

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 6
(31 March 1995)**

**Ferdinand P. Mesch and Robert Y. Siy
v.
Asian Development Bank
(No. 2)**

**E. Lauterpacht, Chairman
F.P. Feliciano, Member
M.D.H. Fernando, Member**

1. This is an application for the interpretation and implementation of the decision of the Tribunal in Mesch and Siy, Decision No. 2 of 8 January 1994 ("the Decision").

2. The principal issue in the case was whether the terms and conditions of employment of the Applicants required the Bank to reimburse income tax levied on their salaries by the member States of which they were nationals. By letter dated 10 February 1992, the Applicants had claimed reimbursement of taxes paid for several years, up to and including 1991.

3. The Decision of the Tribunal was that:

"1. in principle, the terms and conditions of employment of the Applicants entitle them to reimbursement (computed in the manner stated in paragraph 23) of income tax levied and paid on their salaries;

2. the Bank shall reimburse the Applicants the income tax levied and paid on their salaries beginning with the year 1990 together with interest at 5% per annum from 10 February 1992 in respect of the years 1990 and 1991;"

4. The Tribunal clarified the circumstances in which that obligation arose, as well as the extent of that obligation, thus:

"22. Moreover . . . the Bank's obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax.

23. [T]he concept of 'tax reimbursement' means reimbursement only for income tax actually payable and paid in respect of salaries received from the Bank. Each Applicant's entitlement to such reimbursement in each case must be restricted to the amount of income tax payable and paid by him on the assumption that the salary received from the Bank constituted his total income. Further, in determining the reimbursable amount of income tax paid by each Applicant, any tax credits or benefits to which he is entitled under his national tax system must be applied first in respect of his salary from the Bank."

5. The Tribunal summarized the reasons for its decision as follows:

"14. . . . The Charter, By-laws and Board Resolutions did not establish any obligation of the Bank in respect of the reimbursement of income tax levied on staff salaries; equally,

however, those documents did not prohibit the adoption of any such obligation. Likewise, although the letters of appointment issued by the Bank to professional staff did not include any express undertaking to reimburse income tax, nevertheless they did not specifically exclude that prospect. There was thus no pronouncement by the Bank as to the exclusion of tax reimbursement. Moreover, the letters of appointment sent to staff members made the Bank's administrative regulations part of the contract between the Bank and the staff members. Accordingly, from 1967 onwards, the principle of equal compensation for comparable work (contained in Administrative Instruction ADM-7) was part of the terms and conditions of all staff members; and by 1972 the Bank acknowledged the need to apply salary policies equitably throughout the Bank. Thereafter, the Bank accepted, in principle and in practice, that its professional staff were entitled to 'equitable remuneration' both internally (in relation to their colleagues in the Bank) and externally (i.e., bearing 'a reasonable degree of comparability' with the remuneration of their IBRD counterparts).

15. The Tribunal observes that the comparison of compensation levels on the practical plane necessarily involves a consideration of the net benefits, after tax if any, to the recipient. Therefore, it cannot be said that a given salary which, in the hands of one recipient, is taxable is the same as the identical figure which, in the hands of another, is not. Accordingly, the failure to consider the incidence of taxation is inconsistent with the principles of 'equal compensation for comparable work.'

16. The Tribunal is conscious that the implementation of this principle will increase the overall amounts that the Bank must pay to the professional staff. However, that is not a reason for rejecting the logical operation of the principle of equality. The ultimate financial consequences of the proper application of the principle of equal compensation for comparable work, to which the Bank has subscribed since its earliest days, are something that can only be worked out between the Bank and its Members.

17. In balancing in the present case the equities as between the Bank and its staff, the Tribunal considers that more weight should be given to the interests of the employee than to those of the employer, if only because the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement. But it never did so. Any ambiguity or uncertainty in this respect, wherever appearing in documents emanating from the Bank must, therefore, be resolved *contra proferentem* and in favor of the staff."

