



Private Foundation and Trust

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Contact us...

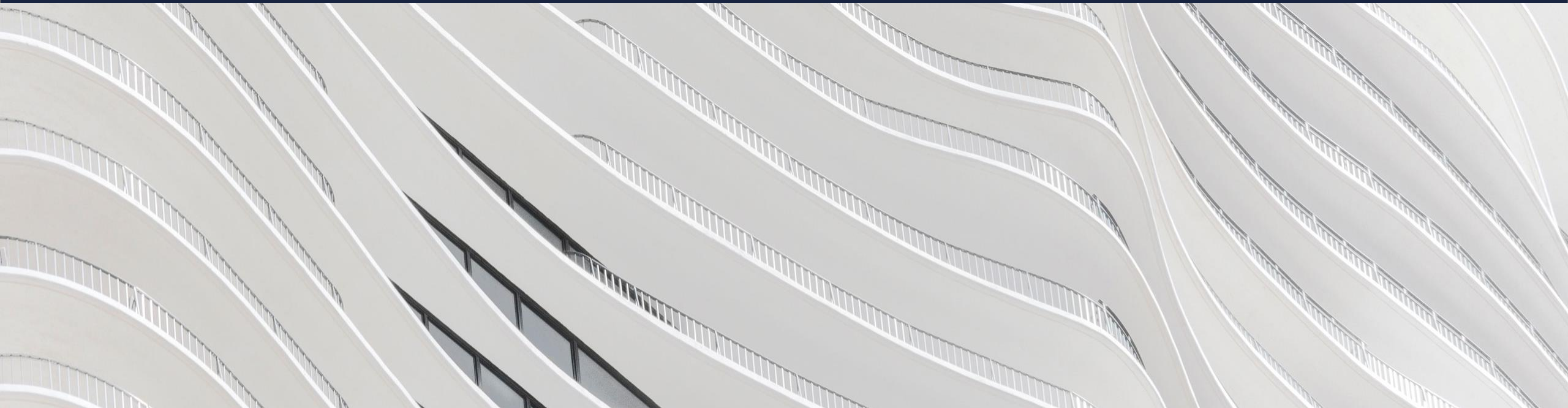
We look forward to discussing our proposal with you further. If you have any questions on any aspect of this proposal, please do contact me.



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AUSTRIAN PRIVATE FOUNDATION ("PRIVATSTIFTUNG") LEGAL AND TAX



Austrian Private Foundation ("Privatstiftung")

Definition according to the Private Foundation Act

- legally independent property and entity without owner
- is capitalized with assets by the founder
- in order to serve a purpose determined by the founder
- most private foundations seek to organize professional business management (outside the family group) and to prevent the splitting up of wealth by dividing it into a heirs majority
- The private foundation, which arises only with entry into the commercial register, is a legal entity
- However the private foundation is no company, because it has no partners or owners only beneficiaries
- The private foundation is to be registered by the first foundation board for entry in the commercial register

Details Austrian Private Foundation

Financial Constitution

- If the capital of at least EUR 70,000 is not raised in money (in euros), an independent formation auditor must examine whether the dedicated assets reach the value of the minimum assets
 - Foundation auditor has to be appointed by the court
- Utility benefit (*Gebrauchsstiftung*) or consumption foundation (*Verbrauchsstiftung*)
- In the case of a utility foundation (*Gebrauchsstiftung*), only the income may be used for the fulfilment of the purpose
- In the case of a consumption foundation (*Verbrauchsstiftung*), the foundation assets (substance of the foundation) may also be used for the fulfilment of the purpose
- The Private Foundation Act does not contain a capital maintenance requirement comparable to that of corporations

Content of the Foundation Declaration

The foundation declaration should contain the following:

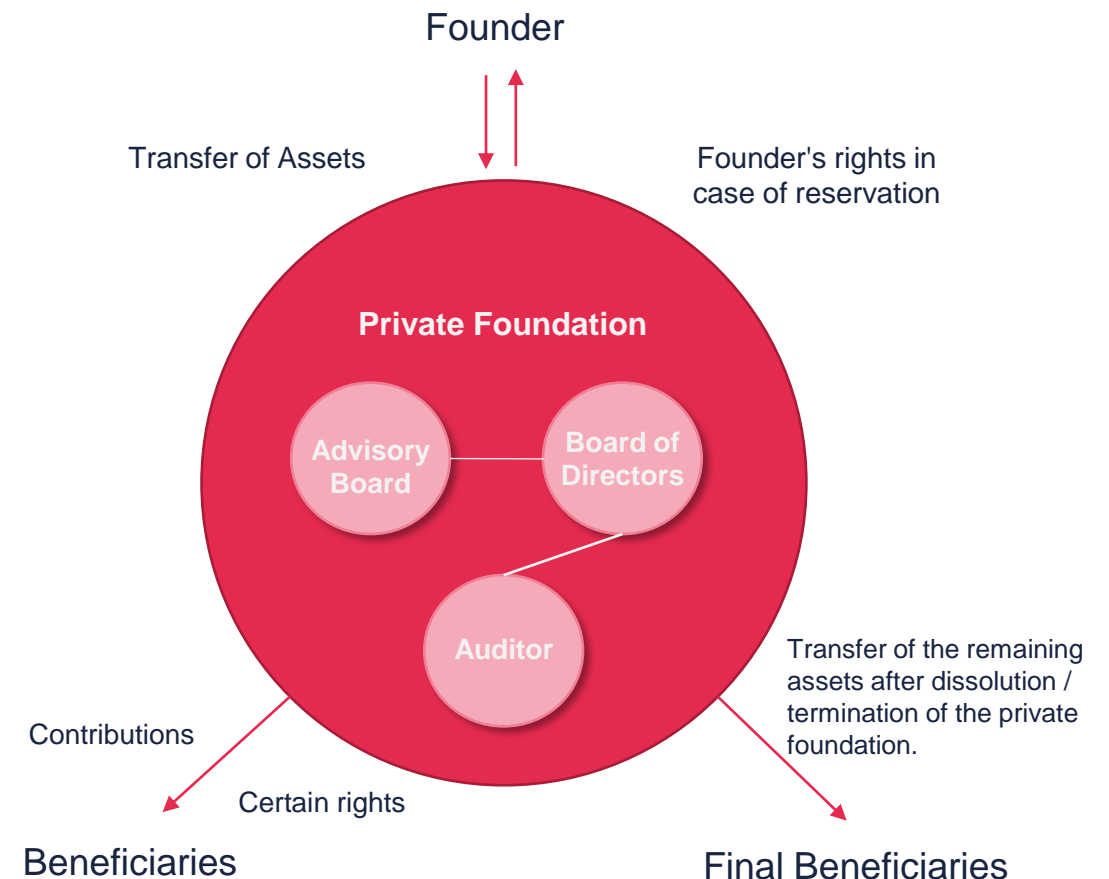
- Capital of at least 70,000 euros in cash or in kind;
- a defined purpose of the foundation (for the activity of the Foundation Board);
- a circle of beneficiaries (or at least a body that determines it, and the founder himself may be the beneficiary);
- Name and seat of the private foundation (for example name of the founder or beneficiary);
- Duration of the foundation (for a limited or indefinite period);
- Name and address of the founder, the date of birth for individual persons, and the commercial register number for legal entities registered in the commercial register
- The declaration must be drawn up in the form of a notarial deed

Supplementary Foundation Declaration

- In addition to the foundation declaration, a supplementary foundation declaration may also be drawn up
- Does not have to be published in the commercial register
- The supplementary foundation deed often regulates the remuneration of the foundation bodies or the dedication of foundation assets in excess of the minimum assets
- Only one supplementary foundation declaration is allowed (not two or more)

Foundation Bodies

- **Founder:** a natural or legal person (e.g. other company, foundation, trust, Anstalt) who participates in the establishment of a private foundation, adopts the deed of foundation or contributes assets to the foundation.
- **Beneficiaries:** do not have to be designated upon establishment of the private foundation but can also be nominated at a later point in time. Founders are not subject to any restrictions in their choice of beneficiaries
- **Mandatory governing bodies:**
 - board of directors (*Stiftungsvorstand*); and
 - auditor (*Stiftungsprüfer*)
- **Other bodies:** In the deed of foundation, the founder may provide for other bodies that serve the purpose of the private foundation (e.g. advisory board (Beirat/Aufsichtsrat))



Founder

Founders/Co-Founders/Sub-Founders

- Founders can be one or more individuals or legal entities
- Can also be established by testament; in this case, only one person is founder
- If several persons are founders, the founder's rights can only be exercised jointly (dispositive law)
 - Several co-founders have a duty of loyalty
- A distinction must be made between co-founders and so-called sub-founders; a sub-foundation is the subsequent endowment of assets to a private foundation after it has been established

