JUDGMENT OF THE COURT

4 July 2023*

(*Article 28 EEA – Free movement of workers – Discrimination between resident and non-resident taxpayers – Tax legislation – Income tax – Equal treatment – Protocol 35 EEA – Principle of sincere cooperation – Principle of equivalence – Principle of effectiveness – State liability*)

In Case E-11/22,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*), in a case between

RS

and

Fiscal Authority of the Principality of Liechtenstein (*Steuerverwaltung des Fürstentums Liechtenstein*),

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 3, 4 and 28,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann, and Ola Mestad (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

– RS, represented by Nicolas Reithner and Tijana Braubach, attorneys;

– the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Romina Schobel and Dr Claudia Bösch, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Michael Sánchez Rydelski and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission ("the Commission"), represented by Wim Roels and Cvetelina Georgieva, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments on behalf of RS, represented by Tijana Braubach; the Liechtenstein Government, represented by Romina Schobel; ESA, represented by Claire Simpson; and the Commission, represented by Wim Roels, at the hearing on 22 March 2023,

gives the following

Judgment

I Legal background

EEA law

1 Article 3 of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement") reads as follows:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*

2 Article 4 of the EEA Agreement reads:

> *Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

3 Article 28 of the EEA Agreement reads, in extract:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
>
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
>
> *...*

National law

4 On 1 January 2011, a new Tax Act (*Gesetz über die Landes- und Gemeindesteuern*) ("the Tax Act") entered into force in Liechtenstein.

5 According to the referring court, the Tax Act, in its original form (at 1 January 2011), provided the following:

– According to Article 6 of the Tax Act, natural persons are subject to property and income tax.

– According to Article 19 of the Tax Act, all taxable persons, including persons with limited tax liability, are required to pay both a national tax and a municipal tax. The national tax is progressive and, depending on the level of taxable income, is between 0 and just above 20 per cent.

– According to Article 75(3) of the Tax Act, the municipal tax is levied as a surcharge ("municipal surcharge") on the national tax. The amount of the municipal surcharge is

fixed by each of the 11 municipalities in Liechtenstein themselves and the surcharge may be no lower than 150 per cent and no higher than 250 per cent.

– Article 23(5) of the Tax Act provides which municipal surcharge is applicable if a person with (limited) tax liability is not resident in Liechtenstein.

– According to Article 23(5)(a) of the Tax Act, earnings from the management of land in Liechtenstein used for agriculture and forestry and earnings from permanent establishments located in Liechtenstein are subject to the municipal surcharge of the municipality in which the land or the permanent establishment is located.

– According to Article 23(5)(b) of the Tax Act, earnings from an activity as an employed person undertaken in Liechtenstein are subject to the municipal surcharge of the municipality in which the activity is undertaken.

6 In 2014 the Liechtenstein Parliament amended Article 23(5) of the Tax Act with regard to the municipal surcharge. Persons with limited tax liability were no longer subject to a municipal surcharge, but a "surcharge", which applied for the first time to the assessment for the 2014 tax year. That surcharge was no longer a municipal tax, but a (supplementary) national tax. Article 23(5) of the Tax Act provided that for the assessment of persons with limited tax liability, the scale under Article 19 of the Tax Act (that is to say, the regular national tax) is to be applied and the following surcharge levied:

(a) for earnings from management of land in Liechtenstein used for agriculture and forestry and for earnings from permanent establishments located in Liechtenstein, the municipal surcharge of the municipality in which the land or the permanent establishment is located;

(b) in all other cases (that is to say, in particular, also earnings from activity as an employed person carried on in Liechtenstein), a surcharge of 200 per cent.

7 By Act of 11 June 2021, the Liechtenstein Parliament amended the Tax Act as follows:

I. Amendment of existing law

The Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act), LGBl. 2010 No 340, in the applicable version, shall be amended as follows:

Article 23(5)(b)

5. For the ordinary assessment, the scale under Article 19 shall be applied and the following surcharge shall be levied:

(b) in all other cases, a surcharge to be laid down each year in the Finance Act.

8 In addition, the Act of 11 June 2021 includes the following transitional provision and rules for its entry into force:

II. Transitional provision

For the 2021 tax year the surcharge under Article 23(5)(b) shall be 150%.

III. Entry into force

This Act shall enter into force on the day after promulgation and apply for the first time to assessments for the 2021 tax year which are carried out after its entry into force.

