PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHES OBERGERICHT
(PRINCELY COURT OF APPEAL)

Please include the case number in all communications
CO.2025.1
Document number 17

ORDER

The Third Chamber of the Fürstliches Obergericht (Princely Court of Appeal), composed of the Presiding Judge Uwe Öhri and Associate Judge Tatjana Nigg-Hirn and Deputy Senior Judge Susanne Jehle as further members of the Chamber, in the

State liability case

applicant: K B, ***strasse ***, CH-***

defendant: Land Liechtenstein,
represented by
Wilhelm & Büchel Rechtsanwälte,
Lova Center 1150, FL-9490 Vaduz

concerning: CHF XXXX

following the hearing of the parties in closed session on **24 September 2025** in the presence of the court clerk Carmen Semmler, has

ordered:

1. The following questions are referred to the EFTA Court for an Advisory Opinion:

Question 1

Must it be presumed as a result of the Advisory Opinion given by judgment of the EFTA Court of 4 July 2023 in Case E-11/22 that the adoption of Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 by the Liechtenstein legislature constituted a sufficiently serious breach of Article 4 EEA and/or Article 28 EEA which, if the other conditions are satisfied, entails State liability?

alternatively:

Must the Advisory Opinion mentioned be understood to mean that, where compensation for the loss and damage resulting from the higher rate of taxation is sought by means of State liability by a person affected in the same way as the applicant in the main proceedings, national courts are precluded from verifying the EEA law conditions for State liability, in particular, the requirement of a sufficiently serious breach of a rule of law, and, if necessary, making a negative finding?

Question 2

If it follows from the Advisory Opinion given by judgment of the Court of 4 July 2024 in Case E-11/22 that national courts must presume that the EEA law conditions for State liability, in particular a sufficiently serious breach of Article 4 EEA and/or Article 28 EEA, are met:

Is it compatible with the principle of EEA State liability that compensation for the loss and damage resulting from the higher rate of taxation may be refused under national law nonetheless because the person concerned

(a) breached his obligation resulting from Article 11(2) of the Act of 22 September 1996 on State Liability (AHG) to submit a prior written request to the public entity against which he wishes to assert the claim for compensation for recognition of the claim for compensation?

(b) contrary to Article 5(1) of the Act of 22 September 1996 on State Liability (AHG), did not challenge the tax assessment of the Fiscal Authority with the legal remedies available to him under national law?

2. The proceedings are stayed until the Advisory Opinion of the EFTA Court is received and thereafter will be continued of the Court's own motion.

Grounds

1. Legal background

1.1 Pursuant to Article 23(5)(b) of the Tax Act (*Steuergesetz*; SteG) in the version of State Law Gazette (*Landesgesetzblatt*; LGBl.) 2014 No 344, a surcharge of 200% on the national tax resulting from Article 19 of the Tax Act was levied on employed persons who are subject to limited tax liability in Liechtenstein and ordinarily assessed in Liechtenstein (Article 23(1)(b) in conjunction with Article 23(2)(c) of the Tax Act).

By judgment of the Constitutional Court (*Staatsgerichtshof*) of 1 September 2020 in Case StGH 2019/095, in proceedings for specific judicial review based on a reference from the Administrative Court (*Verwaltungsgerichtshof*), Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 was annulled as contrary to a Treaty concluded by the State. The ruling of the Constitutional Court was based, in essence, on the consideration that the 200% surcharge was indirectly discriminatory and thus infringed the principle of non-discrimination resulting from Article 4 and/or Article 28(2) EEA. Pursuant to Article 19(3) of the Constitutional Court Act (*Gesetz über den Staatsgerichtshof*; StGHG), the Constitutional Court deferred the operative date of the annulment of Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 in accordance with Article 19(3) of the Constitutional Court Act for the period of one year from the date on which its ruling was communicated, which was effected by State Law Gazette 2020 No 290 on 8 October 2020.

