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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Austria

ADMINISTRATIVE COURT

APPEALS AGAINST THE DECISIONS OF THE *LAND* FINANCE ADMINISTRATION FOR VIENNA, LOWER AUSTRIA AND BURGENLAND: JUDGEMENT OF 10 JANUARY 1985[1]

Purchase of a plot of land by an official of the International Atomic Energy Agency—Joint liability of all persons involved in the acquisition process for payment of the tax—Article 17, item 4, of the Land Purchase Tax Act of 1955—If the buyer enjoys a tax exemption pursuant to the Agreement regarding the Headquarters of IAEA the sellers are held jointly liable for payment of the land purchase tax

IN THE NAME OF THE REPUBLIC

The Administrative Court, acting through Panel Chairman Karlik as presiding officer and Privy Councillors Närr and Meinl as judges, with Dr. Schöller present as secretary, has ruled as follows concerning appeal 1, dated 30 July 1984, No. GA 11-784/1/84, lodged by Mr. _____, and appeal 2, dated 30 July 1984, No. GA 11-784/84, lodged by Ms. _____, both residents of _____, both represented by _____, an attorney at _____, against the decisions of the *Land* Finance Administration for Vienna, Lower Austria and Burgenland, each relating to land purchase tax:

The appeals are denied as being without foundation.

The appellants must pay to the Federal Government costs in the amount of S 2,200 for each appeal, making a total of S 4,400, within two weeks, subject to enforcement action in the event of failure to do so.

The Federal Government's request for additional payment (S 400) is denied.

Grounds for the judgement

According to the records of the administrative proceeding, the first appellant had sold a three-quarter share and the second appellant had sold a one-quarter share of a plot of land, registration number _____, cadastral district _____, to J _____ K _____, an official of the International Atomic Energy Agency at Vienna, by means of a contract of sale dated 12/25 August 1984, for the total purchase price of 2.3 million schillings.

The *Land* Finance Administration for Vienna, Lower Austria and Burgenland, by the decisions being challenged before the Administrative Court, denied as being without foundation the protests of the two appellants against the decisions which had been taken by the _____ Finance Office on 8 August 1983 (appeal 2) and on 20 October 1983 (appeal 1) and by which an 8 per cent land purchase tax in the total amount of S 184,000 had been imposed in respect of the aforementioned purchase on the appellants, in proportion to the share owned by each. The *Land* Finance Administration, after stating the circumstances of the case, concurred in the decisions and pointed out in support thereof that the personal tax exemption of the buyer arose out of the provisions under which officials of the International Atomic Energy Agency at Vienna are entitled to exemptions pursuant to the Agreement regarding the Headquarters of the International Atomic Energy Agency, BGB1. Nr. 82/1958, in conjunction with the Vienna Convention on Diplomatic Relations, BGB1. Nr. 67/1966 (cf. the

Administrative Court's finding of 17 September 1976, Nr. 934/75, Slg. Nr. 5004/F). In this connection, the challenged authority further stated that while in the case of a contract of sale in which the buyer and seller are joint debtors it is within the discretion (art. 20, BAO) of the authority to decide from which of the joint debtors it will demand payment, there is no possibility of a discretionary decision where one of the parties to a contract of sale enjoys a personal tax exemption.

It is against these decisions of the *Land* Finance Administration for Vienna, Lower Austria and Burgenland that the present appeals, identical in tenor, have been lodged; the appeals allege illegality of substance and illegality by reason of violation of procedural regulations.

The Federal Minister of Finance submitted the documents of the administrative proceeding and the replies given by the challenged authority. The replies contain in each case the request that the appeal in question should be denied as being without foundation and that the appellants should be required to pay costs.