II Facts and procedure

9 According to the referring court, RS is a German national residing in Switzerland. Between 1 January 2019 and 31 December 2019, RS worked in the Liechtenstein public service. On that basis, he is subject to (limited) tax liability in Liechtenstein under the Double Taxation Convention between Liechtenstein and Switzerland in respect of income he earns from employment in Liechtenstein.

10 By tax assessment of 11 December 2020, RS was assessed for the 2019 tax year in respect of income he had earned from an activity as an employed person in Liechtenstein. RS contests that tax assessment in the case pending before the Administrative Court. He maintains that he was discriminated against compared to persons who are domiciled and resident for tax purposes in Liechtenstein because he was subject to a higher tax rate than those resident in Liechtenstein.

11 For the tax year at issue in the present case, the Liechtenstein legislation in force at that time provided that persons with limited tax liability were no longer subject to a municipal surcharge (between 150 per cent and 180 per cent depending on the municipality), as Liechtenstein residents, but to a surcharge, which was a supplementary national tax. For earnings from activity as an employed person that surcharge was fixed at 200 per cent for non-residents.

12 The result was that persons with limited tax liability, such as the applicant in the proceedings before the Administrative Court, were subject to a higher tax rate for earnings from activity as an employed person carried on in Liechtenstein than those resident in Liechtenstein.

13 By judgment of 1 September 2020 in Case StGH 2019/095, a case brought by an Austrian national resident in Austria and employed in the public service in Liechtenstein, the Liechtenstein Constitutional Court (*Staatsgerichtshof*) found that Article 23(5)(b) of the Tax Act in the 2014 version was unconstitutional and contrary to a treaty concluded by the State (*Staatsvertrag*), as it discriminates against nationals of an EEA State who are subject to limited tax liability in Liechtenstein in respect of income which they earn from employment in Liechtenstein (infringement of the principle of non-discrimination under Articles 4 and 28(2) of the EEA Agreement).

14 The Constitutional Court, however, deferred the operative date of the annulment of Article 23(5)(b) of the Tax Act by one year on the basis of Article 19(3) of the Constitutional Court Act (*Staatsgerichtshofgesetz*). According to the request, the Constitutional Court held that the creation of a legal situation consistent with the Constitution and international treaties required action by the legislature to avoid legal uncertainty and results that are questionable from the perspective of legal policy. Were the 200 per cent tax surcharge to cease to apply immediately, without provision of a deferral period, persons with limited tax liability would have to pay only one third of the tax previously due under Article 23(5)(b) of the Tax Act until a new provision was brought into force. Furthermore, Article 23(5)(b) of the Tax Act covered not only income from activity as an employed person but also, for example, attendance fees, benefits from old-age and survivors' insurance/disability insurance, occupational benefits and benefits from the termination of a vested benefits policy or a blocked account.

15 The annulled provision of the Tax Act thus remained in force for the duration of the deferral period fixed by the Constitutional Court.

16 By legislative amendment entering into force on 20 August 2021, Article 23(5)(b) of the Tax Act was amended so that: (i) by way of the transitional provision, a surcharge of 150 per cent would apply for the 2021 tax year; (ii) thereafter, the rate of the surcharge is to be laid down each year in the Finance Act. Therefore this permits the Liechtenstein Parliament to set the surcharge by reference to the lowest municipal surcharge applicable at the time.

17 According to the referring court, as a consequence, RS is subject to a surcharge of 200 per cent in the tax years 2019 and 2020, a surcharge of 150 per cent in the 2021 tax year and a surcharge at the level of the lowest municipal surcharge applying in Liechtenstein, which is expected to continue to be 150 per cent in the tax years from 2022.

18 Against this background, the Administrative Court decided to stay the proceedings and request an advisory opinion from the Court. The request, dated 26 September 2022, was registered at the Court on 30 September 2022. The Administrative Court submitted the following question to the Court:

> *Must Articles 3, 4 and 28(2) of the EEA Agreement be interpreted as precluding the application of a higher tax rate to the taxation of earnings gained by activity in Liechtenstein as an employed person by nationals of an EEA Member State who are not resident for tax purposes on national territory (Liechtenstein), compared to persons liable to tax who are resident for tax purposes on national territory (Liechtenstein), when assessing taxes in respect of the tax years up to 2020, insofar as they have not yet been finally assessed?*

19 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Preliminary considerations

20 The referring court seeks guidance as to whether Article 28 EEA and/or Article 4 EEA are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which non-residents are taxed at a higher rate than persons resident in Liechtenstein.

