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Judgment in Case E-11/22 *RS* v *Steuerverwaltung des Fürstentums Liechtenstein (Liechtenstein Tax Administration)*

ARTICLE 28 EEA PRECLUDES INDIRECTLY DISCRIMINATORY TAXATION BASED ON THE CRITERION OF RESIDENCE

In a judgment delivered today, the Court answered a question referred to it by the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) regarding the interpretation of the Agreement on the European Economic Area ("EEA"), in particular Articles 3, 4 and 28.

The main proceedings concern the tax assessment of RS, a German national residing in Switzerland, for the 2019 tax year when he worked in the Liechtenstein public service. Under the Double Taxation Convention between Switzerland and Liechtenstein, RS was subject to income tax in Liechtenstein in respect of his employment in Liechtenstein.

The Liechtenstein legislation in force during the 2019 tax year had the effect that persons with limited tax liability, like RS, were subject to a higher tax rate for earnings from activity as an employed person carried on in Liechtenstein than tax residents in Liechtenstein. By judgment of 1 September 2020, the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof*) found that the relevant provision in the Liechtenstein Tax Act was unconstitutional and discriminatory. The Constitutional Court annulled the provision as regards the applicant in that case, and deferred the operative date of the provision's *annulment erga omnes* by one year.

The Court understood the referring court's request as seeking the answer to two questions. First, whether Article 28 EEA and/or Article 4 EEA 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 persons who are resident for tax purposes in that State. Second, if the first question is answered in the affirmative, whether EEA law must prevail irrespective of any deferral required by national law.

The Court held that the difference in treatment between taxpayers who work in an EEA State but are not resident there and taxpayers who both work and reside in that State, which consists in the former being taxed at a higher rate than the latter, constituted, to that extent, indirect discrimination based on the criterion of residence, contrary to Article 28 EEA. Thus, the Court found that Article 28 EEA must be interpreted as precluding national legislation such as that at issue in the main proceedings, which applies a higher rate of taxation to income gained through employment in that State by EEA nationals who are not resident for tax purposes in that State, compared to those who are resident for tax purposes in that State.

Further, the Court held that Protocol 35 EEA and Article 28 EEA 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.

Finally, the Court found that individuals such as RS 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 RS, in accordance with the principle of State liability.

The full text of the judgment may be found on the Court's website: www.eftacourt.int.