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Subject: Questions regarding the income tax treatment of fund establishment costs as acquisition costs (Section 6e of the Income Tax Act)
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(please quote GZ and DOK when replying)

Application rule

The principles set out in this letter are to be applied in all open cases. For the income tax classification of expenses to be incurred by a fund outside the scope of Section 6e of the Income Tax Act (EStG), margin numbers 21 to 30 and 41 to 49 of the Federal Ministry of Finance letter dated 20 October 2003 (BStBl I p. 546) continue to apply.

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The Act on Further Tax Incentives for Electric Mobility and Amending Other Tax Regulations of 12 December 2019 (Federal Law Gazette I p. 2451) introduced Section 6e of the Income Tax Act (EStG) and regulated the income tax treatment of so-called fund establishment costs. According to this, expenses in connection with the establishment of certain closed-end funds during the investment phase are not immediately deductible operating expenses or income-related expenses, but are acquisition costs of the investment objects if the initiator of the fund specifies a pre-formulated contract and the investors have no significant influence on this due to their affiliation under company law. Following discussions with the highest tax authorities of the federal states, the following applies to the income tax treatment of fund establishment costs (Section 6e EStG):

I. Scope

1 The following provisions apply to all closed-end funds in the legal form of a partnership, which are regularly investment funds within the meaning of Section 1 (1) sentence 1 of the German Capital Investment Code (KAGB) (hereinafter referred to as "funds"). The regulatory criterion of a non-operating company outside the financial sector is irrelevant in this context. The regulations apply accordingly to entire properties (Section 1 (1) sentence 1 number 2 of the Regulation on Section 180 (2) of the German Fiscal Code (Abgabenordnung)) and to comparable models with only one investor.

2 Section 6e of the Income Tax Act applies to funds that generate commercial income and, pursuant to Section 9(5) sentence 2 of the Income Tax Act, also applies mutatis mutandis to asset management funds. Whether Section 6e of the Income Tax Act applies must be decided at the level of the partnership.

3 Section 6e EStG also applies to funds whose specific investment objects have not yet been finally determined at the time of the investors' entry (so-called (semi-) blind pools).

II. Principles

1. Extension of the concept of acquisition costs (section 6e (1) EStG)

4 Section 6e(1) of the Income Tax Act stipulates that fund establishment costs payable by investors in connection with the acquisition of fund units are included in the acquisition costs of the assets acquired by the fund and are therefore not immediately deductible in full as operating expenses or income-related expenses. An acquisition transaction is always assumed to have taken place if the investors, due to their affiliation under company law, have no significant influence on the contract pre-formulated by the project provider (initiator of the fund). In such cases, section 6e(1) sentence 1 of the Income Tax Act extends the scope of the acquisition costs of the acquired assets beyond section 255(1) of the Commercial Code (HGB) to include the fund establishment costs (see III.). It is irrelevant whether the assets are acquired or manufactured (section 6e (1) sentence 2 EStG).

2. Pre-formulated contract

5 A purchase in accordance with a pre-formulated contract always occurs when the project provider specifies the contract (a partnership agreement/bundle of individual contracts) and the individual investor has no significant influence on the drafting of the contract, particularly in the accession phase, or on the execution of the contract, and only has the option of accepting the contract or not participating in the project. Typically, although not necessarily, the investment concept is marketed by means of an investment prospectus or in a comparable form. (Semi-)blind pools may also have a pre-formulated contract.

3. Significant influence

6 The applicability of Section 6e (1) sentences 1 and 2 of the German Income Tax Act (EStG) is subject to the condition that investors, in their corporate affiliation, do not have significant influence over the contract pre-formulated by the project provider. Whether investors have significant influence over the contract pre-formulated by the project provider is determined by the following principles:

7 Investors only have sufficient influence if they are legally and actually in a position to change essential parts of the concept. The essential parts of the concept relate in particular to the selection of specific investment properties, their financing and their use. This can also be affirmed if alternative decisions are offered for the essential components of the concept. However, merely agreeing to the concept or draft contracts presented by the project provider does not constitute sufficient influence. Rather, investors must actually be able to determine the essential terms of the contracts and their implementation themselves. Merely the fact that

The fact that the funds are managed by an asset management company for regulatory reasons does not preclude the assumption of significant influence.

8 Significant influence can only be affirmed if the investors' participation rights go beyond the initiative required for recognition as a co-entrepreneur under section 15(1) sentence 1 no. 2 of the Income Tax Act (EStG). Significant influence does not arise simply because the project provider has acted or is acting as a shareholder or managing director for the fund. The opportunities to exert influence must be available to the investors themselves, who exercise them within the fund within the framework of their corporate affiliation. Representation by third parties who are already predetermined in concept (e.g. trustees, advisory boards) is not sufficient. The following applies to the establishment of a significant opportunity to exert influence via an advisory board or a comparable body:

- Neither the project provider nor persons from its environment may belong to an advisory board or comparable body appointed by the investors themselves from among their ranks.
- The investors alone may decide on the establishment and composition of an advisory board at the earliest at a point in time when at least 50% of the committed capital has been paid in.