21 The Court observes that the applicant, a German national, was resident during the relevant 2019 tax year in Switzerland, rather than in an EEA State. Also, the question raised does not relate solely to the applicant's situation but more generally to the compatibility with EEA law of an item of national legislation, as described by the referring court (compare the judgment in *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 32 and case law cited).

22 In the present case, it is evident from the request as well as all the written observations submitted by the interested parties, that the referring court seeks guidance concerning the consequences that it must draw if the contested national provision infringes Article 28 EEA and/or Article 4 EEA. It follows from settled case law that in order to give the national court a useful answer, the Court may, in the spirit of cooperation with national courts and tribunals, provide it with all the guidance that it deems necessary (see Case E-7/19 *Tak-Malbik*, judgment of 16 July 2020, paragraph 45).

23 In that respect, the referring court observes that in an earlier judgment of 1 September 2020 relating to an EEA national resident in Austria, who had made use of his freedom of movement to take up employment in Liechtenstein, the Constitutional Court annulled Article 23(5)(b) of the Tax Act. The annulment was made on the basis that the provision discriminated against non-resident EEA nationals by taxing them at a higher rate than persons resident in Liechtenstein. However, as is apparent from the request, the question referred focuses particularly on the fact that the Constitutional Court held that the effect of the annulment of the national provision may be deferred for the period necessary to bring the Tax Act into conformity with the EEA Agreement.

24 In the present case, it is apparent from the request that Article 23(5)(b) of the Tax Act was still in force when RS's tax assessment for the 2019 tax year was issued on 11 December 2020.

25 Thus, the referring court seeks to determine, in essence, whether, in the event that the Court declares that Article 28 EEA and/or Article 4 EEA preclude a provision of national law such as that at issue in the main proceedings, EEA law obliges the national court to apply EEA law in the proceedings before it and not to apply the provision of national law at issue, notwithstanding the judgment of the Constitutional Court deferring the date on which the provision in question ceased to have legislative force.

26 In the circumstances of the present case, in order to realise the purpose of the cooperation provided for in Article 34 SCA, the request must be understood as meaning

that the referring court seeks to ascertain the answer to two questions. First, whether Article 28 EEA and/or Article 4 EEA must be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which an EEA State applies a higher rate of taxation to income gained through employment activity in that State by EEA nationals who are not resident for tax purposes in that State, in comparison with persons who are resident for tax purposes in that State. Second, if that question is answered in the affirmative, the referring court seeks to determine whether EEA law must prevail irrespective of any deferral required by national law.

Does Article 28 EEA preclude legislation such as that at issue in the main proceedings?

27 The Court recalls that, as a general rule, the tax system of an EFTA State is not covered by the EEA Agreement. However, the EFTA States must nonetheless exercise their competence in the area of taxation consistently with EEA law (see Case E-15/16 *Yara International ASA* [2017] EFTA Ct. Rep. 434, paragraph 32 and case law cited).

28 In order to ascertain the provisions of EEA law applicable to a case such as that of the main proceedings, it must be observed that Article 4 EEA, which lays down as a general principle a prohibition of discrimination on grounds of nationality, applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 36 and case law cited). So far as the free movement of workers is concerned, that principle was given specific expression and effect by Article 28 EEA.

29 It follows from Article 28(2) EEA that the freedom of movement for workers shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment. It is settled case law that all of the provisions of the EEA Agreement relating to freedom of movement for persons have the purpose of facilitating the pursuit by EEA nationals of occupational activities of all kinds throughout the EEA and preclude measures which might place EEA nationals at a disadvantage when they wish to pursue an economic activity in the territory of another EEA State (compare the judgment in *Lakebrink*, C-182/06, EU:C:2007:452, paragraph 17 and case law cited). Any EEA national who has exercised the right to freedom of movement for workers and who has been employed in another EEA State falls within the scope of Article 28 EEA. This includes the situation of an EEA national who works in an EEA State other than that of his or her actual place of residence (see Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 50, and compare the judgment in *Lakebrink*, C-182/06, cited above, paragraphs 15 and 16 and case law cited).

30 Article 28(2) EEA entails the abolition of all discrimination based on nationality between workers of the EEA States, particularly with regard to remuneration. It is settled case law that the principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax (compare the judgment in *Sopora*, C-512/13, EU:C:2015:108, paragraph 22 and case law cited).

