



**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 30 June 2021

**JUDGEMENT IN CASE No. 95**

Mr AA, Mr BB, Ms CC, Ms DD, Mr EE

v.

Secretary-General

**Translation** (the French version constitutes the authentic text).

**JUDGMENT IN CASE No. 95 OF THE ADMINISTRATIVE TRIBUNAL**

Hearing held by videoconference on 17 June 2021

In Château de la Muette,  
2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

*Mrs. Louise OTIS, Chair*

*Mr. Pierre-François RACINE*

*And Mrs. Alice GUIMARAES-PUROKOSKI*

*with Mr. Nicolas FERRE providing Registry services.*

*The Tribunal heard*

*Mr. Giovanni Michele PALMIERI and Me Laure LEVI, counsels of the Applicants;*

*Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General ;*

## INTRODUCTION

1. In their application for annulment and compensation lodged with the Registry on 30 June 2020, Mr AA, Mr BB, Ms CC, Ms DD and Mr EE (hereinafter the Applicants), request the annulment of the decision by the Secretary-General to seek the repayment of the tax adjustment, provided for in Article 42 of the Co-ordinated Pension Scheme Rules (CPSR)<sup>1</sup> and of the Rules of the New Pension Scheme (NPS)<sup>2</sup> which was paid to them for the year 2018. In the alternative, the Applicants ask that the respondent be ordered to pay a lump sum corresponding to the financial damage incurred by repaying to them the sums improperly deducted from their pensions. Finally, the Applicants request that the respondent be ordered to pay costs in the amount of 9,000 euros.
2. The Secretary-General submitted his comments on 26 October 2020.
3. The Chair of the Administrative Tribunal issued her decision on the procedure and timetable for the examination of the case.
4. The Applicants submitted a rejoinder on 25 November 2020.
5. An application for an extension of the time limit for the Secretary-General to present his comments in rejoinder was made on 2 December 2020. This application was granted by the Chair of the Administrative Tribunal, who extended the time limit to 18 January 2021.
6. The Secretary-General submitted his comments in rejoinder on 15 January 2021.
7. On 26 January 2021, the chair of the tribunal authorised the testimony of the Organisation's expert, Mr Bruno Gibert, whose reports were produced during the written investigation phase.

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<sup>1</sup> Annex X of the Staff Regulations Applicable to Officials of the Organisation.

<sup>2</sup> Annex X bis of the Staff Regulations Applicable to Officials of the Organisation.

8. All the documents cited and produced by the Applicants bear the reference letter **A**, whereas those cited and produced in defence by the Organisation bear the reference letter **O**.
9. Due to the public health situation, the hearing was held by videoconference on 17 June 2021.
10. The Applicants and the Organisation presented substantial documentary evidence. The Organisation also called an expert witness, Mr Bruno Gibert.

## **CONTEXT**

11. After reviewing the documentary and testimonial evidence, the Tribunal singles out the following facts as relevant:
12. The Applicants are former officials (and the duly qualified claimant to the rights of a former official) who spent their careers with the Organisation and receive retirement pensions from it. The officials retired between 1998 and 2018 and receive retirement or survivor's pensions from the Organisation in accordance with the Co-ordinated Pension Scheme Rules (hereinafter 'CPSR').
13. In France, the tax collection system has undergone a major reform with the introduction of tax withholding, which came into effect on 1 January 2019.
14. This reform has had the effect, in particular, of eliminating the time lag between the income year and the payment of income tax. Now, through tax withholding, income tax is paid in the same year as the income to which it relates.
15. Until the tax year 2018, there was a one-year lag between retired staff's receipt of their pensions and the charging of income tax on those pensions. Consequently, the Organisation's pensioners residing in France received a tax adjustment when their pension entitlement was opened, although their pensions had not yet been taxed.
16. The other Co-ordinated Organisations (COs) rectified the tax adjustment for their pensioners who are tax residents of France for the tax year 2018.

