beleuchtet:

Location Promotion Act: Planned amendments to the Investment Tax Act

14th Oktober 2025

On September 10, 2025, the Federal Cabinet approved the government draft for a Location Promotion Act.

This takes up the central concern of the Second Future Financing Act, which was no longer passed in the previous legislative period, to make capital funds available for investments in renewable energies and infrastructure to a greater extent.

However, the draft of the Location Promotion Act now contains a change to other domestic income that was not yet included in the draft of the Second Future Financing Act. In the case of multi-level partnership structures, this change could possibly lead to a loss of tax exemption for tax-privileged investors, which we believe is unjustified.

The other planned amendments to the Investment Tax Act largely correspond to the draft for the Second Future Financing Act, but we would be pleased to discuss them again for you in context

The Location Promotion Act is intended to make capital funds available to a greater extent for investments in renewable energies and infrastructure. To this end, there is first a clarification of the scope of application of the Investment Tax Act, which we consider to be welcome.

Scope of application of the Investment Tax Act - clarification on the classification of an investment fund

Section 1 of the Investment Tax Act defines the scope of application of the Investment Tax Act. According to Section 1 (1) of the Investment Tax Act, the Investment Tax Act applies to investment funds and their investors. According to Section 1 (2) sentence 1 of the Investment Tax Act, an investment fund is an investment fund pursuant to Section 1 (1) of the Capital Investment Code. This means that any investment vehicle that fulfills the requirements as an investment fund, i.e. in particular does not represent an operationally active company outside the financial sector, is also classified as an investment fund, unless one of the exceptions under Section 1 (3) of the German Investment Tax Act is met. This already applies under the current version of the Investment Tax Act.

Section 15 Investment Tax Act stipulates a trade tax liability for Chapter 2 investment funds if an investment fund actively manages its assets on an entrepreneurial basis to a significant extent. This shows that the active entrepreneurial management must be below the threshold of an operating activity outside the financial sector. In other words, an investment vehicle that does not constitute an operationally active company for regulatory purposes and is therefore classified as an investment fund remains an investment fund for tax purposes even if it actively manages its assets as an entrepreneur. No quantitative limit is drawn here. Rather, Section 15 (4) sentence 1 Investment

Tax Act merely stipulates that the active entrepreneurial activity of an investment fund constitutes an economic business operation. If all assets are actively managed as a business, all assets must be included in the economic business operation for which trade tax arises. In a nutshell, this is an investment fund that is fully subject to trade tax, but it is an investment fund (see bepartners podcast from January 24, 2024).

In principle, the government draft now also confirms this, but nevertheless considers it necessary to insert a new Section 1 (2) sentence 2 Investment Tax Act Draft - in our opinion purely for clarification purposes - according to which it is not detrimental to the qualification as an investment fund if an investment fund actively manages all or some of the assets it holds on an entrepreneurial basis. According to the explanatory memorandum to the government draft, this provision is intended to prevent the tax authorities from assuming that a company is regularly subject to corporation tax and rejecting the applicability of the Investment Tax Act if, for example, an investment fund invests exclusively in infrastructure project companies in the legal form of partnerships and possibly dominates these partnerships as a shareholder ([link] explanatory memorandum to Section 1 (2) sentence 2 of the draft Investment Tax Act. In practice, the Federal Central Tax Office has already refused to issue a status certificate as an investment fund in such cases. In doing so, the Federal Central Tax Office has invoked the fact that according to Section 1 (2) sentence 2 of the Investment Tax Act (in future sentence 3 of the regulation), there is no binding effect for tax purposes on the regulatory classification as an investment fund. In this respect, it is helpful that such decisions, which in our opinion are already incorrect under the current Investment Tax Act, will in future be excluded by Section 1 (2) sentence 2 Investment Tax Act Draft.

Reorganization of other domestic income and abolition of the tax exemption for certain other domestic income (in particular from original commercial activity)

The other domestic income pursuant to Section 6(2) of the Investment Tax Act that is taxable at the level of an investment fund pursuant to Section 6(5) of the Investment Tax Act will be reorganized.

New allocation of capital gains from corporations with a predominantly domestic property value domestic property value to domestic real estate income

The profit from the sale of shares in domestic or foreign corporations with a predominantly domestic property value pursuant to Section 49(1)(2)(e)(cc) of the Income Tax Act was included in other domestic income pursuant to Section 6(5) sentence 1 no. 1 of the Investment Tax Act by the Growth Opportunities Act of March 27, 2024 (Federal Law Gazette I 2024 no. 108) (for background see illuminated from July 27, 2023).

