

applies if that the commercial activity is performed as on an ancillary basis; this means that the profits related to this activity may only be used to pursue the foundation purpose.

Thus, income from a business activity is subject to income taxation. The profit is determined by means of comparing the assets of a company in two subsequent years on the basis of the annual financial statements. Depreciations, amortisations and write-offs and provisions as well as operating expenses are deductible. Contributions out of tax-exempt private assets are deemed part of the foundation capital; however, the profit for tax purposes is reduced by the amount of such deposits. Conversely, so-called private withdrawals are to be added to the profits for tax purposes. Contributions as well as private withdrawals are to be stated with their current value on the respective date.

The assets used for the business activity are subject to wealth tax of 0.5%. For tax purposes, donations to foundations are treated as income (as described above). As a general rule, donations, gifts and contributions to foundations may not be deducted from taxable income. Pursuant to Art 109 Income Tax Act, however, these may be considered eligible for deduction as special expenses within the meaning of Art 112 Income Tax Act. Certified registered donations are subject to a register entry fee in the amount of 6 percent.

Payments by a foundation to a third party are subject to gift tax<sup>39</sup>.

#### **7.4. Alternatives to the foundation**

There are no special foundation forms in Luxembourg. Similar legal institutions exist, however, namely trusts and the Luxembourgian fiduciary contract (*contrat fiduciaire*). These legal entities may, in addition to public utility purposes, also serve purely financial or economic interests; thus, they are similar to a private law foundation, at least with regard to the purpose. Luxembourg has approved their legal recognition with its law of 27 July 2003.

In recognising these alternative forms, Luxembourg recognises in particular the dichotomy of the basis of ownership. The beneficiary (in most cases the founder of the trust) is granted rights which are similar to ownership rights; these rights stand independently and in addition to the ownership rights transferred to the trustee (the administrator of the trust). Thus, the beneficiary may for instance claim that a third person (with no ownership rights) or, in the event of solvency, the liquidator return the trust property to him. From a legal perspective, the trustee is treated as an owner; the trust assets and the private assets are considered as two separated properties.

In contrast to the trust, the trustor forfeits his basis of ownership in full in the case of a Luxembourgian fiduciary contract. The law exclusively applies to fiduciary contracts in which the

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<sup>39</sup> Cf. Fort (2007), p. 36 et seq.

trustee is a financial institution, a securities company, an investment company, a pension fund or an insurance enterprise. In Luxembourgian legal practice, however, the law also applies trustees that are natural persons.

Transfers of trust property without consideration are subject to gift tax; the applicable tax rate depends on the degree of relationship. No additional special regulations exist. If the founder of a trust or the trustor himself is the economic beneficiary of the trust/fiduciary contract, the profit is taxed at his level in accordance with fiscal transparency. In the case of a third-party beneficiary, taxations depends on the respective structure of the trust or fiduciary contract; here, the profit may be considered as an “independent legal estate” pursuant to Section 159 Income Tax Act and is then accordingly treated for tax purposes.<sup>40</sup>

### ***7.5. Dissolution***

If a foundation is no longer in a position to perform its purpose, its dissolution may be decided and a liquidator can be appointed. The liquidation proceeds are exempt from corporate tax. Dissolution profit from the foundation business activity is to be taxed pursuant to Article 55 et seq.

### ***7.6. International context***

Luxembourgian legislation applies, on the basis of French and Belgian law, the so-called company seat theory: Abroad-based foundations with legal capacity are recognised as legal persons also in Luxemburg. It is permissible to move a foundation’s seat from Luxemburg into another country.

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<sup>40</sup> Cf. Beissel/Gabriel (2007), p. 1159.