Because of the close substantive and personal links between the two appeals, the Administrative Court has decided that they should be considered jointly and a judgement should be rendered jointly on both, and accordingly it has taken the following into account:

In the proceeding before the Administrative Court, the appellants assert in their joint pleading in each case that they had suffered an infringement of their rights inasmuch as the disputed tax liability did not exist for them. In explanation of this interpretation of the appeal, the appellants assert, with regard to illegality of substance, in accordance with their pleading in the administrative proceeding, that the personal tax exemption of the buyer was assumed by the tax authorities wrongly or on the basis of insufficient examination. In view of their unfavourable income and property situation, they allege in this regard that the imposition of the land purchase tax would create all the more hardship for them because it was imposed on them solely as the result of a mistaken interpretation of the law by the challenged authority, which had altered to their detriment the decision whereby the buyer would be liable for the land purchase tax. It was stated, however, that in that legal recourse proceeding the two appellants had not been granted any legal status.

This pleading is still insufficient to justify the granting of the appeal.

According to the peremptory rule set out in article 17, item 4, of the Land Purchase Tax Act (GrEStG) of 1955, BGB1. Nr. 140, in the case of a purchase, the persons (i.e., all persons) involved in the acquisition process are liable to pay tax. According to article 6, paragraph 1, of BAO, persons liable, pursuant to the taxation regulations, for the same payment due under the tax laws are joint debtors (art. 891, ABGB).

In the disputed decision, the challenged authority rightly relied on the basic arguments in the Administrative Court's finding of 17 September 1976, Z1.934/75, Slg. Nr. 5004/F, which dealt with a set of circumstances entirely similar to those of the case now in dispute (also concerning the purchase of a plot of land by officials of the International Atomic Energy Agency at Vienna). In the aforementioned finding, the Administrative Court, citing its legal precedents, declared that the exemption from land purchase tax granted to the persons referred to in section 39 of the IAEA Headquarters Agreement, BGB1. Nr. 82/1958, was a *personal* tax exemption. The court further stated in this connection that if the buyer of a plot of land enjoys such a tax exemption, then it is not illegal for the tax authority in such a case, on the basis of the provision contained in article 17, item 4, GrEStG, to hold the seller or sellers jointly liable for payment of the tax.

The normative content of article 17, item 4, GrEStG, which has thus been recognized, has legal validity in the present appeal cases as well. The arguments advanced in the appeal on this subject do not, in view of the clear legal situation, give the Administrative Court any cause to alter its previously rendered legal opinion set out above.

But this means that in the substantive and legal circumstances, the challenged authority should not have been accused of having violated the law by requiring in the cases which are the subject of the appeal, that those joint debtors who do not enjoy any (personal) tax exemption should pay the tax.

Since the grounds alleged by the appellants have been found invalid and no relevant error of procedure could be found, it was necessary to deny the appeal as being without foundation, in accordance with article 42, paragraph 1, VwGG, and to limit the grounds for the judgement essentially to a state-

ment of the legal precedents which settle the legal question (art. 43, para. 2, VwGG); the judgement itself, however, had to be rendered by a panel established in accordance with article 12, paragraph 1, item 2, VwGG.

The prompt settlement of the appeals directly after receipt of the reply means that a formal pronouncement on the petition that the appeals should have the effect of postponing payment can be dispensed with.

The adjudication of costs is based on articles 47 et seq., VwGG, in conjunction with the Federal Chancellor's decree of 7 April 1981, BGBl. Nr. 221. The administrative documents prepared jointly in respect of the two appellants were (and could be) submitted only once.

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2. Belgium

COURT OF FIRST INSTANCE OF ANTWERP

REPUBLIC OF GUINEA AND ITS PUBLIC INSTITUTIONS v. MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT: DECISION OF 27 SEPTEMBER 1985[2]

Attachment of assets of a party to an International Centre for Settlement of Investment Disputes—Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965—Exclusive jurisdiction of the Centre over the dispute

The court decided to vacate attachments of assets of a party to an International Centre for Settlement of Investment Disputes proceeding on the ground that under article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965[3] consent to ICSID arbitration is deemed to exclude any other remedy, and accordingly domestic courts in contracting States should decline to entertain claims brought before them by one of the parties.

