

26 September 2022

## **REGISTERED LETTER**

EFTA Court  
1, Rue du Fort Thüngen  
1499 Luxembourg  
Luxembourg

### **Request for an advisory opinion (VGH 2022/033)**

To the Judges of the EFTA Court,

The Administrative Court of the Principality of Liechtenstein decided, in its closed session on 23 September 2022, to stay the administrative appeal proceedings before it in case number VGH 2022/033 (applicant: RS; defendant: Steuerverwaltung des Fürstentums Liechtenstein (Fiscal Authority of the Principality of Liechtenstein) and to request an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

#### Facts:

The applicant, RS, is a German national residing in Switzerland ([... ...]). In the relevant period from 1 January 2019 to 31 December 2019 he worked in the Liechtenstein public service and on that basis he is subject to (limited) tax liability in Liechtenstein under the Double Taxation Convention between Switzerland and Liechtenstein in respect of income he earns from employment in Liechtenstein.

By tax assessment of 11 December 2020, the applicant was assessed for the 2019 tax year in respect of income he had earned from an activity as an employed person in Liechtenstein. The tax was assessed at CHF [...]. The applicant is contesting the tax assessment before the Administrative Court. He maintains that he is discriminated against compared to persons who are domiciled and resident for tax purposes in Liechtenstein (Article 4 and Article 28(2) of the EEA Agreement) because he is subject to a higher tax rate than persons who are resident in Liechtenstein.

### Liechtenstein legal framework:

For a better understanding of the arguments put forward by the applicant, regard should be had to the historical development of Liechtenstein law.

In 2010 the Liechtenstein legislature adopted a new Tax Act, the Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act), Landesgesetzblatt (LGBL.) 2010 No 340. It entered into force on 1 January 2011.

Natural persons are subject to property and income tax (Article 6 et seq. of the Tax Act).

According to the Tax Act in its original version of LGBL. 2010 No 340, 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% (Article 19 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, while the surcharge may be no lower than 150% and no higher than 250% (Article 75(3) of the Tax Act). Article 23(5) of the Tax Act provides which municipal surcharge is applicable if the person with (limited) tax liability is not resident in Liechtenstein. Thus, earnings from 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 (Article 23(5)(a) 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 (Article 23(5)(b) of the Tax Act).

In 2014 the legislature amended the Tax Act inter alia with regard to the municipal surcharge. Persons with limited tax liability are now no longer subject to a municipal surcharge, but a 'surcharge' (LGBL. 2014 No 344, which applied for the first time to the assessment for the 2014 tax year). This surcharge is no longer a municipal tax, but a (supplementary) national tax. Article 23(5) of the Tax Act now provides 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 other cases (in particular earnings from activity as an employed person carried on in Liechtenstein), a surcharge of 200%.

Article 75(3) of the Tax Act remained unchanged.

In 2019 the municipal surcharges fixed by the municipalities ranged between 150% and 180%. The majority of municipalities levied a surcharge of 150%.

The result was that persons with limited tax liability, like the applicant, were subject to a higher tax rate for earnings from activity as an employed person carried on in Liechtenstein than taxable persons resident in Liechtenstein, that is, the tax rate under Article 19 of the Tax Act plus a 200% surcharge, whereas a taxable person resident in Liechtenstein was ‘only’ subject to the tax rate under Article 19 of the Tax Act plus a surcharge between 150% and 180%.

In a case concerning an Austrian national who was resident in Austria and carried on activity as an employed person in the public service in Liechtenstein, and was therefore subject to limited tax liability in Liechtenstein in respect of income he earned from employment in Liechtenstein – the present case concerning the applicant is comparable with that case in this regard – the Administrative Court applied to the State Court (Staatsgerichtshof), in the context of an application for judicial review as to constitutionality, for the annulment of Article 23(5)(b) of the Tax Act. By judgment of 1 September 2020 in Case StGH 2019/095, the State Court granted the application made by the Administrative Court and annulled Article 23(5)(b) of the Tax Act in its version of LGBL 2014 No 344 on the ground that it was contrary to the State Treaty. The State Court concluded that Article 23(5)(b) of the Tax Act in its version of LGBL 2014 No 344 discriminates against nationals of an EEA Member 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 Article 4 and Article 28(2) of the EEA Agreement).

The State Court 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 Staatsgerichtshofgesetz (State Court Act). As grounds it stated that the creation of a legal situation consistent with the Constitution and the State Treaty was dependent on action taken by the legislature ‘to avoid legal uncertainty and results that are questionable from the perspective of legal policy’. If the 200% tax surcharge ceased to apply immediately, without allowing a period of time, 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.

The annulled provision of the Act thus remained in force for the duration of the period of time fixed by the State Court.

