

ORIGINAL

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EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 21 December 2022

To the President and Members of the EFTA Court

Written Observations

submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), Romina Schobel, Deputy Director of the EEA Coordination Unit (*Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*) and Dr. Claudia Bösch, Legal Officer of the EEA Coordination Unit (*Juristische Mitarbeiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), acting as agents of the Government of the Principality of Liechtenstein,

in Case E-11/22

RS v Steuerverwaltung des Fürstentums Liechtenstein

in which the Liechtenstein Administrative Court (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*, hereinafter referred to as 'Administrative Court') has requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour to submit the following observations:

I. Question referred to the EFTA Court

The Administrative Court has stayed its proceedings in order to refer the following question to the EFTA 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?

II. Factual background of the case

1. With regard to the facts of the present case, the Liechtenstein Government would like to refer to the summary of the facts provided by the Administrative Court in its request for an advisory opinion.
2. Furthermore, the Liechtenstein Government would like to emphasize the following:
3. By its Judgement StGH 2019/095 of 1 September 2020,¹ the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtensteins*,

¹ Judgement of the Constitutional Court of 1 September 2020 in Case StGH 2019/095, *Normenkontrollantrag; Art. 23 Abs. 5 Bst. b SteG; Quasiansässige; EWR-Widrigkeit*, Liechtenstein Law Gazette 2020 No 290.

hereinafter referred to as 'Constitutional Court') annulled Article 23(5)(b) of the Liechtenstein Tax Act² in its version of LGBL 2014 No 344, deciding that it was contrary to the EEA Agreement and that it discriminates against nationals of an EEA State who are subject to limited tax liability in Liechtenstein.

4. The judgement by the Constitutional Court was published on 8 October 2020. Thus, the annulment of Article 23(5)(b) of the Liechtenstein Tax Act would have entered into force and become effective on 8 October 2020.
5. However, in the same judgement, the Constitutional Court announced to defer the legal validity of the annulment by one year, beginning with the publication of the judgement, effectively giving the State a one-year period until 8 October 2021 to adapt its national legislation and bring it into accordance with the EEA Agreement.
6. Accordingly, in 2021, the Liechtenstein Parliament (*Landtag des Fürstentums Liechtenstein*) adopted a new provision, according to which the surcharge for persons with limited tax liability in Liechtenstein was fixed at 150 %³. The new legislation entered into force on 21 August 2021 for tax assessments of the tax year 2021.
7. Hence, for the years 2019 and 2020 the 'old' legal framework was applied and therefore a surcharge of 200 % was imposed on persons with limited tax liability. From 2021, the 'new' legal provision replaced the annulled provision and a surcharge of 150 % was and is applied to persons with limited tax liability.

III. Legal framework

8. By way of introduction, the Liechtenstein Government considers it appropriate to briefly outline the legal framework relevant to answer the question referred for a preliminary ruling:

² Gesetz vom 23. September 2010 über die Landes- und Gemeindesteuern (Steuergesetz; SteG), LR-Nr 640.0.

³ Act of 11 June 2021 amending the Tax Act, LGBL 2021 No 256; Government report and motion to the Landtag of the Principality of Liechtenstein concerning the amendment of the Tax Act, BuA No 37/2021.

EEA Law

9. Article 3 of 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.

10. Article 4 of the EEA Agreement provides:

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.

11. Article 28 (1) and (2) of the EEA Agreement govern the following:

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.

12. Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice provides:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the

EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

Treaty on the Functioning of the European Union

13. Article 264 of the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU') provides:

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

14. Article 264 TFEU provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

National Law

15. Article 19 of the Liechtenstein Constitutional Court Act⁴ provides:

1) Erkennt der Staatsgerichtshof, dass ein Gesetz oder einzelne seiner Bestimmungen mit der Verfassung unvereinbar sind, dann hebt er das Gesetz oder die betreffenden Bestimmungen auf. Sind weitere, unmittelbar damit zusammenhängende Bestimmungen des Gesetzes aus denselben Gründen mit der Verfassung unvereinbar, dann kann sie der Staatsgerichtshof auch ohne Antrag von Amtes wegen aufheben.

