

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]
(CASE No: OSCE PoA 47/2019)**

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 29 November 2019 a letter 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 November 2019.
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 4 December 2019 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 January 2020. The Respondent forwarded his reply on 19 December 2019 which was transmitted to the Applicant, advising [REDACTED] that [REDACTED] has a right to file a rebuttal which [REDACTED] did on 24 January 2020. Upon the Panel's request, the Respondent provided additional information regarding the receipt of the appeal.
3. Travel restrictions in relation to a viral pandemic prevented the Panel from meeting in person, as foreseen in Article VI of the Terms of Reference of the Panel. Following consultations with the parties, the Panel held deliberations via videoconference on 5 and 6 November 2020. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members, Ms. Anna Csorba and Ms. Catherine Quidenus.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's main relief claimed is reimbursement by the OSCE for the full amount of income tax [REDACTED] paid to [REDACTED] in 2016.
5. The Respondent, pursuant to his reply, is of the view that the Applicant paid the national taxes voluntarily; further, it is argued that the OSCE in view of their internal law lacks authority to pay the refund.

Summary of facts

6. The Applicant, a locally recruited mission member at the OSCE [REDACTED] [REDACTED] since 2008, submitted a tax declaration in April 2017 for the fiscal year of 2016 and paid income tax [REDACTED] with respect to [REDACTED] OSCE salary to [REDACTED]. Since April 2008, the Applicant has worked for OSCE [REDACTED] [REDACTED] and, as from 2014, as [REDACTED].
7. On 7 August 2017, the Applicant submitted a request of reimbursement of these taxes paid, pursuant to Staff Regulation 5.05.
8. By Note Verbale of 16 August 2017, the OSCE sought reimbursement from [REDACTED]. This request was rejected by Note Verbale dated 7 November 2017.
9. On 21 December 2017, the Applicant was notified of the Secretary General's decision of 5 November 2017 to refuse the request for reimbursement. [REDACTED] filed a request for internal review by email of 19 January 2018.
10. After its establishment in February 2018, the Internal Review Board (IRB) submitted its final report on 15 July 2019, recommending that the Secretary General reimburse the Applicant as per [REDACTED] request.
11. By letter dated 13 August 2019, the Applicant was notified that the Secretary General did not agree with the recommendation of the IRB and that he sustained the initial decision not to reimburse the Applicant.
12. On 12 October 2019, the Applicant sent a request for external review by email. In [REDACTED] request, the Applicant indicates 14 August 2019 as date of receipt of the impugned decision of 13 August 2019. Hard copies of the appeal were delivered to the Respondent on 24 October 2019.

Contentions of parties

13. The Applicant's major contentions are:

- The Secretary General should be bound by the recommendations of the IRB;
- The Secretary General failed to substantiate the decision;
- The contested decision was taken in breach of essential conditions of employment, of the duty of care, and of the principle of *patere legem*.

14. The Respondent's major contentions are:

- It is not proven that the Applicant was under the obligation to pay income taxes ■
■ been seeking to levy such taxes;
- The Secretary General's decision to sustain the impugned decision was duly substantiated;
- Even assuming that the Applicant was under the obligation to pay national income tax, in light of internal law, the OSCE was not in a position to pay the refund.

Considerations

Procedural Issues

Timeliness of the request for external review

15. Pursuant to Staff Rule 10.02.2 (d) (ii), an application shall not be admissible unless it has been "filed within sixty days ... from the date of the notification to the applicant of the decision rejecting his/her request for internal review".

16. The Panel takes note that the Applicant was notified of the decision rejecting [REDACTED] request for internal review on 14 August 2019. Pursuant to the Respondent's clarification, the email containing the request for external review was received on 12 October 2019, i.e. within the time-limit of sixty days.

Merits

The Secretary General's obligations with respect to the IRB's recommendations

17. Pursuant to Art. VIII, para. 2 of the Internal Appeals Procedure (Appendix 12 of the Staff Regulations and Staff Rules), the Secretary General (SG), before taking the final decision in a request for internal review, "shall take into account the recommendations made by the Internal Review Board, but shall not be bound them. The decision shall be fully substantiated and provide the reasons on which it is based."
18. The Panel takes note of the Applicant's view that the SG, when departing from the IRB's recommendations in the present case, failed to substantiate his decision.
19. The Panel further notes that the SG's final decision of 13 August 2019, after referring to the IRB's report dated 15 July 2019, is based on four different reasons set forth in separate paragraphs. The Panel finds that this approach meets the requirements as described above. As the SG was not bound by the IRB's recommendation (in contrast to the PoA's adjudication decisions, see Art. VIII, para. 8 of the Terms of Reference of the PoA, Appendix 2 of the Staff Regulations and Staff Rules), he was allowed to adhere to the position he had maintained during the internal appeals procedure. The rules of the internal appeals procedures do not prohibit the repetition of legal arguments at various levels of the internal justice system.

