

By PwC Deutschland | 30 April 2015

# Continued German tax liability under DTT does not conflict with Swiss free movement agreement?

**An ECJ advocate general has suggested the court rule that there is no conflict between the discrimination prohibition of the EU/Swiss free movement agreement and the Swiss/German double tax treaty provision for the continued German taxation of German source income of a former resident.**

A German resident worked for a Swiss subsidiary in Germany. Later, he moved to Switzerland, but retained his job in Germany. As a cross-border commuter he was no longer a German tax resident. However, the German/Swiss double tax treaty allows Germany to continue to tax the German source income of former long-term residents (other than Swiss nationals) for the next five full years after their move to Switzerland. German national law contains a corresponding (but more extensive) Provision - Sec. 2 of the Foreign Tax Act - whilst the EU/Swiss free movement agreement basically requires each side to treat nationals from the other side as its own citizens in substantially all respects. The taxpayer protested against continued German taxation of his salary, claiming that it conflicted with the spirit of free movement between Switzerland and the EU.

The ECJ advocate general on the case has now suggested the court accept that there is no conflict in letter or spirit between the two agreements, or with the general principles of EU law. The free movement agreement explicitly reserves bilateral double tax treaty provisions, and the provision here at issue follows a legitimate aim of preserving a German taxing right for a limited period. Swiss tax on the German income is credited against the German charge, so the taxpayer suffered no additional burden from his move. The discrimination prohibitions of the free movement agreement do not apply to citizens in their own country, so the German taxpayer cannot claim in Germany that a Swiss national would have been in a more favourable position.

The ECJ case reference is C-241/14 *Bukovansky* opinion of April 30, 2015.

### **Keywords**

Switzerland, discrimination, free movement of persons