By State Law Gazette 2021 No 256, which entered into force on 21 August 2021, the legislature amended Article 23(5)(b) of the Tax Act such that in place of the 200% surcharge "a surcharge to be laid down each year in the Finance Act" is levied on the national tax. Pursuant to Part II "Transitional provision", for the 2021 tax year the surcharge was fixed at 150%. In addition, in Part III of State Law Gazette 2021 No 256 it was provided as a transitional arrangement that the amended Article 23(5)(b) of the Tax Act was to be applied for the first time for the 2021 tax year. For the 2022 tax year and subsequent tax years the surcharge was fixed each year in the Finance Act (*Finanzgesetz*) also at 150%, most recently by Article 2(2) of State Law Gazette 2024 No 441 for the 2025 tax year.

For the tax years 2014 to 2020 it thus remained as a surcharge of 200% in accordance with Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344.

1.2 For the successful assertion of a State liability claim under EEA law, in accordance with the case law of the EFTA Court (judgments of the EFTA Court of 5 June 2025 in Case E-25/24 *Dartride AS*, paragraphs 28, 34 and 62; and of 30 May 2002 in Case E-4/01 *Karlsson* v *Iceland*, paragraphs 25 and 37 et seq.; amongst others), the following three conditions must be cumulatively met:

1. The rule of law infringed is intended to confer rights that are unconditional and sufficiently precise on individuals; 2. the breach is sufficiently serious; and 3. there is a direct causal link between the breach of the legal rule and the loss or damage sustained by the injured parties.

1.3 In the absence of a national provision transposing EEA State liability, State liability claims under EEA law must be asserted under the procedure provided for in the Act of 22 September 1996 on State Liability (State Liability Act) (*Gesetz vom 22.09.1996 über die Amtshaftung*; AHG).

1.3.1 Pursuant to Article 11(2) of the State Liability Act, the injured party must first of all submit a written request to the public entity against which he wishes to assert the claim for compensation for recognition of the claim for compensation. If within three months of this request being received by the public entity the injured party does not receive a response to his request or within this period compensation is partially or fully refused, then he can assert the claim for compensation by way of an action against the public entity.

The written request provided for in Article 11(2) of the State Liability Act must be qualified as a formal act, non-compliance with which renders judicial redress impermissible. According to case law, the letter of request must meet the following substantive requirements: First, the behaviour of the injuring party causing the loss or damage

must be specified; in State liability proceedings only such facts as were previously the subject matter of the request procedure may be asserted as a plea. In other words, the plea set out in the written request and the plea set out in the State liability action must be identical. Therefore, the request must not only quantify the alleged loss or damage but clarify and identify with the appropriate reasoning the individual items of loss or damage at issue caused by the alleged injurious behaviour of an organ of the entity. The entity must be placed in a position, as a result of the letter of request, to carry out a non-binding preliminary examination of the cogency of the claims for compensation brought against it in order to separate the cases which are contested from those which are clear so that the latter may be recognised and compensation provided without further judicial examination; in other words, the public entity should be placed in a position to first examine within its own purview the eligibility of the compensation claim in question.

If the letter of request does not meet the substantive requirements set out here, the action for State liability must be dismissed – even in the absence of an objection by the opponent, of the court's own motion – without an examination of the merits on the ground that judicial redress is impermissible.

1.3.2 Pursuant to Article 5(1) of the State Liability Act, no claim for compensation exists if the injured party could have averted the loss or damage by way of legal remedy or an appeal to a higher administrative authority unless the legal remedy or appeal to a higher administrative authority was not pursued through no fault of the injured party.

The purpose of this provision is to establish that the claim for State liability is in formal terms subsidiary in as much as an individual who is potentially injured by a decision of an authority is obliged first to make use of the legal remedies made available to him by the state

and, in this connection, the term "legal remedy" must, according to case law, be interpreted widely. Consequently, State liability may only come into play if the safety net of remedies made available as a priority by legislation does not and could not suffice still to prevent the loss and damage. Prior recourse without success to the remedies available or the lack of any likelihood that these remedies could have averted the loss or damage is a constitutive element of State liability; compensation may only be provided for implementing measures that cannot be corrected. Moreover, according to case law, the word "could" [in German: können] in Article 5(1) of the State Liability Act means only that a remedy existed which intrinsically offered the abstract possibility to prevent loss or damage arising or to mitigate loss or damage which had already occurred. The hypothetical success of a remedy not pursued is not to be considered in State liability proceedings.