17. The Applicants argue: *'That they have been – and will be – illegally deprived through monthly deductions from their pensions as of January 2020 of the amounts paid in 2018 under the tax adjustment.'*<sup>3</sup>

18. The Applicants maintain that the provisions of the Organisation's internal law were violated by the administration's decision of 13 January 2020 to rectify the entire tax adjustment granted to them in 2018 by spreading the reimbursement over 12 or 24 monthly instalments.<sup>4</sup>

## **ANALYSIS**

### **On the admissibility of the application**

19. On 13 January 2020, in connection with the rectification of the tax adjustment for 2018, the Organisation made the first deduction on the Applicants' pension statements.

20. The prior requests for the withdrawal of the decision of 13 January 2020 were submitted within the period of four (4) months provided for in Article 3 of the Resolution of the Council on the Statute and Operation of the Administrative Tribunal.<sup>5</sup>

21. These withdrawal requests were rejected by the Organisation.

22. The application contesting the rejection of the requests was submitted within the time limits provided for in the Statute.

23. The application is therefore formally admissible.

### **On the pleas on the substance of the case**

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<sup>3</sup> Application, para. 29.

<sup>4</sup> Annex A-7 to the application.

<sup>5</sup> Annex III of the Regulations.

## **I- Tax adjustment and OECD practice**

24. The applicants, who are tax residents of France, are members or beneficiaries of the co-ordinated pension scheme (CPS) common to the OECD and five other international organisations. This scheme, which took effect on 1 January 1974, has been closed since 1 January 2002, each of the Co-ordinated Organisations having set up its own pension scheme. It is the subject of Annex X of the Staff Regulations. The Co-ordinated Organisations have a dedicated service, the International Service for Remuneration and Pensions (ISRP), for the implementation of this scheme and of the remuneration policies.

25. Pensions paid by the OECD do not benefit from any tax exemption in the state where its former officials reside. The tax adjustment, which was created in order to partially off-set officials' loss of the exemption they received for their earned income that occurs when they exercise their pension rights, is governed by Article 42 of Chapter XI of the Co-ordinated Pension Scheme Rules (CPSR), which constitute Annex X of the Staff Regulations and its application instructions reproduced below:

'1. The recipient of a pension under these Rules shall be entitled to the adjustment applying to the Member Country of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that country.

2. The adjustment shall equal 50 per cent of the amount by which the recipient's pension would theoretically need to be increased, were the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Rules.

For such purpose, there shall be drawn up, for each Member country, in accordance with the Implementing Instructions referred to in paragraph 6, tables of equivalence specifying, for each amount of pension, the amount of the adjustment to be added thereto. The said tables shall determine the rights of the recipients.

3. In calculating the theoretical amount of income tax or taxes referred to in paragraph 2 of this Article, account shall be taken only of the provisions of tax legislation and regulations affecting the basis of liability and the amount of income tax or taxes for all pensioner-taxpayers in the country concerned.

...

6. The other procedures for calculating the adjustment and, in particular, those necessitated by the special features of certain national tax laws, and the procedure for payment of the adjustment shall be laid down in the Implementing Instructions established in accordance with the tax legislation of Member Countries.

## **Instructions**

### **42/1 - Scope and calculation of the adjustment**

*1. Article 42 of the Pension Scheme Rules shall apply only if the pension and the adjustment relating to it are subject to taxes on income levied in a Member Country of the Organisation. The family allowances provided for in Article 28 of the Pension Rules shall be assimilated to pensions in determining the tax adjustment in so far as similar allowances are taxable under the national tax legislation of the Member country.*

*2. The adjustment referred to in Article 42 of the Pension Scheme Rules shall be determined on the basis of the legal provisions relating to taxes on income in force in the Member country in which the pensioner is legally subject to such taxation. It shall be established in respect of pensions paid during the tax period as determined in that country.*

...

