

The latest tax and
legislative developments

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German Lump Sum taxation of investment funds is reversible *Latest developments*

Non-German (retail) investment funds are required to perform the same calculations and publications as German investment funds in order for their German investors to be taxed on a tax transparent basis as set out in the German Investment Tax Act (GITA). If an investment fund fails to meet these requirements, its German investors must be taxed under the disadvantageous lump sum taxation rule.

The ECJ's judgment of 9 October 2014 ("van Caster & van Caster") has created the opportunity for German investors to produce evidence of the actual size of their income in order to achieve a tax transparent taxation.

On 5 February 2015 the German Ministry of Finance has specified the requirements for the evidence of the investor's actual income.

The benefits of a retro-active tax transparency can be obtained in all cases in which no final tax assessment has been made. In addition to tax refund claims one can expect reimbursement interest falling due.

Administrative guidance in reaction to "van Caster & van Caster"

The GITA does not foresee a possibility to provide evidence to the contrary in case an investment fund does not meet the extensive requirements for a tax transparency in due form and time. According to the ECJ, such legislation constitutes a restriction on the free movement of capital as it applies predominantly to non-resident investment funds and as it is not justified by legitimate objectives in the public interest. In particular, the lump sum taxation goes beyond what is necessary to ensure effective fiscal supervision. Such supervision may well be ensured if the tax payer were allowed to provide relevant documentary evidence enabling the tax authorities to establish correctly the taxation of the investment fund income.

The new circular of the German Ministry of Finance describes how the evidence to the contrary of the actual income must be produced and makes clear that the income must not be determined by way of estimation.

The German Ministry of Finance imposes high demands on the evidence of the actual income that must be produced by the investor. There is a set of ten specified **minimum disclosures** which must be determined in line with the provisions of the German tax law. The circular provides the possibility to the tax authorities to request substantiating evidence to such minimum disclosures and we expect that the tax authorities will generally make use of this possibility.

Evidence that may be requested include in particular: a certificate of an authorized professional confirming that the income has been determined in line with the provisions of the German tax law; the prospectus of the investment fund; the annual report; detailed trial balances from the fund accounting and reconciliations between the annual report and the tax disclosures. The tax authorities can request **all** such evidence to be provided **in German** language.

In particular for institutional investors but also in case of significant amounts of creditable withholding taxes on investment fund level it is possible and may be favorable to determine in addition to the minimum disclosures all other disclosures (in total 30 items) as specified in the GITA, in order to improve the after-tax return on the investment.

Retroactive application to fund investors' tax assessments

Investors that have suffered the lump sum taxation in the past now have the opportunity to obtain a rectification of their tax assessments provided that such assessments are still open to amendment. As a general rule it can be expected that the actual income should be lower than the lump sum amounts imposed by the law and that the investor may receive a tax refund plus interest on such refunds.

PwC contacts

If you would like further advice or information on the issues outlined in this brochure, please call your PwC contact listed on the final page of this NewsFlash

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