In as much as the legal consequence of Article 5(1) of the State Liability Act presupposes fault, the omission to pursue a legal remedy must, according to case law, as a rule, be seen as fault because, in principle, it is reasonable to expect a person receiving a decision which will inevitably cause loss or damage to him when it becomes legally binding on receipt thereof to pursue the remedies available and, if he lacks the necessary legal knowledge, to seek appropriate professional advice. Only legal remedies which are evidently without any prospect of success or legal remedies which were inadequate to prevent the loss or damage occurring do not need to be pursued by the individual concerned. It is for the applicant to prove that he was not at fault in omitting to pursue a legal remedy.

Infringement of the "obligation to pursue a remedy" established in Article 5(1) of the State Liability Act results in the dismissal of the State liability action without any examination of the merits of the action.

2. Facts and procedure

2.1 The applicant is a German national resident in Switzerland. He worked (also) in 2020 in Liechtenstein as an employed person in the financial services sector. As a person with limited tax liability he was, pursuant to his own request, ordinarily assessed in Liechtenstein on his income earned in Liechtenstein.

By an assessment of Vaduz municipality of 2 December 2021, he was assessed with income tax of CHF XXXX including the levy of a surcharge of 200% pursuant to Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 on the national tax owed in accordance with Article 19 of the Tax Act.

This assessment was not challenged and became legally binding and the applicant paid the tax which he was assessed to pay.

2.2

2.2.1 By an action for State liability of 10 March 2025 (document number 1), the applicant seeks from the defendant the payment of CHF XXXX.

In summary, the applicant argued in support of his claim as follows:

The surcharge of 200% levied on income tax pursuant to Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 was EEA incompatible, because it was indirectly discriminatory within the meaning of Article 4 and Article 28(2) EEA. For that reason, by judgment of 1 September 2020 in Case StGH 2019/095, the Constitutional Court annulled Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 as contrary to a Treaty concluded by the State. The Constitutional Court deferred, however, the operative date of the annulment by one year. Consequently, in his case, the 200% surcharge was still levied for the 2020 tax year.

That Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 was EEA incompatible and consequently not to be applied is a finding also reached by the EFTA Court in its judgment of 4 July 2023 in Case E-11/22. It follows also from this Advisory Opinion of the EFTA Court that the defendant must provide compensation to him under State liability for the loss and damage sustained by reason of the EEA-incompatible surcharge levied.

It is not possible to claim repayment of the EEA-incompatible tax overpaid by means of a review of the legally binding assessment under Article 123 of the Tax Act.

Applying a surcharge of 150% as was levied for the 2021 tax year and the following tax years, the tax debt which results for 2020 is only CHF XXXX. The defendant is obliged to provide compensation to him for the difference to the amount of tax he actually paid, that is to say, CHF XXXX.

2.2.2 The defendant contested the claim, arguing in summary:

As a review of the legally binding tax assessment is not possible, the applicant can only reclaim the EEA-incompatible tax paid through State liability. It is logical, therefore, that the applicant has brought an action for State liability.

However, the conditions for State liability of the defendant are not fulfilled. In particular, the laying down of the 200% surcharge in accordance with Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 does not constitute a sufficiently serious legislative breach of Articles 4 and 28 EEA.

Nor are the conditions for State liability under national law fulfilled. In particular, the applicant infringed the obligation to pursue a

remedy that results from Article 5(1) of the State Liability Act because he did not challenge the assessment of 2 December 2021 with the legal remedies available although it was reasonable to expect him to do so. It cannot be said that the non-exercise of any challenge to the assessment of 2 December 2021 was without fault on the part of the applicant. The ruling of the Constitutional Court of 1 September 2020 by which Article 23(5)(b) of the Tax Act was annulled as EEA incompatible was already communicated by State Law Gazette 2020 No 290 on 8 October 2020; in addition, the matter at issue here attracted media attention as early as mid-2021 and the new provision, currently still in force, (State Law Gazette 2021 No 256) was promulgated on 20 August 2021.

Finally, the claim for State liability is also time barred.

2.3 The judgment of the EFTA Court of 4 July 2023 in Case E-11/22 on which the applicant relies in his State liability action resulted from a reference from the Administrative Court in proceedings before it under case number VGH 2022/033.

