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Arbitrary tax on “non-transparent” investment funds rejected

The ECJ has rejected the estimated taxation of “non-transparent” investment funds as excessive taxation hindering the freedom of capital movement on shares held in foreign investment funds that do not report und publish their results in Germany in accordance with German law.

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The Investment Fund Tax Act basically taxes investors on their dividends and accrued income (reinvested dividends) as apparent from the published accounts of the fund. These must included detailed information on the income and capital of the fund and on the tax position and consequences of its earnings and gains during the year. This latter must be confirmed by a professionally qualified tax advisor, accountant or lawyer. The information must be made available and published in German. Failure of the fund to comply with these requirements exposes unit holders to taxation on their estimated income. This is the total of dividends actually received during the year plus 70% of the appreciation of the redemption price over the year. However, the total taxable income may not be less than 6% of the year-end redemption value of the units held. A resident taxpayer holding shares in foreign funds on deposit with a Belgian bank protested against this estimated taxation as being unrealistic. The government admitted the unrealistic taxation before the ECJ, but maintained its interest in ensuring fair taxation from full and proper disclosure of a fund's activities. It also maintained that a foreign fund was subject to only the same reporting and compliance requirements as German funds.

The ECJ has rejected the German government's arguments and the taxation as excessive. It accepted that the government has a legitimate interest in obtaining sufficient information from sufficiently reliable sources to ensure fair taxation, but held that the prescribed form and publication requirements went beyond what was necessary, particularly for funds not themselves interested in actively promoting their units on the German market. The provisions were, as such, a hindrance on the freedom of capital movement and their application left an investor in a "non-transparent" fund no possibility of satisfying the need for information on his own initiative. He could contact the management of the fund and the German tax authorities could usually verify the results through the international information exchange systems.

The ECJ case reference is C-326/12 *van Caster* judgment of October 9, 2014

Schlagwörter

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