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EFTA Court
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Luxemburg

21 December 2022
E-11/22

TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

RS

represented by
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acting as agents, in

Case E-11/22
RS v. Steuerverwaltung des Fürstentums Liechtenstein

RS has the honour of submitting his Written Observations on the questions which were referred for an advisory opinion by the Administrative Court of the Principality of Liechtenstein (hereinafter referred to as the "**Administrative Court**") to the EFTA Court on 26 September 2022.

In accordance with Article 20 of the Statute of the EFTA Court, RS is entitled to submit Written Observations to the Court within two months of the date of the notification, *i.e.* by **Wednesday, 21 December 2022**.

THE QUESTIONS REFERRED FOR AN ADVISORY OPINION

To avoid unnecessary repetition, reference will be made to the wording of the questions raised by the Administrative Court in its aforementioned request for an advisory opinion.

In summary, the Administrative Court requested the EFTA Court to advise on whether a discriminatory tax rate can be exceptionally upheld.

FACTS

1 RS considers the facts set out in the Administrative Court's Request dated 26 September 2022 (the "**Request**") to be complete and correct.

LEGAL ANALYSIS

Introduction

2 The Administrative Court accepts that the tax rule of a 150% surcharge for the fiscal year of 2021 is in line with EEA law. The Administrative Court does not doubt that the level of surcharge for the fiscal years of 2019 and 2020 discriminates against persons with limited tax liability, i.e. non-residents like RS, who have to pay 200% surcharge. Liechtenstein residents only have to pay between 150% and 180%.

3 The Administrative Court wants to know whether the discriminatory provision can be upheld, on the basis of the overriding consideration of legal certainty. In this case, the Administrative Court considers it to be "discriminatory, unfair and unjust" if all non-

residents, who did not realize that the tax supplement was contrary to EEA law and consequently did not challenge their tax assessment, would end up paying more than those non-residents who did.

4 Thus, the Administrative Court suggests that it could be better to treat RS "discriminatory, unfair and unjust" vis-à-vis Liechtenstein residents, as long as he is treated as an equal to his fellow non-residents. The idea is bound to fail; reasons for this are stated below.

Repayment of charges levied in an EEA State in breach of EEA

5 The Court noted in its judgment E-7/13 *Creditinfo Lánstraust hf. v. Registers Iceland and the Icelandic State* that individuals and economic operators are **entitled to obtain repayment** of charges levied in an EEA State in breach of EEA law provisions. This is a consequence of the rights conferred on them. The EEA State in question is therefore required, in principle, to repay charges levied in breach of EEA law (E-7/13 para 43).

6 The Judgment E-7/13 is in line with well-established EU case law. The right to a refund for charges and taxes levied in a Member State in breach of Community law is the consequence of, and compliment to, the rights conferred on individuals by Community provisions prohibiting such charges and taxes (C-69/14 Târşia [24 and 25], C-524/04 *Test Claimants in the Thin Cap Group Litigation* [para. 128], C-35/11 Test Claimants in the FII Group Litigation, C-441/98 *Mikhailidis* [para. 30], C-199/82, C343/96 *Dilexport*). The Member States are obliged to make sure that individuals have an effective legal remedy, enabling them to obtain reimbursement for the tax unlawfully levied upon them (C-524/04 *Test Claimants in the Thin Cap Group Litigation* [para. 128], C-10/97 *IN.CO.GE.'90*).

7 Member States can resist repayment in some circumstances, such as where reimbursement would constitute unjust enrichment (C-310/09 Accor, C-68/79 *Just v. Danish Ministry for Fiscal Affairs*, C-218/95 *Comateb*, C-441/98 *Mikhailidis*), but not simply based on preference. But the Administrative Court rightfully does not ask whether such exceptions apply, as the present case concerns RS' personal income tax and such an exception cannot be derived from the relevant facts.

8 However, in the absence of EU legislation (or EEA) on the recovery of national taxes unduly levied, it is the role of each Member State to designate the courts' and tribunals' jurisdiction

and to lay down the detailed procedural rules which govern actions in law for safeguarding the rights which taxpayers derive from EU (EEA) law (settled case law; see C-69/14 [26]). These rules must not be less favourable than those governing similar domestic actions (the principle of equivalence) and must not render the exercise of rights conferred by EEA law (the principle of effectiveness) practically impossible or excessively difficult (settled case law; see C-69/14 [27]).

