

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 tax<sup>43</sup>. 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

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<sup>43</sup> 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 2006<sup>44</sup>. 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 general<sup>45</sup>.

#### ▪ **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 tax<sup>46</sup>. Foreign charitable institutions are also tax-exempt if they meet these requirements.

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

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

<sup>46</sup> 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.