The legal amendments in Sections 8, 10, 30 and 33 of the Investment Tax Act will in future exclude the tax exemption options for other domestic income derived from a commercial source of income within the meaning of Section 49 (1) no. 2 of the Income Tax Act. However, this is not appropriate for profits in accordance with Section 49(1)(2)(e)(cc) of the Income Tax Act, as these are derived from the sale of real estate. For this reason, they should continue to remain tax-free for tax-privileged investors - as in the case of direct investments - even in the context of fund investments Explanatory memorandum Section 6 (4) sentence 1 no. 4 InvStG draft.

In future, capital gains from corporations with a predominantly domestic property value will therefore be allocated to domestic real estate income in accordance with Section 6(4) InvStG (see Section 6(4) sentence 1 no. 3 InvStG draft) , for which the tax exemptions under Section 8 and Section 10 of the Investment Tax Act will continue to be granted.

Spin-off of income from a (domestic) commercial enterprise pursuant to Section 49 (1) no. 2 of the Income Tax Act in the case of active entrepreneurial management

The income that is still recognized under current law by Section 6 (5) sentence 1 number 1 of the Investment Tax Act commercial income pursuant to Section 49 (1) no. 2 of the German Income Tax Act is to be hived off and in future covered separately by Section 6 (5) sentence 1 no. 2 of the draft Investment Tax Act.

As before, the income from a co-entrepreneurship is only subject to taxation as other domestic income if the co-entrepreneurship maintains a permanent establishment in Germany or if another circumstance under Section 49(1) no. 2 of the Income Tax Act applies. A corresponding domestic connection is therefore still always required. Income from a co-entrepreneurship operating commercially abroad will therefore not be recorded. The mere exercise of shareholder rights in co-entrepreneurships operating commercially abroad by the domestic fund manager (capital management company within the meaning of section 17 KAGB) does not lead to the establishment of a domestic place of management, so that the foreign taxable substrate is not drawn into Germany (Explanatory memorandum to Section 6 (5) sentence 3 InvStG draft).

The previous provision that commercial income pursuant to Section 49(1) no. 2 of the German Income Tax Act is only to be recognized as other domestic income to the extent that the investment fund actively manages its assets as a business (see Section 6(5) sentence 1 no. 2 of the draft InvStG) is also continued. This provision was amended by the Act on the Further Tax Promotion of Electromobility and the Amendment of Other Tax Regulations of December 12, 2019 (Federal Law Gazette I 2019, 2451) in Section 6 (5) of the Investment Tax Act. According to the explanatory memorandum to the law at the time, the participation of an investment fund in a co-entrepreneurship should generally be assumed to be active entrepreneurial management. However, as some of the tax literature argues that the mere „passive“ holding of participations in co-entrepreneurships does not constitute active entrepreneurial management, the newly inserted Section 6 (5) sentence 3 InvStG draft expressly states that an investment in a co-entrepreneurship - subject to the new provision in Section 6(5a) sentence 1 no. 3 of the Investment Tax Act on proof of asset management activities - always constitutes active entrepreneurial management.

Proof of asset management activity in the case of commercially characterized and commercially infected partnerships

According to Section 6 (5a) sentence 1 number 3 InvStG draft, there is no active entrepreneurial management if the investment fund (or the competent tax authority) proves that the income is derived from asset management activities of these partnerships.

If this proof is provided, the income is not to be recorded as other domestic income in accordance with Section 6(5) sentence 1 no. 2 InvStG draft (commercial income in accordance with Section 49(1) no. 2 Income Tax Act).Section 6 (5a) sentence 2 InvStG draft clarifies, however, that other domestic income pursuant to Section 6 (5a) sentence 1 number 1 Investment Tax Act if the income in question is other income (than commercial income pursuant to Section 49(1) no. 2 of the German Income Tax Act) within the meaning of Section 49(1) of the German Income Tax Act and is not already covered by the overriding Section 6(3) sentence 1 no. 3 of the draft German Investment Tax Act as domestic investment income or by Section 6 (4) sentence 1 no. 5 InvStG draft as domestic real estate income.