6. The Applicants made several requests to the Bank to implement the Decision expeditiously. On 11 March 1994 the Bank informed them that:

"Whilst the requirement to reimburse [them] for taxes payable and paid is not in dispute, the Decision has major ramifications for the Bank and will impact on other staff if any general tax reimbursement scheme is instituted . . . a working group was constituted to review the implications of the Tribunal decision and the report of the working group has been submitted to the General Counsel and Director, BPMSD."

Thereafter, on 14 June 1994 the Bank stated that:

"[It] is still examining the full impact of the judgment on, and its implication to, the Bank, and is actively studying how to establish an appropriate mechanism to give full effect to the judgment.

In the meantime the [Bank] will shortly provide the Applicants with interim reimbursement with respect to tax payments already made by the Applicants."

7. By a memorandum dated 9 August 1994, the Applicants complained to the Tribunal that although seven months had elapsed after the Decision, the Bank had not implemented the Decision, and that they believed that the Bank had arrived at an interpretation which might frustrate the intent and spirit of the Decision. Accordingly they requested the Tribunal to interpret or clarify five aspects of the Decision:

- a. whether the Bank may unilaterally amend its compensation policies to exclude the principle of equal pay for comparable work;
- b. whether the Bank was bound to reimburse taxes paid by the Applicants on that portion of their salaries which was withheld by the Bank as being their contributions to the Bank's Staff Retirement Plan;
- c. whether the Bank was entitled to delay implementation of the Decision, and whether the Bank should be required to pay interest at a rate exceeding 5% p.a. in respect of the delay in tax reimbursement after the date of the Decision;
- d. whether the Bank was obliged to pay interest on tax reimbursement due for the years 1992 and 1993; and
- e. whether the Bank could be regarded as having fully implemented the Decision only when it established a formal mechanism for tax reimbursement in respect of all affected staff.

8. By two memoranda dated 11 August 1994, the Bank informed the Applicants that on 12 August 1994 they would be paid US\$8,833 (Mr. Mesch) and US\$72,493 (Mr. Siy), being 85% of their claims for 1990, 1991, 1992 and 1993. This included interest at 5% p.a. for the period 10 February 1992 to 10 August 1994 in respect of the tax reimbursement for 1990 and 1991, but not for 1992 and 1993. The withholding by the Bank of 15% of the amounts claimed by each Applicant was because the Bank had decided not to reimburse that part of the taxes paid by the Applicants attributable to the portions of their salaries required by the Bank to be deducted at source as compulsory contributions by each Applicant to the Bank's Staff Retirement Plan.

9. On 6 October 1994 the Board of Directors of the Bank resolved that:

"That the Bank shall discharge its obligations under the Statute of the Administrative Tribunal of the Asian Development Bank in connection with Decision No. 2 and reimburse the income tax levied and paid by staff members as follows:

- a. With respect to [the Applicants], the Bank shall make tax reimbursement as instructed by the Decision . . . ;
- b. With respect to 'other members of the professional staff in situations comparable to those of the Applicants', the Bank shall reimburse taxes paid by them at least

in 1994 for their income derived from the Bank in respect of the year 1993 upon a reasonably prompt claim being made before the end of 1994, accompanied by proof of payment of such taxes, in accordance with the same rationale of the Decision;

- c. With respect to those professional staff members whose letters of appointment included the express exclusion of the prospect of tax reimbursement since July 1992, the Bank shall make no tax reimbursement in accordance with the letters of appointment accepted by those staff members; and
- d. in determining the amount of taxes to be reimbursed pursuant to the Decision and its rationale, the Bank shall exclude the amount of the taxes paid, if any, on the Bank's and the staff member's contributions to the retirement plan; furthermore, the Bank shall likewise exclude the amount of the taxes paid by beneficiaries of the Bank's Retirement Plan on their income.

That the Bank shall hereby reaffirm its long-standing practice of no reimbursement of taxes and, except as otherwise provided in Part I of this Resolution, the Bank shall not reimburse the taxes paid by any Governor, any Director, any Alternate, the President, any Vice President and any staff member of the Bank for the taxes paid by them on their salaries and emoluments paid by the Bank, effective upon the date of this Resolution.