Founder

Founder's rights

- The founders may reserve rights of approval for certain transactions
- Reservation of a right of amendment or revocation is possible
 - Reservation of revocation is only possible for individuals
 - Right of revocation must be included in original foundation declaration
 - Right of amendment and revocation expires upon death of the founder (highly personal right)

Board of Directors of the Foundation

Function: day-to-day management of the foundation

Minimum number: three

Requirements to the members: only individuals, not beneficiaries, their spouses, partners and other persons related to the beneficiary in direct line or up to the third degree of consanguinity. At least two should be citizens of EU or EEA countries

Appointment: The first board of directors of the foundation is appointed by the founder. Subsequent appointments shall be determined in the deed on foundation can be conducted:

- by the founder;
- another body of foundation (if appointed);
- the board of directors;
- by the court

Board of Directors of the Foundation

Liability

Each member is liable by a culpable breach of the duty. There is no joint and several liability of the Board of Directors as entire members

Termination of authority of members of the Board of Directors:

The court has to revoke the authority upon request of any member of the board if this is set out in the deed of foundation or if there is an “important reason”. Such important reasons for revocations are:

- material breach of duty;
- incapacity of due fulfilment of duties;
- institution of insolvency proceedings upon the assets of the member of the board of directors;
- rejection of the latter for lack of costs covering assets;
- several unsuccessful tries of execution against the property of the board member

In addition, other reasons can be specified in the deed of foundation

Board of Directors of the Foundation

Possibilities to influence the foundation as a beneficiary

- Beneficiaries, their spouses, partners and other persons related to the beneficiary in direct line or up to the third degree of consanguinity must not be members of the board of directors
- Possibilities to influence the foundation nevertheless
 - Advisory board
 - An advisory board may be established in order to have a certain influence on the board of directors; beneficiaries may also be members of the advisory board
 - The purpose of the advisory board is to be a control and advisory body for the board of directors
 - The foundation board must not be degraded to a mere executive body
 - Influence on the foundation and on the board may also be exercised if the beneficiary is the director of a company which is a subsidiary of the foundation

Details regarding Foundation bodies

Foundation Bodies

- Foundation auditor
 - Mandatory governing body
 - To be appointed by the existing supervisory board or by the court
 - He must be a certified public accountant or tax consultant
 - He may not be a beneficiary, employee of the private foundation or a company controlled by him, and not a member of any other foundation body
 - He has to audit the annual financial statements including the management report and the accounting within three months

Details regarding Foundation bodies

Foundation Bodies

- Supervisory board
 - A supervisory board is required to be appointed
 - if the number of employees in the foundation exceeds 300 or
 - if domestic corporations / cooperatives are managed or over 50% controlled by it ("Group") and the total number of employees in these companies / cooperatives exceeds 300
 - The Supervisory Board must consist of at least three natural persons
 - The founder can appoint the first Supervisory Board, after that it is the responsibility of the court, which also has the right to dismiss the Supervisory Board in its entirety if the private foundation is no longer required by the supervisory board
 - The Supervisory Board must supervise the management and management of the private foundation by means of access rights and information rights
 - There is a possibility to appoint a supervisory board even if the legal requirements for a mandatory supervisory board are not met

Investment of Assets and Notarial Fees

Investment of assets

- The deed of foundation may contain:
 - parameters of investment of the foundation's assets;
 - the scope of director's discretion to invest;
- The risk profile shall be determined by the board of directors.

Notarial and registration fees

- for initial structuring considerations: approx. EUR 8,000-10,000
- for establishment of foundation: approx. EUR 15,000-20,000
- Current annual standard costs: approx. 10,000-15,000 (bookkeeping etc)

Termination of the Private Foundation

The foundation may be dissolved in the following cases:

- lapse of period for existence;
- bankruptcy;
- unanimous decision of the board of directors (voluntary decision or mandatory decision in cases specified by law);
- dissolution by the court