2) Sind das Gesetz oder einzelne seiner Bestimmungen bereits ausser Kraft getreten, dann stellt der Staatsgerichtshof deren Verfassungswidrigkeit fest.

3) Der Spruch über die Aufhebung bzw. über die Feststellung der Verfassungswidrigkeit ist von der Regierung unverzüglich im Landesgesetzblatt kundzumachen. Die Aufhebung wird mit der Kundmachung rechtswirksam, wenn der Staatsgerichtshof hierfür nicht eine Frist von längstens einem Jahr bestimmt; der Anlassfall ist davon ausgenommen.

IV. Legal analysis

16. With its question referred to the EFTA Court, the Administrative Court enquires whether 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 of a national of an EEA State who is 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 and

⁴ Gesetz vom 27. November 2003 über den Staatsgerichtshof (StGHG), LR-Nr 173.10.

including 2020, insofar as they have not yet been finally assessed.

17. Simply put, the Administrative Court requests the EFTA Court to decide whether the fact that Article 23(5)(b) of the Liechtenstein Tax Act, which has been annulled by the Constitutional Court, has remained in force for the duration of one year is interfering with Articles 3, 4 and 28(2) of the EEA Agreement.

Preliminary remarks

18. As a legal basis for its decision, the Constitutional Court referred to Article 19(3) of the Constitutional Court Act, which governs that an annulment by the Constitutional Court shall become legally effective with its publication. However, according to Article 19(3) of the Constitutional Court Act the Constitutional Court may decide to defer the effect of the annulment for a specific period of time, which may be no longer than one year.
19. In the case at hand, the Constitutional Court made use of this provision and granted the legislator one year to adapt the respective national provision, in order to avoid legal uncertainties and results that are questionable from a legal policy perspective.⁵
20. If such a deferring effect would not have been granted by the Constitutional Court, the surcharge for persons achieving income according to Article 23(5)(b) of the Liechtenstein Tax Act, but not resident in Liechtenstein, would have ceased with immediate effect.
21. As a result, persons achieving income according to Article 23(5)(b) of the Liechtenstein Tax Act, but not resident in Liechtenstein, would have been entirely exempt from a surcharge as of the date of the publication of the judgement of the Constitutional Court, which was on 8 October 2020.
22. As the Constitutional Court has only been granted the power to decide that a provision is not compatible with constitutional law, but has no legislative power, the

⁵ See also Paragraph 2-6.

Constitutional Court could neither amend the existing provision nor adopt a new provision. This would interfere with the constitutional rule of separation of powers, as no law shall be given, amended or authenticated without the participation of the Liechtenstein Parliament.⁶

23. Therefore, the Constitutional Court solely had two options, it could either defer the effect of the annulment for a certain period of time to allow the national legislator to adapt the law and provide legal certainty, or take no decision on an entry into force of the annulment. In the latter case, the annulment would have had immediate effect.

Observations to the question referred for an advisory opinion

24. With regard to the question raised by the Administrative Court whether the Constitutional Court could provide for deferral effect in the case of annulment of Article 23(5)(b) of the Liechtenstein Tax Act, the Liechtenstein Government would like to elaborate as follows:

Established practice for deferral effect

25. In EU law, the possibility for the Court of Justice of the European Union (hereinafter referred to as 'Court of Justice') to provide for deferral effect is explicitly foreseen in Article 264 TFEU.
26. Essentially, Article 264 TFEU governs that if an action is well founded, the Court of Justice shall declare the act concerned to be void. However, the Court of Justice shall, if it considers it necessary, state which of the effects of the act which it has declared void shall be considered as definitive.
27. As a result, the Court of Justice may grant a judgement deferring effect if this can be justified in the individual case. This has been outlined and clarified by the Court of Justice in its settled case law.

