JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
16 July 1998 *

In Joined Cases T-202/96 and T-204/96,

Andrea von Löwis and **Marta Alvarez-Cotera**, conference interpreters, residing in Geneva, Switzerland, represented by Gerard van der Wal, Advocate with the right of audience before the Hoge Raad der Nederlanden and member of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand Rue,

applicants,

the second applicant being supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat, Federal Ministry of Economic Affairs, Bonn, Germany, acting as Agent,

intervener,

v

Commission of the European Communities, represented by Peter Oliver, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the repayment of the Community tax deducted from the applicants' remuneration since 1 January 1989,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of: V. Tiili, President, C. P. Briët, K. Lenaerts, A. Potocki and J. D. Cooke, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 5 May 1998,

gives the following

Judgment

Legal background

1 Under Article 13 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 ('the Protocol'):

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission.

The shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

2 Since 1970 the Commission has concluded with the Association Internationale des Interprètes de Conférence (International Association of Conference Interpreters, 'AIIC'), five-year framework agreements laying down the conditions of work and remuneration of freelance interpreters working for the Community institutions.

3 Under the first paragraph of Article 1 of the framework agreements, those agreements 'shall apply, irrespective of the place of employment, to freelance conference interpreters engaged by the Commission under the conditions laid down in the provisions concerning conference interpreters which may be applied by the institution where they work'.

4 In the preamble to the framework agreement concluded on 9 December 1988 ('the 1988 framework agreement'), the contracting parties observed that the European Parliament, pursuant to Article 78 of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment'), levied Community tax on the remuneration of freelance interpreters engaged on its behalf. The signatories of the 1988 framework agreement accordingly considered it desirable, 'with reference solely to the tax provisions arising from the application of Article 78 of the Conditions of Employment, to guarantee equal treatment, for tax purposes, of all freelance interpreters'.

5 Thus, Article 8 of the 1988 framework agreement, which entered into force on 1 January 1989, provided that:

'Freelance interpreters engaged by the Commission on behalf of all the institutions of the Community shall be liable to the tax for the benefit of the Communities, established by Article 13 of [the Protocol].

The preceding paragraph shall not apply to any person who is not a national of one of the Member States of the Community, other than by derogation granted by the institution.'

6 In order to take account of the particular situation of freelance interpreters residing in a non-member State, a third paragraph was added to Article 8 of the framework agreement concluded on 15 September 1994 and covering the period from 1 January 1994 to 31 December 1998 ('the 1994 Agreement'), which provides:

'Where remuneration paid by the Commission is subject to tax in a non-member State and by way of derogation from the first paragraph, the amount of the Community tax as deducted shall, upon production of documentary evidence, be refunded to the freelance interpreter up to an amount equal to the national tax.'

7 So far as concerns the settlement of individual disputes, Article 23 provides that, should it prove impossible to settle a dispute by way of the pre-litigation procedure described in Article 22, the freelance interpreter concerned may bring the matter before the Court of Justice, which is given jurisdiction in that regard, pursuant to Article 42 of the ECSC Treaty, Article 181 of the EC Treaty and Article 153 of the EAEC Treaty, by the contracts under which such interpreters are engaged.

8 The second paragraph of Article 23 provides that, subject to the provisions of the agreement and annexes thereto and of the individual contracts by which they are engaged, Belgian law governs the contractual relations between freelance interpreters and the institutions.

9 In practice, freelance conference interpreters are engaged at short notice by telephone or by fax for a period generally limited to a few days. The contract is subsequently formalised by written confirmation signed by both parties.

10 It is clearly stated in that confirmation that the engagement is governed both by the rules concerning freelance conference interpreters adopted by the institution to which the person concerned provides his or her services and by the framework agreement in force. The confirmation also refers to the arbitration clause conferring jurisdiction contained in Article 23 of that framework agreement.

Facts

11 Ms von Löwis is German and Ms Alvarez-Cotera is Spanish and Swiss. They have been resident in Switzerland since 1964 and 1970 respectively. They both work as freelance interpreters for the Community institutions; Ms Von Löwis has worked between 125 and 135 days per year since 1973 and Ms Alvarez-Cotera approximately 40 to 50 days per year since March 1986.

