9. SWITZERLAND

9.1. Civil Law Framework

The Swiss foundation is regulated in the Swiss Civil Code (*Zivilgesetzbuch*, ZGB), in Articles 80 to 89. Civil law is federal law and thus the legal framework for foundations under civil law is the same in the whole of Switzerland:

Switzerland considers a foundation to be assets dedicated by a donor for a specific purpose. A foundation deed, which documents the founder's will to establish a legally independent foundation, is required to establish a foundation. The Swiss Civil Code permits the following forms of foundation:

- Public utility foundation (*gemeinnützige Stiftung*)
- Personnel provision foundation (*Personalvorsorgestiftung*)
- Family foundation (*Familienstiftung*)

A public utility foundation requires an official letter of recognition from the tax authorities for this form to be recognised for tax purposes. The personnel provision foundation is the form under which the second pillar of Swiss old-age provision (*berufliche Alters-, Hinterlassenen- und Invalidenvorsorge*, BVG) is generally organised. The family foundation is limited to the maintaining, promoting the education of and outfitting of close family members; accordingly (and unlike in Austria), the foundation may not pay any amounts to the donor or his or her family members.
It is the Swiss *Unternehmensstiftung* (corporate foundation) or, in a subform, the *Holding-Stiftung* (holding foundation) that is most comparable to the Austrian private foundation. Whether this construction is in fact permissible under civil law or not is a legally disputed issue. In its decision dated 18 May 2001 (BGE 127 III 337), the Federal Court of Switzerland ruled that an economic foundation purpose was permissible and that corporate foundations could thus be established.

All foundations are subject to regulatory supervision. The authorities may not change the foundation purpose but may dissolve the foundation if the purpose becomes obsolete. The founder himself is not permitted to dissolve the foundation nor is he allowed to change the foundation purpose arbitrarily; he may however limit the time for which the foundation is to be established from the beginning or give the *Stiftungsrat* (administrative board) room for manoeuvre as regards the detailed definition of the foundation purpose.

9.2. Tax Treatment

In Switzerland, direct federal taxes are governed by federal law via the Federal Act on Direct Federal Tax (*Bundesgesetz über die direkte Bundessteuer, DGB*), whereas direct cantonal taxes are regulated by cantonal laws. For municipal taxes and church tax, tax rates which are based on the cantonal base rate apply. The Tax Harmonisation Act (*Steuerharmonie-rungsgesetz*) ensures that the definitions of tax subjects and the assessment bases are at least not essentially different.
Foundations that are exclusively and irrevocably of public utility are exempt from direct taxes as are personnel provision foundations. In principle, corporate foundations are taxed as other legal persons.

In the following, we will explain what the taxation of a corporate foundation in the canton of Zug /Zug capital looks like. Within Switzerland, Zug is considered a tax haven and is thus suited as a competitive model to the Austrian private foundation.

Fiscal Treatment of Foundation Endowments

For tax purposes, the endowment of a non-public utility foundation is regarded as a gift (inheritance) in Switzerland. Inheritance or gift tax only exists at cantonal level. Inheritance tax is only levied in the canton of Schwyz, whereas in the canton of Zug, direct succession and spouses (domestic partners) are exempt from inheritance and gift tax. Tax rates range between 10% and 20% depending on the amount of the assets received. The case of foundations is particular insofar as the tax liability depends on the degree of the donor's relationship to the beneficiary. For direct succession and partners, the rate is zero at all; non-related persons have to pay the full rate. As regards distant relatives, different reduced rates depending on the relationship apply. Moreover, the municipalities may levy additional taxes of up to 100% of the cantonal tax. Thus, in comparison to the foundation entrance tax (*Stiftungseingangssteuer*) of 2.5% in Austria, the tax regime in the canton Zug is only more favourable for close relatives.
The above-stated regulations are valid for donors domiciled in Zug. If the donor resides in Austria, the fiscal consequences depend on applicable double taxation agreements. Austria has signed no double taxation agreement concerning gift tax with Switzerland. As a result, the donor has to pay a foundation entrance tax in Austria for the endowment of the foundation abroad. At present, the Austrian foundation entrance tax is generally 2.5%; however, it should be noted that the tax rate may increase to 25% if no comprehensive administrative assistance and enforcement treaty exists with the country in question (Section 2 (1) No. 3 of the Austrian Foundation Entrance Tax Act (*Stiftungseingangssteuergesetz*). As the administrative assistance provisions in the double taxation agreement concluded between Austria and Switzerland (Articles 26/26a) are not comprehensive to the extent required, Austria-based donors generally have to pay the 25% tax rate on endowments to Swiss-based foundations. Therefore, creating a foundation in the canton Zug from Austria is unattractive from a fiscal perspective.

