

8. NETHERLANDS

8.1. Civil Law Framework

General

Foundations (*stichting*) are set up in many fields of society, not only in non-profit areas but also in connection with enterprises (a foundation may own a company, e.g. in the case of pension funds). Foundations may also be part of corporate structures or other forms of organisation including public and private elements. Foundations have always been regarded as special-purpose funds. The first legal provisions for foundations under private law date from 1956. These rules could however not be applied to all types of foundations.

In 1976, the then existing law was replaced by the *Burgerlijk Wetboek* (Civil Code), Book 2, in which a foundation is defined as a legal person. As a legal person, the foundation has no members and intends to use the funds endowed to it to pursue the foundation purpose as set out in the foundation statutes. The purpose may not consist in the execution of payments to founders or foundation bodies. In the Netherlands, foundations are comparatively flexible; they are not subject to any government supervision. However, there are current considerations to subject foundations to stronger supervision and to require publication of annual balance sheets. Foundations must be entered in the commercial register; in March 2006, there were a total of 153,641 foundations in the Netherlands⁴¹.

Establishment

As a general rule, a foundation is established with a notarial deed. Legal persons, thus also foundations, are in principle established for an unlimited period of time; a time limit may however be laid down in the foundation statutes. Any person having capacity to contract may establish a foundation, also foreign legal or natural persons.

In the Netherlands, establishing a foundation is very simple due to a lack of public supervision; it only requires entry in the commercial register. After publication, an annual fee has to be paid to the chamber of commerce. The founder is not required to endow the foundation with a particular amount of assets.

A foundation may also be established *causa mortis* (in the event of the founder's death) on the basis of a public testament. In this case, the foundation becomes the heir or legatee. In practice, however, a foundation is usually established *inter vivos* (during the founder's lifetime).

⁴¹ Cf. Volders/de Vries (2007), p. 1164 et seq.

The rules, governing bodies and registered office are set out in the foundation statutes. Another important element in the foundation statutes is the purpose and a detailed description of the main activities. The purpose is subject to some restrictions in that it may not consist in the execution of payments to the founders or members of the foundation's executive bodies (benefits which are immaterial or social in nature are however permissible).

A foundation is allowed to make profits and may operate a commercial enterprise⁴². In many cases, foundations have a supervisory board comparable to the supervisory board of a capital company. If a foundation has 50 or more employees, a workers' council has to be set up.

In principle, there are no mandatory rules as to the capital formation, which means that no capital contribution is required upon establishing a foundation. However, the regional court (*Rechtbank*) can file to have the foundation wound up if the assets are insufficient to achieve the purpose. Within the foundation, capital is accumulated through grants, donations, legacies, as well as through subsidies and profits from a company.

8.2. Foundation Forms

General

There are no specific regulations in the Netherlands concerning the management of foundation assets or their taxation. The Foundation for Cultural and Social Initiatives was established by the Dutch Foundation for the Promotion of Notarial Science (*Stichting tot Bevordering der Notariële Wetenschap*), the *Prins Bernhard Cultuurfonds*, the Royal Trade Association of Notaries (*Koninklijke Notariële Beroepsorganisatie*) and the Dutch Bar Association (*Nederlandse Orde Van Advocaten*) to ensure that certain provisions regarding the social or cultural nature of foundations be adhered to. In addition, the *Centraal Bureau Fondsenwerving* establishes guidelines and makes relevant information available to the public. Foundations established in accordance with these guidelines and which are active in the charitable, cultural, scientific, and other public utility areas receive a quality label.

As other legal persons, foundations are generally required to keep books and to prepare balance sheets and a profit and loss statement.

Special Foundation Forms

▪ Dependend Foundations

Assets can be placed in more than one foundation, which means that activities associated with risk are placed in a separate foundation which is also called a support foundation or a cooperation foundation.

⁴² Cf. *ibid*, p. 1170.

- **Civic Foundations**

This type of foundation especially serves non-profit and charitable purposes.

