from [REDACTED] in order to be in a position to grant the Applicant's claim.
9. The Applicant, upon the Panel's request for further information, states that [REDACTED] received the Secretary General's letter via email "on about 16 or 17 March 2017". However, pursuant to the Respondent's email record, an email with the Secretary General's letter attached was sent only on 20 March 2017. One section of the email reads: "If you decide to appeal, please advise and we will provide you with the form."
10. On 21 March 2017, the Applicant answered by email: "I would indeed like to appeal, and move this ahead as quickly as possible. Please do send me the appeals form."
11. On 20 April 2017, [REDACTED] Central European Time (corresponding to 19 April 2017, [REDACTED] [REDACTED], the Applicant submitted via email a request for appeal to the Internal Review Board (IRB), dated 18 April 2017, along with a request to waive the jurisdiction of the IRB and to appeal directly to the PoA. By letter of 24 April 2017, the Secretary General consented and granted the waiver.
12. By email dated 23 May 2017, the Applicant filed a direct appeal to the PoA.

Contentions of parties

13. The Applicant's major contentions are:
 - The primary effect of the local staff income tax leveled is unequal treatment and the inequality that it produced with regard to [REDACTED] net pay.
 - The principle of equal treatment of staff and its subset principle of equal pay for equal work, is established in international law and enshrined in the OSCE's Staff Rules and Regulations, specifically, Staff Regulation 5.05 and applicable Rules.

- In an official OSCE document presented by the Secretariat's Legal Services at an OSCE Chairmanship Conference on Local Staff Income Tax (OSCE document SEC/GAL/151/14 dated 2 September 2014), it was argued that international civil servants cannot be deprived of their fundamental right to be treated on an equal basis and be paid equally for equal work.
- Furthermore, the Applicant claims that the organizations cannot invoke individual State positions on not granting taxation exemptions to their nationals as a reason for refusing to ensure the equal treatment of the staff member, irrespective of whether the organization will be reimbursed by the taxing country or not.

14. The Respondent concedes that the Applicant's submissions are correct and in line with the official position taken by the OSCE ██████ in respect of the principle of tax exemption of OSCE salaries and emoluments and the duty of taxing States to reimbursement of the taxes collected. The Respondent emphasizes that taxation of OSCE salaries is a contentious issue in the OSCE, dating back at least to 1994. The Respondent clarifies that all decisions in the OSCE, pursuant to its Rules of Procedure, are taken by consensus. Since there is no voting, contentious issues do not move forward. The Respondent's major contentions are:

- There is a well-established principle of tax exemption in the international civil service and its three underlying principles (independence, equality of States, equal pay for equal work).
- The official position of the OSCE ██████ is that tax exemption of OSCE salaries and emoluments are to be enjoyed by all OSCE officials without discrimination;
- Any acquiescence to national taxation in the OSCE leads to serious administrative problems and could possibly lead to erosion of the principle elsewhere;
- The participating States are unable to find consensus on a solution to this matter, despite the impact on OSCE officials,

Therefore, the Respondent seeks a ruling by the PoA authorizing the Secretary General to disregard the conditionality in Staff Regulation 5.05 is unenforceable as contrary to the law and practice of international organizations, of which the OSCE *de facto* forms part in practice, as mandated by its participating States.

Considerations

Procedural Issues

Request for review

15. Pursuant to Staff Rule 10.01.1 (b) and (c), a request for internal review shall be submitted in writing to the Secretary General or the head of institution/mission responsible for taking the impugned decision.; further the request shall specify date and references of the impugned decision, the date of notification, the aspects of the decision, and arguments for asking the review.
16. The Panel notes that, by email of 21 March 2017, addressed to the OSCE's ██████████ ██████████ the Applicant wrote that ██████████ "would indeed like to appeal" and asked for the appeals form. Obviously, this short message does not fulfill any of the elements mentioned above. Rather, with this email the Applicant merely expressed ██████████ intention to file an appeal once ██████████ was provided with the appeals form. Therefore, the Panel concludes that the Applicant's email of 21 March 2017 itself and as such cannot be considered as a request for internal review within the meaning of Staff Rule 10.01.1.

Timeliness of the internal appeal

17. Pursuant to Staff Regulation 10.01 (c), which deals with the OSCE's internal appeals procedure, to be considered an appeal shall be lodged within thirty days from the date of the notification of the impugned decision.
18. The Panel takes note that the Applicant was notified of the Secretary General's refusal to refund the Applicant's income tax by his letter dated 15 March 2017, sent by email. Although the Applicant contends, in ██████████ answer to the Panel's request for further information, that ██████████ received the respective email about on 16 or 17 March 2017 already, the Panel tends to rely upon the Respondent's email record, according to which the email at stake was sent only on 20 March 2017 around noon Central European Time. Therefore, and to the Applicant's benefit, it is assumed that the notification of the impugned decision took place no earlier than 20 March 2017.
19. Further, it is noted that the Applicant sent ██████████ request for internal review, using the appropriate form, via email. Pursuant to the Respondent's email record, this email was received on 20 April 2017, ██████████ Central European Time, at the email account of OSCE's ██████████. The Respondent's presentation, in his reply, that the Applicant "on 18 April 2017 ... submitted a Request for Appeal Form..." is mistaken and needs to be corrected. Although the form is dated 18 April 2017, the Panel considers this date as irrelevant in light of the legal requirement that the appeal "shall be lodged" within the time-limit quoted above. In the same vein, Art. III para. 1 of the Internal Appeals Procedure (see Appendix 12 to the Staff Regulations and Staff Rules)

assumes that the request for internal review be “submitted” within the prescribed time-limit. It follows from the file that the request was not submitted before 20 April 2017.

