

2. AUSTRIA

2.1. Civil Law Framework

General Information

In Austria, there are in principle two different types of foundations: public benefit foundations and foundations for private purposes. Only the establishment of public benefit foundations is governed by the Federal Foundations and Funds Act (Bundesstiftungs- und Fondsgesetz)¹ and nine provincial foundations and funds acts. The Austrian Private Foundation Act (Privatstiftungsgesetz, PSG)² enabled the establishment of foundations for both private and public interest, charitable or religious purposes. Under this section, we will primarily cover the so-called private foundations.

The Private Foundation

A private foundation is a legal entity having a legal personality in its own right; it can exercise rights and assume duties. However, in contrast to other legal entities such as companies or associations, private foundations have neither a proprietor nor members. It is the private foundation itself that owns the assets donated. While public benefit foundations have to pursue exclusively public interests, this is not the case for private foundations, and the majority of Austrian private foundations do not pursue any purposes of common interest at all. In fact, the reason for setting up a private foundation is in general the provisioning for family members or other beneficiaries. There are of course also private foundations in Austria that pursue public utility purposes, but this is certainly not the case for the majority of private foundations.

The Establishment of the Private Foundation

Private foundations are set up by means of drawing up a declaration of establishment (“Stiftungserklärung”) and come into being upon entry in the Company Register. The private foundation must be endowed with assets of at least EUR 70,000. At the time of establishment, this amount has to be effectively available.

The will of the founder (Stifterwille) is laid down in the declaration of establishment, and it is the responsibility of the Board of Directors (Stiftungsvorstand) to ensure and control that the purpose of the foundation set forth in the declaration of establishment is observed. The declaration of establishment consists of a foundation deed which has to be drawn up under Aus-

¹ BStFG, Federal Law Gazette 1975/11

² PSG, Federal Law Gazette 1993/694

trian law. The foundation deed must include some minimum information such as the endowment of the foundation with assets, the purpose of the foundation, the name of the founder, the beneficiaries, the name of the private foundation, its registered seat and the period for which it is established. The foundation deed has to be deposited with the Company Register and is accessible to the public. In many cases, the foundation deed is supplemented by a so-called appendix to the foundation deed (Stiftungszusatzurkunde) which is not accessible to the public and may contain more detailed information on the above-mentioned points, or additional rules. A foundation can be established for a definite or an indefinite period of time. Private foundations whose main purpose is the provisioning of natural persons can be set up for a maximum period of time of 100 years; however, the ultimate beneficiaries may decide to extend this period by another 100 years. The bodies which are entrusted with pursuing the purpose of the foundation are the Board of Directors (Stiftungsvorstand), the Auditor of the Foundation (Stiftungsprüfer) and, in specific cases, the Supervisory Board (Aufsichtsrat).³ Moreover, the founder may determine additional bodies for the protection of the foundation purpose. The responsibility of the Board of Directors is the external representation of the private foundation and, at the internal level, its management. In the exercise of its duties, the Board of Directors has to ensure that the purpose of the foundation is observed. The Board of Directors also has to keep the books of the private foundation. In this context, the provisions of the Company Law (Unternehmensgesetzbuch, UGB) have to be observed. Moreover, the report on the situation of the foundation must include information on the progress made in the pursuit of the foundation purpose. The Foundation Auditor has to audit the annual accounts including the report on the situation of the private foundation. An auditor's report is required by law. The publication of the annual accounts, however, is not mandatory.

The foundation documents also have to set forth how the distributions to the beneficiaries are to be effected. The Board of Directors has to ensure the implementation of these documents.

