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Finance ministry interprets ECJ ruling on “non-transparent” investment funds restrictively

The finance ministry has published a list of documents to be produced by unit holders in “non-transparent” investment funds if they wish to avoid taxation on punitive deemed income.

The Investment Funds Tax Act charges resident unit holders to income tax on their distributions received and on their shares in the accumulated earnings of the fund. The necessary figures for this are available from the information required to be published by the fund as a condition for placing their units on the German capital market. If a foreign fund does not comply with the German formalities – including the publication requirement in the German language – it is deemed to be “non-transparent”. In this case the taxable income for the unit holder is the dividend received, the undistributed earnings and 70% of the increase in unit price over the year. 6% of the unit price at year end is the minimum taxable income. On October 9, 2014, the ECJ held that this provision for deemed taxable income offended against the free movement of capital more than was necessary to ensure fair taxation in that it left taxpayers with no possibility of meeting the information requirements of the authorities from their own resources. Accordingly, the provision had to be disapplied (case C-326/12 *van Caster and van Caster*).

The finance ministry has now reacted with a decree setting out the information that tax offices may require from the unit holders in “non-transparent” funds. This includes the results of the fund, the dividends received, the current sales prospectus and the published reports. However, it also includes a trial balance and certificates by a recognised public accountant in the country in question that the taxable income has been computed in accordance with the German tax rules. Unit holders wishing to claim foreign tax credits or other reliefs must submit the necessary specific documents. The decree is silent on the past, although insistence now on documentation that is now no longer available is perhaps a further unwarranted restriction on the free movement of capital.

Keywords

deemed income, investment funds, unit holders