STATEMENT BY MR. VENKATARAMAN

(Original : English)

While agreeing with the foregoing decision, I am of opinion that Staff Notice 573 was intended to mitigate the hardship, if any, caused at the time of the implementation of the amended definition of dependency in July 1960. According to the said Staff Notice any loss in dependency allowance occurring on the date of transition from the old to the new system had to be compensated by grant of a personal allowance. In my opinion, the Notice had no relevancy to any loss occurring in the future and had no application to situations that might arise afterwards.

(Signature)

R. VENKATARAMAN

Judgement No. 111

(Original : English)

Case No. 114: Ashton (Reimbursement of income tax.) *Against:* **The Secretary-General of the International Civil Aviation Organization**

Request for rescission of a decision not to reimburse to a technical assistance official of ICAO the sums to be paid by him to the United Kingdom authorities as income tax on an annuity paid to a dependent under a Court Order.

Consideration of the question whether the Applicant is entitled to obtain from the Respondent reimbursement for the tax assessed by the United Kingdom authorities or to secure reduction in the Staff Assessment Plan applicable to him.—Argument based on the United Kingdom Diplomatic Privileges (ICAO) Order in Council.—The tax in question is not on the emoluments received by the Applicant but on the annuity payments received by the beneficiary under the Court Order.—Purport of, and procedure laid down by, Section 170 of the United Kingdom Income Tax Act (1952).—Applicant's obligation to bear the burden of the dependent's tax himself.—Impossibility of considering this tax as an income tax on the Applicant's emoluments.—Argument based on the Applicant's original contract.—Appointment of Applicant as a member of the regular staff of ICAO.—Unnecessary to go into the question whether regular staff members of ICAO are entitled to reimbursement of national income tax paid on their emoluments.—Argument based on Judgement No. 88 of the Tribunal.—Rejection of the Applicant's contention that he has been subject to double taxation.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, Vice-President, presiding; Mr. Louis Ignacio-Pinto; Mr. Francis T. P. Plimpton; Mr. Zenon Rossides, alternate member;

Whereas, on 21 January 1967, Robert Ashton, the Applicant in the present case and, at the time, a technical assistance official of the International Civil Aviation Organization, hereinafter called ICAO, requested an extension of the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 February 1967, the Applicant requested the President of the Tribunal to designate a counsel to assist him in drawing up and submitting the application;

Whereas, on 15 February 1967, the President, with the agreement of the Respondent, extended to 15 April 1967 the time-limit for the filing of the application;

Whereas, on 20 February 1967, the President, in pursuance of United Nations Administrative Instruction ST/AI/163, designated as counsel Mrs. M. L. Luque de Jolly, a staff member of the United Nations;

Whereas, on 14 April 1967, the Applicant filed an application concerning reimbursement of national income tax;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, under paragraph 10 of that article, the Acting Executive Secretary of the Tribunal returned it to the Applicant on 21 April 1967 and called upon the Applicant to make the necessary corrections within a period of sixty days;

Whereas, with the agreement of the Respondent, the President of the Tribunal extended by thirty days the time-limit for making the necessary corrections;

Whereas the Applicant, after making the necessary corrections, again filed the application on 21 July 1967;

Whereas the pleas of the application request the Tribunal:

"(*a*) [To rescind] the decision of the Secretary-General of the International Civil Aviation Organization dated 8 March 1965, by which the Secretary-General—confirming a previous ruling—decided:

"that you are not entitled to refund of payments made or to be made by you to the United Kingdom authorities, nor can you be exempted from the ICAO Staff Assessment or any part thereof";

"(*b*) To instruct the Respondent to assure the Applicant that any income tax paid by said Applicant to the fiscal authorities of the United Kingdom will be refunded to him to the extent of the payments the Applicant has made to ICAO under the Staff Assessment plan of that Organization.";

Whereas the Respondent filed his answer on 11 August 1967;