20. The Respondent’s advice that the request for appeal was sent on 19 April 2017, [REDACTED], has no bearing on the calculation at hand. As emphasized above, an appeal shall be “lodged” or “submitted” within the applicable deadline, rather than be “sent”. For a submission, pursuant to established legal tradition, only the date of its reception matters, whereas the date of dispatch is normally irrelevant. Otherwise, no reliable control of time limits could be granted in a worldwide system with different time-zones where electronic messages are accepted tools of communication. Therefore, it is of no concern whether the Applicant, a resident of [REDACTED] under [REDACTED], did send the crucial email from [REDACTED] home or from any other place. The relevant timeline in this case is to be measured in Vienna. Therefore, Central European Time is applicable.
21. To the Panel’s best knowledge, OSCE’s internal rules are silent on the calculation of time-limits. Pursuant to the plain wording of the applicable provision, i.e. Staff Regulation 10.01 (c), the crucial thirty days period starts to run “from the date of the notification”. For the case at hand, it follows from this reading that the thirty days started to run on 20 March 2017 (see above para. 18) and, accordingly, ended on 18 April 2017. Therefore, the request of 20 April 2017 was not submitted within the prescribed time-limit.
22. Even if, to the Applicant’s benefit, the day of receipt of the notification is disregarded for the calculation of the time limit - as it is known from various national and international legal systems - the delay continues to exist. In such case, the deadline started to run on 21 March 2017 and, accordingly, ended on 19 April 2017.
23. In the interest of justice and equal treatment, time-limits are to be enforced strictly. Compliance with time-limits is among each party’s responsibilities. It was for the Applicant to ensure that [REDACTED] request for review reaches the addressee on time. No legitimate reasons for not having submitted the request within the prescribed time-limit (cf. Art. III para. 3 of the Internal Appeals Procedure) have been asserted.
24. Based on the findings above, the Panel cannot but determine that the request for internal review was delayed.

Merits

25. Pursuant to Staff Regulation 10.02., the right of final appeal to the PoA is granted “further to the procedure established in Regulation 10.01.”, i.e. the internal appeals procedure. Further, Staff Rule 10.02.2 (d) (i) states that an application to the PoA shall not be admissible unless it complies with the requirements of the internal appeals procedure.
26. Read together, it follows from these provisions that access to the PoA can only be granted where the formal requirements of the internal appeals procedure have been met. Since, in the present case, the initial appeal has not been lodged within the time-limit as established in Staff Regulation 10.01 (c), the Panel is prevented from entering into a discussion of the merits (see also Appendix 12, Art. III 3. (b) regarding the procedure of the Internal Review Board).

Observations

27. This being said, the Panel seizes the opportunity to add observations with respect to some peculiarities of this case.
28. The Panel recalls that the Applicant's Request for refund of income tax is based on OSCE Staff Regulation 5.05 (Taxation), which provides that “in the event that an OSCE official is subject to national income taxation with respect to the net salaries and emoluments paid to him/her by the OSCE, the Secretary General is authorized to refund him/her the amount of those taxes paid to the extent that such amounts have been reimbursed to the Organization by the State concerned”.
29. As reimbursement is, pursuant to this rule, an indispensable prerequisite for each refund of national income tax, it is part of OSCE's general duty of care for Staff to ask the concerned Member State for such reimbursement. With respect to this obligation, the Respondent, in his reply merely refers to “informal consultations” with [REDACTED] [REDACTED] as well as to a “formal request by Note Verbale” dated 15 March 2017. Indeed, the Secretary General's decision to refuse the Applicant's request for refund was already taken on the very same day. In the Panel's view, this approach does not show sufficient *bona fide* efforts to obtain reimbursement.
30. Apart from this, the Panel notes that the OSCE's status as a subject of international law is ambiguous, and as long as – in the Respondent's own words – “OSCE's particularly unique problem with respect to their international legal personality and standing as a subject of international law” exists, the applicability of general principles of international civil service law, including the principle of tax exemption, is questionable.

31. In addition, the Panel recalls the restriction of its jurisdiction. The appeals procedure refers to administrative decisions concerning alleged non-observance of letters of employment or terms of assignment, or of any provisions governing their working conditions (see Staff Regulation 10.01, read together with Staff Regulation 10.02 (a)). As a matter of fact, the Panel was asked to authorize the Secretary General to disregard the conditionality in staff regulation 5.05 against the clear wording of this provision. This would go beyond the competence of the Panel.

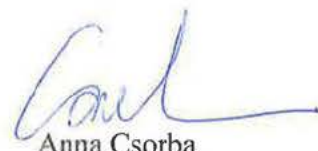
Done in Vienna, on 24 November 2017



Thomas Laker
Chairperson



Gennady Kuzmin
Deputy Chairperson



Anna Csorba
Member