9 In so far as the recovery of a tax, which has been declared incompatible with EU law, is hindered by the existence of a final decision of a court or tribunal imposing payment of that tax (principle of *res judicata*) in a procedure that upholds the above-mentioned principles, the Member State is not obliged to reopen the case or overturn a final judgment (C-69/14 [29 and 38], C-213/13 *Impresa Pizzarotti* [58]). Nevertheless, if the applicable domestic rules of procedure provide the possibility for a national court to go back on a decision in order to ensure compatibility with national law, that possibility must prevail so that the situation is brought back in line with EU (EEA) law (see, to that effect, C-213/13 *Impresa Pizzarotti* [62]).

10 In the present case, RS' national case is not final, and RS has appealed the matter to the Administrative Court. It is already clear that the surplus of 200% was discriminatory in the years 2019 and 2020. The Administrative Court has every possibility to uphold the correct EEA legal position in RS' case, and the Administrative Court does not dispute this. Consequently, the Principality of Liechtenstein is under an obligation to provide repayment (or allow the appeal and do not collect in the first place).

Creation of a new justification for a discrimination - equal treatment of the discriminated

11 The Administrative Court recognizes that RS, as German national and non-resident, is being discriminated against, with Liechtenstein residents paying significantly less tax. The Administrative Court suggests that this discrimination can be justified in order to ensure equality of (bad) treatment among non-residents.

12 Any justification for the infringement of such a rule, i.e., an exception to the rule, is based upon the idea that compliance would violate a second, more important rule. So, according to Art. 13 EEA, discrimination based on nationality to ensure public health is accepted (*e.g.* E-1/11 *Dr A*, E-16/10 *Philip Morris Norway AS v. Norway*). Under the same provision, we

accept that the free movement of workers should not be upheld, if such is necessary in order to ensure public security (*e.g.* E-2/20 *Norway v. L*).

13 Discrimination is prohibited on the basis of Art. 4 EEA. The EEA Treaty recognises the typical exceptions in Art 13, Art. 28(3), 33 and 39. Thus, discrimination can be justified on grounds of public policy, public security, or public health. Moreover, Art. 32 and 39 EEA constitute public sector exemptions. Discrimination can further be justified based on objective considerations independent of nationality and proportionate to the pursuit of the legitimate objective. The grounds for justification are the same under EU and EEA law (see *Fredriksen* in *Baudenbacher*, The Handbook of EEA Law, p. 408-409).

14 The Request suggests a new justification: that the equal treatment within a sub-group is a superior rule which justifies discrimination. In other words, a discrimination of a minority could be justified if not *all* members of that minority are treated better.

15 One consequence of the acceptance of such an idea is that female workers could legitimately be paid less than their male colleagues, if a minority of women do not complain (but strangely felt discriminated against *other women*, if they were paid equal to men).

16 Or, to demonstrate the outcome of this idea being taken to its logical extreme: Mike, a bouncer outside a nightclub in Paris, has refused entrance to 10 people, on the basis that they were of Afro-French ethnicity. Once Mike's work shift ends, nice Pete takes over. Farid, an Afro-French man, wants to enter the club. Under the new rule, Pete is required to refuse him entry (while 50 white French happily enter the club during their discussion). This is because Pete would fear that the 10 Afro-French men who could not enter previously would feel discriminated against within the Afro-French community if he admits Farid to the nightclub.

17 We are certain Farid would not appreciate such a definition of "equality".

18 Hence, it becomes clear that such an argument cannot credibly be made. It should be clarified that nobody is accusing the Administrative Court of supporting racists ideas. But the example demonstrates that the underlying argument, if accepted, could lead to such obscure results. Rules are best tested on paradigmatic cases.

19 It is undoubtably correct that legal certainty is important and can act as a justification. But the present case is *not one of legal certainty*. RS's case tax evaluations were never final and the Liechtenstein tax rule is clear and simple to administer; the sole question to be answered concerns whether to charge 150% or 200% surcharge. Both numbers can be understood with ease. There is no consequence of widespread uncertainty among the taxpayers, even if the Liechtenstein Tax Administration would re-open all cases and provides repayment of the difference to all non-residents for the years 2019 and 2020.