If the project providers themselves participate, either directly, indirectly or through related persons, their ability to exert influence under company law is irrelevant.

9 The possibility of exerting influence must also not be excluded in practice.

10 The implementation of the essential components of the concept and any deviations from it must be fully documented by means of suitable documents, in particular (electronic) correspondence and comparisons of the versions of the contracts or components of the concept.

III. Fund establishment costs (Section 6e (2) EStG)

1. Scope of fund establishment costs

11 Section 6e (2) sentence 1 EStG expands the definition of acquisition costs in Section 255 (1) HGB. In addition to acquisition costs within the meaning of Section 255(1) HGB, acquisition costs also include all expenses payable by the investor to the project provider or third parties on the basis of the pre-formulated contract that are related to the acquisition of the economic goods. This also includes all expenses incurred in the economic context of the project's implementation during the investment phase (Section 6e (2) sentence 2 EStG).

12 The expenses referred to in Section 6e (2) sentences 1 and 2 EStG include, for example, closing costs, agio, construction supervision costs, construction costs for the erection of the investment property, consulting and processing costs, brokerage fees, costs for financing brokerage, costs for the assumption of guarantees, conception costs for the development of the technical, economic

legal and tax-related basic concept, placement guarantee costs, costs for preparing and reviewing the prospectus, costs for brokering equity capital, other preparatory costs, marketing and advertising costs.

13 Acquisition costs also include liability and management fees for general partners, management fees for contractual exchanges of services and fees for trust limited partners, insofar as they relate to the investment phase (Section 6e (2) sentence 3 EStG). For the assessment as acquisition costs, it is irrelevant whether the above-mentioned remuneration is structured as advance profit under contract law or company law.

14 A breakdown of expenses pursuant to Section 6e(2) of the Income Tax Act into immediately deductible operating expenses or income-related expenses and acquisition costs, depending on whether they relate to financing, tax advice or the acquisition of economic goods, is not possible.

15 It is irrelevant whether these expenses are paid directly by the investor or by the fund and whether the investor's contribution or borrowed capital is used for this purpose. The investor's knowledge of these payments is also irrelevant. It is also irrelevant whether these expenses are paid to the project provider or to third parties.

2. Start and end of the investment phase

2.1. Start of the investment phase

16 The investment phase begins with the initial planning and preparatory activities (e.g. establishment of a fund under a partnership agreement prior to investor participation) with a view to the subsequent acquisition of the respective assets.

17 Investor-related dates (e.g. fundraising or joining) are not relevant for the start of the investment phase.

2.2. End of the investment phase

a) Acquisition of only one asset

18 The end of the investment phase for single-property funds is usually marked by the acquired asset becoming operational.

19 Provisions in the partnership agreement or the provision of the contribution are not relevant for determining the end of the investment phase.

b) Acquisition of several assets

20 Regardless of the number of assets acquired, there is always only one uniform investment phase for the fund. The investment phase is complete when all assets listed in the investment

concept are ready for operation. If the investments are made indirectly through a corporation, the end of the investment phase is determined by the acquisition of the assets by the corporation. If the assets to be acquired are not specified at the start of external distribution, at the latest when the first investor joins, and if the investment activity extends over several years, there are no objections to assuming that the investment phase has ended when 80% of the fund's total investment volume has been used for the first time to invest in assets. The investment volume comprises the fund's equity and debt capital. The specific use of the funds by the fund is not relevant for determining the investment volume.

IV. Allocation of acquisition costs for multi-year investment phases and multiple acquired assets

21 If several assets are acquired over several years, the acquisition costs of the individual assets must be determined in two stages. In the first stage, the expenses within the meaning of Section 6e (2) of the Income Tax Act (EStG) must be recorded as acquisition costs of the corresponding assets, provided they can be directly allocated to the individual assets. In the second stage, the expenses that cannot be directly allocated to an individual asset must be distributed in proportion to the acquisition costs of the assets acquired in the respective year, as determined in the first stage.

