



E-11/22-14

## REPORT FOR THE HEARING

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 thereof.

### **I Introduction**

1. By letter of 26 September 2022, registered at the Court on 30 September 2022, the Administrative Court of the Principality of Liechtenstein made a request for an advisory opinion in a case pending before it between RS and the Fiscal Authority of the Principality of Liechtenstein.

2. The case before the referring court concerns the tax assessment for the 2019 tax year in respect of income that RS had earned from an activity as an employed person in Liechtenstein. RS maintains that he is being discriminated against, compared to persons who are domiciled and resident for tax purposes in Liechtenstein, because he is subject to a higher tax rate than persons who are resident in Liechtenstein.

## II Legal background

### *EEA law*

3. Article 3 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

*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.*

4. Article 4 EEA 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.*

5. Article 28 EEA reads:

*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.*

4. *The provisions of this Article shall not apply to employment in the public service.*

5. *Annex V contains specific provisions on the free movement of workers.*

*National law*

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

7. 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%.
- 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, while the surcharge may be no lower than 150% and no higher than 250%.
- 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 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.

8. In 2014 the legislature 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%.

9. 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.*

10. 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.*

### **III Facts and procedure**

11. According to the referring court, RS is a German national residing in Switzerland. In the period from 1 January 2019 to 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 Switzerland and Liechtenstein in respect of income he earns from employment in Liechtenstein.

12. 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 persons who are resident in Liechtenstein.

13. 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% and 180% depending on the municipality), like the residents of Liechtenstein, but to a surcharge, which was a supplementary national tax. For earnings from activity as an employed person that surcharge was fixed at 200% for non-residents.

14. The result was that persons with limited tax liability, like 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 taxable persons resident in Liechtenstein.

15. 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*) ruled that Article 23(5)(b) of the Tax Act in the 2014 version 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).

16. 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 depended on action by the legislature to avoid legal uncertainty and results that are questionable from the perspective of legal policy. Were the 200% 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.

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

18. 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 transitional provision, a surcharge of 150% 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 (thus permitting the Liechtenstein Parliament to fix the surcharge by reference to the lowest municipal surcharge applicable at the time).

19. According to the referring court, the legal situation created by this amendment means that RS is subject to a surcharge of 200% in the 2019 tax year, a surcharge of 200% 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.

20. Against this background, the Administrative Court of the Principality of Liechtenstein 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 has 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?**

#### **IV Written observations**

21. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- RS, represented by Nicolas Reithner and Tijana Braubach, advocates;
- 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.

## V Proposed answers submitted

RS

22. RS proposes that the question referred be answered in the affirmative.

*The Liechtenstein Government*

23. The Liechtenstein Government proposes that the question referred be answered as follows:

*Articles 3, 4 and 28(2) of the EEA Agreement must not 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.*

ESA

24. ESA submits that the Court should answer the question referred as follows:

*Articles 3, 4 and 28(2) of the EEA Agreement must 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 in Liechtenstein, compared to persons liable to tax who are resident for tax purposes in Liechtenstein, when assessing taxes in respect of the tax years up to 2020.*

*The Commission*

25. The Commission proposes that the question referred be answered as follows:

*Articles 3, 4 and 28(2) of the EEA Agreement are [to] 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.*

Páll Hreinsson  
Judge-Rapporteur