If, on the other hand, proof is not provided, Section 6 (5) sentence 3 InvStG draft assumes commercial income in accordance with Section 49 (1) no. 2 of the Income Tax Act due to active entrepreneurial management and, accordingly, this is other domestic income in accordance with Section 6 (5) sentence 1 no. 2 InvStG draft.

Elimination of the tax exemption pursuant to Section 8 and Section 10 of the Investment Tax Act for other domestic income pursuant to Section 6(5) sentence 1 no. 2 of the draft InvStG (commercial income pursuant to Section 49(1) no. 2 of the Income Tax Act)

All income of an investment fund that is generally taxable pursuant to Section 6(2) of the Investment Tax Act and thus also its other domestic income pursuant to Section 6(5) of the Investment Tax Act can currently be tax-exempt pursuant to Section 8(1) of the Investment Tax Act upon application by the investment fund, provided that certain tax-privileged investors such as charitable foundations are involved.

In the case of investment funds in which only such tax-privileged investors may participate in accordance with Section 8 (1) Investment Tax Act, the income is fully tax-exempt in accordance with Section 10 Investment Tax Act, i.e. again including their other domestic income.

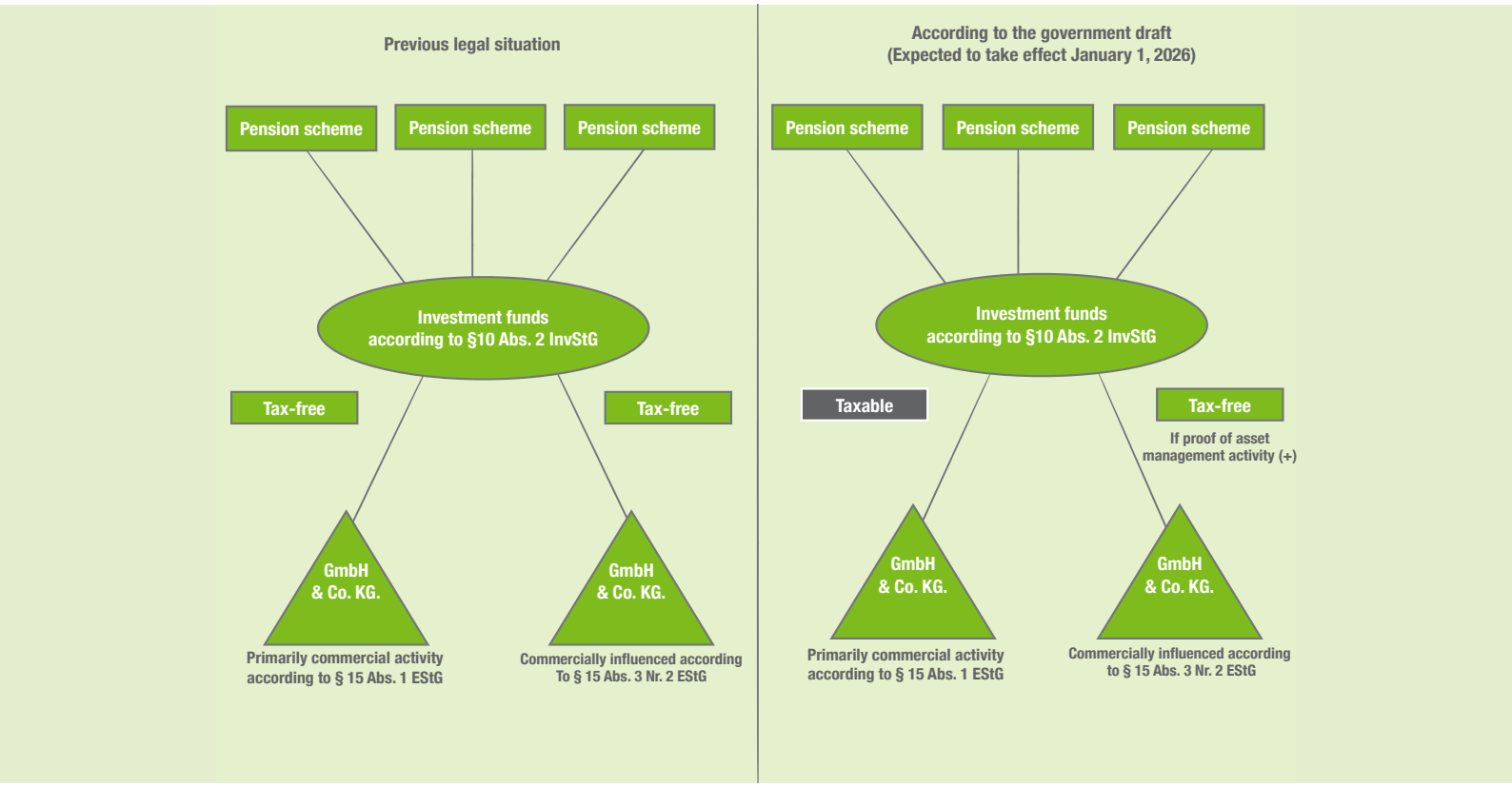
In corresponding application of Section 8 (2) Investment Tax Act (which grants exemption for domestic real estate income), the other domestic income may also be exempt from tax if certain tax-privileged investors participate in the investment fund in accordance with Section 8 (2) Investment Tax Act such as professional pension schemes or pension funds are involved (see BMF Application Decree on the Investment Tax Act, May 21, 2019 para. 8.14) .