The essential conditions of employment with respect to tax exemption

20. The Panel is aware of the Applicant's reference to well-known jurisprudence of international administrative tribunals, according to which the principle of tax exemption is an essential condition of employment in the international civil service. Regarding the particular situation of the OSCE, the Panel held in the decision of 7 July 2020 (OSCE PoA 44/2019):

“15. Pursuant to Regulation 5.05 of the SRSR, in the event 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 of the OSCE is authorized to refund him/her the amount of taxes paid to the extent that such amounts have been reimbursed to the Organization by the State concerned. It follows from a plain reading of this provision that such refund is not possible where reimbursement by the State concerned has not taken place (see Panel’s decision of 24 November 2017, OSCE PoA 2/2017, para. 29).

16. ...

The principle of tax exemption for international civil servants

17. However, pursuant to established jurisprudence of international administrative tribunals, the exemption from national taxation on the income is a fundamental element of the concept of international civil service. In this respect, a provision like Regulation 5.05 of the SRSR may raise concerns, since it requires reimbursement by the concerned State as a precondition for granting de facto tax exemption through refunding the taxes paid, thus calling for an agreement between the organization and the State concerned.

18. These concerns are reflected, e.g., in Judgment 2256 (2003) of the Administrative Tribunal of the International Labor Organization (ILOAT) with respect to a provision similar to Regulation 5.05 of the SRSR. According to this judgment, “it would be similarly strange if the existence of an agreement could be invoked by an international organization to deprive some staff members and not others of their tax exempt status. Such an agreement is meant to set the terms of a member State’s commitment to refund an organization for tax reimbursements. It must, however, conform with international law and cannot be used to undermine the fundamental principles of tax exemption [...]. The Staff Regulations must be in conformity with the requirements of the law and where they are not, they are simply unenforceable.” (see paras. 16 and 17 of said decision).

19. The Panel takes note that the established jurisprudence on this issue concerns international organizations such as the World Bank, the Organization for Economic Cooperation and Development, or the Organisation for the Prohibition of Chemical Weapons, which are in a different legal situation than the OSCE, given that their legal personality, privileges and immunities are based on international agreements. With respect to those organizations, the principles of international administrative law are unquestionably applicable.

20. The Panel could only neglect and/or set aside Regulation 5.05 of the SRSR as being contrary to international law if the principle of tax exemption for international civil servants was undoubtedly applicable also with regard to the OSCE.

21. The issue of OSCE's legal personality has existed since its foundation as 'Conference on Security and CO-operation in Europe' in 1975 and has continued to exist after its renaming in 1994. Particularly since 2000, legal experts in various configurations have examined various approaches to establish the legal status and privileges and immunities of the OSCE under international law (see the comprehensive summary by Tichy, H. (2019), *The Role of the Participating States in Reforming the Legal Framework of the OSCE: Past Developments, Status Quo and Future Ambitions*, in M. Steinbrück Platise, C. Moser, & A. Peters (Eds.), *The Legal Framework of the OSCE* (pp. 82-94), Cambridge University Press). An informal 'Working Group on Strengthening the Legal Framework of the OSCE' (IWG) was established in 2009, with number of reports to the OSCE's Ministerial Council. Pursuant to the report dated 7 December 2018 - MC.GAL/10/18 – (IWG Report 2018), various participating States granted legal status, privileges and immunities through national legislation or bilateral agreements or arrangements with the OSCE; further, the OSCE is currently operating under a variety of legal measures, resulting in a "fragmentation of the legal framework of the OSCE" (see IWG Report 2018, para. 4).

22. Without going into detail, the Panel takes note that international organizations normally derive their international legal personality as well as privileges and immunities from treaties. It is further noted that – regardless of existing drafts – neither a constituent treaty nor an agreement on the legal status, privileges and immunities exists for the OSCE. In addition, the Panel has to take into account that only less than ten - out of 57 - participating States have formally recognized the legal capacity of the OSCE and granted it privileges and immunities (see IWG Report 2018, paras. 22 and 27).