22 When determining profits in accordance with section 4(1) sentence 1 and section 5(1) sentence 1 EStG, the expenses that are to be capitalised as acquisition costs in accordance with section 6e(2) EStG may be recorded in a balancing item during the investment phase. When determining profits in accordance with section 4(3) EStG or in the case of surplus income, a memorandum item may be recorded.
The adjustment item and the memorandum item are not depreciable assets. After acquisition, the items created must always be allocated to the acquired assets. When determining profits in accordance with section 4(1) sentence 1 and section 5(1) sentence 1 of the Income Tax Act (EStG), there are no concerns that a separate balance sheet item (e.g. "acquisition costs section 6e EStG") will be created in this respect. Insofar as this balance sheet item relates to depreciable assets, it can be reversed proportionally in the following period, thereby reducing profit. In the event of the complete or partial sale of an asset, the balance sheet item must be reversed in proportion to the acquisition costs incurred for the asset sold in full or in part and the total acquisition costs incurred up to the date of sale. For reasons of simplification, the total acquisition costs incurred up to the beginning of the financial year or calendar year may also be used to calculate the reversal amount.

23 If no investments are made in a year of the investment phase, the costs must be recognised via an adjustment item/memorandum item within the meaning of margin note 22.

24 If the fund invests in both equity and debt capital of the same target company, the fund establishment costs must be allocated uniformly to the equity portion. In the case of hybrid

or debt instruments with securities characteristics, the allocation of the fund establishment costs is based on the legal principle of section 3c(2) sentence 7 of the German Income Tax Act (EStG) according to the share in the exit or liquidation proceeds. If this cannot be determined in advance, the costs must be recognised via an adjustment item/memorandum item within the meaning of margin number 22 and allocated upon realisation.

25 In the case of conversion transactions in the portfolio (e.g. the merger of two acquisition companies) that are carried out at book value without affecting profit or loss, the reversal of fund establishment costs with an effect on profit or loss can only be considered upon the final sale or liquidation of the investment.

V. Requirements for the deduction of operating expenses or income-related expenses

26 Expenses that are not related to the acquisition of economic goods, in particular those attributable to the use and administration of the acquired economic goods and which the (individual) purchaser could also deduct as operating expenses or income-related expenses outside of a fund structure, are deductible as operating expenses or income-related expenses.

27 If they are paid to the project provider, they are operating expenses or income-related expenses under the following conditions (Federal Fiscal Court ruling of 14 November 1989 – IX R 197/84, BStBl II 1990 p. 299):

- Clear agreements on the reason for and amount of these expenses must be in place before payment is made.
- The agreed services and the associated remuneration must correspond to the actual circumstances; the legal principle of Section 42 of the German Fiscal Code (Abgabenordnung) must not prevent the deduction of business expenses or income-related expenses in the desired amount.
- The expenses must be clearly distinguishable from other expenses related to the acquisition of the object of purchase.
- The remuneration may only be payable if the investors make use of the consideration.
- The legal and actual option to opt out of the service and the resulting reduction in the total price must be available to investors in their corporate affiliation and must be clearly and unambiguously expressed in the contract.

1. Profit determination in accordance with Section 4 (3) EStG and surplus income

In the case of profit determination in accordance with Section 4 (3) EStG and surplus income, the following applies in detail:

1.1. Interest on interim and final financing

28 Interest and processing costs charged by the credit institution are remuneration for the provision of the loan and thus constitute operating expenses or income-related expenses. However, a different assessment is required, for example, if there is an agreement with the project provider regarding interest, according to which a certain interest charge is guaranteed, and higher interest rates are borne by the guarantor, but lower interest rates are not reimbursed to the purchaser. In such a case, the interest payable by the borrower and the fee for the interest guarantee are merely a calculation component of the total price and thus represent acquisition costs.

1.2. Prepayment of debt interest

29 Interest is generally payable by the end of the respective year at the latest. Tax treatment is governed by section 11(2) of the Income Tax Act (EStG). In the case of an advance payment, a cash outflow to be taken into account in the year of payment only exists if there is an economically reasonable reason for the advance payment. This can be assumed if debt interest is paid in advance for a period of no more than 12 months. In the case of an advance payment for a period of more than 12 months, the taxpayer must demonstrate the economically reasonable reason in each individual case. If there are no reasonable economic reasons for the advance payment of debt interest for a period of more than one year, the advance payment of debt interest is deductible on a pro rata basis in the years to which it economically belongs as operating expenses or income-related expenses.

1.3. Damnum, discount, processing and disbursement costs

30 A damnum or discount is deductible as a business expense or income-related expense, provided that the amounts do not exceed the market rates, taking into account the annual interest charges (Section 11 (2) sentence 4 EStG). The portion exceeding the market rates must be distributed over the fixed interest period or, in the absence thereof, over the term of the loan. An interest prepayment is generally assumed if the nominal interest rate is unusually low and the damnum is correspondingly high. For reasons of simplification, market conditions can be assumed to be normal if a damnum of up to 5% has been agreed for a loan with a fixed interest period of at least 5 years. Discount/disagio agreements with commercial banks are generally considered to be in line with market conditions. This assumption can be refuted by special circumstances such as the borrower's lack of creditworthiness, atypical contract arrangements or personal relationships between the parties involved (BFH ruling of 8 March 2016 –
IX R 38/14, BStBl II p. 646). If a damnum has been paid no more than 3 months before disbursement of the loan

or a significant partial disbursement of the loan (at least 30% of the loan amount including the discount), it can be assumed that there is an economically reasonable reason (BFH ruling of 3 February 1987 –
IX R 85/85, BStBl II p. 492).