The same applies in accordance with Section 10(2) Investment Tax Act for the tax exemption of other domestic income for investment funds in which only such tax-privileged investors may participate in accordance with Section 8(2) Investment Tax Act (see BMF Application Decree to the Investment Tax Act, May 21, 2019 para. 10.17).

These tax exemptions for other domestic income, which were previously only granted by decree, are initially placed on a legal basis in Section 8 (2) sentence 2 InvStG draft and in Section 10 (2) sentence 2 InvStG draft.

However, the other domestic income (commercial income in accordance with Section 49(1)(2) of the German Income Tax Act) excluded in Section 6(5) sentence 1 no. 2 of the draft InvStG is now excluded from this tax exemption.

This applies to income from co-entrepreneurships with originally commercial activities as well as

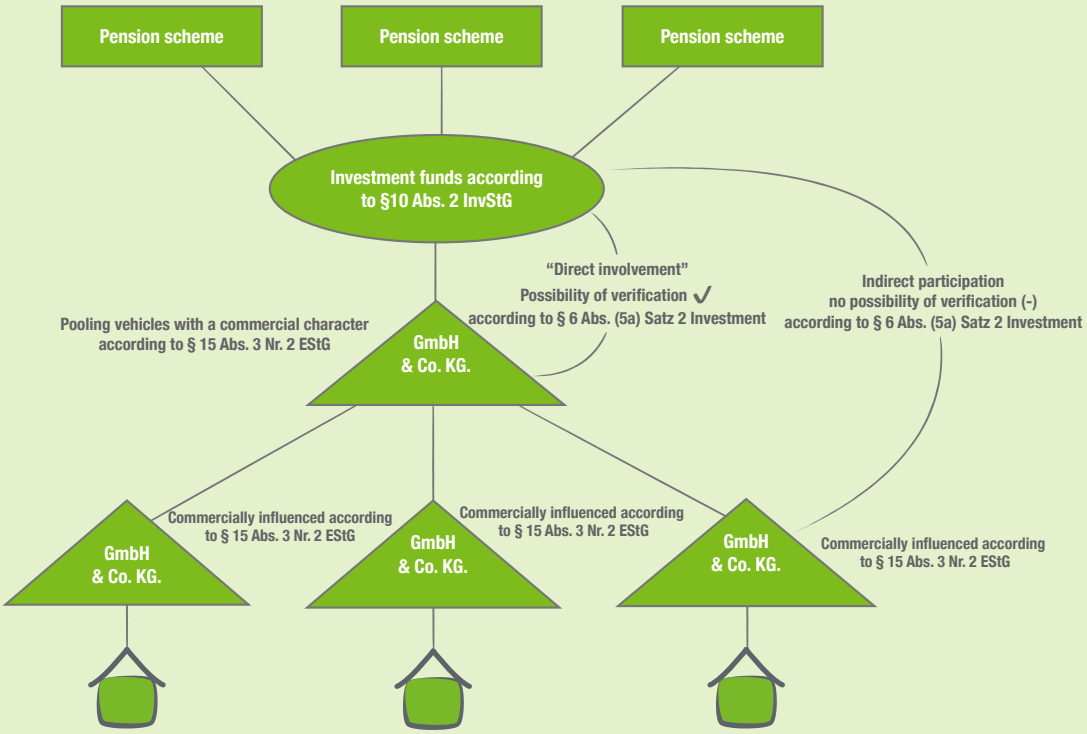


income from partnerships that are merely commercial or commercially infected, provided that proof is not provided for this income in accordance with Section 6 (5a) sentence 1 no. 3 InvStG draft that it is derived from asset management activities.