23. The Panel takes note that the issue of the legal framework of the OSCE is unsolved, regardless of various and long-lasting efforts. As the IWG Report 2018 concludes, "options for strengthening the legal framework of the OSCE remained tabled in 2018 without perceptible progress towards consensus".

24. In such situation, it is not for the Panel to overrule provisions of the SRSR as long as the applicability of principles of international law cannot be based upon respective clarification by the consensus of OSCE participating States."

21. It follows from the above that, for the time being, the Applicant's claim of tax reimbursement cannot be based on the principle of tax exemption in international civil service.

The duty of care

22. As a general principle of civil service law, the duty of care entails an open catalogue of obligations with regard to protecting staff. These obligations include the duties to offer fair labour contracts and to make adequate information about the specific situation in the country of destination available to staff (see, e.g., the list suggested in the above-mentioned IWG Report 2018, para. 33). In the Panel's view, it is also part of these duties to inform staff at the earliest opportunity about the individual financial circumstances of their appointment, including their respective home countries' policy on income taxes and/or tax exemption (see decision of 7 July 2020, OSCE PoA 44/2019, para. 29).

23. In the present case, the issue of taxing the income of local [REDACTED] staff has been discussed between the OSCE Secretariat and the host state at various levels for many years, in particular since 2015, [REDACTED]. There are still differing legal views of the OSCE Secretariat and the host state about the application of the legal arrangements on the status of the [REDACTED] (Memorandum of Understanding), which make the 1961 Vienna Convention on Diplomatic Relations applicable to the [REDACTED], to local staff. The discussions have led to a state of uncertainty about the duty of local staff to pay income tax. Despite serious efforts, no solution has been found. Pursuant to the Respondent's uncontested allegations, since 2015, staff has been regularly briefed about the lack of clarity and the efforts to find an agreement.

24. Under these circumstances, sufficient attention was paid to the Respondent's duty of care, as the OSCE Secretariat put a lot of effort into finding a solution that would provide for legal certainty and ensure that local staff's salary is not being taxed.

The principle of patere legem quam ipse fecisti

25. Due to a general principle of administrative law, every administration must adhere to its own rules.

26. Here, pursuant to Staff Regulation 5.05, in the event of national income taxation with respect to net salaries and emoluments paid to an OSCE Official, the SG 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.

27. In this respect, it is an undisputed fact that ██████ refused to reimburse the taxes paid by the Applicant upon OSCE's respective request. Therefore, as an essential prerequisite for reimbursement pursuant to Staff Regulation 5.05 was not fulfilled, no breach of this provision can be found.
28. Further, Staff Regulation 5.02 (b) prescribes that salary scales of locally contracted staff/mission members shall be established by the SG, taking into account, *inter alia*, the host country's applicable income tax system if any. As a result of this obligation, the OSCE has decided to incorporate a tax advance component into the salaries of local staff where a concerned State unequivocally pursues national taxation and local staff clearly has to comply with respective legislation. Having considerable effect on the OSCE's budgetary needs, these costly measures are not taken lightly as they are likely to provoke dispute among member States about their financial obligations.
29. The Panel reiterates that there are ongoing negotiations between ██████ and the OSCE Secretariat regarding the local staff income tax issue. Further, the Panel notes that ██████ did not levy taxes on OSCE mission members since 1999. Finally, the Applicant seems to be the only OSCE Official in ██████ who paid national income tax.
30. The Panel acknowledges the unfortunate situation of both parties. On the one hand, the Applicant, as a law-abiding citizen of ██████, must comply with the national tax laws of ██████ country. On the other hand, the Respondent maintains the legal view that local staff is not subject to national income taxation under the current legal arrangements and may therefore not simply ask for additional budgetary means as long as there are ongoing discussions with the host state on this issue.
31. Against this background, no legal obligation to incorporate a tax advance component into the salaries of ██████ local staff members can be determined. Apart from that, no such tax advance component could be granted with retroactive effects, i.e. for the year of 2016. Rather, it is for the OSCE Secretariat and ██████ to come to an agreement on the local staff income tax issues as soon as possible. However, these questions are not within the Panel's jurisdiction.

32. In light of the above, the application has to be rejected in its entirety.

Done on 6 November 2020



Thomas Laker
Chairperson



Anna Csorba
Member



Catherine Quidenus
Member