COVID-19 – Tax Relief for Investment Funds

DUE TO THE COVID-19 PANDEMIC, THE PASSIVE VIOLATION OF ASSET COMPOSITION LIMITS IN MARCH AND APRIL 2020 WILL BE WITHOUT CONSEQUENCES FOR INVESTMENT FUNDS

Executive Summary

- Between 01 March and 30 April 2020, a passive violation of asset composition limits will not be considered as a substantial violation of the asset composition requirements for investment funds.
- Such a passive violation will not be counted towards the statutory limit of 20-business days.
- In the case of special investment funds, a passive violation of the limits during this period will not be considered a substantial violation of the investment law provisions of Sec. 26 Investment Tax Act (InvStG).

Federal and state level relief

On 09 April 2020, the Federal Ministry of Finance (BMF) (after coordination with tax authorities of the federal states) published a decree regarding tax relief measures for investment funds reflecting the economic consequences of the COVID-19 pandemic.[1]

Passive violation of asset composition requirements

A substantial violation of the requirements for the composition of assets leads to the loss of the status as an equity fund, a mixed fund or real estate fund in accordance with Sec. 2(6) s. 4, Sec. 2(7) s. 4 or Sec. 2 (9) s. 7 of the InvStG. This status is particularly relevant for the taxation of investors, as it determines the rate of the partial tax-exemption applied in accordance with Sec. 20 InvStG.

In the event of a passive violation of the asset composition requirements, a substantial violation of the asset composition requirements might be assumed if the investment fund does not take possible and reasonable measures immediately after becoming aware of the violation in order to restore the required level of capital participation or real estate investments.[2]

Due to the COVID-19 pandemic, the BMF communicated in its decree of 09 April 2020 that a passive violation of the asset composition requirements will in principle not be considered as a substantial violation for the period between 01 March and 30 April 2020. In this regard, the BMF expressly refers to a regulation for equity and mixed funds. However, the aforesaid should apply accordingly to real estate funds, since the regulations for equity or mixed funds apply accordingly in this respect.[3]

20-business day limit

If an equity fund, a mixed fund or a real estate fund falls short of the asset composition requirements stipulated in Sec. 2(6), 2(7) or 2(9) InvStG for a total of up to 20 individual or consecutive business days within a financial year – the so-called 20-business day limit – this will not be considered a substantial violation of the asset composition requirements.[4]

As, however, a period of 20 business days may prove to be too short in the current COVID-19 pandemic, a passive violation of the asset composition requirements

[1] BMF decree of 09 April 2020, Investment tax measures reflecting the economic consequences of the COVID-19 pandemic, IV C 1 - S 1910/19/10079 :002.

[2] BMF decree dated 21 May 2019, regarding the Investment Tax Act; questions of application of the Investment Tax Act in the version applicable from 1 January 2018 (InvStG), BStBl 2019 I p. 527 ("InvStG 2018 BMF decree"), no. 2.18.

[3] InvStG 2018 BMF decree, no. 2.41.

[4] InvStG 2018 BMF decree, no. 2.19.

occurring between 1 March and 30 April 2020 will not be counted towards the 20-business day limit.

Substantial violation of the investment regulations of a special investment fund

The status as special investment fund under Sec. 26 InvStG depends, among other things, on the fund not substantially violating the investment requirements listed in Sec. 26 InvStG in its actual investment practice.

If special investment funds due to a passive violation of the asset composition requirements do not comply with the statutory limits in March and April 2020, this will in principle not be considered a substantial violation of the investment rules.

Consequences for procedural law

The BMF did not comment on the procedural consequences of a possible retroactive application of the BMF decree of 09 April 2020.

If there is, in accordance with BMF decree of 09 April 2020, no substantial violation of the asset composition requirements, we do not believe that the investment fund should have to notify the competent tax authority as Sec. 153(2) Fiscal Code (AO) demands.[5]

In our opinion, it should also not be necessary to notify investors of a change in the partial tax-exemption rate[6] or other parties obliged to pay taxes or financial information service providers (e.g., WM-Datenservice)[7] of a correction of previous information on the applicable partial tax-exemption rate since no "substantial violation" occurred.

If such changes or corrections have already been implemented for the period since 01 March 2020, we believe that it should be possible to reverse this.

If a party obliged to pay taxes have assumed a substantial violation because of the notification and consequently already taken into account a loss of status as an equity fund, mixed fund or real estate fund for the deduction of withholding taxes, we believe that this, too,[8] should be reversible.

Conclusion

The measures of the BMF decree of 09 April 2020 are a helpful measure for crisis management. However, due to the applicability as of 01 March 2020, it would have been useful to include information on reversing actions already taken as a consequence of an assumed passive violation of the asset composition requirements.

The fact that the measures are limited in time to 30 April 2020 has caused some concerns. It remains to be seen whether the BMF will grant an extension.

Petra Eckl
Lawyer, tax consultant,
Specialised in tax law
Frankfurt
petra.eckl@gsk.de

Dirk Koch
Lawyer, tax consultant
Specialised in tax law
Munich
dirk.koch@gsk.de

Dominik Berka
Lawyer, tax consultant
Frankfurt
dominik.berka@gsk.de

[5] InvStG 2018 BMF decree, no. 2.22 makes a substantial violation of the requirements regarding the composition of assets a precondition in this respect.
[6] InvStG 2018 BMF decree, no. 2.22.
[7] InvStG 2018 BMF decree, no. 2.22.
[8] Cf. generally InvStG 2018 BMF decree, no. 2.23.

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www.gsk.de

GSK Stockmann

BERLIN
Mohrenstrasse 42
10117 Berlin
T +49 30 203907-0
F +49 30 203907-44
berlin@gsk.de

HEIDELBERG
Mittermaierstrasse 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

FRANKFURT / M.
Taunusanlage 21
60325 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

MUNICH
Karl-Scharnagl-Ring 8
80539 Munich
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

HAMBURG
Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

LUXEMBOURG
GSK Stockmann SA
44, Avenue John F. Kennedy
L-1855 Luxembourg
T +352 271802-00
F +352 271802-11
luxembourg@gsk-lux.com