12 Because the Commission has been deducting Community tax from the remuneration of freelance interpreters since 1 January 1989, the applicants are potentially subject to double taxation on that remuneration because of their liability to Swiss income tax.

13 In accordance with the first paragraph of Article 22 of the 1994 framework agreement, Ms Alvarez-Cotera and Ms Von Löwis requested the Commission, on 23 April 1996 and 8 July 1996 respectively, to refund the Community tax paid by them since 1989.

14 After meeting with a refusal from the Director of the Conferences Directorate of the Joint Interpreting and Conference Service, the applicants referred identical requests to the relevant Directors General.

15 By decisions of 25 September 1996 and 21 October 1996, those requests, too, were rejected, on the ground that the applicants had, prior to 1994, provided their services as interpreters in full knowledge of the framework agreements concluded with the AIIC and that the third paragraph of Article 8, inserted by the 1994 Agreement, could have an effect only on services provided after 1994. For the purpose of refunding the Community tax under the latter provision, the Commission required the production of documentary evidence of the payments actually made to the Swiss tax authority.

Procedure

16 By applications lodged at the Court Registry on 9 December 1996, the applicants brought the present actions for repayment of the Community tax.

17 On 22 May 1997 the Federal Republic of Germany applied for leave to intervene in Case T-204/96 in support of the form of order sought by the applicant. That application was granted by order of 11 July 1997.

18 By order of 18 November 1997 Cases T-202/96 and T-204/96 were joined, pursuant to Article 50 of the Rules of Procedure, for the purposes of the oral procedure and the judgment.

19 The cases, which had originally been assigned to the Third Chamber, were referred to the Third Chamber, Extended Composition, by decision of the Court of 4 February 1998, taken in accordance with Articles 14 and 51 of the Rules of Procedure.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure. As a measure of organisation of the procedure, it requested the Commission to provide certain information.

21 The parties presented oral argument and replied to the Court's questions at the hearing which took place on 5 May 1998.

Forms of order sought

22 The applicants claim that the Court should:

— declare the actions admissible;

— annul the decisions of 25 September and 21 October 1996;

— declare the application of Community tax to the applicants unlawful and/or declare Article 8 of the framework agreement null and void;

— order repayment of the Community tax withheld by the Commission and/or paid by the applicants since 1 January 1989 until the date of the judgment to be given in this case, together with interest at the rate of 8% or as laid down by law;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the actions;

— order the applicants to pay the costs.

24 The intervener in Case T-204/96 asks the Court to grant the applicant's claim for repayment of the Community tax.

The legal nature of the employment relationship of the applicants

25 It is clear — and it is not in dispute between the parties — that as freelance interpreters engaged under contracts for short periods, which are renewed on a frequent basis from year to year, the applicants are not to be regarded as officials or servants of the Communities within the meaning of the Conditions of Employment (Case 43/84 *Maag* v *Commission* [1985] ECR 2581, paragraph 23, Case 111/84 *Institut National d'Assurances Sociales pour Travailleurs Indépendants* v *Cantisani* [1985] ECR 2671, paragraph 13), but rather as persons having a contractual relationship with the Commission, determined by terms and conditions of a private-law nature which are, by virtue of Article 23 of the framework agreements,

governed by Belgian law with regard to all those matters not covered by the individual contracts by which they are engaged and the framework agreements.

26 It follows that the present actions are based on contract.

Admissibility

The plea of lack of competence of the Court of First Instance

Arguments of the parties

27 The Commission argues that the Court of First Instance has no jurisdiction to hear and determine the two actions in so far as they relate to individual contracts concluded prior to 1 August 1993, which should have formed the subject-matter of a separate action before the Court of Justice. The second paragraph of Article 3 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21, 'the Council Decision') limits the jurisdiction conferred on the Court of First Instance in actions brought, as in the present case, by natural persons under an arbitration clause to disputes relating to the performance only of contracts concluded after its entry into force on 1 August 1993.