20 It is not without reason that "equal treatment of the discriminated" has to-date never been a justification in EU case law. The Administrative Court makes reference to C-64/20 UH, however, this decision does not address the court's claim that treating discriminated persons equally might be justified in the interest of legal certainty. C-64/20 UH declared the incompatibility of Irish law with a European directive. The court stated that the fact that a regulation comes into force in the future, with which Irish law was already compatible, does not alter nor justify the infringement of the directive before. In exceptional cases and for overriding considerations of legal certainty, the ECJ may temporarily suspend the application of a directive. Nonetheless, in the previous cases referred to in C-64/20 UH, the ECJ interpreted *"exceptional cases and overriding considerations of legal certainty"* as overriding considerations relating to the protection of the environment (C-379/15 *Association France Nature Environnement,* C-409/06 *Winner Wetten,* C-41/11 *Inter-Environnement Wallonie und Terre Wallonne).*

21 An argument based on such overriding considerations or exceptional circumstances has not been presented here. It is a standard case. One person from a discriminated group appeals his case while the others have not, either because they had not realized the EEA law infringement, or because they had not wished to take the burden and financial risk or for other reasons. It is rare that the courts receive thousands of applicants because of an infringement of EEA or EU law in a specific matter.

22 Therefore, there is no justification for the discriminatory tax surcharge and Articles 4 and 28(2) EEA Treaty preclude the application of the higher tax rate.

Open and final cases are not equal

23 Last but not least, it is often impossible to treat persons who appeal against an incorrect application of the law, equal to persons who do not. The higher rule that applies is the need for an efficient system that at some point closes cases (principle of res judicata). As such, EU (EEA) law does in principle protect the wrong (Opinion Advocate General Jääskinen C-69/14 [20], Opinion Advocate General Geelhoed C-119/05 [46]). This is necessary for the for the greater good of the overall legal system.

24 But, of course, where the case is not final, i.e. no res judicata, this principle cannot apply.

25 An unequal treatment before the law can only arise if the relevant situations are comparable (settled case law; see C-149/10 *Chatzi* [63 and 64]).

26 It is evident that the cases of a person who accepts an incorrect tax decision, although he had a fair, effective and equivalent procedure to appeal, and that of a person who makes good use of his remedies, are not comparable. Accordingly, the requirement for equal treatment before the law does not entail that both cases must have the same result.

27 It is almost unavoidable in practice that some persons will not appeal or not apply for a benefit which they are entitled to. The inevitable imperfection of reality provides no reason to refuse appeals in general, as would be the ultimate consequence of the Administrative Court's idea.

Administrative Court fails to mention alternatives

28 For the aforementioned reasons, it is irrelevant whether or not Liechtenstein law permits other non-residents to request repayment of their discriminatory tax. For the sake of completeness, RS wishes to clarify that Liechtenstein law permits a solution different to the one mentioned by the Administrative Court. This solution would allow a tax repayment for all non-residents, so that all members of the group are treated equal.

29 In the Request for an Advisory Opinion to this Court, the Administrative Court failed to consider and set out the law concerning the re-assessment of tax evaluations for Liechtenstein taxpayers. In particular, they did not explore the previous case law according to their decision of 8 November 2013 case no. 2013/093 (published LES 2014, 236). The case concerned Liechtenstein's obligation to demand repayment of state aid that had been

granted in violation of Art. 61 para. 1 EEA Agreement by way of a favourable tax treatment of captive insurances. National law did not provide a remedy and article 119 of the Liechtenstein Tax Code prohibited a change of a tax evaluation which was finalised. The Administrative Court ruled that, according to article 119 in the Tax Code, this finality had to be set aside and remain inapplicable in order to allow effective national compliance with EEA law. The Liechtenstein State Court approved the judgment (court file no. StGH 2013/96). This remains unchallenged case law and the statutory provisions are unaltered.

30 The case demonstrates that Liechtenstein law allows the court to set aside the finality of a tax evaluation, despite article 119 of the Tax Code, in order to comply with EEA law. But it would be this same provision in Liechtenstein law, i.e., 119 Tax Code, that would stop other non-residents from getting their tax evaluations rectified.

31 Since Liechtenstein law shows the flexibility to change final judgments, this flexibility must be used in favour of EEA law (C-69/14 Târşia). There is no apparent reason why the same flexibility that allowed Liechtenstein to demand the return of tax from the companies in the case VGH 2013/093 cannot be applied to repay of tax to non-residents here. Thus, national law allows the Administrative Court to avoid any result that would be, in their view, "discriminatory, unfair and unjust" and still treat RS fully in line with EEA law.

32 Consequently, there cannot be any justification not fully applying EEA law in RS' case.

Conclusion

33 In light of the observations set out above, it is respectfully suggested that the EFTA Court should answer the question in the affirmative.

On behalf of RS

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