2.2. Tax Treatment of Private Foundations

As a legal person, a private foundation is in principle subject to corporate income tax. The fiscal treatment of payments to the beneficiaries is governed by income tax law. While the fiscal treatment of private foundations is governed by both corporate tax law and income tax law, a great number of special provisions exist. This situation ultimately results in a special tax status for the private foundation which entails considerable advantages. Moreover, there are special rules for endowments to private foundations which need to be considered, too. In the following, we want to describe the fiscal impact of donations to private foundations and explain what the regular taxation looks like at the level of both the private foundation and the

³ A supervisory board has to be appointed if the private foundation employs more than 300 staff or if the number of employees with companies and cooperatives domiciled in Austria in which the private foundation has a substantial shareholding exceeds 300. Details are governed by Article 22 Private Foundation Act.

beneficiaries. Moreover, we will discuss the consequences that the liquidation of a private foundation may have in terms of taxation.

Fiscal Treatment of Endowments to a Foundation

When the estate and gift tax was abolished in Austria on 1 August 2008, the legislator also set up new rules for the fiscal treatment of endowments to private foundations. Donations by the founder or third parties to a private foundation are subject to a so-called foundation entrance tax (Stiftungseingangssteuer) of 2.5%. If a foundation is endowed with Austrian land, the foundation entrance tax is increased by 3.5 percentage points to 6% in total.

The foundation entrance tax applies if at the date of the donation, the donor (founder) is domiciled or usually resides in Austria or if the foundation has its registered seat or management there. In principle, the value of the donation minus debt and charges related thereto serve as the assessment basis for the foundation entrance tax. Donations of agricultural or forest property, Austrian land and premises are subject to a specific rule according to which the rateable value of these assets multiplied by three forms the tax assessment basis. The tax assessment basis for the donation of other assets to foundations is determined according to the provisions of the Estate and Gift Tax Act in connection with the Austrian Valuation Act (Bewertungsgesetz). This means that the following valuation rates are to be applied to assets which are typically bestowed upon foundations:

Shareholdings in companies such as participations in a partnership are to be reported at their current value. For securities and shareholdings in companies, the ordinary value (i.e. the value at which the securities or shareholdings could be sold) forms the assessment basis; if a market price can be determined, this price is relevant. If no market price exists, the value of the security or shareholding must be derived from historic data; if this is impossible, their value has to be determined on the basis of the expected development of earnings and capital. Capital investments which are subject to capital income tax (such as savings books) are to be reported at their nominal value. Other movable assets, cash or receivables need to be stated at their current value.

In the event of endowments *causa mortis* (in the context of foundations, this means that the foundation is established only upon death of the founder) or subsequent endowments upon the death of the founder, capital investments which are subject to capital income tax and shareholdings in companies (provided that the stake in the companies amounts to less than 1%) benefit from tax exemptions.

Current Taxation of Private Foundation

As a legal person, the private foundation is subject to corporate income tax. Due to special provisions, which are essentially set forth in Article 13 Corporate Tax Act (Körperschaftsteuergesetz), private foundations usually benefit from a more favourable tax treatment than companies (stock companies, limited liability companies). Although income from private

foundations is generally subject to a corporate income tax of 25%, many exceptions exist and lead to a situation in which particular types of income are not subject to any tax at all or are subject to a reduced tax rate (interim tax) of 12.5% only. The Austrian taxation rules for private foundations provide for another particularity which has far-reaching consequences: In contrast to corporations, private foundations can realise operating profits and other income; as a result, different accounting methods are used for the determination of profits. In practice, this means that the profits of the private foundation are only determined according to the accounting method of the “Betriebsvermögensvergleich” (comparison of the assets of a company in two subsequent years) or financial accounting, which is mandatory for corporations, if the private foundation has realised income from a trading activity. As a rule, private foundations rarely realise income from a trading activity; in most cases, the income of private foundations consists of income from capital assets, rent and lease or agriculture and forestry. For these types of income, however, a private foundation only needs to prepare a simple statement of revenues and expenditures (Einnahmen-Ausgaben-Rechnung) in order to determine taxable profits.