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3. Switzerland

THE SWISS FEDERAL COURT

DECREE OF 31 JULY 1985[4]

Cantonal tax—Deductibility of interest credited to an international official—Question whether an international official can be regarded as a "taxpayer in Switzerland"

SECOND PUBLIC LAW COURT

Ruling in the public law appeal filed by

(1) Résidence Miremont, Inc. Real Estate Corporation, Geneva,

(2) Yvor Jackson, Geneva,

Both represented by Franco N. Croce, attorney, Geneva,

against

the decision rendered on 9 November 1983 by the Administrative Court of the Canton of Geneva in the case of the appellants versus the Canton of Geneva, represented by the Cantonal Tax Administration;

Having considered the documents of the case, which set out the following facts:

A. The Résidence Miremont Inc. Real Estate Corporation (hereinafter the Corporation) is a shareholder-tenants real estate corporation whose shareholder-tenants are at the same time unsecured lenders of large sums of money to the Corporation. While the capital of the Corporation itself amounts to about SwF102,000 (capital plus reserves), the unsecured debt exceeds SwF 7,600,000.

Among the unsecured creditors of the Corporation there were in 1979 persons not designated by name, a person of unspecified domicile and Yvor Jackson, a United Nations official of foreign nationality holding a type C accreditation card.

Under articles 66 f and 88 c of the General Act concerning Public Taxes of 9 November 1887 (hereinafter APT) of the Canton of Geneva, a real estate corporation may not deduct debts and interest on such debts unless the creditor is a "taxpayer in Switzerland".

B. On 30 November 1979 the Cantonal Tax Administration of the Republic and Canton of Geneva (hereinafter the Tax Administration) established a tax liability for 1979 for the Corporation on the basis of a profit of SwF85,175 and a capital of SwF1,624,800. The regular bill sent to the Corporation established the amount of the tax as SwF 27,160.85.

On 24 April 1980, the Tax Administration sent the Corporation an additional bill relating to the taxation of a profit of SwF42,122 and claiming a sum of SwF12,685.80. The reason for the additional bill was that a number of holders of unsecured loans did not meet the conditions specified in articles 66 f and 68 c of APT in so far as they were not taxpayers in Switzerland or were not sufficiently known. The Tax Authority had consequently classified as non-deductible interest a sum of SwF 29,808, of which SwF15,923.05 was credited to Yvor Jackson.

In an appeal of 14 May 1980, the Résidence Miremont Real Estate Corporation contested the additional tax claim. In its view, there was no doubt that Yvor Jackson must be considered a taxpayer in Switzerland. He had, furthermore, filed a tax declaration in 1979. In any case, the additional interest claimed as taxable should amount to SwF16,197 instead of SwF 29,809.

By a decision of 13 October 1980, the Tax Administration maintained its tax assessment, which was in its view in conformity with articles 68 c and 68 f of APT, which must be interpreted restrictively. Under that decision, international officials were not for tax purposes regarded as domiciled in Switzerland, in accordance with both domestic and international law (article 34 of the Vienna Convention on Diplomatic Relations of 18 April 1961[5]).

C. On 12 November 1980, the Résidence Miremont Real Estate Corporation appealed to the Cantonal Tax Appeal Commission maintaining that the interest credited to Yvor Jackson was deductible. That appeal was denied on 13 May 1982.

The Corporation then contested that decision before the Administrative Court of the Canton of Geneva by appeal of 23 June 1982.

On 9 November 1983, the Administrative Court rendered a decision rejecting the appeal essentially on the grounds that the term "taxpayer in Switzerland" employed in article 68 c of APT implied unlimited subjection to taxation in terms of both the obligation to take all the measures necessary to establish the amount of the tax and that of paying the tax. In view of the fact that Yvor Jackson, as an international official, was exempt from the taxes on income and property, he did not pay the general taxes in Switzerland and therefore could not be regarded as a "taxpayer in Switzerland". In that respect, it did not matter whether or not he was domiciled in Switzerland. The Corporation could not therefore claim deduction of the interest credited to that international official. This judgement was transmitted on 30 November 1983.