### **42/2 - Establishment of tables of equivalence for payment of the adjustment**

*1. Tables of equivalence for payment of the adjustment shall be established for each tax year by the Inter-Organisations Section, hereinafter referred to as 'the Section'.*

*2. The tax authorities of Member countries shall provide the Section, at its request, with the details of legislation and regulations necessary for establishing the tables. The tables shall be checked and confirmed by the tax authorities of the Member country concerned. In the event of disagreement between such authorities and the Section on the content of the tables, the Secretaries-General and the Coordinating*

*Committee shall consider the matter on the basis of Article 42 of the Pension Scheme Rules and of these Implementing Instructions.*

*3. Provisional tables of equivalence shall be drawn up prior to the commencement of the period to which they refer. They shall show, for rounded pension figures and in respect of each Member country, an amount equivalent to 90 per cent of the monthly adjustment calculated according to the distinctions contained in Article 42.3 of the Pension Scheme Rules and on the basis of the tax legislation in force at the time of drawing up the tables.*

*4. The provisional tables shall be revised whenever amendments to tax legislation involve a change in the amount of the adjustment. The Secretaries-General and the Coordinating Committee may however decide by mutual agreement to dispense with the up-dating of tables in cases where the balance of gain or loss is minimal.*

*5. As soon as the authorities in Member countries have finally adopted the tax legislation applicable to income for the period covered by the provisional tables, these latter shall be replaced by final tables establishing the rights of recipients in accordance with Article 42.2 of the Pension Scheme Rules. These final tables shall show the amount of the adjustment for the whole of the period which they cover, as well as the monthly amount of the adjustment.*

...

#### **42/3 - Method of payment of the adjustment**

*1. The adjustment shall be paid by monthly instalments by way of advance at the same time as the pension and in an amount corresponding to that appearing in the provisional tables of equivalence referred to in Instruction 42/2, paragraph 3 above. The amounts of pension, arrears of pension and adjustment shall be shown separately on the instrument of payment issued to the recipient.*

*2. At the request of a country, the Secretaries-General and the Coordinating Committee may, by mutual agreement, decide that by way of exception to paragraph 1, there shall be a time lag in payment of the monthly instalments of the adjustment relating to that country, provided however that payment of the whole of the monthly instalments shall be finalised before the ultimate date for payment of the tax to which they refer.*

*[3. As soon as the final tables of equivalence are available, the total amount of the monthly instalments paid in respect of the tax period shall be compared to the final*



*amount of the adjustment due for the whole of that period. Any excess or shortfall shall be rectified but so however that the amount involved shall not be taken into account in determining the adjustment in respect of the following tax year.*

*4. The adjustments shall be paid in the currency of the country in which the recipient is subject to taxes on income.]*

...

26. The tax adjustment, which in this case is payable by France, is subject to income tax there in the same way as the pension.

27. The OECD's practice has been to pay the tax adjustment as soon as the pensioner receives the first monthly payment of his or her pension. As the pensioners in question are tax residents of France, until 2019 they did not pay income tax for a given year until the following year, because of the income tax collection method that was used. Until 2019, under the Organisation's practice, they were therefore allowed to have the adjustment for at least one year before they had to pay tax on income including their pension and tax adjustment.

## **II - The introduction of tax withholding on income in France in 2019**

28. French Law No 2016-2017 of 29 December 2016, the Finance Law for 2017, stated in Article 60 that from the year 2018, income tax would be paid at the same time as the income, i.e. in the year that the income was received rather than with a one-year lag.

29. Initially, the entry into force of the reform was postponed to 1 January 2019 by Ordinance No 2017-1390 of 22 September 2017, but the French authorities hesitated over the advisability of the reform until September 2018, and it was not until Law No 2018-1317 of 28 December 2018, the Second Amending Finance Law for 2018, that the final characteristics of the new system were fixed and its entry into force set for 1 January 2019.