- **Family Foundations**

The introduction of the family foundation in Dutch law has basically resulted in an exception concerning the prohibition of benefits to family members of the founder. Assets are paid into a foundation as part of asset planning; the foundation manages these assets for the holders of share certificates. What is particular about this foundation form is that no inheritance or gift taxes are levied on the assets endowed to the foundation. The foundation files an annual tax declaration over the services provided. After 60 years, the foundation ceases to exist de jure.

Private fund foundations, which are similar to family foundations, exist in parts of the Kingdom such as in the Dutch Antilles and Aruba.

- **Company-related Foundations**

In the Netherlands, it is quite common to include foundations in groups of companies. By means of establishing a foundation, the voting rights associated with and the beneficial interest in shares can be separated (in the case of a trusteeship). This permits companies listed on a stock exchange to create special protective constructs or to enable preferred participation. What is particular in this context is that the statutes of company-related foundations may stipulate that some resolutions by the board of directors require the approval of another foundation, with the advantage that the existence of such provision is not public.

- **Trust Company**

The trust company (Stichting Administratiekantoor) is used to separate legal ownership from economic activities. The trust company can be involved in the certification of shares.

- **Investment Funds and Pension Funds**

In the context of Dutch foundation law, pension funds represent an interesting construct as they do not comply with two fundamental principles of foundations: First, pension funds have members and second, they make payments.

- **Government Foundations**

The government also uses the legal form of foundation, in which government bodies may be directly or indirectly involved. Due to a variety of rules on subsidies, such foundations may depend on government bodies.

Dissolution of Foundations

The foundation statutes can be modified if this is provided for in the foundation statutes. The same rule applies to a change of the legal form, a merger or a division of the foundation, which may represent grounds for dissolution.

Normally, a foundation is dissolved upon a resolution of the board of directors. The grounds for dissolution can be set out in the foundation statutes. The statutes must include a provision on the distribution of the foundation assets. Special procedures involving a liquidator are also provided for.

If in the framework of dissolution, a payment is made to a company which is liable to corporate tax, the payment is to be included in the profits of this company. If a payment is made to a natural person, it is to be included in income under *Box 1*. In all other cases, the payment must be allocated to *Box 3* (capital income tax). Acquisitions are subject to gift tax if no exceptions apply.

International Context

As a general rule, the registered office of the foundation must be located in the Netherlands. In accordance with the European Court of Justice ruling concerning the SEVIC System AG from 13 December 2005, this is contrary to the freedom of establishment. It is thus possible, legally and in practice, to relocate the registered seat of a foundation based in the Netherlands within the European Economic Area.

8.3. Tax Treatment of Foundations

Dutch tax law generally distinguishes between foundations established for public utility purposes and foundations set up to operate a business. If a foundation pursues public utility purposes, the endowments are subject to reduced taxation with regard to inheritance and gift tax and capital transfer tax⁴³. Since 1 January 2006, a general exemption has been in place. As a result, donations to the foundation may be deducted for purposes of income and corporate tax. If the foundation operates a business, it is subject to corporate tax.

Regular Taxation

▪ Inheritance, Capital Transfer and Gift Tax

Inheritance, capital transfer and gift tax are, as a general rule, based on the market value of the foundation. If the foundation is created by more than one person, the founders are considered a single person. This prevents the splitting of gifts to avoid capital transfer or gift tax. Along these same lines, if several donations are made within a calendar year, these donations are treated as a single donation for tax purposes.

At the level of a natural or legal person who acquires a foundation as a result of an inheritance, capital transfer or donation, acquisitions of non-public utility foundations are taxable in

⁴³ Capital transfer tax has to be paid on a donation or legacy if the donor or legator was domiciled outside the Netherlands at the time of his death or at the time the donation was made. The assessment base is the value of assets in the Netherlands after deduction of liabilities in the Netherlands.

the highest tax bracket; in 2007, the tax rate for this bracket was between 41% (for the portion up to EUR 22,051) und 68% (for the portion exceeding EUR 881,722).