Connex to other civil law areas

Foundation and Inheritance Law

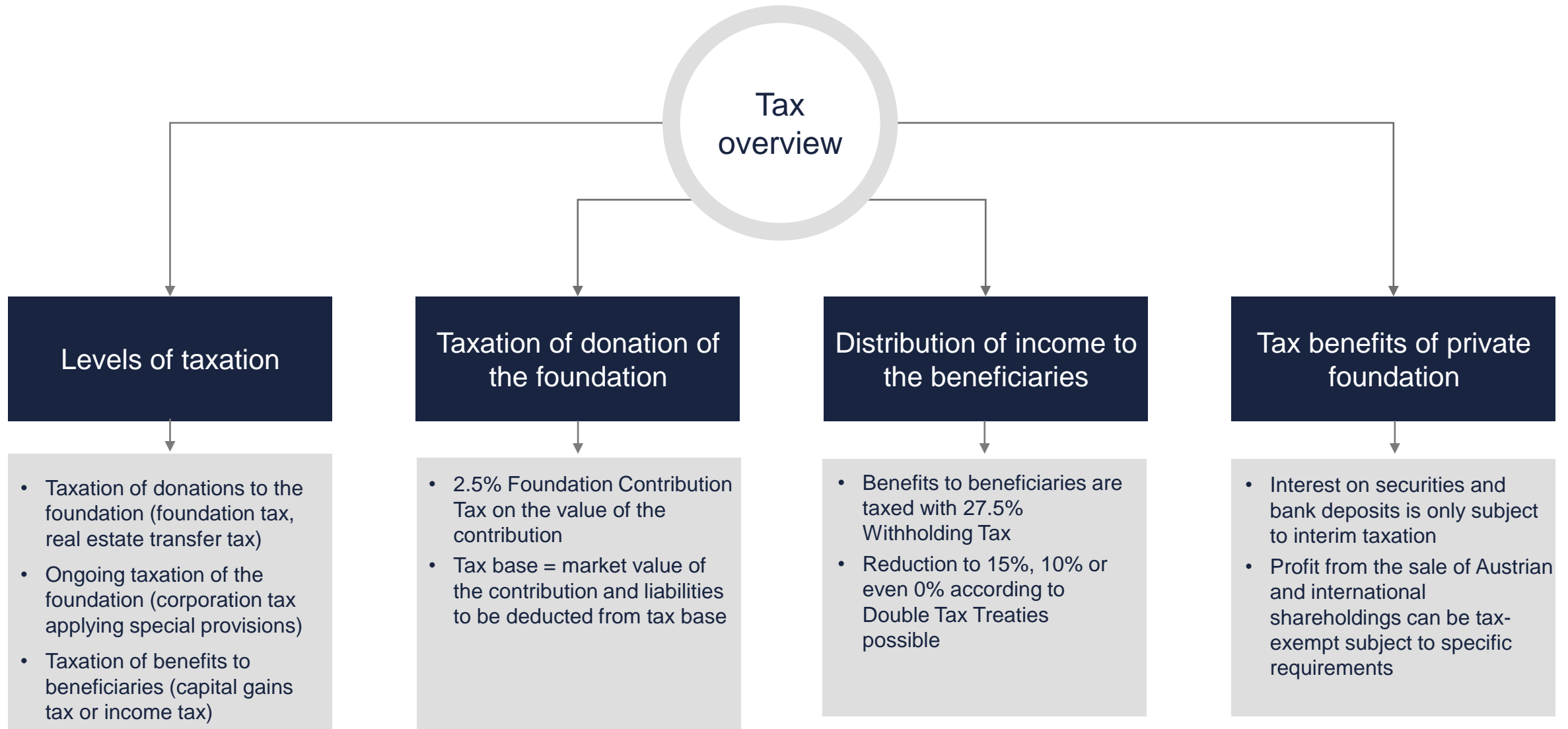
- The testator cannot circumvent the claims to the compulsory portion by establishing a foundation
- Gifts to persons not entitled to a compulsory portion - this includes private foundations - must be added to the calculation of the estate at the request of a person entitled to a compulsory portion, provided the gift was actually made in the last two years before the death of the deceased founder
- Time limit only begins to run from the death of the founder in the case of reservation of revocation of the foundation and/or the right of amendment

Connex to other civil law areas

Foundation and Inheritance Law

- The private foundation can also be established by testament
 - Establishment by testament
 - The private foundation receives the dedicated assets as heir or legatee
 - The assets dedicated to the foundation become part of the estate
- Anything which the beneficiary of the compulsory portion receives as a beneficiary from a private foundation by testament is to be credited against the compulsory portion
 - If the compulsory portion is not covered in full, the private foundation is liable upon death as heir or legatee

