Schlagworte: Anstellungsbedingungen, Steuerbefreiung, Steuerrückvergütung, Beamte schweizerischer Nationalität, Diskriminierungsverbot

Mots-clefs: conditions d'emploi, exemption d'impôts, remboursement d'impôts, agents de nationalité suisse, non-discrimination

Key words: conditions of employment, tax exemption, tax reimbursement, officials of Swiss nationality, non-discrimination

1/1996

Judgment of 7 July 1997

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Robert Patry, President,
Prof. Dr. Walther J. Habscheid, Delegated judge,
Prof. Dr. Arthur Meier-Hayoz, Panel Member,
lic. iur. Felix Heusler, Secretary of the Tribunal.

X. _____,
Y. _____,
represented by Z. _____, attorney at law in Basel

Applicants

versus

the Bank for International Settlements, international organisation with registered office in Basel,
represented by V. _____, attorney at law in Basel

Defendant

re

entitlement to reimbursement of taxes
(Article 1 of the Regulation on the reimbursement of taxes).

As to the facts

A.
Under the terms of the intergovernmental agreement concluded on 20th January 1930 and approved by the Federal Assembly on 25th February 1930 (SR [compendium of Swiss laws] 0.192.122.971), the Swiss Confederation undertook to grant the Bank for International Settlements a Constituent Charter which in Paragraph 6 (e) provides for exemption from all taxes on the remuneration and salaries paid by the Bank to members of its administration or its employees of non-Swiss nationality. This tax exemption was confirmed in Article 15 (a) of the Headquarters Agreement concluded between the Swiss Federal Council and the Bank on 10th February 1987; Switzerland may, however, take these emoluments into account for the purpose of determining the tax payable on income from other sources (SR 0.192.122.971.3).

On the other hand, employees of the Bank who are Swiss citizens are required to pay taxes on the salaries and allowances they receive from the Bank in accordance with the tax legislation of the Canton of Basel-Stadt; however, according to the Regulation on the reimbursement of taxes of 15th December 1951, the Bank reimburses to members of staff of Swiss nationality the taxes levied on their total salaries in the same measure as members of staff of non-Swiss nationality enjoy tax exemption pursuant to Paragraph 6 (e) of the Constituent Charter (Article 1 of the Regulation).

B.
X. _____, Swiss citizen, was employed by the Bank for International Settlements from 1957 to the end of 1994, when he took early retirement. On 7th July 1987 he Y. _____, who is still employed by the Bank as _____. Through marriage Y. _____ acquired the Swiss nationality of her husband while maintaining her native (_____) nationality. On the basis of the law on citizenship (as amended on 23rd March 1990; SR 141.0), she renounced her Swiss citizenship with effect from 5th July 1993.

During the period when both spouses were Swiss citizens, that is, from 7th July 1987 to 5th July 1993, they regularly paid taxes (federal, cantonal, communal and church taxes) in the Canton of Basel-Stadt on their total income inclusive of salaries. In application of the relevant tax legislation, this income was treated cumulatively (Art. 13, para. 1 BdBSt [federal decision on the collection of a direct federal tax] and Art. 2 of the law on direct taxation of the Canton of Basel-Stadt of 22nd December 1949 and 26th June 1986 respectively), albeit using the scale for married couples (Art. 40, para. 2 BdBSt and Art. 48 of the tax law of Basel-Stadt). The Bank did not, however, reimburse all the taxes paid, but cited Article 5 of the Regulation of 15th December 1951, whereby it had the right "to reimburse all or part of the taxes at a presumptive rate". It therefore paid to each of the two spouses individually a sum that would have corresponded to the taxes due if each spouse had been taxed separately; the Bank thus did not take account of the tax progression arising from the cumulation of the two incomes. According to the calculations of the accountants S. _____ AG, this meant that over the period from 1987 to 1993 the spouses paid an additional CHF _____ in taxes that was not reimbursed by the Bank.

C.
By registered letter to the General Manager of the Bank for International Settlements dated 25th August 1995, X. _____ submitted a request for reimbursement of these additional taxes in the amount of approximately CHF 90'000; he pointed out that he had already discussed this question with the Bank's Legal Adviser on a number of occasions, and that on 13th December 1994 he had given the Legal Adviser a letter for the attention of the Secretary General of the Bank.

By registered letter of 24th November 1995, within the 90-day time-limit prescribed by Article 15 of the Rules of Procedure of the Administrative Tribunal, the General Manager of the Bank set out the reasons why the Bank was not willing to grant the request of X. _____ and Y. _____ adding the following: "With regard to the period of limitation, we should like to confirm that this was interrupted with your first enquiry of 13th December 1994, insofar as it had not already elapsed".

D.
By letter of 25th August 1995 X. _____ also applied to the Bank for payment of a marriage allowance to his wife; in the written response of 24th November 1995 the General Manager noted "that this question should properly be put directly by your wife".

Y. _____ withdrew the application that had been filed by her lawyer with the Administrative Tribunal on 15th December, but which was in principle inadmissible. By letter of 15th March 1996 to the General Manager she then submitted a new request, in response to which he finally agreed to the payment of the marriage allowance.

This question is thus no longer in dispute and Proceedings No. 2/1996 were cancelled by the President of the Administrative Tribunal as having been resolved.

E.
On 15th December 1995 X. _____ and his wife, Y. _____, filed an application with the Administrative Tribunal and presented the following submissions:

"1. It is to be found that the Applicants, during the period when they were both Swiss citizens and resident in Basel, that is, from 1987 to 1993, are entitled, under the terms of the Regulation on the reimbursement of taxes to members of the BIS staff of Swiss nationality of 15th December 1951, to reimbursement of the taxes levied on their total salaries, in the same measure as members of staff of non-Swiss nationality enjoy tax exemption pursuant to Paragraph 6 (e) of the Constituent Charter.

It is accordingly to be found that the tax progression to which the two Applicants are subject as a married couple resident in Basel is also included in these total salaries, and the Defending Party is to be required to pay this additional tax arising from the progression to the two Applicants, or to each individually.

2. It is to be found that the subject of the dispute is not a claim by employees arising out of the employment relationship according to Article 128(3) of the Code of Obligations, but a payment which has public-law character and is subject to the statutory limitation laid down in Article 127 of the Code of Obligations.

3. The Personnel Section of the BIS is to be called upon by the Arbitral Tribunal (sic) to determine the difference between the taxes actually reimbursed to the two Applicants by the BIS in the years from 1987 to 1993 and the amounts for which they were assessed and paid to the tax administration as a married couple taking account of the tax progression (the Applicants have themselves estimated this sum at approximately CHF 90'000, and to inform the Tribunal of this sum.

4. The ordinary and extraordinary costs of the proceedings of the Arbitral Tribunal (sic) are to be awarded against the Defending Party."