D. On 20 December 1983, the Résidence Miremont Real Estate Corporation and Yvor Jackson filed a public law appeal against the decision of the Administrative Court with the Federal Court. In addition to the annulment of the decision and the payment of costs, the appellants asked for the annulment of the Corporation's 1979 tax assessment because it disallowed the deductibility of the interest paid to Yvor Jackson by the Corporation; they also requested the Federal Court to direct "that the Cantonal Tax Administration of the Republic and Canton of Geneva submit a new tax claim for the year 1979 to the Résidence Miremont Real Estate Corporation which takes into account the deductibility of the interest credited to Mr. Yvor Jackson and the deductibility of the Real Estate Corporation's capital debt with respect to Mr. Jackson from its total taxable capital".

In support of their conclusions, the appellants maintained that the Authority referred to as well as the Cantonal Appeals Commission and the Tax Administration had interpreted the articles in question in an arbitrary and inequitable manner. That interpretation further constituted a violation of the provisions of international treaties and the principle of the overriding force of federal law. It was their view

that international officials should be regarded as taxpayers domiciled in Switzerland but enjoying exemptions in the sense that some of their income and part of their property was not subject to direct cantonal taxation. The deductibility of the interest paid to them by real estate corporations having their headquarters at Geneva should therefore be allowed.

The Council of State contested the admissibility of Yvor Jackson's legal action and concluded for the rest by rejecting the appeal.

Considering in law:

1. When a public law appeal is submitted to it, the Federal Court examines of its own motion the question of its admissibility without being bound by the conclusions of the parties or the legal arguments they have or have not utilized (ATF 109 Ia 118, 106 Ia 152, 106 Ib 126).

(*a*) The admissibility of a public law appeal is determined exclusively in accordance with the Federal Judicial Organization Act; the fact that the appellant has or has not been accepted as a party to the cantonal proceeding is, from this point of view, irrelevant (ATF 108 Ia 283, 105 Ia 57). Now, under article 88 OJ, individuals or groups damaged by decrees or decisions concerning them personally or of general scope are entitled to appeal. In this respect, the law requires that the appellant must show that he has a real and legal interest in the annulment of the decision attacked, a simple de facto interest or potential interest being in principle insufficient (ATF 108 Ib 124, 103 Ia 10, 101 Ia 543).

Although in the case under consideration there is no doubt as to the admissibility of the corporation's appeal, that of Yvor Jackson does not meet the requirements established under article 88 OJ. Indeed, in principle only the taxpayer directly affected by the decision has the right to appeal against his tax assessment (ATF 105 Ia 57 and references). As he is not responsible for payment of the tax under tax law, Yvor Jackson is not personally affected by the contested decision, which concerns the taxation of the corporation of which he is only one shareholder. The appellant fails to take into account the fundamental principle that the (real estate) corporation is a legal entity separate from the person of its shareholders (article 643 CO). The fact that the appellant corporation could claim an additional charge from him in order to compensate for the additional tax it must pay is not relevant and at most constitutes only a purely factual interest, not a legally protected interest.

(*b*) It has been consistently ruled that a public law appeal has only an annulling effect: except in the case of special circumstances—which do not exist in this case—an appellant cannot request anything but the annulment of the decision attacked (ATF 109 Ia 82 and the decrees cited). The appellant corporation's request to the Federal Court that it order the cantonal authority to prepare a new tax bill is inadmissible.

The same is true of the Résidence Miremont Real Estate Corporation's request for annulment of the tax assessment "inasmuch as it does not allow the deductibility of the interest . . ." Under Geneva tax law, the Administrative Court's authority to consider is not limited when it is ruling correctively (article 359 APT, article 9, para. 1, chap. 3, of the Act concerning the Administrative Court and the Disputes Court of 29 May 1970, article 3, para. 1 a, of the Act establishing a code of administrative procedure of 6 December 1968). The case law under which a person contesting in good time, by means of a public law appeal, a decision made by an appeals authority having limited examining authority may simultaneously contest the decision of the lower cantonal authority on points which could not be submitted to the cantonal appeals authority is inapplicable (ATF 104 Ia 204/205, 100 Ia 123).