28 The applicants, supported, in substance, by the intervener, contend that the Court of First Instance has jurisdiction over their actions since they were brought after the entry into force of the 1994 framework agreement and they concern a continu-

ous legal relationship with the Commission composed of multiple short-term contracts which cannot properly be considered separately.

Findings of the Court

29 The present actions raise the issue of the lawfulness of levying Community tax, under identical provisions of the two framework agreements applicable from 1989 to 1994 and from 1994 to 1998 respectively, on the remuneration which the Commission paid to the applicants under a series of essentially identical individual contracts concluded after 1 January 1989.

30 In those circumstances, it is appropriate from the point of view of the sound administration of justice and the judicial protection of the applicants that the Court of First Instance should hear and determine the dispute as a whole, irrespective of whether the individual contracts by which they are engaged were concluded before or after the entry into force of the Council Decision (cf. the judgment in Case 109/81 *Porta* v *Commission* [1982] ECR 2469, paragraph 10).

31 The plea of lack of competence raised by the Commission must therefore be rejected.

The plea of inadmissibility alleging confusion of remedies

32 The Commission accuses the applicants, in substance, of attempting to blur the fundamental distinction between a remedy which is contractual in nature and an action for annulment. In particular, the applicants are not entitled to characterise the final measures taken by the Commission in the pre-litigation procedure prescribed by the contract as decisions nor to seek their annulment.

33 The applicants reply that their claims cannot be viewed as being confined to disputes of a private-law nature because, by proceeding — unlawfully — to levy the Community tax, the Commission acted not as a party to a contract but as a public authority.

34 Here, the Court need merely note that, as is clear from their claims, the applicants are asking it, in accordance with the contractual nature of the present disputes, to order the Commission to repay the Community tax, alleging that there is no legal basis for the provisions of the framework agreements on foot of which the tax has been withheld.

35 It follows that the plea of inadmissibility raised by the Commission cannot be upheld.

The pleas of inadmissibility alleging breach of the Rules of Procedure

36 The Commission observes, in the first place, that the applicants failed, contrary to Article 44(5a) of the Rules of Procedure, to append to their application a copy of all their contracts of employment containing the arbitration clause.

37 The applicants reply that they duly lodged, with their application, both the applicable framework agreements and a copy of the contracts by which they were engaged, in compliance with the abovementioned provision.

38 The Court finds that the applicants correctly appended to their application a copy of the contracts under which they were engaged, containing the arbitration clause,

as provided for in Article 44(5a) of the Rules of Procedure, and that, in view of the essential similarity of their provisions, they were under no obligation to produce all the contracts subsequently concluded.

39 Secondly, the Commission criticises the applicants for not having specified the precise amount of the Community tax withheld from their income.

40 The applicants point out that what they are challenging is the actual principle of the application of Community tax to their remuneration, and submit that the absence of precise figures cannot render their actions inadmissible.

41 The Court considers that proceedings have been validly instituted before it with a view to obtaining a ruling both on the actual principle of whether the levying of Community tax by the Commission is lawful and on the claims for repayment. It is not disputed that the latter concern sums which the Commission itself withheld and which it is necessarily able to determine.

42 Thirdly, the Commission claims that the applicants have not even attempted to show by what rule of law they may challenge Article 8 of the two relevant framework agreements, in manifest breach of the obligation to state 'a summary of the pleas in law on which the application is based', imposed by Article 44(1)(c) of the Rules of Procedure.

43 The applicants, however, consider that they have adequately set out the reasons why they consider that the Commission wrongly applied Article 8 of the framework agreements to them.

44 The Court considers that the applicants have clearly asserted, referring to the relevant provisions of Community law, that the Commission had no power to withhold the tax in issue.

45 In those circumstances, the pleas of inadmissibility alleging breach of the Rules of Procedure must be rejected.

The plea of inadmissibility alleging acquiescence of the applicants in the levying of the Community tax

46 The Commission states that the applicants had accepted that they were liable to Community tax since 1989 and now seek repayment of that tax after having waited several years before bringing their action.