The law does not contain any more detailed provisions on how this proof of asset management is to be provided. According to the explanatory memorandum to Section 6 (5a) sentence 1 no. 3 and sentence 2 InvStG draft, it is essentially a matter of the investment fund explaining the activity of the partnership and, in cases of doubt, explaining why, in its view, the threshold for commercial activity has not yet been exceeded. Should questions of doubt arise in practice regarding the proof, these could be clarified in a BMF circular. It does not seem too risky to predict that such a BMF circular will be required to clarify questions of doubt.

Doubtful immediacy requirement for proof of asset management activity

In our opinion, a first question of doubt already arises from the statutory provision according to Section 6 (5a) sentence 1 no. 3 InvStG draft, which allows the possibility of proof that income is derived from asset management activities in the case of direct holdings in commercially infected or commercially characterized partnerships.



This raises the question of how the criterion of directly holding interests in commercially infected or commercially characterized partnerships is to be understood. The explanatory memorandum gives no indication as to whether and, if so, why the possibility of providing evidence should be limited to single-storey structures.

In the case of a multi-level partnership structure, the wording of Section 6 (5a) sentence 1 no. 3 InvStG draft does not appear to provide any corresponding possibility of proof with regard to the subordinated partnerships. If the characteristic of immediacy were actually to be interpreted in this sense, the income generated from these co-entrepreneurships would also be at risk of being classified as other domestic income in accordance with Section 6(5) sentence 1 no. 2 of the draft InvStG (commercial income in accordance with Section 49(1) no. 2 of the Income Tax Act) if it originated

exclusively from asset management activities. With such a classification, the possibilities for tax exemption of this income in accordance with Section 8 and Section 10 of the Investment Tax Act would then also cease to apply. In our opinion, this would not be justified. Several associations have already drawn attention to this as part of the consultation on the draft bill for the Investment Promotion Act. It remains to be seen whether the requested deletion of the immediacy requirement or at least a clarification in the explanatory memorandum to the law that proof of asset management activity is also possible at a lower level in the case of multi-level structures will be considered in the further legislative process. Otherwise, there is a risk of legal uncertainty until the publication of a BMF letter on the changes resulting from the Business Location Promotion Act.

Allocation of domestic investment income and domestic real estate income received via a domestic business to other domestic income

In contrast to the previous legal situation, domestic investment income and domestic real estate income will in future also be taxed as other domestic income in accordance with Section 6(5) sentence 2 of the Investment Tax Act if they are part of the income from a domestic business in accordance with Section 49(1) no. 2 of the Income Tax Act, in accordance with Section 6(5) sentence 1 no. 2 of the Investment Tax Act.

According to the explanatory memorandum, this is essentially intended to cover cases in which an investment fund receives domestic investment income and domestic real estate income via a partnership that is originally commercially active. In these cases, the commercial nature of the income is in the foreground and therefore an allocation to other domestic income is appropriate.

Insofar as such income is subject to a tax deduction, i.e. in particular in the case of domestic investment income pursuant to Section 6 (3) of the Investment Tax Act, the tax deduction pursuant to the newly inserted Section 7 (2) sentence 2 of the draft InvStG does not have a discharging effect in these cases.

As the tax exemptions pursuant to Section 8(1) and (2) of the draft InvStG and pursuant to Section 10(1) and (2) of the draft InvStG will in future apply to other domestic income pursuant to Section 6(5) sentence 1 no. 2 Investment Tax Act, this allocation ordered by Section 6(5) sentence 2 of the draft InvStG will result in definitive taxation at fund level if domestic investment income and domestic real estate income is received via a partnership that is originally commercially active.

However, this also applies if domestic investment income and domestic real estate income is received via a commercially infected or commercially characterized partnership and proof that the income is derived from asset management activities in accordance with Section 6 (5a) sentence 1 no. 3 InvStG draft cannot be provided - for example because the investment fund has no direct interest in these partnerships.