On 4 May 2021, the Government proposed to the Landtag (Government report and motion to the Landtag of the Principality of Liechtenstein concerning the amendment of the Tax Act, BuA No 37/2021) that Article 23(5)(a) of the Tax Act be left as it stands, but that Article 23(5)(b) of the Tax Act, the provision annulled by the State Court, be amended such that in the future the Landtag fixes the surcharge each year in the Finance Act by reference to the lowest municipal surcharge at the time. For the 2021 tax year the surcharge was to be fixed in the transitional provision of the Act amending the Tax Act, namely at 150%. The Landtag concurred with the Government and adopted the Act of 11 June 2021 amending the Tax Act, LGBI. 2021 No 256, which was promulgated on 20 August 2021. It reads as follows:

### ***I. Amendment of existing law***

*The Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act), LGBI. 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 other cases, a surcharge to be laid down each year in the Finance Act.*

### ***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.*

The legal situation thus created now means that the applicant is subject to a surcharge of 200% in the 2019 tax year, a surcharge of 200% again in the 2020 tax year, a surcharge of 150% 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%, in the tax years from 2022.

### **European legal framework:**

Article 4 and Article 28(2) of the EEA Agreement prohibit any discrimination against EEA nationals and workers of EEA States on grounds of nationality. The applicant, as a German national, may rely on those provisions of the EEA Agreement.

Direct discrimination does not exist as the tax ‘surcharge’ is not linked to nationality, but to domicile or tax residence. There is, however, indirect discrimination because the surcharge of 200% does not really affect any Liechtenstein nationals, but predominantly nationals of other EEA Member States. The majority of taxable persons

who are resident in Liechtenstein and carry on activity as an employed person in the public service in Liechtenstein are Liechtenstein nationals. Those persons with (limited) tax liability who are resident abroad but carry on activity as an employed person in the public service in Liechtenstein are almost exclusively non-Liechtenstein nationals. A substantial proportion are Swiss nationals, but the majority are nationals of an EEA Member State, in particular Austria.

Assessment of the case by the Administrative Court and the question referred:

The transitional provision in LGBI. 2021 No 256 does not constitute discrimination or any other kind of unequal treatment for taxable persons who are subject to (limited) tax liability in Liechtenstein but are resident abroad compared with taxable persons resident in Liechtenstein. To some extent they are even favoured, namely compared with taxable persons resident in Liechtenstein who are subject to a municipal surcharge in excess of 150%.

The provision governing the entry into force of the Act of 11 June 2021, LGBI. 2021 No 256, gives rise to equal treatment (possibly more favourable treatment) of taxable persons resident abroad for the 2021 tax year and subsequent years if the legislature fixes the surcharge at the level of the lowest municipal surcharge in the annual Finance Act.

The provision governing entry into force does not, however, eliminate less favourable treatment of taxable persons resident abroad in respect of the past, that is to say, in so far as is relevant to the proceedings before the Administrative Court, for the 2019 tax year. In this respect there is an infringement of the principle of non-discrimination under Articles 4 and 28(2) of the EEA Agreement.

The question thus arises whether such discrimination is exceptionally permitted in respect of the past, that is to say, tax years prior to 2021, and in the case at issue the 2019 tax year.

The Administrative Court understands the case-law of the Court of Justice of the European Union as meaning that a national provision may exceptionally run counter to a provision of EU law where this is necessary for appropriate reasons, in particular overriding considerations of legal certainty, it being for the Court alone to decide whether such an exceptional case exists (Court of Justice of the European Union, Case C-64/20 *UH*, judgment of 17 March 2021, in particular paragraph 36 and the case-law cited).

The Administrative Court can see the following arguments to justify such discrimination and thus an exceptional primacy of the national provision:

The vast majority of tax proceedings involving persons with limited tax liability in Liechtenstein for the 2020 tax year and previous years have been finally concluded.

This also applies to the date of entry into force of the Act of 11 June 2021 amending the Tax Act, LGBI. 2021 No 256, on 20 August 2021, subject to the proviso in respect of the 2020 tax year that there is no doubt that at that time a much smaller proportion of tax proceedings had been finally concluded than for the tax years prior to 2020. It would be discriminatory, unfair and unjust for all those taxable persons whose tax assessments for past tax years were finally concluded on 20 August 2021 if a lower tax rate for the past tax years was now applied retrospectively to the few taxable persons, like the applicant, whose tax assessments for past tax years have not yet been finally concluded. Accordingly, the State Court also stated in its abovementioned judgment of 1 September 2020 that ‘legal uncertainties’ and ‘results that are questionable from the perspective of legal policy’ are to be avoided.

The request:

On all these grounds, the Administrative Court requests the EFTA Court to give an advisory opinion on the following question:

**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?**

The Administrative Court is available to provide further information and explanations if requested.

Yours faithfully,

Administrative Court

[signature and official stamp]

lic.iur. Andreas Batliner  
Presiding Judge

cc: - Advocatur Seeger, Frick & Partner AG, Landstrasse 81, 9494 Schaan  
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