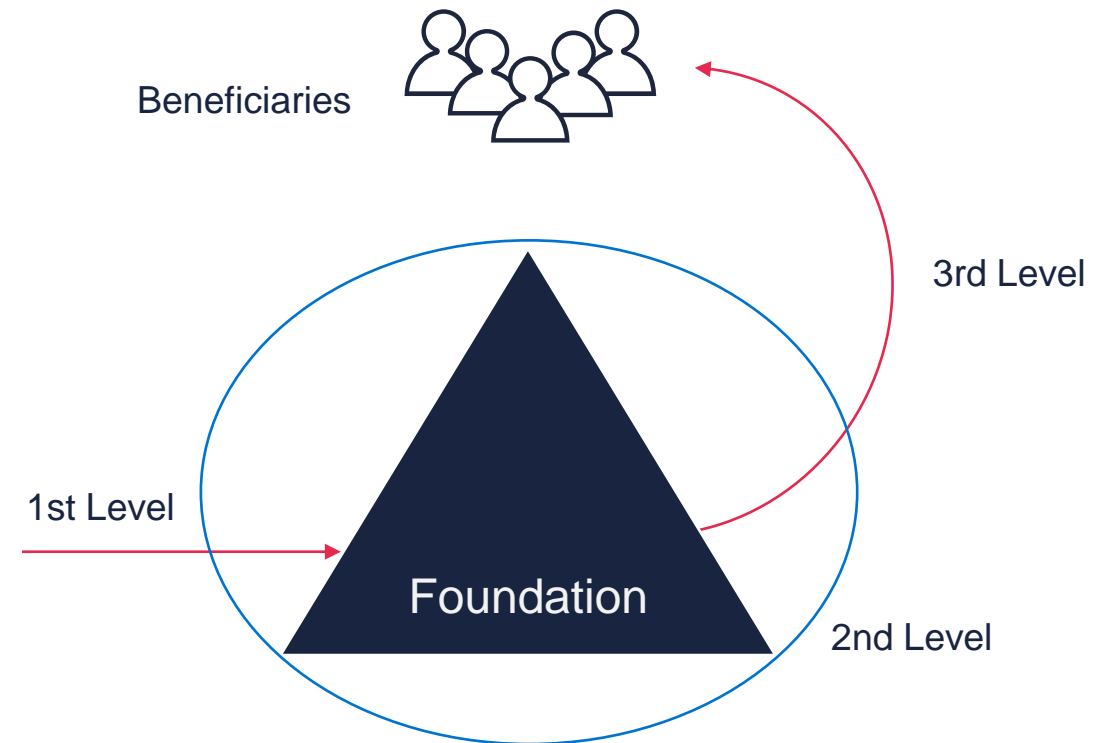
Taxes



Taxation

Taxation on three levels

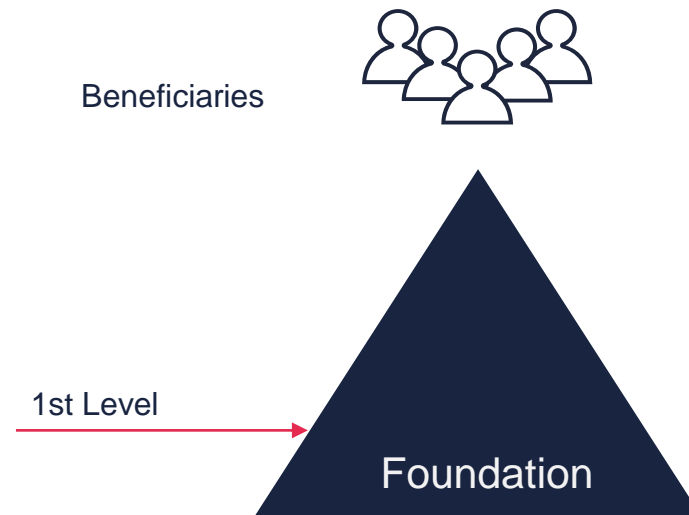
- 1 Taxation of donations to the foundation (foundation tax, real estate transfer tax)
- 2 Ongoing taxation of the foundation (corporation tax applying special provisions)
- 3 Taxation of benefits to beneficiaries (capital gains tax or income tax)



