

6. LIECHTENSTEIN

6.1. Introduction

Foundations play a major role in the financial centre Liechtenstein. Foundations in Liechtenstein have also entered into the public consciousness again recently as a result of the tax evasion cases discovered in Germany at the beginning of 2008, as Liechtenstein foundations also played a key role in many of these cases. This survey is intended to provide an overview of the requirements under civil law and the tax treatment of foundations in Liechtenstein.

6.2. Civil Law Framework

The basis according to civil law for foundations in Liechtenstein is set out in the Persons and Companies Act (Personen- und Gesellschaftsrecht, PGR). A foundation within the meaning of the Persons and Companies Act is a special-purpose fund raised to the status of legal person and which has its own legal personality. The fund is then no longer the property of the donor, but rather becomes the capital of the foundation which is called a collective person (Verbandsperson) in Liechtenstein. Just as in Austria, in contrast to corporations or associations, the foundation has no owners or members. In creating the foundation, the endowment is dedicated to a special purpose. With respect to this purpose, a general distinction is made in Liechtenstein between church-related foundations, charitable and family foundations. Mixed forms are also possible; however this report only deals with the family foundation. The purpose of the foundation is the realization of the founder's will set out in the foundation deed and the foundation statutes. A family foundation is an entity in which the foundation assets permanently serve the purpose of covering the costs of raising, educating, outfitting or supporting one or more members of one or several specified families, or similar purposes. The foundation's beneficiaries are the persons who benefit from the realization of the foundation's purpose. The founder himself may also be a beneficiary.

The foundation deed (Stiftungsurkunde) must be drawn up as a written document and must bear the founder's signature certified by a notary. The foundation deed regulates the internal organization of the foundation. The following points must be provided for in the foundation deed:

- Name of the foundation
- Domicile the foundation
- Purpose or object of the foundation
- Amount of the foundation capital
- Members of the foundation's board of trustees

- Manner in which board of trustee members are to be appointed
- Use of assets in the event the foundation is dissolved

The foundation deed may also contain further regulations on the foundation's organization.

The foundation only has legal capacity through its executive bodies. The board of trustees (Stiftungsrat) is the executive body of the foundation and represents the foundation in external affairs and is responsible for administering the internal matters. The exact extent of the powers result from the statutory provisions and regulations set out in the foundation deed, the statutes and the by-laws. Foundations in which the majority of the executive or representative bodies' members are non-Liechtenstein nationals must appoint a representative in Liechtenstein. This representative must be a Liechtenstein national permanently domiciled in Liechtenstein; moreover, he or she must be authorized to represent the foundation without the assistance of another person in dealing with the public authorities. This person is to be entered in the Public Register. For foundations that pursue a trade that is conducted in a commercial manner, it is mandatory to appoint an auditing body (Revisionsstelle). All other foundations may, but do not have to appoint an auditing body. The auditing body is responsible for auditing the foundation's balance sheets, inventory, profit and loss statement and other accounting with regard to compliance, reliability and accuracy and in order to ensure that they accurately represent the situation and business results of the foundation. In addition, foundations can appoint additional bodies and correspondingly define their rights. For example, a so-called Kollator, who is authorised to appoint beneficiaries, may be appointed. It is also customary to appoint so-called advisory board members (Beiräte) to exercise control over the trustees or who are authorised with certain powers for investing foundation assets. Generally, the foundation bodies are liable for damages caused to the foundation by them as a result of intent or negligence.

The minimum amount of capital for a foundation is EUR 30,000 (or CHF 30,000 or USD 30,000). The assets must be immediately transferred to the foundation when the foundation is established on the basis of the details set out in the foundation deed. As a general rule, the foundation is not established until it is entered in the Public Register. There is no obligation of entering a family foundation in the Public Register. However, the foundation documents of family foundations must be deposited with the Public Register.

In practice, as a result of the rule according to which family foundations only have to deposit their documents, family foundations in Liechtenstein benefit from extensive anonymity.

Foundations are not required to keep books nor are they required to publish balance sheets as long as they do not pursue a trade in a commercial manner.

The foundation may be wound up by legal rescission, dissolution of the foundation in accordance with its statutes or by means of changing its legal form.

Current efforts are underway to extensively reform foundation law in Liechtenstein. While existing draft laws provide for extensive changes, the principle of anonymity, which was regularly criticised in the past, should not be substantially modified.

6.3. Tax Treatment of Foundations

Foundations themselves enjoy very extensive tax advantages regarding foundation endowments, the regular taxation of foundation income, the distribution of income to the beneficiaries or in the case that the foundation is wound up.

Tax treatment of foundation endowment

A foundation fee is charged upon creation of a foundation. For foundations that pursue a trade in a commercial manner, this fee amounts to 1% of the capital. An application can be filed for a capital amount of more than CHF 5 m to have the fee reduced to 0.5%. For a capital amount of more than CHF 10 m, the fee can be reduced to 0.3%. For other foundations the fee amounts to 2‰ of the capital. The minimum amount is set at CHF 250.00; the maximum amount is CHF 250,000.

Regular taxation of foundations in Liechtenstein

▪ Capital tax

Foundations in Liechtenstein are subject to capital tax on the declared capital and the reserves, regardless of the foundation purpose. This tax is very moderate; the annual tax burden for the following amounts of assets can be seen in the table below.

Up to CHF 2 m	1 ‰
From CHF 2 m to 10 m	$\frac{3}{4}$ ‰
More than CHF 10 m	$\frac{1}{2}$ ‰

For the sake of completeness, mention is made that the annual minimum burden amounts to CHF 1,000.