2. The appellant argues firstly that the Administrative Court has arbitrarily interpreted or—applied—articles 66 f and 68 c of APT.

(*a*) Under article 90, paragraph 1 b, of OJ, an appeal, to be admissible, must contain a brief statement of the constitutional rights or legal principles violated, specifying the nature of the violation. When a public law appeal is submitted to it, it is not the function of the Federal Court itself to consider whether the contested decision violates Federal or cantonal constitutional law; it is bound by the arguments the appellant has invoked in his brief and can therefore rule only on the complaints that the appellant has not only alleged but also adequately substantiated (ATF 110 Ia 3, 107 Ia 186, 96 I 17, 451). In the case of an appeal on grounds of arbitrary action, an appellant may not simply claim such

action and oppose his own argument to that of the cantonal authority. He must demonstrate, by specific argument, that the decision made is based on a clearly untenable interpretation or application of the law (ATF 107 Ia 186). On this point, the appeal, although it was drawn up by an attorney, limited to criticisms of an appellatory nature, without attempting to demonstrate that the interpretation or application of the law is untenable; it thus obviously confuses the Federal Court, which is a court of constitutional law, with an appeals court or a corrective authority having full power of cognizance and unlimited examining authority. In these circumstances, the admissibility of this first argument is open to serious doubt; the question may, however, be left open as the allegation of arbitrary action is in any case unfounded.

(*b*) Under article 66 f APT, interest on debts which cannot be deducted under article 68 c is considered net taxable income. This provision, which was amended by the Act of 18 September 1989, which came into effect on 1 January 1981, formerly read as follows:

"The following is considered taxable capital:

. . .

(*c*) In the case of real estate corporations, that is, the legal persons enumerated in article 60 whose principal activity is the construction, possession, use, purchase and sale of buildings, the value of the buildings they possess, established pursuant to article 48, after deduction of unsecured and secured debts substantiated by certificate, excerpts from accounts or ledgers, or receipts for interest, except where the creditor is not a taxpayer in Switzerland . . ."

The question is therefore whether the cantonal judges acted arbitrarily in ruling that Yvor Jackson is not a "taxpayer in Switzerland".

When an appeal is submitted to it alleging arbitrary interpretation of a legal provision, the Federal Court does not seek to establish the correct interpretation of the rule in question but only whether the interpretation made by the authority referred to can be objectively sustained (ATF 109 Ia 22). In the present case, on the basis of the court's jurisprudence and case-law, the Administrative Court decided that only someone who pays all the taxes corresponding to his total financial situation in Geneva can be a "taxpayer in Switzerland" within the meaning of article 68 c, chap. 1 APT. This interpretation is justified—subject to the reservation, irrelevant here, that the legal text requires that payment be made in Switzerland and not solely in Geneva—and has moreover been confirmed by jurisprudence (unpublished decree of 24 February 1939, consid. 1 in the *Humbert* case). It is not contested that, as an international official benefiting from tax exemptions, Yvor Jackson does not pay general taxes in Switzerland; it is therefore certainly not arbitrary to consider that he does not fulfil the condition established by the disputed provision and is not consequently a "taxpayer in Switzerland".

It may be noted, nevertheless, that the appellant does not criticize this interpretation. He does seek to allege that international officials have their tax domicile in Geneva, but, as the authority referred to has already properly pointed out, that is not the question.

(*c*) Although the solution adopted by the Geneva tax authorities seems in no way inequitable, that proposed by the appellant flagrantly violates the sense of justice. It should not be forgotten that the Geneva legislator authorizes real estate corporations to treat the interest they pay as deductible expenses to the extent that such interest is subject to the tax on income of the persons receiving it. The deductibility of interest paid to international officials who, benefiting from a very generous interpretation of Geneva tax law and headquarters agreements, are not subject to income tax, is not therefore allowable.

