

## Client Information

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### ■ Federal Ministry of Finance reacts to Wächtler decision of ECJ: No permanent and interest-free tax deferral when moving to Switzerland

On 13 November 2019, the Federal Ministry of Finance issued a statement on the implementation of the decision of the European Court of Justice in the Wächtler case (26 February 2019 - C-581/17). The European Court of Justice had ruled that people who move from Germany to Switzerland must be treated equally with those who move to the EU/EEA area if they fall within the scope of the Agreement on the Free Movement of Persons between the EU and Switzerland.

However, the tax authorities do not fully implement this equal treatment: Within the scope of application of the Agreement on the Free Movement of Persons, a deferral of the exit tax is to be granted on the basis of Sec. 6 (4) sentence 1 AStG as follows:

- The deferment is to be conducted in five equal annual installments.
- Deferral interest is charged (6 percent p.a.).
- A substantial hardship in the case of immediate collection shall be irrelevant.
- There is no need for collateral security, unless there is reason to believe the tax claim may be jeopardized.

#### 1. Contradiction to the EJC decision

The administrative regulation does not adequately implement the requirements of the ECJ. Accordingly, a move to Switzerland must be treated in the same way as a move to an EU/EEA country. This is because the free movement agreement between the EU and Switzerland also guarantees the taxpayer's freedom of establishment. In this respect, it would have been expected that the tax authorities would also allow an unlimited and interest-free deferral of the exit tax when moving to Switzerland (Sec. 6 (5) AStG).

#### 2. Consequences for the practice / course of action

When moving to Switzerland, the interest-free and unlimited deferment of payment can only be obtained by legal action. This does not seem futile. Objection procedures within the financial authorities will remain unsuccessful. However, the tax courts will take the ECJ case law into account in detail.

### **3. Outlook: Is the legislator planning to abolish the interest-free, indefinite deferral of payments also in the EU/EEA context?**

The letter of the Federal Ministry of Finance explicitly states that it is 'subject to a legal amendment' and is therefore probably intended only as a transitional arrangement.

The letter thus reinforces the fear that the tax authorities will seek to amend the law in order to abolish the indefinite and interest-free deferral of the exit tax in favour of a temporarily deferred payment of the exit tax (in accordance with the model in Sec. 4g Income Tax Act – EStG – regarding business assets being transferred from Germany to EU/EEA permanent establishments), even in the case of people moving within the EU/EEA.

It remains to be seen whether the legislator will follow this path within the context of the reform of the Foreign Tax Act (AStG), which is already under discussion. It cannot be ruled out that the legislator could introduce a retroactive regulation. However, it is doubtful whether such a provision might also apply to departures that have already been implemented prior to a public announcement of a corresponding amendment to the law (e.g. by cabinet resolution).

For taxpayers who are currently planning to move to Switzerland, but also to EU/EEA countries, there is likely to be a need for action in any case. It is advisable to implement the project swiftly before any planned legislative steps are concretized, in view of the possible retroactive effect.

Please do not hesitate to contact us should any further questions arise. We will keep you up to date.

■ **Contact us**



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