On 29th March 1996 X. _____ and Y. _____ submitted a memorandum in accordance with Article 16.3 of the Rules of Procedure in which they, on the one hand, gave a breakdown of the taxes due and paid (direct federal, cantonal and church taxes) for each tax year over the

period 1987-1993 and, on the other hand, listed the sums which the Bank had reimbursed to them (i.e. in total CHF 236'964 to X. _____ and CHF 103'517.45 to Y. _____); in support of these statements, which were not contested, the Applicants produced the tax assessments and the accounts in respect of the reimbursements made by the Bank.

In their memorandum of 29th March 1996 X. _____ and Y. _____ presented the same submissions as in their application of 15th December 1995, with two differences: they added a third paragraph to Submission No. 1:

"Furthermore, by way of compensation for the damage caused to the Applicants by not offsetting their taxes, the Defending Party is to be required to pay them interest on overdue payment of 5 % of their total claims as from 31st July 1991."

In addition, in Submission No. 3 the Applicants stated that they had "themselves estimated this sum at approximately CHF 90'000 to CHF 100'000".

F.
The panel of the Administrative Tribunal responsible for judging this case was finally constituted after the Secretary of the Tribunal who had served hitherto was replaced owing to the existence of grounds for disqualification.

On 27th August 1996 the Defending Party filed its response to the application with the following submissions:

"1.The application is to be dismissed on all counts.

2. Alternatively, the claims for the tax years 1987 and 1988 are to be dismissed as having lapsed by limitation.

3. The ordinary and extraordinary costs of the proceedings are to be awarded against the Applicants."

G.
By decision of 23rd September 1996, the President of the Tribunal declared the exchange of written statements and documents closed and instructed the delegated judge to conduct the preliminary hearings in accordance with Article 21 of the Rules of Procedure.

By decision of 7th January 1997, delivered on 14th January 1997, the delegated judge invited the two parties to set out their positions on the various legal questions in writing. The Applicants then submitted a further memorandum on 24th January 1997, to which the Defending Party responded only in summary form with a submission on 4th February 1997.

On 6th February 1997 the delegated judge held the preliminary hearings with the two parties, in the presence of their legal representatives as well as, on the part of the Bank, various heads of service and the Bank's Legal Adviser, at the registered office of the Bank. The Secretary drew up a record of this meeting, which was then delivered to the parties.

During these preliminary hearings the delegated judge proposed that the Applicants' submission be modified so as to require the Defending Party to reimburse taxes in the amount of CHF 87'505, or alternatively CHF 80'294, plus 5 % interest on overdue payment of the individual annuities as from the following 1st April. The Defending Party objected to such modification of the submission with respect to the interest on overdue payment, but not with respect to the amount of the tax reimbursements, as an inadmissible change in the application. The Applicants declared themselves in agreement with the delegated judge's proposal and presented the following submissions:

"1. The Defending Party is to be required to reimburse taxes in the amount of CHF 87'505 in accordance with Annex 1 to the memorandum of 24th January 1997, or alternatively CHF 80'294 in accordance with Annex 2 to the memorandum of 24th January 1997, plus 5 % interest on overdue payment as from 1st April in respect of each of the preceding annuities.

2. The costs of the proceedings and out-of-court expenses are to be awarded against the Defending Party."

Both parties were then given another opportunity to submit any further clarification of their position to the delegated judge in writing. The lawyer of the Defending Party agreed with the proposal of the delegated judge that the proceedings be confined to the legal questions. On 13th February 1997 the Applicants' lawyer presented various documents that had been requested by the delegated judge (i.e. assessments in respect of direct federal tax and church tax and the bill for the fees of the accountants of S. _____ Treuhand AG).

H.
At the main hearing on 7th July 1997 the parties waived any further discussion before the panel of the questions of the taxation of income under the tax legislation of the Canton of Basel-Stadt and the Confederation and again stated their cases orally (Art. 22.2 and 22.3 of the Rules of Procedure).

After deliberating and voting in secret on each of the terms of the judgment and on the main grounds for the judgment, the panel gave notification of the terms of the judgment orally (Art. 23.3 of the Rules of Procedure).

I.
In accordance with the instructions of the President, the Secretary drew up the full text of the judgment, which was circulated to the members of the panel for approval (Art. 24.1 of the Rules of Procedure).

The Administrative Tribunal gives consideration to the following:

1.
Under Article 25 of the Rules of Procedure the Tribunal is empowered to examine the admissibility of the application and of all procedural documents (clause 1). It decides upon its own competence (clause 4).

a) The Administrative Tribunal was established in 1987 pursuant to the Headquarters Agreement (SR 0.192.122.971.3) in order, inter alia, to settle disputes arising in matters of employment relations between the Bank and its officials or former officials or persons claiming through them. Under Article 4.2 of the Headquarters Agreement, matters of employment relations shall be deemed to include all questions relating to the interpretation or application of contracts between the Bank and its officials concerning their employment, of the regulations to which the said contracts refer, and in particular of the provisions governing the Bank's pension scheme and other welfare arrangements provided by the Bank. The Tribunal has no competence, however, in the matter of appointments or promotions (Art. 2.1(a) in fine, Rules of Procedure) or in other civil or commercial disputes, as in such matters the Bank must be proceeded against in the ordinary courts, save in those cases in which provision for arbitration has been or shall have been made (Art. 4.3 of the Headquarters Agreement).

In the present case the Applicants base their application on the "Regulation on the reimbursement of taxes to members of staff of Swiss nationality" of 15th December 1951. The contracts between the Bank and the Applicants also refer to this Regulation, since during the period in question (July 1987 - July 1993) both Applicants were officials of the Bank as well as Swiss citizens. The present dispute therefore relates to a claim arising from the employment relationship.

It is true that in their memorandum of 29th March 1996 (p. 20), as well as in the preliminary hearings of 6th February 1997, the Applicants maintained "that the entitlement to reimbursement is not a part of salary but, like the basic legal relationship requiring performance, namely the fulfilment of tax obligations, is of a public-law nature" (Record of the preliminary hearings, p. 6, item 3). This argument, which was introduced by the Applicants in connection with the Defending Party's plea of statutory limitation, is, however, without foundation. The Applicants overlook the fact that the Administrative Tribunal would have no competence if their applications did not relate to the employment relationship.

Since the question in dispute relates to the employment relationship in accordance with Article 4.2 of the Headquarters Agreement, the Administrative Tribunal has competence to judge it.

b) Save in exceptional circumstances at the discretion of the Tribunal, the application is only admissible before the Tribunal if the applicant has previously submitted a request on the same subject to the General Manager of the Bank (Art. 6.2(a) of the Statute of the Administrative Tribunal of 10th February 1987; see also Art. 15.1 of the Rules of Procedure). In the present case, only the Applicant X. _____ approached the General Manager of the Bank by letter of 25th August 1995, whereas the application before the Tribunal was filed in the name of both spouses, that is, also in the name of Y. _____. Insofar as the application

was filed also in the name of Y. _____, it might be found inadmissible, since she had not previously submitted a corresponding request to the General Manager of the Bank.