⁶ Artikel 65 Verfassung des Fürstentums Liechtenstein vom 5. Oktober 1921, LR-Nr. 101.

28. By way of preliminary observation, the Liechtenstein Government would like to highlight that when interpreting and applying the case law of the Court of Justice concerning the deferring effect to the case at hand, the special nature of the EEA Agreement has to be considered.
29. This concerns especially the absence of a principle of primacy in EEA Law⁷, the missing obligation of the national courts to refer to the EFTA Court⁸ and the effect of advisory opinions⁹.
30. In all those respects, there are substantial differences between the EU system and the EEA system, which have to be taken into account when interpreting and applying the respective case law of the Court of Justice to EEA cases.
31. As regards the case law of the Court of Justice outlining and clarifying the deferral effect as mentioned in paragraph 27, the Liechtenstein Government considers Case C-43/12¹⁰ noteworthy. In this case, the Court of Justice decided on an annulment of a Directive under the condition that the effects of this Directive were to be maintained for a reasonable period of time, limited to a maximum of twelve months as from the date of delivery of the judgement, to allow for an entry into force of a new Directive. The Court of Justice warranted this decision with the 'important grounds of legal certainty'.
32. The same reasoning was followed by the Court of Justice in Case C-355/10,¹¹ when the Court of Justice decided that the effects of a Council Decision were to be maintained for a reasonable period of time until the entry into force of new rules intended to replace the contested Council Decision annulled by the present judgment within a

⁷ Judgement of the EFTA Court in Case E-1/07, *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 246; Protocol 35 to the EEA Agreement.

⁸ Compare Article 267 TFEU and Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

⁹ Compare Article 267 TFEU and Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

¹⁰ Judgement of the Court of Justice in Case C-43/12, *Application for annulment under Article 263 TFEU*, ECLI:EU:C:2014:298, in particular recital 56.

¹¹ Judgement of the Court of Justice in Case C-355/10, *Application for annulment under Article 263 TFEU*, ECLI:EU:C:2012:516, in particular recitals 89 f.

reasonable period of time.

33. In Case C-335/13¹² the European Commission requested the Court of Justice to consider not only aspects of legal certainty, but also potential grave financial consequences to justify the need to limit the temporal effects of this judgement.
34. Furthermore, the Court of Justice has decided more than once that not only the Court of Justice, but also a national court may, if the national law provides for such a provision, exceptionally and on a case by case basis, decide that provisions of national law held to be contrary to EU law shall be provisionally maintained, having regard to the specific circumstances of the case pending before it.¹³
35. In line with the considerations above, and especially considering the observations made in paragraph 28, the Liechtenstein Government concludes that in the EEA context not only the Court of Justice respectively the EFTA Court may grant the annulment of a specific provision or an entire law deferring effect, but also the national courts.

Assessment of the conditions

36. Pursuant to the settled case law of the Court of Justice in accordance with the special nature of the EEA Agreement and the relevant literature such a granting of deferral effect – by the Court of Justice, the EFTA Court or the national court – can be justified by **aspects of legal certainty, the protection of legitimate expectation and other overriding public interests**.¹⁴ When assessing whether these conditions are fulfilled protectable interests of an individual, of an EEA State or of the EEA may be taken into

¹² Judgement of the Court of Justice in Case C-335/13, *Request for a preliminary ruling under Article 267 TFEU from the Scottish Land Court (United Kingdom)*, ECLI:EU:C:2014:2343, in particular recitals 63 f.

¹³ Judgement of the Court of Justice in Case C-41/11, *Inter-Environnement Wallonie and Terre wallonn*, ECLI:EU:C:2012:103, in particular recitals 63 f; Judgement of the Court of Justice in Case C-379/15, *Association France Nature Environnement v Premier ministre, Ministère de l'Écologie, du Développement durable et de l'Énergie*, ECLI:EU:C:2016:603.