30. The question arose of what to do about income received in 2018, which was normally taxable and for which taxpayers should have paid the corresponding tax in 2019, i.e. in the year that French taxpayers had to start paying tax on their 2019 income.
31. To avoid this excessive tax burden, it was decided that 2018 income would remain taxable in law, but that taxpayers would be granted a tax credit, the Collection Modernisation Tax Credit (CIMR), which would completely cancel out tax due on non-exceptional income only. This measure was intended to thwart the manoeuvres of taxpayers, who would otherwise have received income in 2018 that should normally have been received in 2017 or 2019.
32. Tax withholding can take two forms: for income declared by third-party payers, monthly withholding is performed by the payer on behalf of the tax authorities, at a rate calculated with reference to the taxpayer's previous taxes. For other income, it involves a periodic payment on account taken from the taxpayer's bank account. As the Organisation does not collect taxes on behalf of governments, it is this second method that applies to its former officials.
33. In all cases, taxpayers remain subject to the obligation to declare their income for a given year the following year, so that their tax can be adjusted upward or downward, and so that the rate of withholding or of payment on account for the current year can be adjusted if necessary. However, taxpayers have the right, if they believe they are justified in doing so, to change this rate themselves, under their own responsibility, during the year.

### **III - The subsequent adaptation by the OECD of the tax adjustment received in 2018.**

34. In January 2017 and January 2018, the ISRP sought the views of the French tax authorities on the reform's consequences for pensions paid to former staff, and in particular on whether pensions paid by the Organisation would be eligible for the CIMR tax credit.

35. However, the postponement by a year of the reform's entry into force and the French government's hesitation until September 2018 on whether to introduce the reform at all prevented the French tax authorities from issuing the correspondence tables necessary for the calculation of adjustment rights, as stipulated in § 2 and § 5 of Instruction 42/2 of CPSR.
36. In the meantime, from January 2018, in the absence of any answer to the question of whether the CIMR was applicable to pensions paid by the OECD to retirees resident in France, the tax adjustment continued to be paid to pensioners on the basis of provisional tables.
37. The final tables, taking account of the introduction of the reform and the impact of the CIMR cancelling out any tax on non-exceptional income for 2018, did not receive detailed confirmation from the French tax services until September 2019.
38. In October 2019, the ISRP then sent an information note to the pensioners concerned announcing the rectification of the tax adjustment paid in 2018 from 1 January 2020 in twelve monthly deductions, and published an explanatory note on this rectification on its website. Given the excessive burden that this rectification might represent for some pensioners, the period was extended to 24 months by decision of the Secretary-General on 13 January 2020.

#### **IV - Violation of Article 42 of the CPSR and of Instruction 42/2**

39. It is not disputed that the retirement pensions received by former staff of the Organisation in 2018 were, for the purposes of French tax legislation, 'non-exceptional income' conferring the right to the CIMR.
40. A confusion between legal questions concerning the right to adjustment and material cash flow questions needs to be cleared up.
41. The right to tax adjustment for pensions received during a given year, in the case of a pensioner who is tax resident in France, arises from the fact that the pensioner is liable

for income tax for that same year, regardless of the year in which that tax must be paid. This link is expressly created by:

paragraph 2 of Article 42 of the CPSR: '*2. The adjustment shall equal 50 per cent of the amount by which the recipient's pension would theoretically need to be increased, were the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Rules.*' (Tribunal's underlining) and by paragraph 6 of the same article: '*6. Such recipient shall produce evidence of his pension and the relative adjustment having been declared or taxed*'.

42. In the present case, it is beyond dispute that the Applicants, although subject in law to income tax for the year 2018 by reason of their pension payments and the corresponding tax adjustment, did not in fact have to pay it following the introduction of the Collection Modernisation Tax Credit, the amount of which was strictly equivalent to the tax they would have had to pay in the absence of such a credit. France has permanently waived the collection of income tax on non-exceptional income for 2018. These two points were confirmed through consultation in March 2020 with Francis Lefebvre, a firm with a global reputation as a specialist in French and international taxation.
43. By application of Article 42 of Chapter XI of the CPSR, pensioners who are tax residents of France were therefore not, in principle, entitled to any tax adjustment for pensions received in 2018. Moreover, it is difficult to see how the Organisation could have required France to bear the burden of a tax adjustment that does not correspond to any taxation.
44. In order to maintain the contrary position, the Applicants claim that they paid income tax in 2018, as in 2017 and 2019 and that, in spirit if not in letter, Article 42 of the CPSR confers on them a right to receive a tax adjustment every year they pay such a tax. According to them, continuing tax adjustments must correspond to the 'continuum' of taxation.

