Chapter Two

The Impact of the National Jurisdiction to Tax

The question of concern in the present study is how the international civil servant, given the particularities described in Chapter 1, is affected by the exercise of national jurisdiction to tax. To properly understand the issue of the tax treatment of international civil servants, it is necessary to take the doctrine of the jurisdiction to tax as the point of departure and place the practice with regard to the tax treatment of international civil servants in the context of their putative independence. As pointed out by the European Court of Justice in *Humblett*, one of the major risks of national taxation of international civil servants is that, if left unaddressed, it would interfere with the freedom of international organizations to fix the remunerations of their employees in complete independence:

> From another aspect the system applied by the defendant affects the freedom of the Community to fix the remuneration of its officials. Under this system an official of the Community would not merely be obliged to declare his remuneration to the tax authorities but also set out the usual deductions (expenses arising from employment and other expenses) relating to this salary in order to avoid excessive tax on his personal income. If national tax authorities were to examine the admissibility and the amount of these deductions they would have to look into the various components of the community salary. Apart from the unfortunate consequences which could follow from differences in standards of judgments between the national tax authorities, this would also affect the right of the community institutions to fix in complete independence the remuneration of their officials and thus to determine and justify various components of the total salary to each official.1

National taxation clearly constitutes a major challenge to the independence of international civil servants, particularly the independence of organizations to fix the remuneration of their staff members. A brief explanation of the

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The doctrine of jurisdiction to tax under international law should help to understand this concern.

It is, of course, conceivable theoretically that by virtue of international law, the institutional income of an international civil servant – i.e. the salary, emoluments and compensations paid by international organizations – could be declared to be beyond the prescriptive reach of the countries. As the present author has explained elsewhere, the material sphere of validity of any national legal order – including the competence in tax matters – may be limited by a rule of either general or particular international law. In other words, international law can remove some or even all national fiscal jurisdiction in respect to the income of international civil servants. This is illustrated by the European Court of Justice’s preliminary ruling in Van Gend & Loos. That case involved the question of whether member States of the European Community were still competent to take certain fiscal measures, notwithstanding Article 12 of the 1957 Treaty of Rome establishing the European Economic Community. The European Court of Justice held that the European Community constitutes in international law a new legal order, in favour of which States have, in a limited measure, restricted their sovereignty and hence their jurisdiction to tax. In Costa/E.N.E.L., the European Court Justice added that the transfer of competencies by Member States to the European Community under the Treaty of Rome, carries with it a clear limitation of their sovereign rights, upon which a subsequent unilateral legislation incompatible with the concept of European Community, cannot prevail. However, as far as concerns direct taxes, to date, this form of transfer of parts of national fiscal sovereignty to a supranational body has remained largely theoretical for most countries, even within the European Union. Therefore, it is debatable that as a matter of principle the institutional income of international civil servants can be said to be beyond the prescriptive reach of countries.

Consequently, it is safe to proceed on the presumption that, absent a rule of general or particular international law that removes the institutional income

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3 Martha, THE JURISDICTION TO TAX IN INTERNATIONAL LAW, op. cit., pp. 34–35.

4 Case 26–62. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Judgment of the Court of 5 February 1963, [1963] ECR 1. The case is authority for the proposition that articles of the EC Treaty are directly effective (as distinct from directly applicable) in their application against the State.

5 C-6/64 Flaminio Costa v. ENEL [1964] ECR 585, 593 concerned the doctrine known as the supremacy of EU law and took place in the European Court of Justice and is one of the most important cases in EU law.