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Alignment of different grandfathering regimes for application of the German Investment Tax Act

http://bepartners.pro/documents/2014-05-22_BMF_Verlaengerung_Bestandsschutz_InvStG.pdf

Up to now, two different grandfathering regimes exist for the application of the German Investment Tax Act (“GITA”) to foreign investment funds. The German Federal Ministry of Finance has now aligned both regimes in an Ordinance dated May 22, 2014. This is particularly important for certain foreign real estate funds.

The Act Amending the German Investment Tax Act and Other Acts (AIFM Tax Amendment Act, or “GITA–AIFM”) implemented a differentiation between open-ended and closed-ended funds within the GITA’s scope of application (see [beinformed](#), dated January 30, 2013). UCITs and open-ended AIFs that comply with the requirements of Sec. 1 (1b) GITA (“qualifying AIF”) all qualify as “Investment Funds” under the GITA and are subject to the principles of investment taxation. AIFs that do not comply with the requirements of Sec. 1(1b) GITA (“non-qualifying AIF”) are defined as “Investment Vehicles” and are subject to the general German tax rules.

This distinction between Investment Funds and Investment Vehicles entered into effect as of 22 July, 2013. At the same time, funds that were established before 22 July, 2013, were grandfathered for a transition period of at least 3 years. Under this grandfathering provision, an investment entity that qualified as an investment fund under the old investment tax rules, continue to qualify as an Investment Fund and to enjoy the same tax treatment as before until the business year ending after July 22, 2016.

However, up to now, certain foreign investment entities could not benefit from this grandfathering regime provided by the GITA-AIFM. Due to a revision of the interpretation of the German investment regulatory laws by the German investment supervisory authority (the “BaFin”) by the end of 2008, many foreign collective investment schemes no longer qualified as “foreign investment funds” within the meaning of the Ger-

man investment regulatory laws and the GITA. This is particularly true with regard to foreign real estate funds, which invest in real properties indirectly via special purpose vehicles (“SPVs”). The German regulatory laws require that the statutory purpose of such SPVs is strictly limited, not only factually but also legally, to certain activities. Only if said limitation of purpose is set forth in a SPV’s constitutive documents in writing, will the SPV meet the qualification as a so-called “real estate company”. If a foreign real estate fund invests in SPVs, which do not qualify as a “real estate company”, the fund itself is not deemed to invest in eligible assets and thus can not qualify as a “foreign investment fund” within the meaning of the German investment regulatory laws. Prior to the revision of the interpretation of the German investment regulatory laws, a bottom-up approach applied: a foreign real estate fund, which held a portfolio of real properties indirectly via entities controlled by the fund, was deemed to directly hold the properties itself.

Therefore, in 2009, the German Federal Ministry of Finance provided a grandfathering clause for a limited period of time. According to said grandfathering clause, the GITA could still be applied to any foreign collective investment schemes, which ceased to qualify as a “foreign investment fund” within the meaning of the German investment regulatory laws as a result of the revised interpretation of the regulatory laws. This grandfathering was initially limited to the foreign funds’ business years commencing prior to May 31, 2011, and has been extended to business years commencing prior to May 31, 2014. It was doubtful if foreign funds, to which this grandfathering clause is applicable, would also be covered by the grandfathering regime provided by the GITA-AIFM. Thus, it is appreciated that the German Federal Ministry of Finance has now declared in an Ordinance dated May 22, 2014, that the grandfathering for those foreign funds will also continue until the business year ending after July 22, 2016.



be in touch: If you have any questions, please do not hesitate to contact us!



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