

tions and examine whether the major part of the income is given to charitable institutions. The stricter approval process further distinguishes this type of foundation from the private foundation.

- **The Belgian „administrative office“**

This private foundation for the certification of securities was created on the basis of the Dutch model.¹² It enables ownership rights to securities to be divided with the result that the assets and membership rights to one and the same security are in multiple hands. This so-called administrative office is involved in the process and issues the certificates. Thus, the securities are uniformly managed and offer management a protection mechanism against hostile company takeovers. This type of private foundation has been particularly criticised because the requirement of an ideal purpose is not met with the administrative office, which is operated according to economic principles.

- **Foundations not subject to the Association and Foundation Act**

This category includes foundations for the benefit of public education with the main task of granting scholarships. University foundations or foundations under administrative law are also included in this group.

In Belgium, foundations with an artistic, religious or scientific purposes („public utility foundations“) cannot be established unless their capital amounts to EUR 1 million. Private foundations do not have to meet this minimum capital requirement, nor are they subject to the strict supervision provisions that exist for public foundations.¹³

3.2. Tax Treatment of Foundations

3.2.1. Taxation upon establishment

Registration fee

A one-time fee of EUR 25 is charged upon registration. Taxation of the transfer of assets to foundations depends on the nature of the transaction from a legal perspective.

- An acquisition tax of 10% in Flanders and 12.5% in Wallonia and Brussels Capital is levied on **real estate transfers without consideration**. The tax is based on the purchase price. The transfer of movable goods against consideration is not taxable. The transfer of real properties located outside Belgium is subject to the flat fee of EUR 25.

¹² Cf. *ibid*, p. 690.

¹³ Cf. <http://www.efc.be/cgi-bin/articlepublisher.pl?filename=BG-SE--G-3.html>

- **Deposits against consideration**, such as the transfer of shares to a foundation – “administrative office” – are subject to a one-time fee of EUR 25. The consideration of the donors consists in the certificates issued by the foundation.
- In the case of **deposits without consideration**, clarification must be made on whether or not the transfer is a gift. In contrast to a gift, there is no “donative intent” (*animus donandi*) in connection with a deposit without consideration on the part of the donor. In the regions of Wallonia and Brussels Capital, a general fee of EUR 25 is charged on the deposit without consideration of both movable and immovable goods.

Gift tax

The gift tax makes a clear distinction between the donor’s assets and the assets of the foundation¹⁴. The foundation is thus liable for the payment of the gift tax. In Flanders, the tax rate for gifts to private foundations is 7%. Gifts from an association or a public utility foundation are charged with a flat fee of EUR 100.

Gifts to public utility foundations are taxed at 6.6% in Wallonia and Brussels Capital and at 7% in Flanders (Article 140 of the Belgian Transaction Tax Act). It is possible to avoid the gift tax by means of certifying the gift abroad, making hand to hand gifts or including a retraction clause in the foundation statutes when establishing the foundation. Such a clause ensures that upon achieving the foundation’s purpose, the assets go back to the donor.¹⁵

Pursuant to Article 33 Association and Foundation Act, any gift of more than EUR 100,000 must be approved by royal resolution. This amount is adjusted annually. The general formal requirements are also valid for gifts.

The donor may deduct gifts of a value exceeding EUR 25 from his or her taxable income if the foundation serves a purpose that falls in the scope of Article 110 in connection with Article 104 of the Belgian Income Tax Act. This is for instance the case for foundations with cultural activities or serving the purpose of scientific research¹⁶.

Inheritance tax

Legacies of foundations are subject to inheritance tax, which is based on the value and the composition of the bequest. As a rule, the tax rate for third parties is applies. In Flanders, a tax rate of 8.8% is levied upon legacies of public utility foundations and private foundations according to Article 59 of the Belgian Inheritance Tax Law.

¹⁴ Cf. *ibid*, p 16.

¹⁵ Cf. *ibid*, p. 16.

¹⁶ Cf. Kocks (2007), p 688.

Legal persons engaged in a non-profit activity, legal estates and associations are subject to an annual tax rate of 0.17% in lieu of inheritance tax if their assets amount to more than EUR 25,000.

In connection with the establishment of a foundation upon death, the inheritance regulations of “reduction” and “restitution/allowance” are to be considered. Endowments may not amount to more than fifty percent of the assets if the endower leaves behind one child; one third if the endower leaves behind two children and one fourth in the case of three or more children. Relating to spouses endowments may correspond to the full amount to the assets.