¹⁴ See *Pechstein* in Frankfurter Kommentar (2017), Art.264 AEUV, Recital 9.

account.¹⁵

37. The Constitutional Court justified the granting of a deferring effect by stating that the establishment of a legally correct situation was dependent on an action by the Liechtenstein legislator in order to avoid legal uncertainty and results that are questionable from a legal policy perspective.
38. In this regard, the Liechtenstein Government would like to clarify that the wording, which the Constitutional Court used in its judgement, namely “to prevent legal uncertainty”, does not concern the specific consequences of an immediate effect of the judgement.
39. The situation is rather clear, if the Constitutional Court had not decided to defer the legal validity of the annulment of Article 23(5)(b) of the Liechtenstein Tax Act by one year, the respective provision would have ceased to be in force with the publication of the judgement. In this case, there would have been no provision governing surcharge for persons achieving income according to Article 23(5)(b) of the Liechtenstein Tax Act being subject to limited tax liability in Liechtenstein as of the publication of the decision of the Constitutional Court.
40. This would have led to a situation in which a person achieving income according to Article 23(5)(b) of the Liechtenstein Tax Act, but not resident in Liechtenstein, whose taxes had not been finally assessed, would have had to pay only about one third of their previous tax obligation¹⁶ until a new provision on their surcharge obligation entered into force.
41. In this case, EEA nationals, who were not resident in Liechtenstein and who were therefore subject to limited tax liability in Liechtenstein, would have had an advantage over every EEA national, who was not only achieving income according to Article

¹⁵ Judgement of the Court of Justice in Case C-65/90, *European Parliament v Council of the European Communities*, ECLI:EU:C:1992:325, in particular recitals 23 f.

¹⁶ A situation like this would lead to a tax advantage of up to 64% of the previous tax obligation.

23(5)(b) of the Liechtenstein Tax Act, but also resident in Liechtenstein, and therefore subject to unlimited tax liability in Liechtenstein.

42. And above all, EEA nationals, who were not resident in Liechtenstein and who were subject to limited tax liability in Liechtenstein, would have also had an advantage over every EEA national, who was not resident, and subject to limited tax liability in Liechtenstein, whose tax calculation had already been finally assessed by the date of the publication of the judgement of the Constitutional Court.

43. A situation like this would interfere with one of the most important principles of tax law namely **equal treatment**, which must be considered an **overriding public interest** according to the settled case law of the Court of Justice.¹⁷ As a consequence, solely objectively different circumstances may justify a different treatment.

44. In a case like this, however, in which it was purely coincidental which tax calculations of persons subject to limited tax liability had already been finally assessed at the relevant time, a different treatment cannot be justified. Such a difference in treatment would have been discriminatory, unfair and unjust.

45. Furthermore, a retroactive effect of changes to the relevant tax legislation would contradict two important principles of (tax) law, namely **legal certainty and legal predictability**.

46. Legal provisions must satisfy requirements of clarity, stability, and intelligibility to allow those who are subject to these provisions to calculate with relative accuracy the legal consequences of actions as well as the outcome of legal proceedings. Legislation must therefore be clear and predictable to those who are subject to it. All those who are subject to law shall be fully aware of which provisions apply to them in a specific situation. This ensures legal certainty, predictability and transparency.

¹⁷ Judgement of the Court of Justice in Case C-279/93, *Schumacker*, ECLI:EU:C:1995:31, in particular recitals 30 and 58; C-80/94, *Wielockx*, ECLI:EU:C:1995:271, in particular recital 17; C-107/94, *Asscher*, ECLI:EU:C:1996:251, in particular recital 40; C-311/97, *Royal Bank of Scotland*, ECLI:EU:C:1999:216, in particular recital 26.