45. The Tribunal takes the view that there was no continuum of taxation, but that the Applicants nonetheless received the tax adjustments to which they were entitled.
46. It is true that the Applicants paid income tax contributions each year both before and after the entry into force of the reform.
47. However, the income tax paid in 2017 corresponded to their 2016 income, the year in which they received the corresponding monthly adjustment;
48. whereas the tax paid in 2019, the year in which the French tax reform was introduced, corresponded to the income they received in that same year and during which they received the corresponding monthly adjustment.
49. Although they had to pay income tax in 2018, that tax was due for the previous year, 2017, in which they received the tax adjustment, rather than for income from 2018.
50. It is therefore incorrect, in law, to maintain that there was continuity of taxation, since under French law 2018 income was not taxed. However, the Applicants received the adjustment whenever they were entitled to it, as the above shows.
51. It is also true that the pensions for 2020 and 2021 have been or will be subject to deductions made by the Organisation.
52. However, this is a question not of law, but of cash flow. The Tribunal readily agrees that such an imbalance is not without its disadvantages, but neither Article 42 of the CPSR nor the instructions on its application contain any provision obliging the Organisation to remedy a strictly transient imbalance affecting pensioners' cash flow that arises from the obligation to repay an amount to which they were not entitled, but which they held until December 2019.
53. The Tribunal wishes to point out that, in the system applicable before 1 January 2019, an official of the Organisation who was a tax resident of France and who retired on, say, 1 January 2016, received a tax adjustment right from the time of his or her first pension payment, even though his or her 2015 income from employment, which was taxable in 2016, was exempt from income tax under the regime of privileges and

immunities of the Organisation and its staff in France. In addition, during the following year – 2017 in our example – such former officials would simultaneously have received their pension and the corresponding tax adjustment every month.<sup>6</sup> These officials therefore received an advantage in the first year of their retirement, which they subsequently retained thanks to a liberal interpretation for them of the CPS. However, the situation in force since 1 January 2019 is strictly in accordance with the requirements of Article 42: pensioners receive a tax adjustment at the same rate as that at which they pay income tax.

54. It follows from the foregoing that the Organisation was entitled under Article 42 of the CPSR to request the reimbursement of the tax adjustment initially paid in 2018, as it did, without breaking any laws or being guilty of any factual errors with regard to the establishment of the correlation tables necessary for the calculation of this tax adjustment.

55. It is clear that in the context of the uncertainty surrounding the reform of income tax collection that lasted from the election of the President of the French Republic in April-May 2017 until the passing of the law of 28 December 2018, it was simply impracticable to apply in its entirety the procedure set out in the instructions for establishing the provisional and final correspondence tables. The Tribunal merely notes that the final tables for 2018 were drawn up after verification by the French tax services.

56. However, in order to argue that the claimed repayment of the tax adjustment initially received in 2018 was illegal, the Applicants allege that certain general principles were violated.

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<sup>6</sup> Annex O-2 to the response.

## **V - Violation of equality between pensioners**

57. The Applicants maintain that a breach of equality between pensioners arose due to an *'error in the application of the existing rules in the circumstances of the French law on the modernisation of collection in 2018'*.
58. As stated above, the Organisation did not commit any legal error in applying the rules set out in Article 42 of the CPSR. The plea that there was a breach of equality between pensioners must therefore be rejected.
59. In addition, contrary to what is argued, the aim of French legislators in introducing the CIMR was not 'to maintain stable non-exceptional household income' but merely to prevent households from having to pay income tax twice in the same year.
60. Finally, the Organisation has put forward the uncontested argument that all the Co-ordinated Organisations have carried out the rectification of the tax adjustment for all pensioners who are tax residents of France for the year 2018.