It would, however, be excessively formalistic to demand that the previous request should also have been signed by the Applicant Y. _____. In the matter in question, which concerns the reimbursement of the taxes paid by both spouses, it must be accepted that the Applicant X. _____ could also legally represent his wife (cf. Art. 113, para. 3 DBG [federal law on direct federal tax] (SR 642.11) and Art. 40, para. 3 StHG [federal law on the harmonisation of cantonal and communal direct taxes] (SR 642.14)).

The application of X. _____ and Y. _____ is therefore to be admitted, since it was filed within the time-limit of 30 days in accordance with Article 7 of the Statute of the Administrative Tribunal and Article 16.1 of the Rules of Procedure, as was already found, without objection, by the delegated judge at the preliminary hearings on 6th February 1997 (Record of the hearings, p. 2, item 1).

c) The Administrative Tribunal, which was established pursuant to the Headquarters Agreement between the Swiss Federal Council and the Bank for International Settlements (see Art. 4.2 of the Agreement (SR 0.192.122.971.3)), is an international tribunal independent of Swiss or other international tribunals: its decisions are final; no appeal is possible (Art. 11 of the Statute).

The designation of the Administrative Tribunal as Arbitral Tribunal by the Applicants is therefore incorrect. The Administrative Tribunal is not an arbitral tribunal. Its decisions cannot be referred to the Swiss Federal Supreme Court.

d) As an international tribunal with its seat in Switzerland, the Administrative Tribunal applies Swiss law only in a subsidiary role. In accordance with Article 9 of the Statute, it bases it decisions on general principles of law and, in cases of doubt, on the general principles of Swiss law; it takes into account the customs and traditions of the Bank.

It should also be noted that the Tribunal may not go beyond the submissions of the parties to their advantage or disadvantage; it is not, however, bound by the reasons put forward by the parties (Art. 25.2 of the Rules of Procedure).

2.
In their application of 15th December 1995 and their memorandum of 29th March 1996 the Applicants requested a declaratory judgment. It must therefore be examined whether their application for a declaration is in fact admissible before the Administrative Tribunal.

a) In its decision on a matter of principle of 19th June 1951 (BGE [collection of Federal Supreme Court decisions] 77 II 344 or Praxis 41, 1952, No. 12) the Federal Supreme Court found that "for its protection, substantive law has need not only of the "Verurteilungsklage" (action for performance) but also of the action for a declaration. This is now generally accepted, as indeed is evident from the fact that in most countries the declaratory action is provided for in law or recognised in decisions of the courts ... It remains to be examined whether the condition of an interest in an immediate declaration is fulfilled". In the case in

which it had to give judgment the Federal Supreme Court had found that the plaintiff applied to the judge to establish the validity of a collective labour agreement that had already expired at the time the action was filed: "The plaintiff himself recognises that the agreement expired at the end of 1940. There is therefore no longer any legal interest in an immediate declaration of the validity of the agreement for the period in question. The matter at issue is one of claims which arose at that time and were not satisfied. If they are satisfied, the interest in establishing the validity of the agreement is extinguished. But the action for performance exists to protect these claims. This renders the declaratory action unnecessary and therefore inadmissible" (Decision in the matter of Federazione svizzera dei ferrovieri c. SA Bellavista Monte Generose, BGE 77 II 344, Considerations 2 and 3, Praxis, as quoted above).

In the second, revised edition of his textbook, Walther Habscheid explicitly confirmed this fundamental subsidiarity of the declaratory action: "The Federal Supreme Court rightly emphasised the fundamental subsidiarity of the declaratory action vis-â-vis the action for performance. Where the analogous action for performance is possible, the action for a declaration is inadmissible. This is also the case when the damage cannot yet be fully assessed. In this case the subject of the action must be the damage suffered, and the level of the damages that cannot yet be proven must be left to a discretionary decision." (Walther Habscheid, Schweizerisches Zivilprozessrecht and Gerichtsorganisationsrecht, Ein Lehrbuch seiner Grundlagen, with Stephan Berti, 2nd edition, Basel 1990, p. 199). Moreover, in his French-language treatise "Traité de droit judiciaire", Walther Habscheid had already pointed out that this action will at all events have subsidiary character if the plaintiff can enforce his right by means of an action for performance; he may not then bring a declaratory action. This principle derives from the need for efficiency in the administration of justice; if the defendant were to refuse to comply with a declaratory judgment in favour of the plaintiff voluntarily, an enforcement order would be necessary, and this would time-wasting (Walther Habscheid, Droit judiciaire privé suisse, 2nd edition, Mémoire No 48 published by the Faculty of Law of Geneva University, 1981, p. 245).

b) What is at issue in the present case is not only the theoretical question of how the Bank must in future calculate the amounts to be reimbursed to married couples on its staff who are of Swiss nationality. X. _____ and Y. _____ claim that they are entitled to reimbursement of the additional taxes that they had to pay during the earlier periods from July 1987 to July 1993 as a result of the cumulation of their salaries. It is therefore possible to determine for each of these years the additional tax that the Applicants have actually already paid; in their memorandum of 29th March 1996 the Applicants themselves estimated "the amount of the reimbursement due to them at approximately CHF 90'000 to CHF 100'000 on the basis of the documents available to them" (p. 10), and before the preliminary hearings of 6th February 1997 they submitted two detailed accounts drawn up by the accountants S. _____ AG which put the total additional taxes at CHF 87'505, or at all events CHF 80'234 (memorandum of 24th January 1997, pp. 2 and 3; Annexes 1 and 2).

It follows that the Applicants should simply have applied for the Bank to be required to pay a sum of money. Since an application for performance was possible, there is no room for an

application for a declaration, so that the Tribunal should not in principle have admitted the present application for a declaratory judgment.

c) However, the Applicants in fact not only requested the Administrative Tribunal to establish that they are entitled to reimbursement of the taxes levied on their total salaries; they also specifically requested that "The Defending Party is to be required to pay this additional tax arising from the progression to the two Applicants, or to each individually in proportion to their additional tax claim" as well as "to pay them interest on overdue payment ..." (submissions under 1, paragraph 2 in fine and paragraph 3; memorandum of 29th March 1996, pp. 2 and 3). In other words, X. _____ and Y. _____ did indeed file applications for performance. Moreover, the Tribunal notes that at the preliminary hearings the delegated judge proposed that the Applicants' submission be amended so as to require the Defending Party to reimburse taxes in the amount of CHF 87'505, or alternatively CHF 87'294, plus 5 % interest on overdue payment. The Defending Party objected to this proposal only with respect to the interest on overdue payment, but not with respect to the amounts of the tax reimbursements. The Applicants agreed to the delegated judge's proposal and filed a submission to that effect (Record of the preliminary hearings, p. 8, item 4 in fine).