Whereas the Applicant filed written observations on 20 September 1967;

Whereas, on 2 October 1967, the Respondent filed a reply to the Applicant's written observations;

Whereas the facts in the case are as follows:

The Applicant is a former technical assistance official of ICAO who was engaged as an expert and served in the Organization since October 1951 until his retirement in 1967. His first contract, for a duration not to exceed six months, became effective on 4 October 1951 and was subject to the regulations for Technical Assistance personnel together with such amendments thereto as might be made from time to time. Paragraph 8 of the Provisional Regulations for Technical Assistance personnel in force at the time provided that "officials under the Technical Assistance Programme may, upon evidence of liability and payment of national income tax on their emoluments from the Organization, be

reimbursed by the Organization for national income tax up to the amount of the deduction under the Staff Assessment Plan ". The Applicant received successive extensions of his first contract over a period of some eight years during which the Provisional Regulations for Technical Assistance Personnel were replaced by three successive editions of the Technical Assistance Board Manual of Personnel Policies and Procedures for the Expanded Programme of Technical Assistance which all contained provisions on reimbursement of income tax levied on salaries. Article 19 of the first edition of this Manual provided that " . . . Organizations having a staff assessment plan will calculate salaries on a gross basis for assessment purposes, reimbursing national income taxes levied on earnings received from the Organization " ; article 219 of the second edition stated : " Subject to authorization by their governing bodies, organizations shall reimburse any national income taxes levied on earnings received by project personnel from the organization " ; and article 220 of the third edition reproduced the article 219 just quoted with the omission of the phrase " Subject to authorization by their governing bodies, ". Before the expiration of its last extension, the Applicant's initial contract was superseded by a two-year appointment on the regular staff of ICAO, effective on 5 August 1959, which in turn was superseded by a permanent appointment effective on 1 January 1961. These two appointments were subject to the ICAO Service Code in force and as amended from time to time, and the ICAO Service Code contained no provisions on reimbursement of income tax levied on salaries. Finally, the Applicant's permanent appointment was superseded by a programme appointment with ICAO's Technical Assistance Programme effective on 1 June 1966 and subject to the ICAO Field Service Staff Rules, which contain provisions on reimbursement of income tax (rule 3.14).

Under a Court Order dated 30 December 1953, the Applicant was required as from 18 July 1952 to pay to a dependent in the United Kingdom maintenance at the rate of 264 pounds per annum " free of tax ". As interpreted by the United Kingdom Revenue, the phrase " free of tax " meant that the payer was required under section 170 of the Income Tax Act of 1952 to pay such a gross sum as, after deduction of tax at the standard rate in force at the time of payment, would leave the net amount stated in the Order, and to account to the United Kingdom Revenue for the tax so deducted. The Applicant has made the annuity payments provided for by the Court Order and has received from the fiscal authorities in his country various notices of assessment in respect of those payments. It appears, however, that he has not paid the tax so far and has made for some years every attempt to persuade the United Kingdom Revenue authorities to give up their demand. In August 1962 the Applicant turned to ICAO for assistance in settling the matter. On 10 June 1963, in a letter addressed to the Chief of the Personnel Branch, he requested the assurance that any amounts of income tax paid by him would be reimbursed, and referred to a letter, sent to him on 24 August 1951 together with the initial offer of appointment, in which his attention had been called to paragraph 8 (quoted earlier) of the Provisional Regulations for Technical Assistance Personnel. The reply from the Chief of the Personnel Branch, dated 5 July 1963, read as follows :

" . . .

" I regret that I cannot confirm that amounts you might have to pay under the United Kingdom Income Tax legislation would be refunded to you in accordance with the system outlined in the second paragraph of the letter

of 24 August 1951 accompanying an offer of temporary appointment made to you at the time. Since that date the Council in November 1951 declined to endorse a recommendation of the Finance Committee which would have given blanket authority for reimbursement of amounts deducted under the Staff Assessment Plan up to the amount of national taxation paid on the salary and emoluments received by an ICAO Staff member during any calendar year.