In the proceedings under case number VGH 2022/033, the Administrative Court had to rule on the appeal of the German national RS (= abbreviation as used in the judgment of the EFTA Court) also resident in Switzerland, who, like the applicant, was subject to limited tax liability in Liechtenstein on his income earned from activity as an employed person in Liechtenstein. As a consequence of the Constitutional Court judgment of 1 September 2020, Case StGH 2019/095, by which Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 was annulled as EEA incompatible, RS challenged the assessment of the Fiscal Authority (*Steuerverwaltung*) for the 2019 tax year and at the same time sought a retroactive rectification of the legally binding assessments for the tax years 2014 to 2018. He asserted that in place of the EEA-incompatible surcharge of 200% the tax calculations had to be based on the surcharge of 150% provided

for in the transitional provisions for the 2021 tax year set out in State Law Gazette 2021 No 256. Following his unsuccessful appeal first to the Fiscal Authority and then against the appeal decision to the National Tax Commission (*Landessteuerkommission*), RS brought an appeal to the Administrative Court.

The Administrative Court submitted the following question to the EFTA Court for a preliminary ruling:

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?

In reply, by judgment of 4 July 2023 in Case E-11/22, the EFTA Court gave 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.*

On the basis of this Advisory Opinion, by judgment of 27 October 2023, the Administrative Court allowed the appeal of RS to the extent that he challenged the assessment of the Fiscal Authority for the 2019 tax year. On the other hand, the appeal of RS was rejected to the extent that he continued to seek the retroactive rectification refused by the previous instances of the legally binding assessments for the tax years 2014 to 2018. On the latter point, the Administrative Court considered that review of the legally binding assessments pursuant to Article 119 et seq. of the Tax Act was not open to RS and thus a repayment of the taxes levied contrary to EEA law was not possible as none of the grounds for review provided for in Article 123 of the Tax Act were fulfilled. According to the judgment of the EFTA Court, it was for RS to assert the loss and damage sustained by reason of the EEA-incompatible taxes already paid under State liability.

The individual application brought by RS challenging the judgment of the Administrative Court was rejected by the Constitutional Court by judgment of 1 July 2024, Case StGH 2023/105.

3. The questions referred

3.1

3.1.1 The applicant is, as was the applicant in the proceedings before the Administrative Court in case number VGH 2022/033, a German national residing in Switzerland who was subject to limited tax liability in Liechtenstein on his income earned as an employed person in Liechtenstein and on whom also by legally binding assessment an EEA-incompatible surcharge of 200% was levied pursuant to Article 23(5)(b) of the Tax Act in the version of State Law Gazette 2014 No 344 in force until 20 August 2021.

As a result of the ruling of the Administrative Court handed down in proceedings under case number VGH 2022/033, it has been clarified that the applicant cannot claim a repayment for the tax overpaid for the 2020 tax year, because a review of the legally binding assessment is not possible under national law. For that reason, the applicant seeks correctly to obtain compensation under State liability for the loss and damage sustained by reason of the EEA-incompatible tax assessment.

In its Advisory Opinion of 4 July 2023, Case E-11/22, the EFTA Court held without reservation and with knowledge of all the information necessary to assess the conditions for State liability that – if the repayment of any taxes already paid in breach of EEA law is not possible – the defendant "**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". (Emphasis added by the referring court).

In the view of the referring State liability chamber of the Court of Appeal, the Advisory Opinion of the EFTA Court, in particular, having regard to paragraphs 50, 53, 54, 57 and 59 and by reason of the finding that the defendant "is obliged" to provide compensation, may be understood to mean that it is precluded in cases such as the present from verifying itself the EEA law conditions for State liability of the defendant and/or that the EEA

Court has (implicitly) already determined that for cases such as those in the main proceedings these conditions, in particular the condition of a "sufficiently serious breach", are met. On the other hand, the wording, according to which the loss and damage must be [made good] "in accordance with the principle of State liability" can also be understood to mean that the liability of the defendant exists only "as a matter of principle" and that the individual EEA law conditions for State liability, in particular, the condition of a "sufficiently serious breach" must be verified in full and/or independently by the competent national court itself.