The application is therefore to be admitted.

d) During the preliminary hearings the question was raised as to whether the Tribunal was at this stage to give a ruling only on the question of principle, or whether it was also to fix the sum of money to be paid by the Defending Party (quantum). The Defending Party submitted that "the question of principle should be decided separately from and prior to the question of the quantum" (Record of the hearings, p. 8 in fine). The Applicants for their part again submitted "that the question of the quantum may only be decided together with the question of principle" (Record, p. 8). However, X. _____ and Y. _____ also requested that "the Personnel Section of the BIS is to be called upon by the Arbitral Tribunal (sic) ... to inform the Tribunal of this sum" (Submission 3). But before these calculations can be made, the Bank must know the Tribunal's judgment on the question of principle.

With the final ruling on the question of principle, the Administrative Tribunal refers the matter back to the General Manager in order that, within the time-limit of 90 days pursuant to Article 15.1 of the Rules of Procedure, he should take a new decision in accordance with the considerations underlying the judgment and communicate it to the Applicants. In other words, in determining the tax reimbursements to be paid to the Applicants, the Bank must adhere strictly to the method of calculation indicated in the judgment (see Considerations 3 and 4). This decision can in turn be referred to the Tribunal.

3.
The Applicants are essentially demanding reimbursement of the additional taxes that they had to pay as a result of the cumulation of their salaries for the period in which they were married, were both Swiss citizens and were in the Bank's service. The application is in principle well-founded.

a) The Defending Party has legal personality under international law, and as such it enjoys, in principle and in its own name, immunity from Swiss jurisdiction in matters of employment

relations. This derives from the Hague Convention respecting the Bank for International Settlements of 20th January 1930 and the Constituent Charter of the Bank of the same date (SR 0.192.122.971), as well as the Protocol regarding the immunities of the Bank for International Settlements of 30th July 1936 (SR 0.192.122.971.1) and the Agreement between the Swiss Federal Council and the Bank to determine the Bank's legal status in Switzerland of 10th February 1987 (SR 0.192.122.971.3). The last-mentioned Headquarters Agreement recognises the legal personality and the legal capacity of the Bank within Switzerland (Art. 1), explicitly grants it immunity from Swiss jurisdiction in administrative, criminal and employment contract matters (Art. 4), exempts it from all direct and indirect federal, cantonal and communal taxes (Art. 7), and provides in Article 15 that the officials of the Bank who do not have Swiss nationality shall enjoy "exemption from all Federal, cantonal and communal taxes on salaries, fees and allowances paid to them by the Bank; however, Switzerland may take these emoluments into account for the purpose of determining the tax payable on income from other sources". The legal position regarding tax exemption which is defined here in the Headquarters Agreement had already applied since the entry into force of the Constituent Charter of the Bank of 20th January 1930 (Paragraph 6 (e)), and thus represents no more than a redefinition identical in content.

Since Swiss officials of the Bank consequently do not enjoy such tax exemption, and would therefore be at a disadvantage vis-à-vis non-Swiss officials, the Regulation on the reimbursement of taxes of 15th December 1951 was issued. It was intended to ensure equal treatment for Swiss and non-Swiss members of the Bank's staff in accordance with Article 1, which is worded as follows:

"The Bank reimburses to members of staff of Swiss nationality the taxes levied on their total salaries in the same measure as members of staff of non-Swiss nationality enjoy tax exemption pursuant to Paragraph 6 (e) of the Constituent Charter."

This regulation, which is an integral part of the contracts of employment, requires a corresponding compensatory payment by the Bank in all cases where non-Swiss but not Swiss nationals are exempt from Swiss taxes. The Applicants accordingly are basically entitled to reimbursement of the federal, cantonal, communal and church taxes they have paid.

This is not in principle contested by the Defending Party, which under the general legal principle of "pacta sunt servanda" is bound to fulfil its contractual obligations vis-à-vis its officials. There is, however, a difference of opinion between the parties as to how the additional taxes are to be determined.

b) Article 1 of the Regulation on reimbursement of 15th December 1951 provides that:

"The Bank reimburses to members of staff of Swiss nationality the taxes levied on their total salaries in the same measure ..."

This clearly means that the Bank has undertaken to reimburse to its Swiss officials those taxes that they have effectively paid - in accordance with the assessment basis actually used by the tax authority concerned. In other words, the Bank is bound by the tax system (direct

federal tax, cantonal and communal taxes and church tax) applying in the Swiss official's tax domicile, that is, in the present case that of the Canton of Basel-Stadt, on the basis of which X. _____ and Y. _____ paid their taxes for the relevant period from 7th July 1987 to 5th July 1993.

The Defending Party contended that it had been its hitherto undisputed practice to make the tax reimbursement to married couples employed by the Bank separately, on the basis of the rate for single persons applying to each of the spouses. While this custom, established by administrative practice, is to be taken into account in the judgment in accordance with Article 9.1 of the Statute and Article 26 of the Rules of Procedure, it has no normative status and can therefore only be an aid to interpretation. The question of interpretation would, however, only arise if the contract or the applicable rules of law required interpretation. If these are clear, the rule is "in clans non fit interpretatio".

In the present case the legal position is clear to the Administrative Tribunal and does not require interpretation. Irrespective of the fact that the Applicants have not cited this legal principle, the Tribunal must on its own initiative (Art. 25.2 in fine, Rules of Procedure) take it into account in reaching its judgment. This legal principle follows conclusively from Article 1 of the Regulation on reimbursement. Under Article 5 of the Regulation the Bank is at liberty to reimburse all or part of the taxes at a presumptive rate. This does not, however, mean that the Bank can disregard the principle that emerges clearly from Article 1. Since the Bank is obliged to reimburse the taxes levied, it must in doing so pay due regard to the tax system actually applied.

c) In the "Hegetschweiler" judgment of 13th April 1984 the Federal Supreme Court rejected the system of individual taxation of married couples on the grounds that "separate taxation as such would at the most be of some benefit only in certain cases, namely for two-income couples, but it could at the same time create an undesirable inequality between single-income and two-income couples (BGE 110 Ia 17 E 3b)". One of the principles of Swiss tax legislation is that the income and assets of married couples living in the same household are to be added together, irrespective of their matrimonial property arrangements (Art. 3, para. 3 StHG, SR 642.14; Art. 9 DBG, SR 642.11). In the "Hegetschweiler" judgment the Federal Supreme Court gave a clear opinion on the principle of factor addition: "Factor addition, that is, the joint taxation of a married couple living in the same household, applies today in the Confederation and the Cantons without exception and irrespective of the matrimonial property regime applying to the spouses. As long as the tax burden was relatively light and the tax progression was flat, there was generally only one scale for married and single persons; special deductions for married couples were introduced relatively late and only gradually. Since the Second World War it has become apparent that, depending on the rate of progression, factor addition may lead to disproportionate additional taxation of married persons ..." (BGE 110 la E 3a, pp. 15-16). In order to avoid this additional tax burden, Article 11, paragraph 1 of the tax harmonisation law (SR 642.14) provides that the taxes for married couples living together de jure and de facto are to be appropriately reduced relative to those for single taxpayers. The same reduction also applies to widowed, separated, divorced and single taxpayers who live in the same household as children or persons requiring support and who provide primarily for their maintenance. Cantonal law prescribes

whether the reduction takes the form of a percentage deduction from tax up to a fixed sum or separate scales for single and married persons.