" It is therefore necessary to refer individual cases to the Finance Committee for specific decision in cases where hardship might arise owing to double taxation.

" Before doing so however it would be necessary to determine conclusively that the taxation to which you are subject relates specifically to the salary and emoluments paid to you by ICAO, and, if such is the case, that you are liable to such taxation in spite of the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies and of the Convention on the Privileges and Immunities of the United Nations . . . ".

Further communications were sent by the Applicant or exchanged between various ICAO services. On the two questions mentioned in the last paragraph of the above letter an opinion was requested on 25 November 1964 from the ICAO Legal Bureau, which on 30 November gave on the first question a negative answer as a result of which the second did not arise. On 3 December 1964 a copy of the opinion was sent to the Applicant, who expressed his disagreement in comments dated 1 January 1965. These comments having been referred to the Legal Bureau for consideration, the latter reaffirmed its position and, on 28 January 1965, the Chief of the Personnel Branch advised the Applicant that he was not entitled to refund of the payments made or to be made by him to the United Kingdom authorities ; nor could he be exempted from the ICAO Staff Assessment or any part thereof. On 21 February 1965 the Applicant requested the Secretary General to review the above decision and, on 8 March 1965, the Secretary General confirmed that decision. Thereupon the Applicant filed an appeal before the Advisory Joint Appeals Board by a letter dated 21 March 1965. The Board gave its Opinion (No. 26) on 2 November 1966. The sections of the Opinion entitled " Findings and conclusion " and " Recommendation " read as follows :

" *Findings and conclusion*

" 9. From the facts available the Board finds that the assessments made on the Appellant by the UK Special Commissioners of Income Tax were not on the emoluments received by the Appellant from ICAO, which were free of all national income taxes, but on certain sums of money that the Appellant was legally bound to pay under a court order. As such the Appellant had no right to be reimbursed by ICAO for payments that he might make in compliance with such Notices of Assessment issued or to be issued by the UK Special Commissioners of Income Tax.

" *Recommendation*

" 10. In view of the finding and conclusion stated in para. 9 above, the Board recommends to the Secretary General that the appeal be rejected. "

On 3 November 1966 the Secretary General accepted the above recommendation and, on 21 July 1967, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are :

1. It is a fundamental principle of income tax that any person paying such tax cannot be assessed to tax on the income of another person. The United Kingdom tax authorities, in agreeing that the income of the Applicant would be free of tax if it had been assessed to tax, are inconsistent in not accepting his explanation concerning the status of his income from ICAO.

2. The original contract the Applicant had with ICAO stated that his income from ICAO would be free of tax and if he were to be called upon to pay national income tax he would be reimbursed up to the extent of the deductions which had been made from his salary under the ICAO Staff Assessment. This concept has remained the same throughout his employment with ICAO under several contracts and there has never been any qualification of the reimbursement principle. It is clear from the notices of assessment that it is the Applicant who is called upon to pay national income tax. Since the regular staff of ICAO are entitled to the same privileges as the United Nations staff, the position of the Applicant during the years in which he was on the regular staff of ICAO was the same as when he was engaged under the Technical Assistance Programme of the United Nations.

3. In making a tax free payment to a payee from a tax free salary and in offering this explanation to the United Kingdom income tax authorities the Applicant was complying with the conditions of English tax law. However the United Kingdom income tax authorities insist upon assessing the Applicant to tax. Therefore, under the terms of his contracts and conditions of employment with ICAO, the Applicant is entitled to be reimbursed by ICAO.

4. Whether or not the disbursements are made by the Applicant in his capacity as a payer—and not as a payee—that money has already been taxed (ICAO's Staff Assessment), and the tax that the United Kingdom fiscal authorities levy on it is undoubtedly " income tax ", whether or not the Applicant pays it in his own name or on behalf of his dependent.