3.2.2. Current taxation

Taxation of the Foundation

Pursuant to Article 150, an annual amount of 0.17% is to be paid, as a tax compensation for the inheritance tax, on the entire property of the foundation (with the exception of securities that the foundation holds in own trading companies). In accordance with Article 220 of the Belgian Income Tax Act, the foundation is subject to taxation for legal persons with its income. The tax assessment basis is composed of the following forms of income:

- **Income from immoveable assets**

if the real property is used commercially, the net rental is to be taxed on the amount that exceeds the indexed cadastral income. The net rental corresponds to the gross rental less the rental costs (flat rate of 40% for developed properties or 10% for non-developed properties). The applicable tax rate amounts to 20 %¹⁷. If the real property is not used commercially, only land and building tax is levied.

- **Income from moveable assets and capital**

is subject to withholding tax at source which has the effect of final taxation for the recipient (15% or 25% depending on the type of income).

- **Income from „diverse sources“ and „non justified payments“**

This includes the added value realized in the sale of properties, which is taxed at a rate of 16.5% or 33%. A tax of 309% may be levied for payments the recipients of which are not disclosed to the financial authorities; these payments also include unjustified salaries and remuneration payments.

Taxation of the administrative office

In accordance with Article 181 of the Income Tax Act, different rules may apply to foundations that are operated as administrative offices; these are treated as legal persons for tax

¹⁷ Cf. *ibid*, p. 696

purposes if certain conditions are met. In this case, the foundation must comply with the regulations on certification and pursue its activity without the aim of making profit; moreover, the dividends must be directly assigned to the certificate holders based on the size of their shares.¹⁸

Application of corporate taxation

In the case of extensive commercial activity of the foundation, its income may be subject to corporate tax of 33.99% applicable to domestic companies.

Certification

Dividends held in the foundation assets in the framework of the activity of securities certification are not included in the tax assessment base as these are directly attributed to the certificate holders in accordance with the principal of fiscal transparency. In this case, the issuer of the certificates pays the final withholding tax at source levied on the dividends directly to the tax authorities.

For certificate holders, the income from the disposal of certificates is tax-exempt (in the case of companies). The same applies to private persons; however, under certain conditions, their income from the disposal of certificates may be subject to taxation under the category of "Miscellaneous income".

Income from certificates is considered as dividends at the level of a company; as a result of arrangements for parent and subsidiary companies, it is tax-exempt to the extent of 95%.

3.2.3. Dissolution

Dissolution of a foundation occurs upon application by a founder or its legal successor, the managing director, the public prosecutor's office in accordance with Article 39 Association and Foundation Act after a court decision, regardless of whether or not the termination was originally provided for upon expiration of a period of time or occurrence of certain circumstances (e.g. fulfilment of the purpose).¹⁹

The dissolution occurs when the conditions defined in the statutes are met or through court decision if the foundation is no longer able to perform its activities. The court appoints liquidators to distribute the assets. If this is not possible, the government is responsible for undertaking a distribution that comes closest to the original purpose of the foundation. However, the statutes should contain a provision which precisely defines the proceedings in the event of dissolution.

¹⁸ Cf. *ibid*, p. 697.

¹⁹ Cf. *ibid*, p. 692 et seq.

The distribution of assets to the donors results in no taxes levied; it is merely a form of ownership transfer subject to a general fee of EUR 25. If the foundation is subject to corporate tax, a tax of 10% will be levied on reserves paid out to donors upon dissolution.

3.3. International Context

The Belgian International Private Law is based on the company seat theory, which means that the legal capacity of a foundation is judged in accordance with the law of the country in which the registered office is located. In determining which domestic law is applicable, not the registered seat set out in the statutes is relevant, but the place where the business activity is actually performed. A foundation relocated from abroad to Belgium is strictly subject to Belgian law.

In Belgium, abroad-based foundations are subject to the same reporting regulations and supervision as foundations established under Belgian law²⁰. Tax advantages are listed in Article 104, which apply under the following conditions:

The beneficiary must have legal capacity under Belgian law.

The foundation may not be aimed at profit-making (neither for the benefit of the founder nor for that of its members).

The foundation must engage in special activities: scientific, cultural, environmental activities or activities for the benefit of developing countries, disabled, elderly or needy people or victims of natural disasters.

The general management costs or administrative costs may not exceed 20% of the total foundation resources. Public approval is granted for 3 years at a time.

3.4. Conclusion

Generally, it can be said that the private foundation in Belgium is not yet developed very far. The statutory regulations in the Association and Foundation Act are not always precise and clear.²¹ (For Kocks&Partners2006, it was not possible to comprehensively evaluate the actual importance of private foundations).

- Given to the strict reporting and supervisory regulations and the right of third parties to inspect the files of foundations, Belgian foundation law does not offer the same global conditions as Liechtenstein. Private foundations primarily serve the certification of securities.

²⁰ Cf. *ibid*, p. 694.

²¹ Cf. Theisinger (2006), p. 19.