

BAER CASE—DECISION No. 199 OF 12 DECEMBER 1959 ¹

¹ *Collection of decisions*, vol. VI, case No. 284.

The Italian-United States Conciliation Commission established by the Government of the United States of America and the Government of the Italian Republic, pursuant to Article 83 of the Treaty of Peace with Italy dated February 10, 1947, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member chosen by mutual agreement between the United States and Italian Governments.

Having seen the Petition dated May 28, 1957, filed on the same date by the Agent of the United States of America with the Joint Secretariat of the Commission *versus* the Government of the Italian Republic on behalf of Ludovico Baer, the claimant;

Having seen the Answer filed by the Agent of the Italian Government on October 1, 1957;

Having seen the *Procès-verbal* of Non-Agreement dated December 10, 1947, signed by the Representatives of the two Parties to the dispute, wherein it is stated that recourse shall be made to a Third Member, as provided for in Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order that the controverted issues raised by the instant case be resolved;

Having noted that the Agents of both Parties, as stated in their joint declaration of November 25, 1959, voluntarily relinquish the oral discussion of the case, so that the Commission is enabled to render a decision on the basis of the written pleadings and defences filed during the course of the proceedings in the instant case;

Having seen that, in his Petition, the Agent of the United States concludes by requesting:

That this Conciliation Commission:

(a) Decide that the claimant has the status of a United Nations national within the meaning of the second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace;

(b) Decide that the claimant is entitled to receive, under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, two-thirds of the sum necessary at the time of payment to make good the loss suffered, which sum was estimated to be, as of November 15, 1954, 9,897,538 lire, as well as the entire sum of 500,000 lire representing the reasonable expenses incurred in Italy by the claimant in establishing the claim;

(c) Decide that the claimant is entitled to be exempted from the Extraordinary Progressive Patrimonial Tax under paragraph 6 of Article 78 of the Treaty of Peace as well as to the reimbursement of any sums which have been or may hereafter be collected from him by the Italian Government in connexion with said tax.

Having noted that the Agent of the Italian Government, in his Answer, concludes by requesting that the Petition be rejected.

STATEMENT OF THE FACTS:

1. The claimant, who is of Italian origin and professes the Jewish faith, acquired, by naturalization, title to United States citizenship on November 20, 1944 and has since then preserved his American nationality uninterruptedly to date. He is at present domiciled at Springfield, Massachusetts (U.S.A.). The regularity of his naturalization, resulting from an official certificate thereof,

attached to the record of the case, has not given rise to any disagreement between the two Parties to this dispute, and the Commission's jurisdiction to adjudicate the case is therefore unchallenged.

2. The claimant is the owner of an industrial building situated at Via G.B. Vico No. 30, Milan, which he acquired by purchase on February 11, 1930. This building was almost completely destroyed as a result of the air raids over Milan which occurred on February 14 and August 15, 1953. The sum necessary to repair the damages so caused was estimated, as of the date of November 19, 1954, to be 9,897,538 lire by the expert named by Ludovico Baer for the purpose of making this estimate.

3. By Decree dated April 27, 1944 (No. 2034/257) the Chief of the Province of Milan, implementing the Legislative Decree No. 2 of January 4, 1944 of the Head of the Government of the Italian Social Republic, known as the Salò Republic, published in the *Official Gazette* No. 6 of January 10, 1944 and the provisions for implementing this Legislative Decree adopted by the Ministry of Finance in its circular No. 4032 B of February 12, 1944, ordered the seizure of the industrial building owned by the claimant and situated at Via G.B. Vico No. 30, Milan, as well as the installations, machines, raw materials, furniture, tools, stock and any and every other property, whatever the nature thereof and wherever situated, and all other assets such as furnishings, floating funds, shares of stock, credits, etc.

All the property so seized was transferred, for the management and subsequent sale thereof, to the Ente di Gestione e Liquidazione Immobiliare known as E.G.E.L.I., a special agency established by the Italian Government for the management and settlement of property owned by Jews or by enemy nationals.

4. On January 28, 1955 the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic, on behalf of Ludovico Baer, a claim for compensation for the war damages suffered by his property in Italy, on the basis of Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof.

But, by letter No. 401994 dated March 13, 1957 the Minister of the Treasury rejected this claim on the grounds that Ludovico Baer did not fulfil the conditions required by the aforesaid Treaty for the purpose of being entitled to receive compensation in that he was not vested with the nationality of the United States either on the date of the Armistice, September 3, 1943, or on the dates on which the property was damaged by air attacks (February 17 and August 15, 1943) and, furthermore, because the claimant had not been treated as enemy under the laws in force in Italy during the war so that he did not fulfil the conditions required by Article 78, paragraph 9 (a) of the Treaty of Peace for the purpose of benefiting by the advantages accorded to a "United Nations national".