▪ Earnings tax

Earnings tax is levied on the annual net earnings; these are all profits including capital gains and liquidation profits from which business-related expenses are deducted. The tax amounts

to a minimum of 7.5% and a maximum of 15% of the net earnings²⁸. It increases by a further 1% to 5% if the distributions amount to more than 8% of the taxable capital.

Foundations that only have their seat in Liechtenstein, but which do not maintain an office and do not pursue any business or commercial activity there are however exempt from income taxation.

Taxation of beneficiaries of the foundation

No taxes are levied on distributions to beneficiaries who have neither a domicile nor an ordinary residence in Liechtenstein.

Tax consequences in the event of liquidation of a foundation

There are no particular tax consequences connected with the liquidation of a foundation in Liechtenstein.

The tax treatment of a Liechtenstein foundation from the point of view of the Austrian tax authorities

The above-stated provisions are the domestic law in Liechtenstein. However, as a large part of foundations in Liechtenstein have foreign founders or foreign beneficiaries, inter-country regulations (or the regulations applicable in countries in which the founders and/or beneficiaries reside) are also of importance in this context. An overview of tax consequences for Austrian founders and beneficiaries in connection with the establishment of a foundation in Liechtenstein follows. As Liechtenstein is one of the few countries in Europe that is considered a tax haven, it comes as no surprise that Austria has not concluded any double taxation agreement with Liechtenstein.

As a general rule, Liechtenstein foundations are also recognised by the Austrian tax authorities. However, in many cases, the Austrian tax authorities examine whether a foundation is recognised as a legal person under the laws and regulations of Liechtenstein or whether the assets of the foundation may be attributed to the founder from a tax perspective. In this case, the profits of the foundation would be considered as taxable income at the level of the founder.^{29,30} This often happens in connection with the so-called foundation with mandate agreement (Stiftung mit Mandatsvertrag). This type of foundation is a speciality of Liechtenstein. By means of a mandate agreement, which is normally concluded between the founder and a

²⁸ Article 77 Tax Act. The tax rate amounts to half as many percent of the net profits as the net profits percent of the capital subject to tax, at least 7.5% and a maximum of 15%.

²⁹ Foundations recognised by the Austrian tax authorities are referred to as non-transparent foundations, while foundations the assets and income of which are assigned to the founders are referred to as transparent foundations.

³⁰ For the criteria that must be met in the case of a non-transparent foundation, see Hosp (2008).

Liechtenstein fiduciary, the creation of a foundation can be laid down by contract. Moreover, the mandate agreement regulates the delegation of the bodies, the day-to-day administration of the foundation and similar matters. Thus, in this situation, the founder can exercise factual control over the foundation without having to act as an executive body of the foundation. As a consequence, the foundation profits are attributed to the founder for tax purposes pursuant Sections 21 et seq. of the Austrian Federal Fiscal Code (Bundesabgabenordnung) according to which the beneficial ownership prevails over the legal ownership .

As of 1 January 2008, a foundation entrance tax in the amount of 25% is levied on an Austrian founder upon creation of a foundation in Liechtenstein. The lower foundation entrance tax rate of 2.5% levied on Austrian private foundations does not apply in that case because no administrative and enforcement assistance agreement was concluded between Austria and Liechtenstein. As regards the regular taxation of foundation profits, the Austrian tax authorities recognise the so-called non-transparent foundation; as a result, the profits of these foundations are, as a general rule, not subject to taxation in Austria. The case of transparent foundations is different. Here, the profits are generally attributed to the founder from an economic perspective and hence taxed in accordance with Austrian income tax regulations. In the case of non-transparent foundations, a 25% income tax rate at the level of the beneficiary is levied on payments to the beneficiary in Austria.

With regard to foundations created (or assets dedicated) on or after 1 August 2008, the distributions of assets (Substanzausschüttungen) are tax-exempt (as are distributions of assets by Austrian private foundations according to Austrian regulations). The same regulations are applicable if distributions are paid to the beneficiaries as part of the winding-up of a Liechtenstein foundation.

6.4. Conclusion

The Liechtenstein foundation has fallen in international disrepute – even more so as a result of the tax evasion cases discovered in Germany at the beginning of 2008. An examination of legal provisions shows that the Liechtenstein foundation does in fact provide extraordinary advantages. It enables pure family foundations to continue to remain largely anonymous externally. The foundation can be established very easily and supervision of these foundations remains weak. Establishing a foundation is not associated with any significant costs or duties, and regular income from foundations with a relationship outside Liechtenstein are virtually tax-exempt with the exception of a very moderate capital tax. In addition to this capital tax, taxes which largely correspond to the tax burden of an Austrian private foundation continue to be levied on Austrians who establish a foundation in Liechtenstein. Despite this, the Liechtenstein foundation remains very attractive from a tax-related point of view. Although a reform of foundation law is being drafted in Liechtenstein, it can be assumed that the general terms will not be significantly changed.

Therefore, it also comes as no surprise that as of 12 September 2008, there were 1.565 registered foundations and 45.839 so-called deposited foundations (hinterlegte Stiftungen) in Liechtenstein³¹. No official figures on the assets held by these foundations exist, however the figure of CHF 100 billion occasionally batted around does not seem in any case too high³².

³¹ http://www.llv.li/llv-gboera-oera-amts-geschaefte-hinterlegung_im_oeffentlichkeitsregister.htm

³² Eiselsberg (2008), p. 43 et seq.