1.4. Costs of loan collateral

31 The proportionate notary and land registry costs for securing the loan are immediately deductible operating expenses or income-related expenses in the amount paid to the notary and the land registry office.

1.5. Costs associated with letting

32 If the assets acquired are real estate, the costs of renting out a property for the first time are operating expenses or income-related expenses, provided they do not exceed the local brokerage commission. In general, a fee of up to two months' rent can be considered reasonable. There is no economically serious consideration if, for example, the property is already planned to be built for a specific tenant or if a rental agreement or a corresponding preliminary agreement with the tenant already existed at the time the investor joined. A tenant referral fee is also not to be taken into account if the agent is identical to or economically linked to the tenant, if the investor moves into the property himself or if he does not make use of the services offered for other reasons. In these cases, the costs incurred represent a proportion of the acquisition costs of the land and the building or the freehold flat.

1.6. Costs in connection with final financing

33 Funding costs for final financing are deductible as operating expenses or income-related expenses, provided that they are in line with market conditions.

1.7. Remuneration paid to tax and legal advisers

34 Consulting costs incurred in connection with the investment phase are to be included in the acquisition costs. Further consulting costs may be deducted as operating expenses or income-related expenses in accordance with general principles, in particular if the services relate to the period after the acquisition. If the tax and legal advisor is also an intermediary, project provider or trustee, and separate billing of costs has been agreed, it must be checked whether the costs are appropriate for the respective scope of services. If a total fee has been agreed for the intermediary, project provider or trustee activities and the tax and legal advisory activities, the costs are included in the acquisition costs. This also applies if a flat-rate tax and legal advisory fee covering the period before and after the acquisition has been agreed and the activity is economically related to the acquisition of the asset.

1.8. Contributions to property and liability insurance

35 Premiums for property and liability insurance for damage occurring during the construction period are operating expenses or income-related expenses, provided that they were paid by the purchaser as the policyholder.

2. Profit determination by means of a comparison of business assets

36 The provisions of margin numbers 28 to 35 also apply in principle to funds that determine their profit by comparing operating assets. Where applicable, different (balance sheet tax law) provisions must be observed, particularly with regard to the timing of expenses.

VI. Comparable models with only one investor and total properties

37 The provisions of this letter also apply to individual investments with only one investor and to entire properties (Section 1 (1) sentence 1 no. 2 of the Regulation on Section 180 (2) of the German Fiscal Code) outside of a fund structure, where expenses comparable to fund establishment costs are payable and which are based on a pre-formulated contract.

38 In the case of the construction, renovation, modernisation or acquisition of buildings and freehold flats, the following principles also apply to the distinction between the status of builder or purchaser:

39 If a maximum price is agreed for the total expenditure (including the financing costs incurred until completion of the construction project) which does not need to be itemised to the investor after completion of the construction work, the investor is also considered the purchaser. This also applies if the actual construction costs are invoiced, but the difference to the agreed maximum price is claimed as a fee for the maximum price guarantee.

VII. Special features of construction measures within the meaning of Sections 7h and 7i EStG

40 The total expenditure must, as far as this is clearly possible, be allocated directly to the land, the old building fabric, the certified construction measures within the meaning of Sections 7h and 7i EStG, the other construction measures and the immediately deductible operating expenses or income-related expenses. Expenses that cannot be clearly allocated must be divided among the cost types to which they relate. The division is made in proportion to the costs clearly attributable to these cost types. The expenses that can be clearly allocated to the certified construction measures within the meaning of Sections 7h and 7i of the Income Tax Act, plus the portions of the acquisition costs that cannot be clearly allocated, determined in accordance with the above principles, which are attributable to the expenses for certified construction measures within the meaning of Sections 7h and 7i

EStG, the eligible acquisition costs within the meaning of Sections 7h and 7i EStG are calculated. If the investor only joined the overall property after the start of the construction measures within the meaning of Sections 7h and 7i EStG, the expenses for construction measures, insofar as they were carried out before the investor joined, are classified as non-preferential acquisition costs. The investor must explain the allocation. If he joined later, he must explain to what extent the expenses attributable to the construction measures within the meaning of Sections 7h and 7i EStG are attributable to measures that were carried out after the legally effective conclusion of the mandatory purchase agreement or an equivalent legal act.

VIII. Relationship to section 15b EStG

41 The loss offset restriction for tax deferral models under Section 15b EStG is to be applied to the loss determined in accordance with Section 6e EStG.

This letter will be published in Part I of the Federal Tax Gazette.

On behalf of

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