31 Further, it is settled case law that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result (see Case E-9/20 *ESA* v *Norway*, judgment of 15 July 2021, paragraph 100 and case law cited). Consequently, the freedom of movement of workers prohibits an EEA State from adopting a measure which favours workers residing in its territory if that measure ultimately favours that EEA State's own nationals (compare the judgment in *Sopora*, cited above, paragraph 24). Such measures are liable to operate mainly to the detriment of nationals of other EEA States, since non-residents are, in the majority of cases, foreign nationals, and thus to constitute indirect discrimination by reason of nationality (see Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 17 and case law cited).

32 The Court observes that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see Case E-3/21 *PRA Group Europe AS*, judgment of 1 June 2022, paragraph 31 and case law cited). In relation to direct taxes, the situations of residents and non-residents are not, as a rule, comparable. However, a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works, is objectively in the same situation as regards income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same (see Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraphs 86 and 87 and case law cited).

33 Hence, non-residents such as the applicant in the main proceedings, for whom all or almost all of their worldwide income arises in Liechtenstein, must be considered, in terms of the rules governing their income tax, as being in a comparable situation to that of persons who reside and work in Liechtenstein. The fact that a tax may be levied by a municipality or the central government is not, as such, capable of altering that conclusion (see Case E-6/07 *HOB vín ehf.* [2008] EFTA Ct. Rep. 127, paragraphs 29 and 37 and case law cited).

34 Moreover, it follows from settled case law that the status of residence, or non-residence, of an EEA national is irrelevant where it concerns the determination of the rate of tax in circumstances in which there are no obvious reasons to warrant a higher tax burden for non-residents (compare the judgment in *Asscher*, C-107/94, EU:C:1996:251, paragraph 62).

35 The difference in treatment between taxpayers who work in an EEA State but are not resident there and taxpayers who both work and reside in that State, which consists in the former being taxed at a higher rate than the latter, therefore constitutes, to that extent, indirect discrimination based on the criterion of residence, contrary to Article 28 EEA.

36 It follows that Article 28 EEA must be interpreted as precluding national legislation such as that at issue in the main proceedings, which applies a higher rate of taxation to income gained through employment in that State by EEA nationals who are not resident for tax purposes in that State, compared to those who are resident for tax purposes in

that State.

Consequence of finding a breach of the main part of the EEA Agreement

37 The Court observes that, even though it follows from the foregoing considerations that EEA law precludes a tax provision such as that at issue in the main proceedings – and indeed the referring court starts from the assumption that this is the case – it is clear from the request that the referring court seeks guidance concerning the consequences that it must draw from the infringement of Article 28 EEA resulting from the contested national provision.

38 In particular, the referring court wishes to ascertain whether EEA law must prevail over the national provision at issue even though the Constitutional Court deferred the date on which the annulment of the provision took effect. In this regard, the referring court observes that the Constitutional Court, in its judgment of 1 September 2020, held that such deferral was justified in relation to that provision on the grounds of legal certainty.

39 The referring court refers to the judgment of the European Court of Justice in *An tAire Talmhaíochta, Bia agus Mara and Others*, C-64/20, EU:C:2021:207, in support of the contention that a national provision may, exceptionally, be maintained in force, notwithstanding the fact that the measure is contrary to EEA law, where this is necessary for appropriate reasons including those of legal certainty.

40 The Court recalls that it is inherent in Article 3 EEA and Protocol 35 EEA that, in the event of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and to claim, at the national level, any rights that can be derived from provisions of the EEA Agreement as being, or having been made, part of the respective national legal order, if they are unconditional and sufficiently precise (see Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 122 and case law cited).

41 Thus, any provision of national law that is contrary to a provision of the EEA Agreement, which is or has been made part of the respective national legal order, must be disapplied if the provision of EEA law in question is unconditional and sufficiently precise (see Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paragraphs 53 to 55). There can be no doubt that Article 28 EEA fulfils these requirements. In that context, it must be borne in mind that national courts are bound under the principle of sincere cooperation in Article 3 EEA, for the matters within their jurisdiction, to ensure the full effectiveness of EEA law when they determine the disputes before them (see Case E-2/21 *Norep AS*, judgment of 14 December 2021, paragraph 43 and case law cited).