Extension of the period of validity of subsequent status certificates

Until now, the certificate of investment fund status issued in accordance with Section 7 (3) Investment Tax Act has had a maximum validity period of three years in accordance with Section 7 (4) sentence 2 Investment Tax Act. According to the current legal situation, this applies both to the first issue of the status certificate and to each subsequent status certificate. In future, the period of validity for subsequent certificates will be extended to a maximum of five years in accordance with Section 7 (4) sentence 2 InvStG draft. The three-year period will only apply to the first issue of the status certificate. This is intended to reduce both the bureaucratic burden on the fund industry and the enforcement burden on the tax authorities (see Explanatory memorandum to Section 7(4)).

Extension of the exclusion of income from active entrepreneurial management for trade tax purposes

Currently, according to Section 15 (2) sentence 2 of the Investment Tax Act, only income from active entrepreneurial management in the case of investments in real estate companies is excluded for trade tax purposes.

By extending Section 15 (2) sentence 2 of the draft Investment Tax Act, this is also to apply in future to investments in companies whose corporate purpose is the management of renewable energies, infrastructure project companies and PPP project companies.

According to the explanatory memorandum to the draft of Section 15 (2) sentence 2 of the Investment Tax Act - draft, this is primarily intended to achieve an administrative simplification for these investment objects, by avoiding the determination of a trade tax assessment amount at company and fund level.

This is because, if the RE companies and PPP and infrastructure project companies held by the investment fund (hereinafter collectively referred to as „portfolio companies“) are commercial partnerships, they are themselves subject to trade tax if a permanent establishment is maintained in Germany. In order to avoid double taxation with trade tax, Section 9 (2) of the German Trade Tax Act stipulates that the profit shares from these commercial partnerships must be deducted from the trade tax base of the shareholders (in this case: the investment fund).

An investment fund that invests in a partnership operating commercially in Germany would therefore generally be liable to tax on the resulting profit shares, but its trade tax base would in turn have to be reduced by these profit shares.

If the portfolio companies are corporations, the investment fund‘s holding of shares in corporations would generally be regarded as an asset management activity. If, due to special circumstances, the holding of investments in corporations were exceptionally to be classified as a commercial activity, the relevant profit shares would also have to be excluded from the investment fund‘s trade tax assessment basis in accordance with Section 9 no. 2a of the German Trade Tax Act if the investment fund held at least 15% of the shares at the beginning of the tax period.

The income from the portfolio companies, like the income from real estate companies, is not included in the 5% threshold for income from active entrepreneurial management in accordance with Section 15(3) of the Investment Tax Act, below which the requirements for trade tax exemption in accordance with Section 15(2) of the Investment Tax Act are deemed to be met.

Extended investment opportunities for special investment funds

The investment provisions under Section 26 of the Investment Tax Act for special investment funds are being extended.

Acquisition of AIFs in the legal form of a partnership

Until now, special investment funds pursuant to Section 26 no. 4 letter h) of the Investment Tax Act have only been able to acquire investment units in domestic and foreign investment funds in addition to investment units in UCITS funds, which in turn fulfill the requirements of Section 26 no. 1 to 7 of the Investment Tax Act.

This restriction is to be dropped. According to Section 26(4)(h) of the draft Investment Tax Act, special investment funds may in future not only acquire investment units in all types of domestic and foreign investment funds, but also units in all types of domestic and foreign investment funds pursuant to Section 1(1) of the German Investment Code. This means that special investment funds may also invest in real estate, private equity and infrastructure funds in the legal form of a partnership, for example, which are not investment funds under Section 1 (3) no. 2 of the Investment Tax Act.

Acquisition of participations in companies whose corporate purpose is the management of renewable energies

Companies whose corporate purpose is the management of renewable energies in accordance with Section 1(19)(6a) KAGB are now to be expressly included in the assets permitted under Section 26(4)(j) InvStG draft. The addition is intended to enable investment in these companies with legal certainty. This is - also according to the Explanatory memorandum to Section 26 no. 4 letter j Draft InvStG - a clarifying provision, as the fundamental permissibility of investments in companies whose corporate purpose is directed towards the management of renewable energies already arises under current law from Section 26 no. 6 letter c Investment Tax Act (in future: letter a).

Removal of the limitation on income from the generation or supply of electricity in connection with the letting and leasing of real estate

With the Annual Tax Act 2022, the legislator introduced a new investment provision in Section 26 no. 7a of the Investment Tax Act. This initially increased the permissible limit for certain income from active entrepreneurial management of a special investment fund from below 5 percent to 10 percent if this income is derived from the generation and supply of electricity and is related to the letting and leasing of real estate (see beleuchtet vom 22. Dezember 2022). The Growth Opportunities Act increased the limit once again from 10 to 20 percent (see illuminated from July 27, 2023).