5. The argument referred to in paragraph X of Judgement No. 88 of the Administrative Tribunal (" . . . For example, if United States nationals were obliged to pay income tax to the United States (without reimbursement) and also the staff assessment, this could amount to double taxation . . . ") is valid in the Applicant's case.

Whereas the Respondent's principal contentions are :

1. The Applicant is the payer, not the payee, of the annuity under consideration. His income is a separate and distinct matter from his expenditures ; he received his emoluments from ICAO, and on that income as such no tax was levied by the United Kingdom authorities ; having received his income from ICAO free and clear of national income tax, he makes various kinds of disbursements ; among such disbursements would be payment of sums of money to other persons which, being periodical payments, would be annuities and which as such would constitute income of the payee and might under a national law be subject to income tax.

2. The so-called fundamental principle of income tax that any person paying such tax cannot be assessed to tax on the income of another person is entirely a matter between the Applicant and his national tax authorities.

3. The statement that there has never been any qualification of the reimbursement principle is wrong. From 5 August 1959 until 1 June 1966 the Applicant, being a regular staff member of ICAO, was governed only by the ICAO Service Code and his letters of appointment and under neither the Code nor his letters

of appointment for that period was the Applicant entitled to reimbursement of any amount which could be proved to have been paid by him as national income tax levied upon his emoluments from ICAO.

4. The reference to Judgement No. 88 has no bearing on the present case. The Tribunal was referring to a question of double taxation on salary and emoluments received from the same source. No such question arises in the present case since the income tax which the United Kingdom authorities are claiming is not in respect of ICAO salary and emoluments, but in respect of a separate payment made by the Applicant to an individual in the United Kingdom.

The Tribunal, having deliberated from 3 to 20 October 1967, now pronounces the following judgement :

I. In the light of the facts set out above the point that arises for determination is whether either under the terms of appointment or under any relevant regulations and rules, the Applicant is entitled to get from the Respondent reimbursement for the tax assessed by the United Kingdom authorities or secure reduction in the Staff Assessment Plan applicable to him.

II. The Applicant's contention that assessment of tax on annuity payments made by him to a dependent is exempt from taxation under the United Kingdom Diplomatic Privileges (ICAO) Order in Council is a matter of British law on which the Tribunal does not pass. But the Tribunal notes that the exemption in question applies only " in respect of emoluments received . . . as officers or servants of the Organization ". The tax levied by the United Kingdom authorities is not on the emoluments received by the Applicant from ICAO but on the annuity payments received by the beneficiary under the order of Court. That such payments may have been made out of the emoluments received from ICAO by the Applicant is not relevant, as the tax in question is a tax on the recipient of such payments.

Section 170 of the United Kingdom Income Tax Act, 1952, reads as follows :

" (1) Where—

" (*a*) any interest of money, annuity or other annual payment charged with tax under Schedule D ; . . .

" (*b*) . . .

" (*c*) . . .

is not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any payment thereof is made shall, on making the payment, deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment.

" (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment for which an account is so delivered on that person.

" . . . "

III. According to the above provisions, a person making annuity payments has to deduct out of them a sum representing the amount of the tax on the recipient at the standard rate in force at the time of the payment. The United

Kingdom tax authorities were therefore enforcing an obligation arising out of the annuity payments and not out of the receipt of emoluments from ICAO. Since the legal obligation towards the dependent imposed a condition that such periodic payments were to be " free of tax " the Applicant had to bear the burden of the dependent's tax himself and could not set it off against the payee.

IV. The Tribunal is not concerned with the validity of the assessment of income tax on the Applicant's payments to his dependent. The Tribunal finds that the income tax assessment complained of is not in respect of emoluments received by the Applicant as an " officer or servant " of the Organization. Reimbursement or reduction of staff assessment could be claimed, if at all, only if any national income tax were levied on the emoluments received from ICAO. In this case, as already stated, no income tax has been levied on the emoluments of the Applicant but tax has been levied on certain disbursements made which, though borne by him, cannot be called income tax on his emoluments.

