

(Signatures)

Endre USTOR
President

T. MUTUALE
Member

Geneva, 15 May 1984

Roger PINTO
Member

Jean HARDY
Executive Secretary

Judgement No. 323

(Original: English)

Case No. 308:
Mills

Against: The Secretary-General
of the United Nations

Request by a former staff member of the United Nations concerning the reimbursement of the United States income tax on a partial lump-sum withdrawal benefit from the Staff Pension Fund, in implementation of Judgement No. 320.

Applicant's contention that under Judgement No. 320 he was entitled to the reimbursement of the tax he would have paid had he retired on the date of his transfer to FAO, rather than the smaller amount reimbursed by the Respondent, representing the amount of tax he actually paid.—The Tribunal recalls that in his original application the Applicant requested the payment of the smaller of two amounts.—Application of the principle ne ultra petitem and of the principle of unjust enrichment.—The Tribunal holds as obvious that the reimbursement of tax must take place in accordance with Staff Regulations.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Endre Ustor, President; Mr. Luis M. de Posadas
Montero; Mr. Roger Pinto;

Whereas, on 22 February 1983, Victor Moore Mills, a former staff member of the United Nations, filed an application in which he requested the Tribunal to grant the following relief:

“1. Order rescission of the decision of the Secretary-General rejecting the Applicant's request for tax reimbursement on a partial lump-sum withdrawal benefit from the United Nations Joint Staff Pension Fund, conveyed to the Applicant by the Assistant Secretary-General for Personnel Services in her letter of 14 September 1982;

“2. Order the Secretary-General to reimburse the Applicant forthwith by payment of the smaller of the following two amounts:

“(a) The tax the Applicant would have paid on the lump-sum, as calculated by the Secretary of the Joint Staff Pension Fund, to which the Applicant would have been entitled had he retired on 26 April 1979 on separation from service in the United Nations, or

“(b) The tax which the Applicant actually paid on the lump-sum which he received in 1981 upon withdrawal from the Pension Fund;

“3. Order the Secretary-General to pay interest at the prevailing rate, to be added to the tax reimbursement; such interest to be computed as from 14 September 1982, the date of rejection of the Applicant’s request for reimbursement.”;

Whereas the Tribunal, by its Judgement No. 320 rendered on 28 October 1983, decided as follows:

“XIII. On the basis of those considerations, the Tribunal orders the rescission of the Secretary-General’s decision rejecting the Applicant’s request for tax reimbursement on his lump sum pension benefit and orders the Secretary-General to reimburse to the Applicant a sum equivalent to the taxes he would have paid on the lump sum pension benefit to which he would have been entitled had he retired from the United Nations on 26 April 1979, and to pay to the Applicant interest on that sum. At the request of the Respondent, to which the Applicant essentially agreed, the Tribunal leaves it to the parties to agree on the amount of tax reimbursement and on the interest, with the proviso that in the event that such agreement cannot be reached, each party shall be entitled to turn directly to the Tribunal for the settlement of the dispute.”;

Whereas, on 10 November 1983, the Applicant addressed to the Controller of the United Nations a letter which read in part:

“Had I retired from the United Nations on 26 April 1979, my income tax for that year would have been increased to \$75,431 by exercising the entitlement to a lump sum withdrawal of \$160,722.35. The difference between the tax actually paid and the tax I would have paid had I received the lump sum in 1979 amounts to \$58,950. This is the amount of tax I would have paid on my lump sum benefit. I attach a copy of the tax return I would have submitted in these circumstances along with a copy of paragraphs 23, 24 and 25 of the facts of my application to the Tribunal showing how my calculations were made.

“As for the interest, I request that it be computed as from 14 September 1982, the date of rejection of my request for reimbursement. I propose that as a practical and equitable formula the rate of interest should be the rates applicable to overpayments or underpayments of Federal Income Tax established by the U.S. Internal Revenue Service for the period concerned. These are: (a) through 31 December 1982, 20%; (b) from 1 January through 30 June 1983, 16%; (c) beginning 1 July 1983, 11%. All rates are compounded daily.”;

Whereas, on 23 December 1983, the Director of the Accounts Division, Office of Financial Services, advised the Applicant as follows:

“In implementing the Tribunal’s judgement, we were constrained by staff regulation 3.3 (f) (i) promulgated by the General Assembly which states that ‘the amount of such refund shall in no case exceed the amount of his income taxes paid and payable in respect of his United Nations income’. Hence, it is our opinion that we are unable to pay you the tax which would have been due to you had you retired from the United Nations on 26 April 1979 since the amount would exceed the *actual* amount paid and payable by you in respect of your United Nations income. In accordance with our established tax reimbursement procedure, this notional calculation would have been \$53,350. This calculation excludes your

FAO income earned subsequent to your retirement from the United Nations in 1979 and the related deductions.