5. A Special Progressive Tax on Property was established in Italy under Legislative Decree of the Provisional Head of the State No. 143, dated March 29, 1947.

On September 1, 1947 the Provisional Head of the State approved and enacted Law No. 828, dated September 1, 1947, "ratifying with amendments and complements Legislative Decree of the Provisional Head of the State No. 143, dated March 29, 1947, concerning the establishment of a Special Progressive Tax on Property".

On December 27, 1956 the III Ufficio Distrettuale delle Imposte Dirette of Milan served on the claimant a notice of assessment of this Special Progressive Tax on Property owned by him in Italy and requested him to pay the sum of 1,417,660 lire.

On February 19, 1957, the claimant submitted a request for exemption from this tax to the III Ufficio Distrettuale delle Imposte Dirette invoking Article 78, paragraph 6 of the Treaty of Peace; subsequently, by letter dated February 8, 1957, the Embassy of the United States of America in Rome supported this request in resorting to the good offices of the Italian Agent General of this Commission.

As no action was taken on these requests, the Agent of the United States of America submitted the subject claim to this Commission.

CONSIDERATIONS OF LAW:

6. In his Answer dated October 1, 1957 the Agent of the Italian Government made a brief reference to the other cases pending before this Commission which, in substance, are identical to the claim of Ludovico Baer. These cases are: Fubini (No. 272)¹ and Falco Bolasco (No. 270),² both of which were adjudicated by this Commission on December 12, 1959, on the basis of a reasoning that is very similar to that already adopted by the Commission in its three previous decisions, all of them rendered on the same day, that is, on September 24, 1956, in the Treves (No. 95),³ Levi (No. 96)⁴ and Wollemborg (No. 109)⁵ cases.

In the light of such a well established jurisprudence, the Commission does not believe it necessary to repeat *in extenso* the grounds on which the decisions involved were rendered and confines itself to setting forth the principles of law on which it (the jurisprudence) is based and to referring to the aforementioned decisions in their support.

7. It is not denied by the Parties that Ludovico Baer, the claimant, does not fulfill the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in order that his American nationality entitle him to receive compensation for the damages suffered by him as a result of the war and to be exempted from the Special Progressive Tax on Property, because, as he was naturalized in the United States in 1944, he was not vested with the nationality of this country on September 3, 1943, the date of the Armistice, although he did possess the status of a United States national on September 15, 1947, the date on which the Treaty of Peace came into force.

He could therefore benefit by Article 78, paragraph 4 (a), second sentence and paragraph 6 of the Treaty of Peace only if it were established that he was treated as enemy under the terms of the legislation in force in Italy during the war (Article 78, paragraph 9 (a), sub-paragraph 2).

8. The Commission cannot admit that the aforesaid Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace should be interpreted in the light of sub-paragraph 1 and that treatment as enemy of a person who was not vested with the nationality of one of the States at war with Italy could actually have taken place only if it occurred before the Armistice of September 3, 1943; this interpretation would lead to introducing into Article 78, paragraph 9 (a), sub-paragraph 2, a restriction which is not to be found therein and which would altogether change the very text thereof, and this the Commission does not feel authorized to do in light of the fundamental rules of the Law of Nations on the art of interpreting international treaties (see Advisory Opinion of Sep-

¹ *Infra*, decision No. 201, p. 420.

² *Infra*, decision No. 200, p. 408.

³ *Supra*, decision No. 144, p. 262.

⁴ *Supra*, decision No. 145, p. 272.

⁵ *Supra*, decision No. 146, p. 283.

tember 15, 1923 of the Permanent Court of International Justice on the interpretation of Article 4 of the Treaty regarding Polish minorities of June 28, 1919, in the matter of acquisition of Polish nationality, *Recueil C.P. J.I.*, serie B. No. 7, p. 20).