42 It should be recalled that the interpretation which the Court gives to rules of EEA law clarifies and defines the meaning and scope of those rules as they must be or ought to have been understood and applied from the time of their entry into force (compare the judgment in *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16). The Court observes that any other solution could undermine the guarantees that EEA law will be

uniformly applied and the rights which individuals derive from EEA law will be effectively protected.

43 In this context, first, the Court recalls that an important objective of the EEA Agreement is to ensure the equal treatment of individuals and economic operators and equal conditions of competition, as well as adequate means of enforcement (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 57).

44 Second, as stated above, an unconditional and sufficiently precise EEA rule which has been made part of domestic law in the EEA States in accordance with their constitutional and legal traditions must be fully and uniformly applied in all the EFTA States from the day on which the respective legal act is made part of the EEA Agreement. It is a source of rights and duties for all those affected thereby, whether EEA States or individuals. In accordance with Article 3 EEA, it is the responsibility of the national courts, in particular, to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective (see Case E-14/20 *Liti-Link AG*, judgment of 15 July 2021, paragraph 74 and case law cited).

45 Thus, the Court observes that it is only in exceptional cases, in application of the general principle of legal certainty inherent in the EEA legal order, that EEA States may temporarily maintain the effects of a national rule that is contrary to EEA law, depending on the circumstances of the case. As noted by ESA and the Commission, two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (compare the judgments in *Meilicke and Others*, C-292/04, EU:C:2007:132, paragraphs 35 and 36, and *Herst*, C-401/18, EU:C:2020:295, paragraph 56).

46 Accordingly, such a temporary limitation may only be imposed in very specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EEA law by reason of objective, significant uncertainty regarding the implications of provisions of EEA law, to which the conduct of other EEA States, ESA or the Commission may even have contributed (compare the judgments in *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 93 and case law cited; *Hein*, C-385/17, EU:C:2018:1018, paragraph 57 and case law cited; and *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 61 and case law cited). As observed by ESA and the Commission, the conditions are not fulfilled in the case in the main proceedings.

47 As regards the risk of serious difficulties, the Court notes that the information contained in the request does not make it possible to conclude that a large number of *bona fide* legal relationships based on the contested provision would have been affected and, consequently, that it would be particularly difficult to ensure compliance with Article 28 EEA. A mere reference to the budgetary and administrative problems that might arise from the immediate annulment of the contested provision in the case in the main proceedings is not sufficient to establish overriding considerations of legal

certainty (compare the judgment in *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17, EU:C:2019:544, paragraph 60). Consequently, the Court finds that the existence of a risk of serious difficulties justifying the limitation of the temporal effects of Article 28 EEA cannot be regarded as established.

48 Regarding the criterion that those concerned should have acted in good faith, the Court notes, as also observed by the Constitutional Court in its judgment of 1 September 2020, that it is clear from settled case law that the free movement provisions preclude a legislative provision such as that at issue in the main proceedings, which applies a higher rate of income tax to the income of non-residents than to that of residents.

49 Since the cumulative criteria seem not to be fulfilled, the temporal effects of Article 28 EEA in the main proceedings may not be limited (compare the judgment in *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 136).

50 In circumstances such as those of the main proceedings, it is inherent in Protocol 35 EEA that the national court must give full effect to Article 28 EEA and disregard any national rule or case law maintaining the legal effects of legislation that infringes Article 28 EEA, as such a limitation is not compatible with EEA law (see Case E-1/94 *Restamark* [1994–1995] EFTA Ct. Rep. 15, paragraph 77).

51 This assessment cannot be called into question by the referring court's observation that it would be discriminatory, unfair and unjust for those taxpayers whose tax assessments for past tax years were finally concluded by 20 August 2021 if a lower tax rate for the past tax years was now applied retrospectively to the few taxpayers, like the applicant, whose tax assessments for past tax years have not yet been finally concluded.

52 In this regard, the Court observes that a judicial decision that temporally limits the effects connected with a declaration of nullity in respect of a national measure in circumstances such as those noted above deprives EEA taxpayers of the right to obtain a refund of the taxes unduly levied. Such protection is, therefore, incomplete and insufficient and does not constitute either an adequate or effective means of remedying violations of the rights of such individuals, in breach of EEA law (compare the judgment in *Gutiérrez Naranjo and Others*, Joined Cases C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 73 and 74).