“The Controller has therefore agreed to reimburse you the amounts of \$37,784 representing your out-of-pocket tax payment plus \$7,305 in interest at the prevailing Internal Revenue Service rates of interest for the period 14 September 1982 to 31 December 1983. It should be noted that the calculations resulting in the amount of \$37,784 take into consideration the portion of your lump sum withdrawal attributable to your service with FAO for the years 1979 through 1981.”;

Whereas, on 6 March 1984, the Applicant filed a further application in which he requested the Tribunal to rule on the contested issues;

Whereas the Respondent filed his answer on 9 March 1984;

Whereas the Applicant filed written observations on 30 March 1984;

Whereas the facts in the case were set out in Judgement No. 320;

Whereas the Applicant's principal contentions are:

1. There is no basis for the Respondent's implication that Judgement No. 320 is not absolute but is subject to limitation by Staff Regulation 3.3 (f) (i), or that the Tribunal was not aware that the application of formula (a), in paragraph 2 of the Applicant's original pleas, would result in a payment higher than the out-of-pocket costs which the Applicant calculated he eventually incurred. It is also doubtful whether payment under formula (a) would in fact contravene Staff Regulation 3.3 (f) (i) since such payment would in fact reimburse the tax which the Applicant would have had to pay on the lump sum benefit he would have received in 1979.

2. In excluding the Applicant's FAO income in calculating the tax reimbursement due under formula (a) the Respondent is not in accordance with established procedure but on the contrary is in conflict with it.

Whereas the Respondent's principal contentions are:

1. The Tribunal, in referring to Staff Regulation 3.3 (f), clearly recognized that the Applicant's "legitimate expectation" was limited to reimbursement of taxes *actually paid*. Judgement No. 320 stands for the proposition that the Applicant is entitled only to reimbursement of taxes *actually paid* on that portion of the lump sum pension payment, received after separation from FAO in 1981, which was attributable to United Nations service between April 1946 and 26 April 1979.

2. The interest awarded by the Tribunal adequately compensates the Applicant for the delay in reimbursement of taxes actually paid while the litigation was pending, and there is no basis in the Tribunal's Statute for ordering payment other than for compensation for non-observance of contract rights.

The Tribunal, having deliberated from 4 to 15 May 1984, now pronounces the following judgement:

I. The disagreement between the parties as presented before the Tribunal centred around the question whether the Applicant, by his transfer from the United Nations to FAO, did or did not lose his entitlement to reimbursement of the taxes due on his partial lump sum withdrawal benefit from the United Nations Joint Staff Pension Fund.

II. The Tribunal by its Judgement No. 320 decided this question in favour of the Applicant on the consideration that reimbursement of the taxes imposed upon a partial lump sum withdrawal benefit is a terminal payment (as

recognized by the Tribunal in its Judgement No. 237: *Powell*) and that on the principle of equality of treatment of staff members the Applicant cannot be deprived of that payment.

III. The determination of the amount to be paid to the Applicant was left to agreement between the parties with the proviso that in case of disagreement each of them was entitled to request the Tribunal to settle the dispute between them. As the Applicant availed himself of this possibility, the Tribunal must consider his second application.

IV. In his original application the Applicant requested the Tribunal to order the Respondent to pay him the smaller of two amounts. He further specified that this—the smaller—amount was 37,784 US dollars.

Upon the judgement rendered by the Tribunal, that amount, together with an agreed amount of interest, was duly paid to the Applicant. Thus it appears that the Applicant has received what he had claimed and has no ground for further claims.

V. However, in his second application, entitled “Request by the Applicant for the settlement of a dispute with the Respondent over the implementation of the Tribunal’s judgement No. 320”, the Applicant asserts that under that judgement he is entitled to a larger amount than he was paid by the Respondent, i.e. a larger amount than what he had claimed in his first application.

VI. To refute that assertion there is no need for the Tribunal to examine in detail the application of the principle *ne ultra petitem* in the practice of this or other administrative tribunals. Even if it were admitted that the Tribunal may in certain circumstances go beyond the claims of the Applicant and award him more than he had applied for, this cannot be presumed unless clearly stated in the judgement. In Judgement No. 320 the Tribunal has expressed no such intention, particularly since ordering reimbursement of taxes not actually paid would have resulted in undue enrichment for the Applicant. The mere fact that the judgement does not explicitly spell out the obvious, namely that the reimbursement of taxes must take place in accordance with the relevant Staff Regulations, does not entitle the Applicant to more than he was already paid by the Respondent in full satisfaction of his original claim.

VII. For the foregoing reasons, the application is rejected.

(Signatures)

Endre USTOR
President

Luis M. de POSADAS MONTERO
Member

Geneva, 15 May 1984

Roger PINTO
Member

Jean HARDY
Executive Secretary