In most cases, income from capital assets makes up the largest part of the private foundations' income. With regard to the fiscal treatment of income from capital assets, there are particularities for private foundations. As a general rule, equity income from domestic or foreign companies (basically profit distributions from stock corporations, limited liability companies or comparable corporations that may exist in other countries) is tax-exempt at the level of the private foundation. Income from bank deposits in Austria or abroad, income from debt securities issued by domestic entities and income from investment funds is subject to taxation also in the case of private foundations; however, private foundations benefit from a reduced tax rate of 12.5%. Only interest on loans, typical silent partnerships and donations by other private foundations (provided that these foundations does not act as founders), discounts earned, and payments by capital insurances with a maturity of more than ten years are subject to a tax rate of 25%.

Additional advantages exist for private foundations concerning the disposal of shareholdings. Here, a distinction has to be made between two different cases: If a shareholding in a company is sold within the one-year speculation period (period between the acquisition and the disposal), equity income related to this shareholding is subject to the regular rate of 25% independent of the size of the stake in that company. If the stake in the company exceeds 1%, and provided that the shareholding is sold after the one-year speculation period, the equity income related to the shareholding is subject to a reduced tax rate of 12.5% only. However, under particular circumstances, it is possible to avoid taxation at a reduced rate. If the shareholding in a company exceeds 10%, hidden reserves uncovered at the disposal of shareholdings can be transferred to other shareholdings that were acquired in the same financial year. If no shareholding was acquired in the year of the disposal, the private foundation may set up a tax-exempt reserve. Within a period of twelve months, this reserve may be transferred to such shareholding acquired, if applicable. If no shareholding is acquired within the twelve-

month period, the reserve has to be realised and is then subject to the reduced tax rate of 12.5%.

However, at the level of the beneficiaries, who are normally subject to a capital income tax of 25%, the above-mentioned reduced tax rate of 12.5% is taken into account; thus, the reduced 12.5% rate has the effect of an advance payment of capital income tax.

To conclude, we note that in Austria, taxation is still very favourable for private foundations. On the one hand, particular capital income is completely tax-exempt at foundation level, and on the other hand, another major part of capital income is subject to a reduced tax rate of 12.5% only, and, what is more, this tax is offset against the capital income tax when this becomes due. Moreover, due to the possible transfer of uncovered hidden reserves to newly acquired shareholdings, income from the disposal of shareholdings is de facto tax-exempt. In Austria, the combination of these rules leads to a very favourable fiscal treatment for private foundations, in particular when income is not immediately distributed to the beneficiaries, but retained in the foundation. As a result, private foundations are much better off in terms of taxation than natural persons who realise the same capital income and do not benefit from a private foundation interposed between them and the tax authorities. Also in comparison to corporations, the private foundation offers some advantages. While equity income from shareholdings is in principle also tax-exempt at the level of corporations, this does not apply to other types of capital income which remain taxable as a general rule and are subject to the regular corporate income tax rate of 25%. In addition, the rules governing the favourable treatment of equity income from shareholdings are much stricter than for private foundations.

Taxation of the Private Foundations Beneficiaries

Payments by the private foundation to the beneficiaries are considered as income from capital assets at the level of the beneficiaries and in principle subject to a capital income tax of 25%. The capital income tax is to be retained by the foundation upon distribution and paid to the tax authorities. The capital income tax is to be considered as a final tax. Under certain circumstances, the beneficiaries may claim in their tax declaration that only half of the average tax rate be levied on their income. Moreover, in many cases, the capital income tax rate of 25% is applied only if the beneficiary is fully tax-liable in Austria, i.e. if he is domiciled or usually resides in Austria. Payments to beneficiaries who are not fully tax-liable in Austria are often completely tax-exempt due to particular provisions in many double taxation agreements; as a result, no capital income tax is levied on the payments at the beneficiaries' level in Austria. The abolition of estate and gift taxes in Austria on 1 August 2008 has also resulted in significant changes with regard to the taxation of payments by foundations. Until 31 July 2008, payments of all kinds were subject to a capital income tax in the amount of 25%, whether these payments were distributions of profits or distributions of assets (Substanzausschüttungen). Only in the case of one revocation of a foundation, a tax relief in the amount of the value of the assets donated to the foundation as of the date of their donation (Stiftungs-

