
2022 Annual Tax Act – Amendments to the Investment Tax Act

January 18, 2023

The 2022 Annual Tax Act, which was passed by the German Federal Council (Bundesrat) on 16 December 2022 (Federal Law Gazette I 2022, 2294), will also result in amendments to the German Investment Tax Act. The aim of the amendments is to prevent a German special investment fund (Spezial-Investmentfonds) from losing its tax transparent status under German tax law when generating revenue from the production of renewable energies (cf. Explanatory Memorandum to Section 26 number 7a - NEW - Investment Tax Act). Whether this goal will be achieved is doubtful in view of the framework of the new regulation. Overall, however, the amendments also result in notable changes to the taxation of Spezial-Investmentfonds. In the future, the trade tax provisions of Section 15 of the Investment Tax Act will also apply to Spezial-Investmentfonds and thus these may also be subject to German trade tax. The general trade tax exemption of Section 29 (4) of the Investment Tax Act is no longer available to Spezial-Investmentfonds.

In addition, there is a small but important change in the capital gains tax refund options for Spezial-Investmentfonds. These will now be able to apply for a refund under Section 11 of the Investment Tax Act via the new Section 29 (1) of the Investment Tax Act.

Changed System of Taxation of Spezial-Investmentfonds

Until 31 December 2022, a Spezial-Investmentfonds was required to fulfil the requirements of Section 15 (2) and (3) of the Investment Tax Act in order to qualify as a Spezial-Investmentfonds within the meaning of the Investment Tax Act and thus to attain a tax transparent status under German tax law. One of these requirements was that a Spezial-Investmentfonds could not generate more than 5 % from so-called “harmful active entrepreneurial management.” Producing and selling energy from renewables (e.g., photovoltaic systems) would be deemed to be such harmful active entrepreneurial management.

Only active entrepreneurial management in real estate companies was not detrimental, since the Investment Tax Act did not apply to investments by a Spezial-Investmentfonds in such companies. Until 31 December 2022, the Investment Tax Act did not provide for preferential treatment of revenue from the generation of renewable energies.

The new legislation, on the other hand, is intended to raise the de minimis threshold from 5 % to 10 % as of 2023, provided the income comes from the generation or supply of electricity and this is in connection with the letting and leasing of real estate. The income must be generated

- from the operation of plants for the generation of electricity from renewable energies, or
- from the operation of charging stations for electric vehicles or electric bicycles.



For this purpose, when determining a Spezial-Investmentfonds' tax status, the German legislator has deleted the link to harmful active entrepreneurial management in the amended Investment Tax Act and has instead introduced a new investment provision in Section 26 number 7a of the Investment Tax Act.

Compared to the previous law, Section 26 number 7a of the amended Investment Tax Act no longer results in a loss of tax transparent status of qualified income ranging between 5 % and less than 10 % from active entrepreneurial management. Only if there is a material breach of this investment provision can there be a loss of status. In this respect, the question of how to deal with violations of this threshold remains unchanged. However, income from active entrepreneurial management within this range, on the other hand, could now also be subject to German trade tax.

It is not clearly regulated whether the trade tax exclusions of the Investment Tax Act continue apply to income generated from the active entrepreneurial management of real estate companies under the new amendments. According to the Application Decree on the Investment Tax Act of 21 May 2019 (margin number 15.14) of the German Federal Ministry of Finance, the following applies in general: „As a rule, an active entrepreneurial management is to be assumed if an investment fund participates itself or through third parties in the active management of portfolio companies. Furthermore, active entrepreneurial management may be present if a legal or de facto authority issues instructions to target companies that are themselves operationally active.” However, this would lead to the contradictory result that investment regulations may be violated because of active entrepreneurial management in non-compliance with the exemption limit even though the trade tax exemption via Section 29 (1) of the amended Investment Tax Act applies.

The amended Investment Tax Act states that the trade tax provision set forth in Section 15 of the Investment Tax Act is applicable without restriction. This means that in the future, Spezial-Investmentfonds will therefore be subject to trade tax in the event of a business operation established by active entrepreneurial management, just like investment funds (Chapter 2 investment funds). In this context, any other income generated by the Spezial-Investmentfonds will not be tainted thereby, just as it was already the case for Chapter 2 investment funds.

Under the amended Investment Tax Act, a possible trade tax exemption will no longer result from Section 29 (4) of the Investment Tax Act, but from Section 29 (1) of the Investment Tax Act. In any case, the Spezial-Investmentfonds will continue to be exempt from trade tax in the future below an income limit of 5 % from an active entrepreneurial activity.

In our opinion, since a trade tax liability for qualified income from renewable energies - as in the case of Chapter 2 investment funds - would have been sufficient to prevent a Spezial-Investmentfonds from gaining a tax advantage in this respect over taxable energy producers, the legislator has missed an opportunity to also grant Spezial-Investmentfonds an uncomplicated possibility to contribute to the energy transition.

The amendments to the Investment Tax Act apply as of 1 January 2023.



Capital Gains Tax Refund for Spezial-Investmentfonds

In addition, the amended Investment Tax Act extends the refund procedure of capital gains tax by the tax authorities to Spezial-Investmentfonds. In practice, this relates in particular to cases under Section 11 (1) sentence 1 number 2 of the Investment Tax Act in which capital gains tax and the solidarity surcharge have been withheld in an amount exceeding Section 7 of the Investment Tax Act and the party liable to pay has not made a refund pursuant to Section 7 (5) of the Investment Tax Act.



be in touch: Any questions? Please do not hesitate to contact us!



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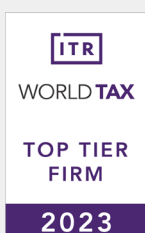
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