9. Also, this Commission cannot admit that the notion of "laws in force in Italy during the war" adopted in Article 78, paragraph 9 (a) sub-paragraph 2 of the Treaty of Peace should not include the laws, decrees and acts emanated by the Italian Social Republic after the Armistice; in point of fact, in conformity with the principle of effectiveness sanctioned by the Law of Nations, when a legal Government and a Government of insurgents share power within a State, the laws enacted by each one of them, in the parts of territory which they respectively occupy, are considered as laws in force which find support in the actual power exercised by each of these two Governments over the territory where it is able, by threat of punishment, to insure the carrying out of its intent. It follows that, in all parts of Italy subjected to the power of the Italian Social Republic, the legislative acts emanated by this Republic fall within the notion of "laws in force in Italy during the war" contained in the aforementioned Article. A teleological interpretation of this provision would not lead to a different conclusion, because the purpose of the text adopted by the contracting Parties is that of according the benefits of the Treaty of Peace to persons whose property, rights and interests sustained damages under the laws in force in Italy during the war; as the contracting Parties failed to indicate by which Italian power these laws were to have been enacted, this gap must be filled, as has been affirmed by the Institut de droit international in its Resolution of April 19, 1956, Grenade session, "in accordance with good faith and in the light of the principles of international law" (*Annuaire*, vol. 46, p. 365); the principle that must be applied in the instant case is that of effectiveness as it is explained above.

10. The Commission cannot, furthermore, admit that the notion of "laws in force in Italy during the war" should not be made to include provisions containing racial discrimination on the grounds that these have no connexion with the contingencies of war and that they were only directed at Italian nationals and not at enemy nationals.

The Commission is of the opinion that the connexion between the Italian legal provisions concerning racial persecution and the war cannot be denied. These provisions preceded the establishment of the Salò Republic and go back to Decrees No. 1390 and No. 1630 of September 5 and 23, 1938, which were enacted by the legal Italian Government at the time of their adoption. They served as a basis for a whole series of legislative measures directed against the Jews in Italy and to the persecutions which were made worse by point 7 of the Programme of Action of the First Assembly of Republican Fascism, which was the legislative authority of the Italian Social Republic, and which, as a matter of policy, stated (November 1943):

Those who belong to the Jewish race are aliens. During the war they are enemy nationals.

This hostility towards the Jews materialized in Law Decree No. 2 of January 4, 1944, which was applicable in the whole of the territory over which the Italian Social Republic could exercise its authority, and which led many Chiefs of Provinces to issue decrees of confiscation of Jewish owned property, based on the rule that "Jews are considered to be the subjects of an enemy State".

11. The facts of the instant case show that Ludovico Baer was the victim of measures of confiscation directed against all his assets in Italy, covering his

real and personal property and his industrial installations, as well as his funds, his shares of stock, credits, etc., wherever these different items of property were situated; the confiscation was complete and effective and was not of a merely symbolic nature.

It was decreed and executed under the legislation in force in Italy during the war.

This Commission, consequently, establishes that Ludovico Baer was treated as enemy in Italy under the terms of the legislation there in force during the war and that he therefore fulfils the conditions required by Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace for the purpose of being qualified as a "United Nations national". He is hence entitled to benefit by the provisions of Article 78, paragraph 4 (a), second sentence, and of paragraph 6 of the aforesaid Treaty.

12. The claimant concludes by requesting that the Italian Government reimburse him the reasonable expenses incurred by him in establishing his claim; the amount requested is 500,000 lire. The Commission reserves unto itself the right of making a final decision on this point. On the foregoing grounds,

DECIDES,

by a majority vote of the Members on the Commission, the Italian Representative dissenting on certain questions of principle:

1. The claimant, Ludovico Baer, is entitled to avail himself of the quality of "United Nations national" within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947.

2. It therefore follows that he is entitled to receive, in lire, from the Italian Government, under Article 78, paragraph 4 (a) of the Treaty of Peace, compensation to the extent of two-thirds of the sum necessary, at the date of payment, to make good the losses suffered as a result of the war by the building situated at Via G.B. Vico No. 30, Milan, of which he is the owner.

3. The Italian Government shall submit, within an unextendable time-limit of three months, beginning from the date on which this Decision is notified to him, his observations on the amount of compensation to be awarded to Ludovico Baer for the war damages specified in paragraph 2 above.

4. Ludovico Baer is entitled, under Article 78, paragraph 6 of the Treaty of Peace, to be exempted from the Special Progressive Tax on Property, established by Law No. 828 of September 1, 1947 of the Italian Republic.

5. Within a time-limit of sixty days, beginning from the date on which this Decision is notified, the Italian Government shall refund to the claimant any sums which he may have already paid as a result of the notice of assessment of this tax served on him on December 27, 1946.

6. This Decision is final and binding; its execution is incumbent on the Italian Government.

7. It shall be notified to the Agents of the two Governments concerned.

DONE in Rome, at the seat of the Conciliation Commission, on this 12th day of the month of December nineteen hundred and fifty-nine.

The Third Member

G. SAUSER-HALL

*The Representative of the
United States of America*

Alexander J. MATTURRI

*The Representative of the
Italian Republic*

Antonio SORRENTINO