Public utility foundations in the Netherlands are foundations pursuing church-related, charitable, cultural, and scientific or public utility purposes; such foundations are not subject to the highest tax rate but are generally tax-exempt since 1. January 2006⁴⁴. Since 2008, these foundations must obtain permission from the Finance Ministry which examines the foundation with regard to its size, the purpose, administrative costs and accounting. Donations to foundations which are recognised by the government may be deducted for tax purposes from the personal income (in the case of donations by private persons) or corporate income (in the case of donations by companies).

Foreign foundations are treated as Dutch foundations in accordance with EU law if they meet the requirements of “public utility”. The tax exemption also applies in connection with a change of the legal form, mergers and divisions of foundations operating in the public utility area.

▪ **Personal Income Tax**

As a legal person, the foundation is not subject to personal income taxation. It can, however, become liable to personal income taxation if it is considered to be a “transparent” foundation (*transparance fiscaal*). In the case of a transparent foundation, one person can have disposal right to the assets as if these were that person’s own assets; which means that income and assets are accordingly attributed to that person for tax purposes. With regard to corporate tax liability of foundations, the Supreme Court seems to be more hesitant in general⁴⁵.

▪ **Corporate Tax**

If a Dutch foundation operates a business for the purpose of making profit, it is subject to corporate tax. Subsidised foundations may however generate operating surpluses; as long as these surpluses are used according to the subsidy guidelines, these institutions are not deemed to intend to make profits.

If a foundation is partly subject to corporate tax, an exemption may be considered, however, depending on the activities and amount of profit generated. Subjective exemptions are subject to the fulfilment of certain requirements; in the case of pension insurance companies, for instance, tax-exemption may apply if the company's exclusive purpose is the provision for employees, invalids, old-age, children, etc. Furthermore, companies that pursue a charitable or public utility purpose (at least 90% of their activity) are exempt from corporate tax⁴⁶. Foreign charitable institutions are also tax-exempt if they meet these requirements.

⁴⁴ Until 31 December 2005, a tax rate of 8 percent was applied to public utility foundations.

⁴⁵ Cf. Volders/de Vries (2007), p. 1206.

⁴⁶ Cf. *ibid*, p. 1209.

A company is free to opt for non-exemption in its tax declaration in order to record hidden reserves to finance investments. Investment reserves may be recorded for a period of three years.

Deductible donations exceeding EUR 227 are deductible to the extent of 10% of the profits.

▪ **Earnings Tax**

Earnings realised by a foundation from shareholdings in Dutch companies are subject to earnings tax. Earnings tax has the effect of final taxation and cannot be offset against any corporate tax due. The Earnings Tax Act provides for earnings tax reduction or an exemption for legal persons which are not subject to corporate tax and may therefore claim a refund of earnings tax paid.

▪ **Real Estate Transfer Tax**

A 6% real estate transfer tax is generally levied on properties and rights to properties located in the Netherlands. Real estate tax exemptions may apply to donations. If a foundation receives Dutch properties as a donation, it does not have to pay real estate transfer tax. In this case, the applicable gift or transfer tax is not less than any property transfer tax that may be due. An acquisition in accordance with inheritance law is not considered an acquisition.

Mergers, reorganisations or changes in the legal person are also exempt from real estate transfer tax.

▪ **Value-added Tax**

As an enterprise, the foundation is subject to value-added tax. Exceptions exist for foundations that are financed by government subsidies or that do not demand any consideration for their services.

Taxation of the Donors

Donations to charitable foundations may be deducted from personal income tax (in the case of natural persons) or corporate income tax (in the case of legal persons). Donations are by definition made without consideration. Such donations are considered as a transfer of assets from the donor to the donee. In a further step, the tax authorities examine whether the donor has retained the power of disposal over the donated asset or not. Donations in kind may also be made, for example, of artworks (paintings, etc). Since the modification of the law effective 1 January, donations to foundations based abroad are subject to the same tax rules as donations to Dutch foundations. Expenses that have already been reported as business expenses or other income-related cost are not recognised as donations.