

„Jahressteuergesetz 2008“ voted on by the German Parliament on November 9, 2007

On Thursday of last week, a revised version of the “Jahressteuergesetz 2008” has been voted on by the Lower House of the German Parliament. The most important modification in comparison to published drafts impacting the Investment Fund industry is the revision of the transition rules for the application of the German Flat Rate Tax and the rewording of Art. 42 Abgabenordnung (AO). Whilst the modification of the transition rules in relation to the Flat Rate Tax mainly concerns certain investment funds, the rewording of Art. 42 Abgabenordnung (AO) could imply significant uncertainty when structuring investments and multinational companies.

Modification of transition rules for the introduction of the Flat Rate Tax

According to the transition rules voted on in July 2007, capital gains from the redemption of fund units are not subject to the Flat Rate Tax as far as they have been subscribed by the investor before 1 January 2009.

The financial committee of the Parliaments upper House (“Bundesrat”) highlighted in this context the potential tax advantages, which may result from investments in foreign specialized funds. Therefore, it proposed to revise the transition rules so that capital gains from the redemption of fund units are subject to the Flat Rate Tax even if the units have been subscribed before 1 January 2009 under the condition that the fund does not has more than 30 shareholders (see also Flash News of 14 September 2007).

Under the revised rules, which have now been adopted by the Parliaments Lower House, capital gains from the redemption of units in domestic and foreign specialized funds (“Spezialfonds”), which have been subscribed after 9 November 2007 are subject to the Flat Rate Tax at a rate of 25 % as far as redeemed after 31 December 2008. This applies accordingly to the redemption or disposal of units in other investment funds, for which the participation of natural persons depends under legal provisions, bylaws, articles of association or contractual terms on the expertise of the investor or for which a minimum investment of 100.000 Euro or more is required.

This new regulation will not impact capital gains from the redemption of units of publicly distributed funds according to Part I and II of the Luxembourg Law of 2002 subscribed before 1 January 2009, unless the bylaws or contractual terms include the abovementioned limitations.

Those modifications do also not impact business investors, as the Flat Rate Tax is limited to private investors only.

Moreover, the reporting obligations according to the German Investment Tax Act have been slightly extended; Interest income is in future to be reported separately. This provides business investors with the possibility to compensate interest income from fund investments with interest expenses when applying the newly introduced interest deduction limitations (“Zinsschranke”). This extension is valid with immediate effect after promulgation.

Anti abuse rules (Article 42 Abgabenordnung)

Under Art. 42 AO (General German Tax Code, equivalent of UK CFC rules), the tax charge for an abusive structure shall be equal to such tax burden, which would have been due by using an economically reasonable structuring. In the past, German courts have interpreted these rules very strictly.

According to the amendment to Article 42 AO voted on by the Parliaments Lower House an abusive structuring is given, “if an inappropriate (legal) structuring leads for the tax payer or a third party in comparison to an appropriate structuring, to tax advantages not provided for by tax laws. This does not apply contingent the taxpayer provides for the chosen structuring non-tax reasons, which are substantial from a global point of view.”

During the parliamentary process, the missing right for tax payers to receive a binding statement from the German tax administration on the acceptance of a structuring has been criticized frequently as this might imply significant uncertainty for structurings and investments.

This final vote of the “Jahressteuergesetz 2008” by the German Parliaments upper House (“Bundesrat”) as the last step in the parliamentary process is scheduled for 30 November 2007. Further changes to the present regulations are not expected.

Contacts

For further information, please contact the PricewaterhouseCoopers Luxembourg Investment Management experts:

Laurent Garzino

Partner
+352 49 48 48-3171

laurent.garzino@lu.pwc.com

Oliver Weber

Director
+352 49 48 48-5712

oliver.weber@lu.pwc.com

PricewaterhouseCoopers

400, route d'Esch, B.P. 1443
L-1014 Luxembourg
Téléphone +352 49 48 48-1
Facsimile +352 49 48 48-2900

PricewaterhouseCoopers cannot be held liable for mistakes, omissions, or for possible results obtained further to the use of this document, which is issued for information purposes only. No reader should act on or refrain from acting on the basis of any matter contained in this publication without considering and, if necessary, taking appropriate advice upon their own particular circumstances.

© 2007 PricewaterhouseCoopers. All rights reserved. PricewaterhouseCoopers refers to the network of member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.