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Statutory charge on real estate holdings, a Damocles' sword over property owners' heads

Dear Ladies and Gentlemen,

As a purchaser of real estate property in Switzerland you always need to be aware that the purchased property always serves as security for any possible property gains tax or property transfer tax still unpaid by the vendor, should it not be possible to collect the money from the vendor.

How it occurs

The statutory charge on real estate property occurs during the assessment of property transfer and property gains tax. As long as it has not been entered in the land registry within a certain period, it will usually cease again. However, there are certain legal differences from canton to canton. In the canton of Basel-Landschaft, for example, the entry into the land registry must be made within a period of four months after maturity of the underlying claim, but not later than two years after the original accrual of the claim – in the canton of Bern, within six months of the legal effect of the assessment.

At the latest, the entry should be made once there is no longer any doubt that the taxes due from the seller either will not or cannot be paid. Generally, the entry will happen, for example in the canton of Basel-Landschaft, once the tax administration has sent a first reminder to the seller, and the entry then remains in the land registry until full payment of all taxes has been made.

That regulations differ from canton to canton makes it considerably difficult for tax advisers, lawyers and notaries to deliver comprehensive and specific advice. Additionally, many of those consulting instances may not be aware of the latent risks.

Assertion

With the statutory charge on real estate property, the entire tax amount, which has been sent to the seller with the tax assessment, will be secured, though without any additional charges or interest on arrears, and without any additional supplementary taxes. After an unsuccessful debt enforcement procedure against the seller, the amount due will then be claimed from the purchaser of the property.

Thus, the consequence of the property gains tax is that I now also have to pay those taxes that the vendor is liable to, because he or she has made a profit by selling the property in question to me.

This may appear ironic and iniquitous; however, it has been incorporated in law and will be implemented this way by certain (albeit not all) cantons.

How to prevent this

On the basis of the existing risk for the purchaser the question then arises how the amount that the vendor is due can or should be secured. The tax law of the canton of Bern, for example, explicitly grants the purchaser the right to demand a security provided by the vendor which would cover any possible taxes due arising out of property gains tax and property transfer tax.

In the cantons of Basel-Stadt and Basel-Landschaft, for example, securing the assumed amount of tax due often happens in practice via an appointed paying agency or escrow agency, the establishment of which is already an integral part of the purchase contract. Very often the attesting notaries also take over the mandate of said paying and escrow agency and hold back part of the purchase price on a separate blocked account, as security against taxes due.

This part of the purchase price will only then be paid out to the vendor once he has paid the property gains tax and property transfer tax (usually directly from the notary).

The waiting periods until the final assessment and thus the release of the amount held back on the blocked account can sometimes be rather long. Due to appeals or when the tax authorities have a high workload the lengths of these waiting periods might even be extended. This means that holding back a part of the selling price will have drastic and protracted consequence for the vendor.

Thus, the significant element of this solution is to carefully calculate the presumed tax burden in advance.

On the one hand, the risk of an entry of the statutory charge on real estate property is practically eliminated for the buyer. On the other hand, only the really required funds will be blocked and the vendor will not be restricted unnecessarily in the disposal of the sales proceeds.

Kind regards

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