47 This plea must be considered with the substance of the case, of which it is an integral part.

Substance

Arguments of the parties

48 The applicants, supported in substance by the intervener in Case T-204/96, point out that, on the basis of Article 13 of the Protocol, the Council laid down the conditions and detailed rules for applying the Community tax to the remunerations

paid by the Communities to their officials and other servants in Regulation (EEC, Euratom, ECSC) No 260/68 of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ 1968 L 56, p. 8).

49 Since freelance interpreters are neither officials of the Communities nor other servants within the meaning of the Conditions of Employment, the Commission committed a manifest error in law in deducting the Community tax from their remuneration, in reliance on Article 8 of the framework agreements, when those agreements were concluded with an international association governed by private law and are themselves governed by civil law.

50 The Commission contends that the basis on which freelance interpreters are liable to Community tax is contractual, so that, by reason of the principle *pacta sunt servanda*, the applicants may not challenge the lawfulness of their contracts in the absence of any fraud, mistake, duress or similar defect. The Commission considers, moreover, that Article 8 of the framework agreements cannot be severed from its other provisions.

Findings of the Court

51 The first paragraph of Article 13 of the Protocol established a tax for the benefit of the Communities on the remuneration paid to officials and other servants by the Communities.

52 On the basis of that provision, Article 2 of Council Regulation No 260/68 stipulated that persons coming under the Staff Regulations or the Conditions of Employment, with the exception of local staff, were to be liable to that Community tax.

53 Since, as freelance interpreters, the applicants cannot be considered either as officials or as servants within the meaning of the Conditions of Employment, the Commission could not lawfully levy Community tax on the remuneration which it has paid to them since 1 January 1989.

54 Moreover, it is clear from the scheme of Article 13 of the Protocol that the liability, under the first paragraph, of officials and other servants of the Communities to Community tax on remuneration paid to them by the Communities necessarily has the corollary, expressed in the second paragraph, of exempting those concerned from national taxes on those same amounts.

55 That principle is stated more specifically in Article 2(a) of Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom certain provisions of the Protocol apply (OJ 1969 L 74, p. 1), as subsequently amended, according to which the provisions of the second paragraph of Article 13 of the Protocol apply, save for local staff, only to persons coming under the Staff Regulations or the Conditions of Employment.

56 It follows that the remuneration paid by the Commission to the applicants falls under the tax jurisdiction of the Member States.

57 Thus the Commission, by levying the Community tax at issue, also failed to take account of the tax jurisdiction retained by the Member States.

58 The applicants' claims for repayment must therefore be upheld, without there being any need to consider the pleas of inadmissibility which the Commission has based on the applicants' alleged consent to the Community tax being levied and on the non-severability of the provisions of the framework agreements (see paragraph 50 above). Neither the will of the parties nor the balance in the structure of an agreement may validly be invoked in order to secure the performance or continued performance of unlawful obligations.

59 It follows from the foregoing that the Commission must be ordered to repay to the applicants the sums referred to as Community tax which it has unlawfully levied on their remuneration paid since 1 January 1989, together with interest at the statutory rate applicable in Belgium, to run from the date of the first application for repayment submitted by each of the applicants respectively (see paragraph 13 above) until payment is actually made.

Costs

60 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

61 The Federal Republic of Germany, which has intervened in Case T-204/96, must bear its own costs pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1. **Orders the Commission to repay to the applicants the sums referred to as Community tax which it has unlawfully levied on their remuneration paid since 1 January 1989, together with interest at the statutory rate applicable in Belgium, to run from the date of the first application for repayment submitted by each of the applicants respectively until payment is actually made;**

2. **Dismisses the remainder of the applicants' claims;**

3. **Orders the Commission to pay the costs;**

4. **Orders the Federal Republic of Germany to pay its own costs.**

Tiili Briët Lenaerts

Potocki Cooke

Delivered in open court in Luxembourg on 16 July 1998.

H. Jung V. Tiili

Registrar President