3. The other arguments invoked by the appellant are also either inadmissible or without foundation.

(*a*) In jurisprudence, the principle of equal treatment prohibits the making of legal distinctions between different cases which are unjustified by any important fact or applying identical treatment to factual situations which differ significantly from each other and differ in ways which make different treatment necessary; in other words, similar legal treatment should be given to similar factual situations and different legal treatment to different factual situations (ATF 110 Ia 13/14, 103 Ia 519, 100 Ia 328).

In the present case, the appellant claims to have been subjected to unequal treatment by the Tax

m., Administration because it allows the deduction of interest and capital for debts contracted by a Geneva real estate corporation with respect to the permanent missions of various States to the United Nations while disallowing them where the creditors are senior international officials.

Even if the Federal Court were to consider a letter from a real estate agency concerning the United Kingdom and Qatar missions as sufficient proof in itself of a practice extending to all the permanent missions to the United Nations in the same situation, that difference of treatment would not in itself constitute a violation of article 4 Cst. There is a fundamental difference between an official of an international organization and the diplomatic mission of a State to that organization. The distinction based on the different legal character of the foreign State, which is subject to international public law, seems sufficiently well founded to permit the canton to grant such tax privileges as are within its jurisdiction to real estate corporations whose creditors are foreign States without extending them to corporations whose creditors are private individuals.

The same is true of real estate corporations which pay interest to shareholders who, as taxpayers in Switzerland, regularly pay all their taxes in Switzerland: in that case, the interest is subject to taxation while in the case of the international officials those officials are exempt from precisely such taxation.

(*b*) Lastly, the appellant complains of a violation of international agreements, and in particular article 34 of the Vienna Convention on Diplomatic Relations: although they are not diplomatic agents in the meaning of that Convention, international officials have been granted the benefit of the advantages conferred on that category of persons by the Convention. In particular, they enjoy the tax exemption provided for in article 34 of the Convention. As Yvor Jackson is in fact exempt from taxation, there is obviously no question of a violation of that clause of the Convention. The fact that the real estate corporation transfers the burden of the tax by increasing the rent paid by the beneficiary of the exemption has no effect in that respect (cf. Ménétrey, Tax Status of Diplomatic and Consular Missions and their Staff, RDAF 1978, p. 7).

4. Inasmuch as their cases fail entirely, Yvor Jackson—whose appeal is inadmissible—and the Résidence Miremont Real Estate Corporation—whose appeal is denied in so far as it is admissible—must jointly bear all the legal costs. As the pecuniary interest in question refers not only to the tax for one year (about SwF5,000) but, as the appellants emphasize in their brief, the taxes for subsequent years, it is appropriate to fix the fee at SwF1,200.

For these reasons,

the Federal Court,

pursuant to article 92, paragraph 1 OJ:

1. Declares the appeal of Yvor Jackson inadmissible and denies that of the Résidence Miremont Real Estate Corporation to the extent that it is admissible;

2. Holds the appellants jointly liable for:

(*a*) a court fee of SwF1,200,

(*b*) shipping expenses of SwF188,

(*c*) clerical expenses of SwF22;

3. Transmits copies of this decree to the attorney for the appellants, the Cantonal Tax Administration and the Administrative Court of the Canton of Geneva.

NOTES

[1]Translation prepared by the Secretariat of the United Nations on the basis of a German version of the judgement.

[2]The decision is published in *International Legal Materials*, vol. XXIV, p. 1639 (1985), and in *ICSID Review—Foreign Investment Law Journal*, vol. 1, No. 2 (1986).

[3]United Nations, *Treaty Series*, vol. 575, p. 159.

[4]Translation prepared by the Secretariat of the United Nations on the basis of a French version of the decree.

[5]United Nations, *Treaty Series*, vol. 500. p. 95.