For the period under consideration in the present case, that is, from 7th July 1987 to 5th July 1993, the system that applied - and will also apply in the future - is that of a dual scale, both for direct federal tax (Art. 40 BdBSt and Art. 60 DBG; SR 642.11) and for the cantonal and communal taxes of the Canton of Basel-Stadt (Art. 48 of the law on direct taxation of Basel-Stadt, as also in the Canton of Basel-Land, Art. 34 of the law on direct taxation of Basel-Land). In accordance with the principle referred to in Article 11, paragraph 1 of the tax harmonisation law, the tax scale for married couples is in principle more favourable than that for single persons, since at the same taxable income the rate of tax for married couples is lower; however, in the case of two-income couples the addition of incomes and the consequent tax progression results in an additional tax burden when the incomes of both spouses are relatively high. For example, in considering Zurich tax legislation the Federal Supreme Court noted that two-income married couples suffer an additional tax burden in comparison with cohabiting couples as soon as their combined incomes exceed CHF 50'000. For the Hegetschweilers the additional burden amounted to more than 10 %. The Court merely noted that the existing arrangements in the Canton of Zurich did not yet fully conform to the Constitution. However, it rejected the Hegetschweilers' appeal on the basis of its considerations (BGE 110 Ia E 6 p. 26, 27).

In the present case, X. _____ and Y. _____ were taxed for the tax years 1987 to 1993 according to the principle of factor addition on the basis of a scale for married couples. Indeed, this was not contested by the parties, and also emerges clearly from the documents lodged, in particular the assessments for federal, cantonal and communal taxes.

In using a different tax system, that is, the system of individual taxation, the Bank failed to observe the principle deriving from Article 1 of the Regulation on the reimbursement of taxes. The infringement of rights in effect claimed by the Applicants in their memorandum of 29th March 1996 (p. 15 ff., items 3 and 4) is therefore an established fact and gives sufficient grounds for annulling the General Manager's decision of 24th November 1995.

d) It is true that, as an independent international organisation endowed with its own legal personality, the Bank for International Settlements is not directly subject to the requirements of equality of treatment and non-discrimination (Art. 4 of the Swiss Constitution, SR 101; Art. 14 of the European Convention on Human Rights, SR 0.101; Art. 2 and 7 of the UN International Covenant on Economic, Social and Cultural Rights, SR 0.103.1). Nonetheless, like any employer, it is obligated to respect this general principle (see Frank Vischer, Schweizerisches Privatrecht VII/1, III Der Arbeitsvertrag, 9 6 V.4, p. 60 and 5 10.I.5, p. 101 ff.). In particular, the Bank must also ensure equal treatment of Swiss and non-Swiss employees. This accords with the spirit of Article 1 of the Regulation on the reimbursement of taxes, and was also cited by the General Manager of the Bank himself in his decision of 24th November 1995.

The Defending Party contends that it is the sole responsibility of the legislature of Basel-Stadt to remedy the unequal, that is, disadvantageous, treatment of the Applicants; the Defending

Party cannot be made responsible for tax legislation that is contrary to the Constitution; at all events, the legal situation regarding tax matters in the Canton of Basel-Stadt is no reason to depart from the basis for calculation used hitherto (memorandum of 27th August 1996, p. 9, item 9). Undeniably, it is not the duty of the Bank to make amends for the fact that Swiss tax legislation does not yet fully comply with the Federal Constitution. But this does not authorise it to adopt the system of individual taxation which the Federal Supreme Court has explicitly rejected as conflicting with the constitutional principle of equal treatment (BGE 110 Ia E 3a, p. 17). Moreover, there is no provision for the method of calculation used by the Bank in the Regulation on reimbursement itself; and indeed it conflicts with the principle deriving from Article 1 according to which the Bank is to reimburse those taxes which have effectively been levied (see Consideration 3b above).

The Defending Party further contends that in applying the Regulation it has to be borne in mind that in the case of most Swiss married couples with whom a comparison is to be drawn only one spouse is employed at the Bank. Its method of calculating the tax reimbursement "ensures equal treatment of all Swiss employees". In numerous cases the spouse of a Bank employee is also in employment elsewhere. The Bank has no knowledge of the incomes of the working spouses who are not in its employ, and they are not taken into account in the reimbursement of taxes according to the Regulation and consistent practice. If the Bank were to take account of the progression in reimbursing taxes only in those exceptional cases in which both spouses are employed by the Bank, this would amount to preferential treatment vis-à-vis all married Swiss employees whose spouses work elsewhere" (memorandum of 27th August 1996, p. 819, item 6). This argument is mistaken: to be sure, it is not for the Administrative Tribunal to rule on this legal question, which is not here in dispute, but the Tribunal does not consider these objections to be sufficient grounds for applying the system of individual taxation of spouses (in violation of the principle deriving from Article 1 of the Regulation on the reimbursement of taxes) in the case of X. _____ and Y. _____. It makes no difference whether only one of the two spouses or both spouses are in the Bank's service. The problem remains the same: in order to determine the actual rate of tax which is to be taken into account in the calculation, not only the incomes of both spouses but also income from other sources must be included. This is the procedure followed by the tax administration, which in its assessment indicates the rate at which the taxes owed by the spouses are calculated. This rate, and not a hypothetical rate resulting only from the income received from the Bank, is the one that must be used by the Bank as the basis for calculation. The tax rate shown in the tax assessment is that which is of relevance for the Bank in calculating the tax reimbursement on the total salaries paid by it. In other words, before the Bank calculates the reimbursement it must consult the final tax assessments, which show the actual rate of tax, of its Swiss officials applying for reimbursement (see the assessments for direct federal tax and cantonal taxes submitted by the Applicants).

Finally, the Defending Party referred to Decision 1/1981 of the World Bank Administrative Tribunal of 5th June 1981 (Record of 6th February 1997, p. 6, item 2 in fine). While this judgment relates to the calculation of the tax reimbursement made by the Bank to a US citizen, that is, a national (foreigners are here also exempt), a different legal question was to be decided. The system of presumptive rate deductions from gross income used to determine the entitlement to reimbursement had led to reimbursements being made which were

typically higher than the taxes actually paid. The World Bank therefore introduced another presumptive rate system which brought the amount of the reimbursement close to the taxes levied. The applicants considered this procedure to be an infringement of their contractual rights. This is a different legal question from that to be decided by the Tribunal, where it is not in doubt that the Regulation on reimbursement is an integral part of the contracts of employment. In these circumstances the Administrative Tribunal sees no cause to follow the ruling of the Administrative Tribunal of the World Bank.

e) Accordingly, the Bank's Swiss officials are in principle entitled to reimbursement of all taxes (federal, cantonal, communal and church taxes) that they have actually paid on the total salaries received from the Bank. As far as the Applicants are concerned, it is to be borne in mind that as long as they both worked at the Bank and were Swiss citizens, X. _____ and Y. _____ were in fact taxed on their combined total salaries according to the scale for married couples. The same also applies in principle in the case of other Swiss officials whose spouses do not work at the Bank.