Regular Taxation of the Foundation

On foundations which do not pursue a public utility purpose, a special corporate tax rate of 4.25% is levied on the federal level (tax allowance of CHF 5,000). Tax exemptions (in the form of an investment allowance or "*Beteiligungsabzug*") exist for investment income realised in connection with shareholdings equal to or exceeding 20% and shareholdings equal to or exceeding CHF 2,000,000 of the registered/share capital of another company.
As a result of this allowance, a part of the foundation profits, which is proportional to the amount of the shareholding, is tax-exempt. The same applies to capital gains generated by a disposal of shareholdings.
Dividends distributed to the foundation are subject to a 35% withholding tax; the foundation may however claim a refund. As a consequence, all capital income from shareholdings is tax-exempt at the level of the foundation.

In the canton Zug, the base tax rate is 4% (tax allowance of CHF 10,000). On the basis of this base tax rate, the rates of the canton Zug (0.83%), the municipality Zug (0.63%), and the protestant church community (0.095%) are determined. In total, this leads to a tax rate of 6.22%.

However, at cantonal level, foundations can benefit from advantages granted to so-called domiciled management companies (*Domizilgesellschaften*). These are companies which are not engaged in business in Switzerland, but only perform management activities there.
In this case, all profits from shareholdings are tax-exempt at foundation level. Other income is subject to the tax rates stated above. Concerning real properties, it should be taken into account that in the canton of Zug no speculation periods apply; as a result, capital gains from the disposal of real estate are subject to taxation.

Furthermore, at cantonal level, there is a so-called net asset tax (*Nettovermögenssteuer*) or capital tax. This tax is, however, so low that it is negligible in economic terms.

Thus, profits in connection with shareholdings (including capital gains) realised by a foundation established in the canton of Zug and which exclusively bundles large shareholdings in companies are ultimately tax-exempt. While foundations are not subject to the 12.5% rate applicable in Austria, there are some other fiscal aspects that should be taken into account (taxation of payments to beneficiaries or taxation upon liquidation).

Taxation of payments to beneficiaries or in the event of liquidations

According to prevailing opinion, payments by corporate foundations of liquidation proceeds or assets to beneficiaries are subject to personal income tax at the level of the beneficiaries in Switzerland (in some cases these payments may also be subject to gift tax). The highest marginal tax rate in the canton capital Zug amounts to 25.5% including direct federal tax. If the beneficiary resides in Austria, the payment is only subject to taxation in Austria pursuant to the double taxation agreement concluded between Switzerland and Austria. Pursuant to the Austrian Income Tax Act (as amended by the Gift Notification Act) the payments are income from capital assets (Section 27 (1) No. 7 Income Tax Act), but nonetheless subject to the special tax rate of 25% (Section 34 (8) Income Tax Act).

9.3. Conclusion

The legal framework under civil law for corporate foundations in Switzerland is similarly liberal as that of Austria, however the legal framework under civil law is more uncertain and only based on case-law. As long as this situation does not change, foundations in Switzerland can be established for practically any economic purpose. Such foundations do not have to be entered in the commercial register and enjoy extensive freedom as regards the appointment of executive bodies. They are, however, subject to public supervision and must comply with specific accounting rules.

Foundations are not subject to taxation of income in connection with profits and capital gains related to shareholdings in companies. It should however be noted that gift tax is levied upon establishment of the foundation, on endowments to the foundation, in the event of liquidation or on payments to beneficiaries. For persons domiciled in the canton of Zug, the overall burden is comparable to that of the Austrian private foundation. For persons residing in Austria the combination of the Zug gift tax and the Austrian income tax is prohibitive; therefore, the Zug foundation model is not really suitable for persons domiciled in Austria. As an alternative foundation location, only the canton of Schwyz can be considered as it levies no inheritance and gift tax. If a donor is successful in relocating his or her domicile to Schwyz/Schwyz, he can benefit from a perfect tax situation.