## **VI- Violation of Article 17/8 of the Rules**

61. This article states that:

*'The right of the Organisation to recover any payment made unduly shall lapse two years following that payment.'*

62. First, as has already been decided, the OECD was right to claim the repayment of the tax adjustment initially paid in 2018 and it is not disputed that it acted within the applicable time limit. Article 17/8 in no way makes the right to recover undue payments conditional on fraud or negligence on the part of officials.
63. Second, the Applicants have failed to demonstrate in what way seeking the repayment of the tax adjustment received in 2018 was 'unfair or inequitable'. The cash flow disadvantages of this repayment, real though they may have been even when spread over 24 months, cannot make it unfair or inequitable.

## VII- Violation of the right to good administration

64. In essence, the Applicants, while admitting that Article 41 of the Charter of Fundamental Rights of the European Union is not necessarily applicable to relations between the OECD and its officials or former officials, complain of the lateness and unreliability of the Organisation's interpretation of the changes to French tax law and maintain that they were not properly informed until 4 October 2019.
65. The Organisation cannot be seriously criticised for not having informed pensioners of what would happen with the tax adjustment to be received in 2018 as soon as the law of 29 December 2016 establishing tax withholding on income tax was published, given how uncertain it was from the spring of 2017 that this reform would be applied from 1 January 2018 and that it was even open to question until September whether it would ever be applied.
66. Although the law definitively confirming the introduction of the reform on 1 January 2019 was not published until 29 December 2018, pension statements made it clear to pensioners from June 2018 that the procedures for the introduction of tax withholding would be communicated to them as soon as the necessary information had been received from the French government. From September 2018, the ISRP Internet portal included a message relating to the continued lack of this information. Finally on 25 March 2019 the ISRP, in an information note addressed to pensioners, specified that the approaches made to the French tax authorities since 2017 *'also seek... to determine what the consequences of tax withholding will be for the possible rectification of the tax adjustment advance paid in 2018.'* Having been informed in this way, the Applicants could not cite the principle of legitimate expectations to justify their right to retain the tax adjustment paid to them in 2018.
67. Finally, the Applicants claim in their rejoinder (§39) that they suffered financial loss.
68. It is true that the consequences of the initial payment of the adjustment in 2018 go beyond the mere requirement for its repayment: in 2019, the Applicants declared the amount of their pension **and** of the tax adjustment initially received, resulting in a



withholding rate through payment on account higher than that which they would have incurred if they had only received their pension in 2018; this was the situation first of all in 2019, but without any disadvantage since the reclaiming of the 2018 tax adjustment did not begin until 2020. Above all, it was the situation in 2020, the year in which the Organisation began to deduct this adjustment on a monthly basis – initially in 12 and subsequently in 24 instalments.

69. But the Organisation is not responsible for this situation, which is due exclusively to the rules set by French tax law for determining each year the rate of deduction at source or withholding through payment on account on taxable income for the current year: these rules refer for the initial withholding charges to the rate used two years previously, and then, when the income for the previous year has been declared, to the rate applicable to that previous year.
70. It should be noted that under certain conditions, this legislation authorises any taxpayer to take the initiative of adjusting – and in particular adjusting downwards – his or her rate of deduction at source or payment on account, when he or she is able to foresee that this rate is excessive in relation to the income received. This could have been the case in 2020 for the Applicants, since they knew as early as January that they would have to repay the 2018 tax adjustment through a deduction from their pensions made by the Organisation (and this may be still the case in 2021, since the repayment period for the 2018 tax adjustment has been extended to 24 months).
71. In any event, consultation with CMS Francis Lefebvre shows that by application of the rules outlined above, the disadvantage associated for 2020 or even for 2021 with the initial rate of the payments on account made in these years will automatically disappear no later than 2022, when income for 2021 is declared.
72. As the analysis of CMS Francis Lefebvre also shows, the Applicants were able in 2021 and will be able in 2022 to deduct from their taxable income for the years 2020 and 2021 the deductions that were made in 2020 and will be made in 2021, since there is nothing either in French tax law or in the published doctrine of the French tax

authorities to prevent Applicants from deducting from their taxable income deductions corresponding to the tax adjustment received in 2018, which was taxable in law, but ultimately was not and never will be taxed.

**FOR THESE REASONS, THE TRIBUNAL**

1. **DECIDES** that the Applicants' application is admissible.
2. **DISMISSES** the application on its merits.