However, the regulation has not yet led to special investment funds investing extensively in the generation of renewable energies, as exceeding the limit still threatens the loss of status as a special investment fund. This loss of status would lead to a notional sale of all assets, revealing the hidden reserves. In addition, the units in the special investment fund would be deemed to have been sold at investor level - also with the disclosure of hidden reserves.

The new version of Section 26 no. 7a sentence 2 InvStG draft, the limitation on income from the management of renewable energies and from the management of charging stations for electromobility in connection with the letting and leasing of real estate is therefore to be abolished. Instead, such income will in future no longer be taken into account in total for the limit of income from active entrepreneurial management in accordance with Section 26 no. 7a sentence 1 InvStG draft.

This is intended to create a legally secure framework for special investment funds for investments in, for example, renewable energy plants. As before, the management of renewable energies must be carried out in connection with the letting and leasing of real estate. This connection exists, for example, in the case of photovoltaic systems on the roof of a rented or leased property, on the façade or in a covered parking lot. However, systems that are installed in close proximity to a property are also eligible. For the connection with a property, only the type of energy generation and not the subsequent use of the energy is important. It is therefore not necessary for the electricity or other energy generated to be provided exclusively to the tenants or leaseholders of the property (against payment); it is equally permissible for the electricity to be fed into the public grid or sold to third parties Explanatory memorandum to Section 26(7a) InvStG draft).

Also excluded from the calculation of the 5 percent limit for income from active entrepreneurial management Section 26 (7a) sentence 1 InvStG draft is income from investment units and shares in accordance with the extended Section 26 (4) (h) InvStG draft and from investments in companies within the meaning of of Section 15 (2) sentence 2 InvStG draft. The latter are no longer only real estate companies as before, but in future also companies whose corporate purpose is aimed at the management of renewable energies, infrastructure project companies and PPP project companies. This will enable special investment funds to invest in renewable energies and infrastructure as well as private equity and venture capital funds to a much greater extent.

However, it should be ensured that special investment funds pay tax on the income resulting from these expanded investment opportunities at their own level in the assessment procedure. Therefore, a special investment fund cannot exempt itself from its corporation tax liability for other domestic income from commercial sources of income within the meaning of Section 6(5) sentence 1 no. 2 and no. 3 InvStG in accordance with Section 30(5) sentence 2 InvStG draft and Section 33(4) sentence 3 InvStG draft using the transparency and collection options.

Removal of the participation limit for corporations that operate infrastructure projects

Pursuant to Section 26 no. 6 sentence 1 of the Investment Tax Act, special investment funds may only hold less than 10 percent of the capital of a corporation. In addition to the existing exceptions for real estate companies, PPP project companies and companies whose corporate purpose is the management of renewable energies, in which up to 100 percent of the shares may be held, in Section 26 no. 6 sentence 2 of the Investment Tax Act, a further exception has been created. According to Section 26 no. 6 sentence 2 Investment Tax Act - Draft, up to 100 percent of shares may also be held in infrastructure project companies in future.

Conclusion and dates of application

Overall, it is expressly to be welcomed that the aim of making capital funds available for investments in renewable energies and infrastructure to a greater extent has been taken up again and will hopefully be finally adopted in the autumn of the reforms. It is to be hoped that the questions of doubt in connection with the proof of income from asset management activities in the case of multi-level partnership structures will be addressed in the further course of the legislative process.

The clarification of the scope of application of the Investment Tax Act in Section 1 (2) sentence 2 InvStG draft and the extensions of the investment provisions for special investment funds pursuant to Section 26 InvStG draft are to be applied as early as January 1, 2026 in accordance with Section 57 (11) number 1 in order to achieve an expansion of investment opportunities as soon as possible.The other new regulations are to be applied for the first time to income that accrues to a (special) investment fund in a financial year that begins after December 31, 2025 in accordance with Section 57 (11) (2) and (3) InvStG - draft. This only applies to gains from the sale of corporations with a predominantly domestic property value if the sale takes place after March 27, 2024 and only insofar as the gains are based on changes in value that occurred after March 27, 2024. According to the [link] explanatory memorandum to Section 57(11)(3) InvStG-Entwuf, this serves to avoid retroactive effects.

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

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