That for the purpose of the preceding paragraph, the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally shall be construed to be applied before the imposition of any tax, and any policy pronouncements, administrative regulations, orders and circulars not consistent with the provisions of this Resolution shall be deemed to have been amended by this Resolution."

10. This Tribunal is satisfied that it has the inherent power to interpret its own decisions and to give necessary directions as to implementation in the event of any uncertainty or ambiguity. Indeed, the parties have not suggested otherwise. At the same time, the Tribunal is guided by the statement of the International Court of Justice, in which, in dealing with a request for interpretation of one of its own judgments, it said:

"The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided." (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, I.C.J. Reports 1950, p. 395, at p. 402).

A. Did the Decision hold that the principle of equal pay for comparable work was a fundamental condition of employment?

11. The Applicants contend in the present proceedings that the Decision "makes it clear that the Tribunal considers the principle of 'equal pay for comparable work' as a fundamental and essential condition of employment that may not be unilaterally withheld." They say that the Bank has interpreted paragraph 17 of the Decision to mean (a) that the Bank may unilaterally amend its compensation policies to exclude this principle, and thereby disallow any form of tax reimbursement for all staff, without violating any of their terms or conditions of employment, and

(b) that the Bank may re-state its guarantee of "equal pay for equal work" as being applicable only before tax.

12. Although it is true that in the proceedings leading to the Decision the parties exchanged arguments as to whether the right to tax reimbursement was a "fundamental and essential" condition of employment, the fact remains that the Tribunal decided no more than that the terms and conditions of employment of the Applicants required the Bank to reimburse income tax levied on their salaries by the member States of which they were nationals. In order to determine that question the Tribunal did not need to discuss or decide - and did not actually discuss or decide - that those terms or conditions could not be unilaterally amended by the Bank either because they were "fundamental and essential" or because the Applicants had "acquired rights" or "vested rights" in respect thereof. It was sufficient for the Tribunal to decide that the obligation to reimburse tax was a condition of employment. The quality of that condition - whether it was "fundamental and essential" or not - was not relevant since, at that time, the question whether the Bank had any right to change that condition had not arisen; and it is only in relation to the possibility of change that the characterization of the condition as "fundamental and essential" matters.

13. The Tribunal holds that the question whether the Bank can unilaterally amend the term or condition as to tax reimbursement, insofar as it arises between the Applicants and the Bank, is not a matter of interpretation or clarification of the Decision but a separate issue which arises from the preparatory steps which the Bank then took with a view to adopting the Resolution of 6 October 1994. Any grievance which the Applicants may have in that respect cannot be decided by the Tribunal in this case.

B. Reimbursement of taxes on staff pension contributions

14. The Bank seeks to withhold reimbursement of taxes paid by the Applicants in respect of their contributions, made in the form of deductions from their salaries, to the Bank's Staff Retirement Plan through which their pensions would ultimately be paid. The Decision on its face does not authorize such withholding. These contributions are made by Staff members out of their salaries. This can only mean that their gross salaries included the amounts then deducted as their contributions to the Staff Retirement Plan. Having paid income tax on the whole of their salaries, including the amounts contributed to the Staff Retirement Plan, the Applicants are entitled to reimbursement of the whole of the tax so paid, together with interest thereon at the rate of 5% from 10 February 1992. The Tribunal cannot contemplate the possibility of further delay on the part of the Bank in the full payment of the sums involved.

C. Delay in implementation and payment of interest

15. The Applicants contend that the Bank unreasonably delayed the reimbursement of tax for 1990 and 1991 due to the Bank's erroneous interpretation that the Tribunal had permitted such delay on the basis that the Applicants would be entitled to interest at 5% p.a. They claim that the Bank was not only obliged to implement the Decision promptly, but also that the stipulated rate of interest was applicable only to delay up to the date of judgment, and that this rate of interest "no longer represents appropriate or equitable compensation for the financial and moral injury suffered by the Applicants as a result of the [Bank's] continuing failure to implement the Decision."