V. The Applicant further contends that the original contract with ICAO stated that his income from ICAO would be free of tax and if he were called upon to pay national income tax, he would be reimbursed to the extent of the deductions which had been made from his salary under ICAO Staff Assessment. The Applicant also relies on a letter from the Chief of the Organization and Personnel Branch dated 17 August 1962 which states as follows :

> " . . . Section 19 (*b*) of the Convention on the Privileges and Immunities of the Specialized Agencies acceded to by the Government of the UK on 16 August 1949 provides that officials of the Specialized Agencies shall ' enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the Specialized Agencies and on the same conditions as are enjoyed by officials of the United Nations ', . . . ".

VI. The Respondent argues that the original contract was superseded by his appointment as a member of the regular staff of ICAO with effect from 5 August 1959, and that neither under the ICAO Service Code nor in his letters of appointment was the Applicant entitled to reimbursement of any amount paid by him as national income tax levied upon his emoluments from ICAO.

VII. It is unnecessary in this case to go into the question whether regular staff members of ICAO are entitled to reimbursement of national income tax paid on their emoluments, as the claim fails in substance.

VIII. Lastly, the Applicant refers to Judgement No. 88 of the Tribunal and contends that the United Kingdom tax on the annuity payments made by him and the staff assessment on his emoluments amount to double taxation and that relief should therefore be given. The Tribunal held in that case that " the Social Security tax is a different tax from national income tax and therefore that there is no double taxation in the sense in which it is legally understood ".

IX. The Tribunal considers that the case cited above is not applicable to the facts of this case. The Tribunal has earlier held that the assessment of United Kingdom income tax was really on the recipient of the annuity and not on the Applicant's income from ICAO. By a consent order of the British Court, the Applicant agreed to make the periodic payments to the dependent free of tax and therefore had to bear the burden of the assessment, himself. This does not alter the character of the tax in question which is wholly on a different person namely the recipient of the annuity. The Tribunal concludes that while the Staff Assessment is made on the Applicant, the assessment of the British Income tax

is made really on the beneficiary of the annuity payments and that the assessments are in effect on two different persons. The contention of the Applicant that he has been subject to double taxation therefore fails.

X. For the foregoing reasons, the Application is rejected.

(Signatures)

R. VENKATARAMAN
Vice-President, presiding

Francis T. P. PLIMPTON
Member

L. IGNACIO-PINTO
Member

Z. ROSSIDES
Alternate Member

Jean HARDY
Executive Secretary

New York, 20 October 1967.

Judgement No. 112

(Original : French)

Case No. 110 : Yáñez

Against : **The Secretary-General of the International Civil Aviation Organization**

Non-renewal of fixed-term appointment of a technical assistance expert of ICAO.

Request for opinion of expert graphologist concerning a confidential report on the Applicant.—Rejection of the request on the ground that the report contested did not prevent the extension of the Applicant's appointment and did not influence the contested decision.

Request by the Respondent that the Tribunal should examine as a preliminary question the Applicant's plea that he had a right to expect renewal of his contract.—Rejection of the request.

Request for a rescission of the decision not to renew the appointment.—Discretionary nature of this decision.—This decision could not impair any legitimate right or expectation since, under a provision of the relevant Staff Rules, the appointment could not carry any expectation of, nor imply any right to, renewal.—Principle that, for the purposes of rescission for misuse of power, the Tribunal should not investigate the reasons for a discretionary decision unless that decision impaired a right or a legitimate expectation.—Jurisprudence of the Tribunal and the International Court of Justice.

Request for a new certificate of service.—Necessity of using, in the certificate of service issued to a staff member leaving the Organization, the very words which have been put in the periodic reports by the superior.—Conformity of the disputed certificate with the last confidential report on the Applicant.—Rejection of the request.

Application rejected.