eingangswert) was at the request of the donor granted upon repatriation of the assets. In the past, these rules concerning the taxation of donations were (regardless of the type of the donations) often heavily criticised by donors, foundations and beneficiaries alike. Manifestly, these critical voices have been loud enough to bring about an amendment of the law. The new Gift Notification Act (Schenkungsmitteilgesetz) stipulates that distributions of assets related to assets donated after 31 July 2008 remain tax-exempt as long as these distributions of assets are exceeding the balance sheet profit determined pursuant to company law plus retained profits (which are reflected in the revenue reserves and the hidden tax reserves related to the assets donated at the beginning of the fiscal year). Distributions of assets are only tax-exempt if a so-called evidence account for tax purposes (Steuerliches Evidenzkonto) is kept. For the tax exemption the distributions have to be covered by the evidence account

Fiscal Consequences of the Private Foundation's Liquidation

The Gift Notification Act has also resulted in a number of taxation changes in connection with the dissolution of private foundations. In principle, payments related to the dissolution of a private foundation are considered as income from capital assets and are therefore subject to capital income tax in an amount of 25%. However, if assets are repatriated to the donor upon the dissolution and provided that the donor has revoked the foundation, the taxable amount is reduced by the amount of the value of the assets donated to the foundation as of the date of their donation (the value of these assets is determined on the basis of the evidence account for tax purposes). However, the donor may only revoke the foundation if he has explicitly reserved the right to do so. The right to revoke the foundation must be laid down in the declaration of establishment.

In other respects, the general rules on the taxation of donations apply to payments in connection with the liquidation of private foundations. As a result, donations are in principle – independent of their nature – subject to capital income tax in the amount of 25%. If the donations consist of assets donated after 31 July 2008, distributions of assets remain tax-exempt as long as these are exceeding the balance sheet profit determined pursuant to company law plus retained profits (which are reflected in the revenue reserves and the hidden tax reserves related to the assets donated) and, once again, provided that an evidence account for tax purposes is kept at the beginning of the fiscal year and that the distributions are covered by the evidence account.

2.3. Conclusion

Austria remains very attractive as a country for private foundations that manage significant assets. This is attributable to two factors: On the one hand, it is relatively easy to establish a private foundation in Austria; and on the other hand, the fiscal framework is still very favourable. With the abolition of the estate and gift tax with effect on 1 August 2008 an important reason to establish a foundation ceased to exist. However, private foundations still offer advantages in terms of income taxation which cannot be denied. While the so-called foundation

entrance tax continues to apply upon the donation of assets to the benefit of the foundation, the initially fixed rate of this tax, which was meant to replace the estate and gift tax, was halved from 5% to 2.5%. In comparison to the advantages still offered by private foundations, the foundation entrance tax seems moderate indeed, and in practice, it will not prevent prospective founders from establishing a private foundation in Austria. Foundations seem to remain very attractive as they offer far-reaching advantages compared to those enjoyed by individuals or corporations. Given the tax-exemption of equity income from shareholdings at the level of the foundation in many cases and the reduced tax rate of 12.5% applicable to the majority of the remaining capital income, foundations offer considerable tax advantages if profits are retained in the foundation. In contrast, individuals realising the same income are in principle immediately subject to a capital income tax in the amount of 25%. At the level of foundation beneficiaries, the capital income tax has to be paid only upon effective receipt of payments; and any reduced tax rates levied at the level of the foundation are offset against the capital income tax to be paid by the beneficiaries. Moreover, in many cases, private foundations provide some possibility to achieve virtual tax-exemption for capital gains on the disposal of assets. This is not possible for individuals having realised comparable capital gains.

At the end of 2007, there were approximately 3,000 private foundations in Austria, with estimated assets of EUR 60 billion.⁴

⁴ Der Standard, 18/12/2007, p. 17 et seq.