16. The Applicants allege that the delay was "unreasonable, unnecessary and associated mainly with the [Bank's] efforts to circumvent the Decision." The Tribunal notes, however, that

on 11 March 1994, and again on 14 June 1994, the Bank confirmed that tax reimbursement would be made; and interim payments were in fact made on 12 August 1994.

17. The decisions of this Tribunal must be promptly implemented. However, what is "prompt" cannot be rigidly defined in terms of a period of days or weeks. It depends on the nature of each decision. Nonetheless, in the present case, it is difficult to see what justification there can be for so long a delay in making the interim payments, even taking into account the complexity of the issues facing the Bank. The appropriate remedy for delay is, of course, an order requiring payment of interest. In this case, however, payment of interest at the rate of 5% p.a. has already been ordered and the Bank has paid it. The Tribunal therefore makes no order for damages or enhanced interest in respect of the delay in implementation.

D. Interest on tax reimbursement for 1992 and 1993

18. The Applicants claim interest on the tax reimbursements for 1992 and 1993. The question of reimbursement for 1992 and 1993 was not formally a matter covered by the Decision. The substance of the Decision was applicable to 1992 and 1993 and this was recognized by the Bank in making tax reimbursements for those years. In its Comments on the Application, the Bank stated that it agreed to pay interest at the rate of 5% p.a. on any delay in making tax reimbursements for 1992 and 1993.

19. The Tribunal therefore makes no order in this respect.

E. Establishment of a formal mechanism for tax reimbursement

20. The Applicants claim that "unless the [Bank] makes a public acknowledgment of its obligation to reimburse taxes on Bank salaries and takes action to establish a formal mechanism to provide tax reimbursement for all affected staff including the Applicants, it cannot be considered as having implemented in substance the Tribunal's order."

21. This claim is misconceived. The Decision granted relief only to the Applicants. Of course, as the Tribunal stated in its Judgment, the Decision had implications for other members of the professional staff in situations comparable to those of the Applicants in that, if the same principles were not applied to them, they may become entitled to similar relief from the Tribunal. That, however, is not a question of implementation of the Decision, though it may be a matter for another case.

F. Costs

22. The Applicants in their Reply to the Bank's Comments in the present proceedings have asked for costs incurred "in pursuing this case, including the submissions related to [their] request for interpretation." In so far as this request extends to costs incurred in the proceedings leading to the Decision, it cannot be entertained in the present proceedings which are limited to the interpretation of the Decision. In so far as the request relates to costs incurred in pursuing the present Application, the Tribunal recognizes that the cause of the Applicants' request for interpretation has been the unjustifiable delay by the Bank in the payment of the whole of the Applicants' entitlement to the reimbursement of tax paid on their 1990 and 1991 salaries and of the interest thereon. The Applicants have evidently been put to considerable trouble in presenting their claims to the Bank and in developing their case in this respect. The Tribunal is therefore prepared to award them costs in respect of the present Application only.

Notwithstanding the absence of the particulars of such costs, the Tribunal fixes the sum to which the Applicants are thus entitled at US\$2,000.

Decision:

Although amendments made to the Statute of the Tribunal on 22 December 1994 (effective 1 January 1995) increased the number of Members of the Tribunal to five and also permit the Tribunal to adjudicate in panels of three, the Board of Directors of the Bank have not yet appointed the additional Members of the Tribunal foreseen in those amendments. The Tribunal has, therefore, decided that the present case should be considered and determined by reference to the Statute of the Tribunal as it stood prior to the adoption of the above mentioned amendments.

For these reasons the Tribunal unanimously:

- a. orders the Bank to pay immediately to the Applicants with interest any balance of the tax reimbursement still outstanding in respect of 1990 and 1991, as stated in paragraph 14 above;
- b. dismisses all the other claims; and
- c. orders the payment to the Applicants jointly of costs in the amount of US\$2,000.