47. After the decision of the Constitutional Court, that Article 23(5)(b) of the Liechtenstein Tax Act is in breach of the EEA Agreement when it comes to quasi-residents, the establishment of a legal situation compliant with EEA law and the Constitution was dependent on the action by the legislator. Otherwise the existing legal situation would have changed in an unpredictable fashion on very short notice leading to a discriminatory practice.
48. To avoid a legal vacuum und guarantee legal certainty, the Constitutional Court had to grant deferral effect to the annulment of Article 23(5)(b) of the Liechtenstein Tax Act.
49. In addition, the Judgement of the Constitutional Court only concerns the situation of a quasi-resident with limited tax liability in Liechtenstein. According to the Judgement of the Constitutional Court Article 23(5)(b) of the Liechtenstein Tax Act was only in breach of EEA Law with respect to such quasi-residents.
50. However, Article 23(5)(b) of the Liechtenstein Tax Act does not only cover income from employment of quasi-residents but also attendance allowances, social security benefits, benefits from company pension schemes and benefits due to the termination of a vested benefit policy or a blocked account. The latter taxable amounts are not necessarily inextricably linked to quasi-residents. Therefore, although Article 23(5)(b) of the Liechtenstein Tax Act covers all these taxable amounts, the Constitutional Court only declared that parts of it – the parts concerning quasi-residents – are in breach of EEA law.
51. Hence, in this context, the fact that the Constitutional Court held in its judgement that ‘legal uncertainties and results that are questionable from the perspective of legal policy’ are to be avoided, is undisputedly correct.
52. To conclude, the Liechtenstein Government has no doubt that the decision of the Constitutional Court to defer 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, does not interfere with Articles 3, 4 and 28(2) of the EEA Agreement, as it provides for

legal certainty and predictability and avoids a legal vacuum and the establishment of a discriminatory practise.

53. As regards the time limit of the deferral which the Constitutional Court decided on, the question is whether the period of twelve months for the legislator to enact a law which corresponds with EEA Law is in this case to be considered accurate and necessary. Article 264(2) TFEU does not provide for a time limit of deferral. Hence, it is assumed in literature that the Court of Justice would have the power to rule that a provision shall be maintained for an unlimited period of time, even though the conditions for an annulment are fulfilled.¹⁸ However, the Court of Justice itself has held in several decisions that a deferral effect may only be granted for the time necessary to allow the legislator to adopt a new legislation.¹⁹

54. It must therefore be concluded that an annulled provision may only be maintained for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.²⁰

55. Considering that the ordinary legislative process in Liechtenstein takes at least two years, the Liechtenstein Government considers the decision of the Constitutional Court to allow for a deferral effect of twelve months to amend the respective national legislation to be undoubtedly appropriate.

Additional remarks

56. In the request for an advisory opinion the Administrative Court referred to Case C-64/20²¹ and expressed the opinion that it is for the Court of Justice and the EFTA Court alone to decide whether a national provision may exceptionally run counter to a

¹⁸ Dörr in *Grabitz/Hilf/Nettesheim*, EU (2012), Art. 264 AEUV, recital 15.

¹⁹ Judgement of the European Court of Justice in Case C- 411/17, *Reference for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Constitutional Court, Belgium)*, ECLI:EU:C:2019:622, recital 178.

²⁰ Judgement of the European Court of Justice in Case C-41/11, *Reference for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Belgium)*, ECLI:EU:C:2012:103, recital 63.

²¹ See page 5 of the request of an advisory opinion: "Court of Justice of the European Union, Case C-64/20 UH, judgement of 17 March 2021, in particular paragraph 36 and the case-law cited".

provision of EEA law.

57. In Case C-64/20, however, the national court of a Member State refused to declare that a Directive had been incorrectly transposed into national law, on the grounds that a Regulation would enter into force in due time, which would repeal the respective Directive.

58. The Court of Justice decided that until the Directive is fully repealed by that Regulation, the provisions of the Directive remain binding, unless the Court of Justice decides that they are invalid.

V. Conclusion

59. Following the above observations, the Liechtenstein Government considers that the question referred to the EFTA Court for an advisory opinion should 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.

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