4.
Since the Defending Party used a different method of calculating the reimbursement, and thereby violated the principle contained in Article 1 of the Regulation on the reimbursement of taxes, the Administrative Tribunal cannot confine itself to annulling the General Manager's decision of 24th November 1995 and leave it to the Bank to reach agreement with the Applicants on the amount of the tax reimbursements still due. Since the Tribunal refers the matter back to the General Manager for a new decision in accordance with its considerations, it has the duty to define the method of calculation to be used by the Bank.

a) Article 1 of the Regulation provides that the Bank reimburses to its Swiss officials the taxes that they have paid on their total salaries in the same measure as its non-Swiss officials are exempted from tax.

Paragraph 6 (e) of the Constituent Charter simply says that non-Swiss officials are exempt from tax on the remuneration paid by the Bank (see also in this connection a notice from the tax administration of the Canton of Basel-Stadt of 1962 to officials of the Bank who are not of Swiss nationality). On the other hand, Article 15 (a) of the Headquarters Agreement of 10th February 1987 states that Switzerland reserves the right to take the total salaries into account for the purpose of determining the tax payable on income from other sources.

It follows from this that in determining the reimbursement entitlements of its Swiss officials the Bank cannot take as a basis the tax rate based on the salaries paid by it, since according to the principle of factor addition Swiss officials have to pay tax on the whole of their income, including income from other sources (in the case of the Applicants, their investment income). However, this other income is not known to the Bank. In practical terms this means that the Bank must consult the tax rate fixed in the tax assessment. This is the only way the Bank can establish the rate at which its Swiss officials have actually been taxed.

b) On the other hand, the Defending Party also cannot base its calculation only on the taxable income shown in the tax assessment, since the tax authorities have included not only

the salaries paid by the Bank but also income from other sources. Nor may it take as a basis only the total salaries it has paid.

According to Article 4 (a) of the Regulation on the reimbursement of taxes, the reimbursements are to be calculated annually on the basis of the total salary (after deduction of the statutory allowances, including family allowances and those for contributions to the Swiss social security system and contributions to the Bank's pensions and savings systems). In addition, Article 4 (b) provides that the total annual salary for the purpose of these regulations includes the tax reimbursements paid by the Bank during the year in question. For this purpose the Bank reserved the right to reimburse all or part of the taxes at a presumptive rate (Article 5). This method of calculating at a presumptive rate, which is explicitly foreseen in the Regulation, is binding both on the Bank and on its Swiss officials, even if in certain circumstances it may lead to a tax reimbursement which is higher or lower than the taxes actually paid by the Swiss official on his total salary.

c) It must also be established which assessment year is relevant for the Bank in calculating the tax reimbursement: in accordance with the principle deriving from Article 1 of the Regulation on the reimbursement of taxes, the Defending Party must also take account of the assessment period on the basis of which the Swiss officials have to pay tax, which may vary depending on the type of tax.

In the case of direct federal tax for the years 1989 to 1993, Article 41 of the BdBSt (which was in force until 31st December 1994) stipulated that the assessment period comprised the last two years preceding the tax period (also two years). As from 1st January 1995, Article 40, paragraph 1 of the DBG provides that income tax is fixed for one tax period and collected for each tax year (calendar year). The tax period is two consecutive calendar years (para. 2). In the case of officials who have entered the Bank's service in the course of the tax period, income tax is calculated on the basis of the income received since the start of the tax liability (para. 3). In the present case, this means that in calculating the tax reimbursement in respect of direct federal tax for the years 1989 to 1993 the Bank must take account of the tax rate set by the Basel tax authorities for the assessment periods (1989-1990, 1991-1992 and 1993-1994). At the same time, the Bank must also take account of the average of the total salaries as defined in the presumptive rate provision in Article 4 of the Regulation on reimbursement and which were taxed during these assessment periods, that is, the average of the total salaries for the two assessment years. This method of biennial taxation (anticipatory taxation with retrospective assessment) is also used in the Canton of Basel-Land.

In Basel-Stadt, cantonal tax is assessed on income annually on the basis of income in the preceding year (ex post taxation). The Applicants were taxed under this tax system for the years 1987 to 1993. In future, however, the Bank must also take account of the new assessment periods that will enter into force in the Canton of Basel-Stadt and the Canton of Basel-Land as a result of the tax harmonisation (Art. 15 and 16 of the tax harmonisation law).

In practical terms this means that in calculating the tax reimbursement the Bank must take into account the time-lag between tax period and assessment period and the tax rate actually assessed by the tax administration. The Bank cannot determine the tax reimbursement of its own accord without first having consulted the legally binding tax assessment of its Swiss official; in Basel-Stadt this is normally issued during the first quarter following the end of the tax period. It might perhaps be advisable for the Defending Party to amend or supplement the Regulation on the reimbursement of taxes so that it is stated in Article 2 that the taxes will be reimbursed on the basis of the tax assessment submitted by the officials if they so wish, and that as a rule the reimbursement will be made in the first quarter of the following year.

d) In the present case the Administrative Tribunal is not obliged to determine the taxes claimed and actually paid by X. _____ and Y. _____ by way of direct federal tax, cantonal and communal taxes and church tax. The Tribunal must adhere to the procedural rule "iudex non calculat", and in any event it does not possess the necessary information to do so.

It is therefore the duty of the General Manager of the Bank to take a new decision in accordance with the Tribunal's considerations and for this purpose to use the method of calculation indicated in the present judgment.

5.
In its memorandum of 27th August 1996 the Defending Party argues that all or part of the claims of X. _____ and Y. _____ are forfeited (4 and 5) or have lapsed by limitation (pp. 11-14).

a) "In very many and diverse cases a claim lapses through forfeiture, that is, through the failure of the claimant to take an action necessary to preserve the claim within a statutory or contractual time-limit, if the action to be taken within a time-limit is the filing of a suit, the result is similar to lapse by limitation. However, lapse by limitation is fundamentally different in terms of preconditions and effects from the lapsing of a claim through failure to observe a preclusive time-limit. As regards effect, the difference is that failure to observe the preclusive time-limit results in the extinction of the claim, while lapse by limitation merely gives rise to a defence plea. The expiry of a preclusive time-limit is therefore to be taken into consideration on the initiative of the court, but, under Article 142 of the Code of Obligations, lapse by limitation is to be considered only if this is pleaded by the defending party." (Von Tuhr, Allgemeiner Teil des schweizerischen Obligationenrechts, p. 557).

