

GERMAN INVESTMENT TAX REFORM AS AT 1 JANUARY 2018 IS COMING CLOSER - START TAKING ACTION

Starting 1 January 2018, the new German investment tax act ("Gita") will come into force. Gita will have a substantial impact on Luxembourg based funds with German investors or invested in German equities. Without further delay, Luxembourg funds should start evaluating whether they have to take actions.

NEW APPROACH: NON OPAQUE VS. TAXATION AT FUND LEVEL

Starting January 2018, only two different categories for tax purposes will exist: "Publikumsfonds" (funds open to the public) and "Spezialfonds" (special funds).

For "Publikumsfonds", the old approach of assessing the taxable income of a German investor as if he invested directly in the underlying assets of the fund will no longer be applicable. As from 1 January 2018, the opaque approach will be the rule.

Only so called "Spezialfonds" will be able to benefit from a tax look-through approach which is close to the system in place now. However in order to qualify for this regime, the fund prospectus will need to explicitly limit potential unit holders to 100 and it might not allow any direct or indirect investment by individuals.

Most Luxembourg specialized investment funds do not have such limitations. Generally, the prospectus allows any "well-informed investors" to invest, not excluding individuals. Therefore, if a SIF wants to benefit for the non-opaque regime in the future, the prospectus will probably need to be revised to meet all the requirements set forth by the German law. Any investment fund not meeting the requirements set out above will fall within the opaque regime.

OPAQUE SYSTEM AS THE NEW GENERAL RULE – TAXATION AT FUND LEVEL

According to the new regulations, most Luxembourg funds will be treated as of 1 January 2018 as taxable entities with respect to certain income originating from Germany:

- Dividends distributed by a German entity
- Real estate income derived from German based real estate
- Other domestic income as defined by Par. 49 of the German Income Tax Act.

A 25% withholding at source (plus solidarity surcharge of 5,5%) will be levied in case of dividends.

In case of real estate income and other domestic income, the fund will have to file a corporate income tax return (the standard German corporate income tax rules apply).

"STATUSBESCHEINIGUNG" – REDUCING WITHHOLDING TAX TO BE LEVIED AT FUND LEVEL

The withholding tax levied on German source dividends can be reduced to 15%. In case of a non-German fund, this requires a so-called "Statusbescheinigung" issued by the German Bundeszentralamt für Steuern ("BZSt"). In order to issue such a "Statusbescheinigung", the BZSt will need to agree that the fund is an "investment fund" as defined in Par. 7

Section 3 Gita. A special mandatory template will need to be used to apply for this "Statusbescheinigung". The template is not yet available and no guidelines have been published concerning the supporting documents that will be required.

The fund legal representative or a professional advisor will be able to file the application.

The certificate will be valid for three years.

If the fund wants to benefit from the reduced withholding tax rate, it will need to furnish the "Statusbescheinigung" to the paying agent well before the dividend payment.

WM-Daten is implementing a field indicating to paying agents whether a given fund is in possession of a valid "Statusbescheinigung" or not.

TAX PRIVILEGED INVESTORS – PRO RATA REDUCTION OF WITHHOLDING TAX

Some German investors, like German individuals investing in investment funds via certified old age pension schemes, are not taxable on the income deriving from the investment funds.

If they provide the investment fund with evidence of their tax-exempt status, no withholding tax will be levied on their pro rata "portion" of the taxable income originating from Germany.

In case of overwithholding, the fund will be allowed to file for a refund.

Non-German investors such as non-profit organizations, might also benefit from such exemption if they file a request and receive a certificate of "Vergleichbarkeit" from the BZSt.

TAXATION AT INVESTOR LEVEL FOR OPAQUE FUNDS: ADVANCED LUMP SUM AMOUNT

German investors in opaque funds will be taxed on distributions and on capital gains realized on the sale of units.

However, in order to generate constant tax revenue the investor will be taxed on a lump sum amount. Please refer to **Annex 1** for further details.

In case of sale of units of the fund, the lump sum amount will be deducted from the taxable capital gain or loss.

WM-Daten intends to implement a field to report this amount.

TAXATION AT INVESTOR LEVEL FOR OPAQUE FUNDS – PARTIAL EXEMPTION RATES

German investors might benefit from a partial exemption depending on the investment policy of the fund. Please refer to **Annex 2** for further details on thresholds/ applicable rate.

WM-Daten intends to introduce new fields to indicate the respective fund type.

TRANSITION RULES/ GRANDFATHERING

Each investment fund will have to establish and publish a final reporting based on the existing rules (as at 31 December 2017).

This reporting is mandatory and independent of the financial year end of the fund. The reporting will have to be filed before 31 December 2018.

Moreover, the investor will be deemed to realize a sale of all his units on 31 December 2017. Although considered as a taxable event, the fictitious capital gain or loss will not be taxed immediately. The tax will be payable in the event of a later genuine sale of fund units.

HOW BDO CAN HELP

BDO can help:

- Analyze the impact at the level of the fund
- File applications for "Statusbescheinigungen";
- Help implementing procedures to benefit from a reduced withholding tax rate on dividends;
- Help non German investors evaluate questions of "Vergleichbarkeit" in order to potentially benefit from the withholding tax exemption ;
- Determine the advanced lump sum amount;
- Determine the partial exemption category that applies to the investment fund and help adapting the prospectus if required;
- Liaise with WM-Daten to provide the information required from the fund;
- Prepare final reporting, manage potential distributions before and in transition period;
- Make sure that German investors, German paying agents and WM-Daten do have all the information they need to fulfill their new legal obligations/ to provide the German market with all the new information required.

If you wish to discuss in more detail on any related aspect, please contact one of the following persons

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Annex 1

	Redemption price of investment fund unit at beginning of calendar year
X	70% of "Basiszinssatz" (Base interest rate, fixed by German legislator)
=	"Basisertrag" (base amount for computation purposes)
	"Basisertrag" is capped at increase in value, so the increase of net asset value plus all distributions during calendar year (if the result is a decrease, lump sum amount is 0)
./.	Distributions during calendar year (these are taxable in any event, so deducted to avoid double impact)
=	Advanced lump sum amount

Annex 2

Fund Type	Threshold*	Private investor	Business investor (individual or partnership)	Business investor (corporation)
Equity Fund ("Aktienfonds")	51%	30%	60%	80%
Real Estate Fund - German real estate	51%	60%	60%	60%
Real Estate Fund – Non-German real estate	51%	80%	80%	80%
Balanced Fund ("Mischfonds")	25%	15%	30%	40%
Other Fund	n/a	0%	0%	0%
*Minimum percentage of equity ("Kapitalbeteiligungen")/ real estate or real estate companies according to prospectus, in case of "Balanced Fund" 25% refers to equity part				

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