On this basis, the competent State liability chamber of the Court of Appeal requests the EFTA Court, having regard to Article 97(2) of the Rules of Procedure of the EFTA Court, for an interpretation of the Advisory Opinion of 4 July 2023 given in Case E-11/22 (Question 1).

3.1.2 In the event that the EEA law conditions for State liability must be deemed met on the basis of the Advisory Opinion of 4 July 2023 given by the EFTA Court in Case E-11/22, the further question arises whether the principle of effectiveness ("effet utile") precludes the application of Articles 5(1) and 11(2) of the State Liability Act, a question on which as yet no case law of the EFTA Court exists (Questions 2a and 2b).

3.2

3.2.1 The applicant supported the obtaining of an advisory opinion from the EFTA Court.

He suggested that further questions be put to the EFTA Court for an advisory opinion, in particular on "the accrual of interest" on and the "time barring" of the claim for compensation asserted.

In view of the fact that in his State liability action the applicant has not claimed interest for late payment and that the objection raised

by the defendant that the action is time barred, according to the legal view taken by the referring court, does not succeed already as a matter of national law, there is no need to put further questions to the EFTA Court for an advisory opinion.

3.2.2 The defendant took the view that it was not appropriate to obtain an advisory opinion from the EFTA Court.

3.2.2.1 In relation to the first question, the defendant claimed that the judgment of the EFTA Court of 4 July 2023, Case E-11/22, does not constitute a precedent. The Advisory Opinion contains merely a reference to the obligation on the defendant to provide compensation in accordance with the principle of EEA State liability. Moreover, in that judgment, the EFTA Court could not in any way have examined the condition of a sufficiently serious breach because it lacked the necessary information.

Contrary to the view taken by the defendant, the judgment of the EFTA Court of 4 July 2023, Case E-11/22, does constitute a precedent because, in terms of the facts relevant for determination of the matter in the present State liability proceedings, it was based on an identical set of facts and the EFTA Court had all the information necessary for an assessment of the conditions for State liability.

3.2.2.2 Notwithstanding the fact that the absence of a proper letter of request in accordance with Article 11(2) of the State Liability Act (intended: as a condition for the action) must be acknowledged also of a court's own motion, Question 2a is, in the defendant's view, not relevant. In light of the complete pre-litigation correspondence between the applicant and the defendant, the latter has not raised any objection based on Article 11(2) of the State Liability Act. Question 2a is thus purely hypothetical.

Nor do the EEA law principles of effectiveness and equivalence preclude the requirement of Article 11(2) of the State Liability Act, according to which the injured party must as a first step request the public entity to recognise the claim for compensation, or the obligation to mitigate the loss, also referred to as "rescue obligation", provided for in Article 5(1) of the State Liability Act. Questions 2a and 2b must be answered without more in the affirmative.

In reply to this position of the defendant it must be observed:

The pre-litigation correspondence referred to by the defendant and of relevance in the light of Article 11(2) of the State Liability Act has not been submitted in the proceedings to date and the Court therefore has no knowledge of this. In relation to Questions 2a and 2b no case law of the EFTA Court exists as yet nor as far as it can be discerned – at any rate in relation to Question 2a – any precedent from the ECJ. Moreover, according to case law of the EFTA Court, in the case of EEA State liability, in any event, reliance cannot be placed without more on the case law of the ECJ (see most recently: judgment of the EFTA Court of 5 June 2025 in Case E-25/24, *Dartride AS*, paragraph 26).

Therefore, despite the objections of the defendant, Questions 2a and 2b are referred for an Advisory Opinion.

3.2.3 Finally, the parties' attention is drawn to the fact that in the present order a minor rewording of the questions without any amendment of substance has been made in comparison with those on which they were granted the right to be heard (see document number 12).

4. Pursuant to Article 60(1) of the Organisation of the Courts Act (*Gerichtsorganisationsgesetz*; GOG), the proceedings must be stayed until the Advisory Opinion of the EFTA Court is received.

FÜRSTLICHES OBERGERICHT, Third Chamber
Vaduz, 24 September 2025

Presiding Judge Court clerk

Notice concerning rights of appeal:

No appeal may be brought against this order.