Article 9 of the Regulation on the reimbursement of taxes prescribes that queries concerning tax reimbursements must be made within two weeks of receipt of the payment. While X. _____ addressed repeated verbal inquiries to the Personnel Section of the Bank regarding the tax reimbursements received, he never did so within the prescribed two-week time-limit. Accordingly, the Tribunal would have to consider whether the Applicants' claims had not lapsed through forfeiture. However, the Defending Party explicitly waived this "in the interests of a substantive clarification of the question of principle" (submission of 27th August 1996, p. 5).

b) "Should the Tribunal, contrary to expectations, find in favour of the Applicants' fundamental entitlement to additional tax reimbursements, the Defending Party pleads limitation with respect to those tax reimbursements based on salary claims which fell due before 13th December 1989." (submission of 27th August 1996, pp. 11-12, item 3). This plea is insofar well-founded.

The fact that claims are subject to limitation is a general principle of law within the meaning of Article 9 of the Statute. There is, however, no generally accepted rule as regards limitation periods. In accordance with Article 9 of the Statute, the Tribunal therefore applies Swiss law, that is, Article 128(3) of the Code of Obligations. Within the meaning of Swiss law the agreements concluded between the Bank and the Applicants are deemed to be contracts of employment, and the tax reimbursement provisions of the Regulation of 15th December 1951 are an integral part of these contracts of employment.

The Applicants maintain that the entitlement to reimbursement is not a part of salary but has public-law character, like the basic legal relationship requiring performance, namely the fulfilment of tax obligations. For this reason, the ten-year limitation period should apply to the present claim (Record, p. 6, item 3). This reference to the general rule contained in Article 127 of the Code of Obligations is, however, mistaken: the Bank's reimbursement obligation is clearly not of a public-law nature; it is based on the Regulation on the reimbursement of taxes, which is an integral part of the contracts of employment between the Bank and its Swiss employees and which explicitly provides that the reimbursements are included in the total salaries (Art. 4 (b)). Moreover, the private-law limitation period within the meaning of Article 127 of the Code of Obligations does not automatically apply to public-law claims. "The institution of limitation is now also recognised in public law on the basis of a general legal principle when no explicit regulation in the matter exists ... Where the relevant ordinance contains no rules governing the start and duration of the limitation period, the statutory time-limits under other ordinances for related claims are to be consulted. For this purpose, the first resort is to the arrangements laid down by public law for related cases. In the absence of analogous statutory regulations, the limitation period is ultimately to be fixed according to general principles" (BGE 112 Ia 263 with references). According to André Grisel, former President of the Federal Supreme Court (Traité de droit administratif, Neuchâtel 1984, p. 496), before the entry into force of Article 72, paragraph 1 of the Civil Service Ordinance (SR 172.221.101) the courts based their decisions in the public-law area on Article 128 of the Code of Obligations to apply a limitation period of five years to monetary claims (including claims for the reimbursement of certain expenses arising out of the official's employment relationship) (see BGE 87 I 413, 85 1183).

The Applicants' reference by analogy to Article 134, paragraph 1(4) of the Code of Obligations in support of the argument that the annuities for 1987 and 1988 have not yet lapsed by limitation (Record, p. 7, item 3) is also mistaken. The present case is evidently not one covered by Article 134, paragraph 1(4), according to which the limitation is suspended only for claims of employees living in the same household as the employer, against the latter, for the duration of the employment relationship. Likewise, Article 341 of the Code of Obligations cited by the Applicants is not relevant as regards statutory limitation, since in paragraph 2 it makes explicit reference to the general provisions governing limitation, that is,

in the present case Article 128(3) of the Code of Obligations. With this reservation "it is made clear that the period during which a claim may not be waived is neither a limitation period nor a period governing forfeiture" (Frank Vischer, Schweizerisches Privatrecht VII/1, III Der Arbeitsvertrag, p. 204). In their pleadings the Applicants referred to Article 134, paragraph 1(6) of the Code of Obligations, whereby the limitation period for a claim is suspended as long as the said claim cannot be asserted in a Swiss court. This provision is not relevant. The Administrative Tribunal adjudicates by virtue of agreement under international law and passes judgment in place of the ordinary Swiss courts.

c) Under Article 130 of the Code of Obligations the period of limitation for a claim, that is, also for a claim arising out of a contract of employment, begins to run when the claim becomes due. In the present case, the taxes in respect of a calendar year are reimbursed during the first quarter of the following calendar year (Art. 2 (a) of the Regulation on reimbursement). This means that these claims were in each case due for payment at the latest on 31st March of the following year. This was also explicitly acknowledged by the Defending Party (submission of 27th August 1996, p. 13) and was not contested by the Applicants.

The first assertion of the claim by the Applicant in writing occurred with X. _____ letter to the Secretary General of the Bank of 13th December 1994. The Defending Party explicitly acknowledged this letter as interrupting the period of limitation, insofar as the five-year time-limit had not elapsed.

d) In consideration of the limitation period under Article 128(3) of the Code of Obligations, the Applicants' claims for reimbursement for 1987 had thus lapsed at the end of 31st March 1993, and those for 1988 at the end of 31st March 1994. The Defending Party specifically advanced this argument, which the Applicants accept on the assumption that the claim is a claim by employees arising out of the employment relationship under the terms of Article 128(3) of the Code of Obligations (submission of 29th March 1996, p. 20).

6.
The Applicants further submitted the following request: "Furthermore, by way of compensation for the damage caused to the Applicants by not offsetting their taxes, the Defending Party is to be required to pay them interest on overdue payment of 5 % of their total claims as from 31st July 1991." (_____). This request is only in part well-founded.

a) It is a general principle of law that by not paying a debt when it falls due the debtor is in default and must then pay interest on the debt. However, the specific conditions defining default and the rate of interest payable vary across national legal systems. In the present case, this leads the Tribunal to apply Swiss law. As a precondition of default this generally requires a reminder (Art. 102, para. 1 of the Code of Obligations). If, however, a due date is agreed within the meaning of Article 76 et seq. of the Code of Obligations, default occurs even in the absence of a reminder (Art. 102, para. 2 of the Code of Obligations). By citing judicial practice (BGE 111 II 426 E. 12), the Defending Party itself recognised this in principle; but it argued "that the parties did not agree a due date" (submission of 27th August 1996, p. 14, item 10).

According to Article 2 (a) of the Regulation on the reimbursement of taxes, the taxes for a calendar year are as a rule to be reimbursed during the first quarter of the following year, that is, at the latest by 31st March of the following year. Even if Article 76 of the Code of Obligations speaks of a due date at the beginning and end of a month, it still covers a three-month period. In this case the due date is the end of the three-month period. While Article 2 (a) says that the reimbursement is as a rule to be made in the first quarter, this can at most be taken to mean that this period can be exceeded in exceptional cases. Such an exceptional case has not, however, been pleaded by the Defending Party.

