



P+P Pöllath + Partners **Attorneys-at-Law • Tax Advisors**

Berlin • Frankfurt • Munich

Investing in Luxembourg – The Tax Perspective

Certain German Tax Considerations for German Investors investing through Luxembourg Regulated Investment Companies

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I. Introduction

II. Case 1: Foreign Investment Fund

Special tax regime of the German Investment Tax Act (*InvStG*)

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1. Case 2: S.C.S. (SICAF / SICAR)
2. Case 3: S.A. / S.C.A. (SICAV / SICAR)



Life and Health Insurance companies
Companies fully subject to tax

Tax exempt investors
(pension funds, trusts)



S.A. / S.C.A. SICAV
(OGA / SIF)
or
SICAR

S.C.S. SICAF
(OGA / SIF)
or
SICAR

FCP (OGA / SIF)

German perspective

- (1) „Foreign Investment Fund“?
 - Invested in **eligible assets** pursuant to principle of risk diversification?
 - „Qualified“ investment **supervision or redemption** rights?
- (2) If the answer to (1) is **NO**: transparent or opaque for tax purposes?

eligible assets,
e.g. listed securities,
real estate

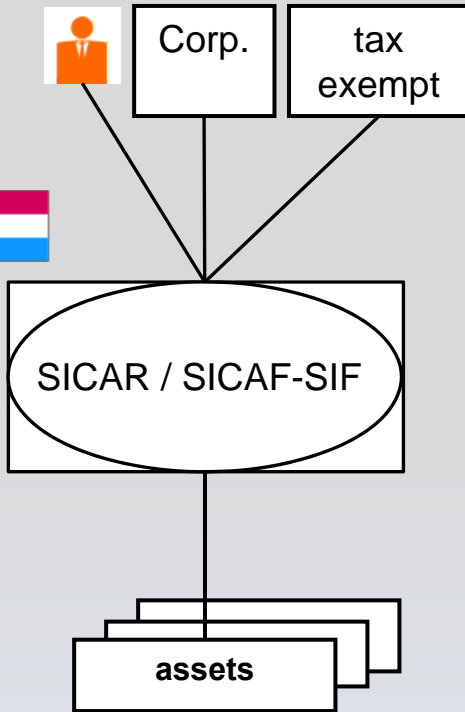
not or only partially eligible assets,
e.g. commodities, certain securities,
entrepreneurial participations

➤ Special Tax Regime German Investment Tax Act

- German Investment Tax Act (*InvStG*) applicable to German investors if the respective Luxembourg investment company qualifies as a „Foreign Investment Fund“ within the meaning of the German Investment Act (*InvG*)
 - Substantive Criteria: Eligible Assets and risk diversification (cf. § 2 (8) *InvG*)
 - Formal Criteria: qualified investment supervision or redemption rights (cf. § 2 (9) *InvG*)
- Because of the special tax regime under German Investment Tax Act legal format of investment company irrelevant
- Consequence: The German Investment (Tax) Act might be applicable to all forms of Lux-regulated investment companies

- Principles of taxation under German Investment Tax Act (*InvStG*)
 - Partial tax transparency
 - „earnings distributed“ and „earnings deemed to have been distributed“
 - Income determination at fund level
 - detailed rules regarding deductibility of expenses
 - Loss carry forward
 - Regular taxation subject to fulfillment of publication and reporting requirements
 - Risk of lump sum taxation

II. Case 1: Foreign Investment Fund



- capital gains
- dividends
- interest and other income

	Individuals	Corp.	Tax exempt
dividends (distributed: „earnings distributed“; retained: „earnings deemed to have been distributed“)	25% flat tax	corporate tax: 95% exemption (§ 8b KStG), i.e. effective tax rate: 0.79% (incl. soli)	<ul style="list-style-type: none"> • tax exemption from German corporate income tax and trade tax • no risk to lose tax exemption
capital gains		fully taxable appr. 15% or trade tax: 95% exemption	
distributed	25% flat tax	corporate and trade tax: 95% tax exemption, i.e. effective tax rate: appr. 1.5% (incl. soli)	
retained	not taxable	not taxable	
interest and other income (distributed/retained)	25% flat tax	fully subject to corporate and trade tax, i.e. effective tax rate: appr. 30% (incl. soli)	

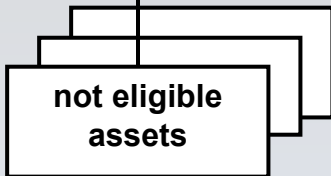
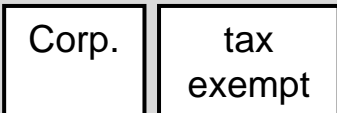
1. General Rules

- Legal format of investment company decisive
- Partnerships (e.g. S.C.S.): tax transparency (Case 2)
- Corporations (e.g. S.A.): tax opacity (Case 3)

2. Determination of the legal form for tax purposes

Legal Form (Lux)	Legal Form (D)
S.A. (société anonyme)	= AG (stock corporation)
S.à r.l. (société à responsabilité limitée)	= GmbH (company with limited liability)
S.C.A. (société en commandite par actions)	= KGaA (stock corporation with general partner)
S.C.S. (société en commandite simple)	= KG (limited partnership)

Source: Exhibit to BMF letter ruling as of 24th of December 1999, Az.: IV B 4 – S 1300 – 111/99, BStBl. I 1999, S. 1076



- capital gains
- dividends
- interest and other income

	Individuals	Corp.	Tax exempt
dividends and capital gains	40% are tax exempt and 60% are fully subject to tax according to the individual tax rate	corporate tax: 95% exemption (§ 8b <i>KStG</i>), i.e. effective tax rate: 0.79% (incl. soli)	risk to lose tax exemption (BFH as of 29.01.1969, BStBl. 1969 II, 269 and BFH as of 17.10.1979, BStBl. 1980 II, 225)
		No trade tax! (§ 9 Nr. 2 <i>GewStG</i>)	
interest an other income	fully subject to tax	fully subject to corp. tax, tax rate 15,825%, (incl. soli)	but note: FG Düsseldorf as of 12.05.2009, EFG 2009, 1593
		No trade tax! (§ 9 Nr. 2 <i>GewStG</i>)	



Corp.

tax exempt



dividends

capital gains

S. A. / S.C.A.
SICAR / SICAV-SIF

not eligible assets

- capital gains
- dividends
- interest and other income

	Individuals	Corp.	Tax exempt
dividends	25% flat tax	corporate tax: 95% exemption (§ 8b KStG), i.e. effective tax rate: 0.79% (incl. soli)	no risk to lose tax exemption (opaque for German tax purposes)
		Generally, full trade tax! Exemptions?	
capital gains	25% flat tax	corporate and trade tax: 95% tax exemption, i.e. effective tax rate: appr. 1.5% (incl. soli)	
interest and other income	CFC taxation applicable on passive income full taxation, no flat tax	CFC taxation applicable on passive income full taxation, no exemptions	



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