53 Furthermore, it is settled case law that the right to a refund of taxes levied by an EEA State in breach of EEA law is the consequence and complement of the rights conferred on individuals by provisions of EEA law prohibiting such taxes. EEA States are therefore, in principle, required to repay taxes levied in breach of EEA law (see Case E-7/13 *Creditinfo Lánstraust* [2013] EFTA Ct. Rep. 970, paragraph 43 and case law cited). Thus, it must be held that individuals such as the applicant in the main proceedings may not be subjected to a higher rate of taxation on the basis of the national measure at issue. Rather, the referring court is required to draw the necessary consequences from the breach of EEA law, and within the scope of its powers grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law (compare the judgment in *Târșia*, C-69/14, EU:C:2015:662,

paragraphs 24 and 25 and case law cited).

54 The Court observes that the taxpayers whose tax assessments have been finally concluded must also be able to benefit from remedies for breaches of their rights under EEA law, to the extent that such remedies remain available to them under national procedural law (compare the judgment in *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 58 and case law cited).

55 In this regard, it must be borne in mind that, in accordance with the principle of national procedural autonomy, it is for the national legal order of each EEA State to lay down procedural rules governing actions for the repayment of taxes, while respecting the requirements of equivalence and effectiveness. This entails that the procedural rules governing actions for safeguarding a taxpayer's rights under EEA law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness). It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness (see Case E-6/17 *Fjarskipti hf.* [2018] EFTA Ct. Rep. 78, paragraph 31, and compare the judgment in *i-21 Germany and Arcor*, Joined Cases C-392/04 and C-422/04, EU:C:2006:586, paragraph 57).

56 However, it should be emphasised, without prejudice to the above, that, in accordance with the principle of legal certainty, EEA law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of reasonable periods for legal remedies or by the exhaustion of remedies. Compliance with this principle prevents administrative acts which produce legal effects from being called into question indefinitely (compare the judgment in *Grossmania*, C-177/20, EU:C:2022:175, paragraph 52 and the case law cited). EEA States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to EEA law as interpreted subsequently by the Court to be made to the competent administrative authority within a reasonable period (compare the judgment in *Kempter*, C-2/06, EU:C:2008:78, paragraph 59).

57 In addition, if it is not within the scope of the referring court's power to grant an effective remedy, the Court notes that, in cases of violation of EEA law by an EEA State, the EEA State would also be obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement (see Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 42 and case law cited).

58 As mentioned before, the answer to the question referred is that Article 28 EEA must be interpreted as precluding national legislation such as that at issue in the main proceedings, by which an EEA State applies a higher rate of taxation to income gained through employment activity in that State by EEA nationals who are not resident for tax purposes in that State, in comparison with those who are resident for tax purposes in

that State. Furthermore, Protocol 35 EEA and Article 28 EEA must be interpreted as precluding an EEA State from applying a provision such as that at issue in the main proceedings, which has been deemed incompatible with Article 28 EEA.

59 Moreover, individuals such as the applicant in the main proceedings may not be subjected to a higher rate of taxation on the basis of a national measure such as that at issue in the main proceedings. The referring court is required to draw the necessary consequences from the breach of EEA law and, within the scope of its powers, grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law. If that is not possible, the EEA State is obliged to provide compensation for loss and damage caused to individuals, such as the applicant in the main proceedings, in accordance with the principle of State liability.

IV Costs

60 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the question referred to it by the Administrative Court of the Principality of Liechtenstein gives the following Advisory Opinion:

1. **Article 28 of the EEA Agreement must be interpreted as precluding national legislation such as that at issue in the main proceedings, by which an EEA State applies a higher rate of taxation to income gained through employment activity in that State by EEA nationals who are not resident for tax purposes in that State, in comparison with those who are resident for tax purposes in that State.**

2. **Protocol 35 to the EEA Agreement and Article 28 of the EEA Agreement must be interpreted as precluding an EEA State from applying a provision such as that at issue in the main proceedings, which has been deemed incompatible with Article 28 EEA.**

3. **Individuals such as the applicant in the main proceedings may not be subjected to a higher rate of taxation on the basis of a national measure such as that at issue in the main proceedings. The referring court is required to draw the necessary consequences from the breach of EEA law and, within the scope of its powers, grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law. If that is not possible, the EEA State is obliged to provide compensation for loss and damage caused to individuals, such as the applicant in the main proceedings, in accordance with the principle of State liability.**

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 4 July 2023.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President