"The obligee can demand full payment of the debt due and under Article 69 of the Code of Obligations is not in principle bound to accept partial payment, even if the debt is by nature separable. Also in this respect, he can insist on the exact performance of his claim. By refusing an inadmissible partial payment the obligee is not rendered in default in accepting performance, whereas the obligor is in default in respect of the entire payment." (Von Tuhr, Allgemeiner Teil des Schweizerischen Obligationenrechts, p. 418/9, S 57 I). Since the Defending Party paid only part of its debt before the due date, it was therefore in default at the latest on 1st April of the year in question, without a reminder.

b) With their application the Applicants requested payment of interest from a median date, 31st July 1991 (submission of 29th March 1996, p. 3), but in the preliminary hearings of 6th February 1997 they changed this submission to the effect that interest on overdue payment should always be due as from 1st April of the following year on each of the individual payments (Record, p. 7/8). The Defending Party objected that this was an inadmissible change in the application (Record, p.8). This objection is to be disregarded.

The Administrative Tribunal admits the change in the application as pertinent. Since neither the Statute nor the Rules of Procedure contain rulings in this respect, the Tribunal is authorised to draw on a rule which exists in many rules of procedure (Walther Habscheid, Schweizerisches Zivilprozessrecht, 2nd edition N. 412 ff., p. 232 ff.). According to Article 26 of the BZPO [code of federal civil procedure] (SR 273), a change in the application is admissible if there is a close connection with the original application. While the Administrative Tribunal may not go beyond the submissions of the parties (see Art. 25.2 of the Rules of Procedure), the delegated judge may in the preliminary hearings first discuss the subject of the dispute with the parties and invite them, if need be, to rectify, simplify or supplement their arguments (see Art. 21.2, Rules of Procedure; see Art. 35, para. 1 BZPO). Accordingly, the delegated judge may - as in this case - invite the parties to clarify their submissions and, at all events within the limits of Article 26 of the BZPO, applicable by analogy, to modify them. The Rules of Procedure do not preclude this.

c) The Administrative Tribunal sets the rate of interest which is to compensate for the damage arising from non-payment of the full tax reimbursement (see Art. 97, para. 1 of the Code of Obligations), as prescribed by Article 104, paragraph 1 of the Code of Obligations.

Interest at the rate of 5 per cent per annum is therefore to be paid on the annuities still due for 1989 to 1993 as from 1st April of the following year.

7.
In their application the Applicants requested that "the ordinary and extraordinary costs of the proceedings of the Administrative Tribunal are to be awarded against the Defending Party." (submission of 29th March 1996, p. 3). This request is in part well-founded.

a) While under Article 14.2 of the Statute the Defending Party bears the costs incurred in connection with the functioning of the Administrative Tribunal, as well as the costs of all proceedings, Article 27.2 of the Rules of Procedure provides that the costs of the successful party for representation by a professional representative are to be refunded according to the scale applicable in the Swiss Federal Court (SR 173.119.1 with reference to Art. 159 OG [federal law on the organisation of the administration of federal law], SR 173.110).

In the present case the Applicants are only partially successful, that is, in respect of five of the seven annuities.

In application by analogy of Article 159, paragraph 3 of the OG, the Administrative Tribunal reduces the allowance payable to the Applicants by two-sevenths.

b) Also in dispute between the parties is the difficult question of whether the fees of CHF 7'579.65 paid by the Applicants to the accountants are to be included in the allowance in addition to the lawyer's fees.

The scale (SR 173.119.1) referred to in Article 27.2 of the Rules of Procedure stipulates that the allowance awarded to the successful party must cover all the costs necessarily incurred through the litigation (Art. 1, para. 2). It is acceptable that in the present case, which was concerned with technical provisions of tax legislation, the lawyer, lacking the relevant competence himself, should have called upon a specialist, that is, an accountant. Without exceeding its discretion, the Administrative Tribunal can therefore find that the consultation of a specialist may be deemed to be a necessary expense within the meaning of Article 1, paragraph 2 of the scale.

On these grounds the Tribunal directs the Bank to pay this sum of CHF 7'579.65 as a necessary expense.

c) According to Article 5 of the scale (SR 173.119.1), which is applicable by analogy in those cases in which the Administrative Tribunal passes judgment as the sole instance, the amount of the lawyer's fee depends on the amount in dispute (Art. 4, para. 1). In the case of an amount in dispute of between CHF 50'000 and CHF 100'000, the fee is accordingly to be fixed at between CHF 5'000 and 15'000.

Given the Applicants' claim in the amount of CHF 87'505 and the fact that these proceedings involved no extraordinary expenses for the parties within the meaning of Article 7 of the scale, the Tribunal would therefore consider it appropriate to award the Applicants a lawyer's fee of CHF 12'000 plus the necessary expenses of CHF 7'579.65 if they had wholly succeeded; the total allowance payable to the Applicants would therefore amount to CHF 19'579.

d) With a reduction to five-sevenths, the allowance due to the Applicants is fixed at CHF 14'000 in round figures (Art. 8, para. 1 of the scale of costs). The Bank is to pay this sum to the Applicants without delay by way of an allowance in respect of expenses pursuant to Article 27.2 of the Rules of Procedure.

Therefore the Administrative Tribunal finds

1.
With respect to the tax reimbursements for 1987 and 1988 the application is dismissed on grounds of lapse by limitation.

2.
It is found that:

a) In principle the federal, cantonal, communal and church taxes levied on the Applicants in accordance with the relevant scales for married couples for the tax years 1989 to 1993 are to be reimbursed in full. Reimbursements that have already been made are to be taken into account.

b) Interest at a rate of 5 % is to be paid on each residual annuity thus calculated for the tax years 1989 to 1993 as from 1st April of the following year.

c) In these respects the application is approved and the decision of the General Manager of the Bank of 24th November 1995 is annulled.

3.
The matter is referred back to the General Manager of the Bank for a new decision on establishing the tax reimbursements for the tax years 1989 to 1993 in accordance with the Tribunal's considerations. The decision is to be announced within 90 days of delivery of the final text of the judgment.

4.
An allowance in respect of expenses in the amount of CHF 14'000 is awarded to the Applicants, to be charged to the Bank.

5.
The Bank bears the costs of the Administrative Tribunal.

6.
This judgment takes immediate and binding effect; it is without appeal.

7.
A copy of the judgment giving the grounds for the judgment shall be delivered to the representatives of the parties.

8.
The original of the judgment and the case-file shall be placed in the archives of the Bank.

Basel, 7 July 1997

The President of the Tribunal:	The Secretary to the Tribunal:
Prof. Dr. Robert Patry	lic. iur. Felix Heusler