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**Germany – ECJ C-236/12
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Operational Tax News. Germany Update



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German Lump-Sum Taxation violates the European Principle of Free Movement of Capital – The “Van Caster” decision of the European Court of Justice (C-236/12)

Background

Income generated by investors, tax resident in Germany, through investment into investment funds, subject to the German Investment Fund Tax-Reporting Regime, is determined for German income tax purposes on the basis of relevant tax information published by funds in accordance with relevant requirements of the tax-reporting regime.

In case, such tax relevant information has not been made available or relevant publication requirements have not been met, the taxable income derived by German investors through investments in so-called non-transparent investment funds, has to be determined on a lump-sum basis. The German tax law does not provide any provision that would allow investors to provide tax authorities proof of actual income, generated by the investment in non-transparent investment funds, by appropriate documents or information.

The decision of the ECJ

In its decision, C-326/12 dated 9 October 2014, the ECJ has ruled that the lump-sum taxation under the German Investment Fund Tax Reporting Regime is in breach of the European concept of free movement of capital, as investors are not allowed to provide tax authorities proof of actual generated income by appropriate documents or information.

Impact for Luxembourg

The decision of the ECJ might make investments into foreign funds more attractive for German investors as it mitigates the risk of failure with German investment fund tax reporting requirements.

It remains to be seen if the individual estimation of income will lead to better fiscal results for investors as this might depend primarily on their ability to provide appropriate documentation or information to German tax authorities for justification.

Nevertheless, investors who have suffered the lump-sum taxation should investigate whether they can appeal against correspondent tax assessments.

It is unclear how Germany will react to the judgment of the ECJ and which consequences it finally has for the German investment fund tax reporting regime.

It should further be pointed out that the decision of the ECJ might have impact in other European jurisdictions, who have also implemented investment fund tax reporting regimes and who determine investment fund income on a lump-sum basis in case relevant reporting requirements are not met.

We will keep you updated in case of any further developments.

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