Taxation

1st Level

- 2.5% Foundation Input Tax on the value of the grant
 - Basis of assessment results from the market value of the grant
 - Optimization by sale of assets combined with debt-structuring possible
- Grants from real estate are not subject to the foundation tax but to the real estate transfer tax (GrESt) up to 6%
- Foundation Input Tax increases to 25% under certain conditions
- May apply also for foreign structures/foundations/trusts



Taxation

1st Level

Foundation entrance tax (Stiftungseingangssteuer)

- In general, a contribution of assets to a private foundation is subject to a foundation entrance tax of 2.5%. In the following cases the tax increases to 25%:
 - contribution to a foreign foundation or legal estate, which is not comparable to an Austrian private foundation;
 - the private foundation does not disclose the statutes and bylaws before the foundation tax is due and payable (i.e. 15th of the second month following the month of the contribution);
 - the private foundation is not legally obliged to disclose its beneficiaries;
 - the private foundation is not listed in the commercial register or comparable foreign public register under submission of its statutes; and
 - contribution to a foreign foundation domiciled in a state, in relation to which Austria does not have a comprehensive administrative and enforcement assistance agreement

Taxation

1st Level

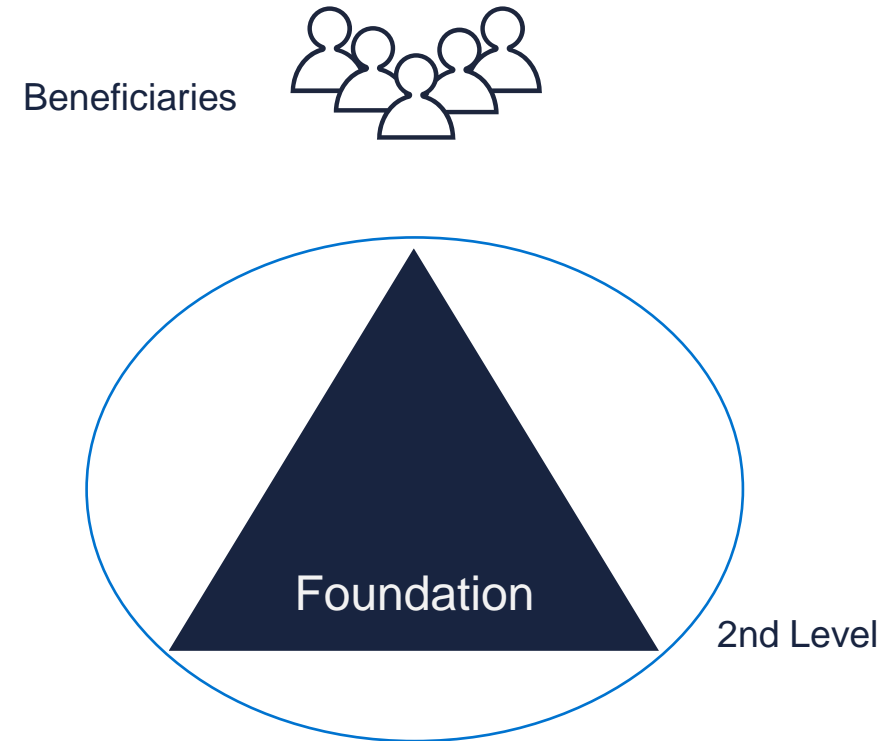
Foundation entrance tax (Stiftungseingangssteuer)

- The following contributions to private foundation are exempt from the foundation entrance tax:
 - contributions inter vivos of movable property and money claims to domestic and – if specific formal requirements are fulfilled – foreign charitable and ecclesiastical foundations;
 - contributions made by corporate bodies under public law;
 - mortis causa contributions of investments, the income of which is subject to final withholding tax, with the exception of stocks;
 - transfer of domestic and foreign real estate, however, real estate transfer tax (3,5% from the fair market value) is increased by 2.5% if domestic real estate is transferred (i.e. 6% total of the fair market value);
- The tax base for private foundation tax purposes is determined, in general, on the basis of the fair market value of the contributed assets

Ongoing taxation

2nd Level

- Taxable income of the private foundation
 - Income from agriculture and forestry
 - Income from capital
 - Income from renting and leasing
 - Income from the sale of land
- Corporation tax of 25% for
 - Income from agriculture and forestry
 - Income from renting and leasing



Ongoing Taxation

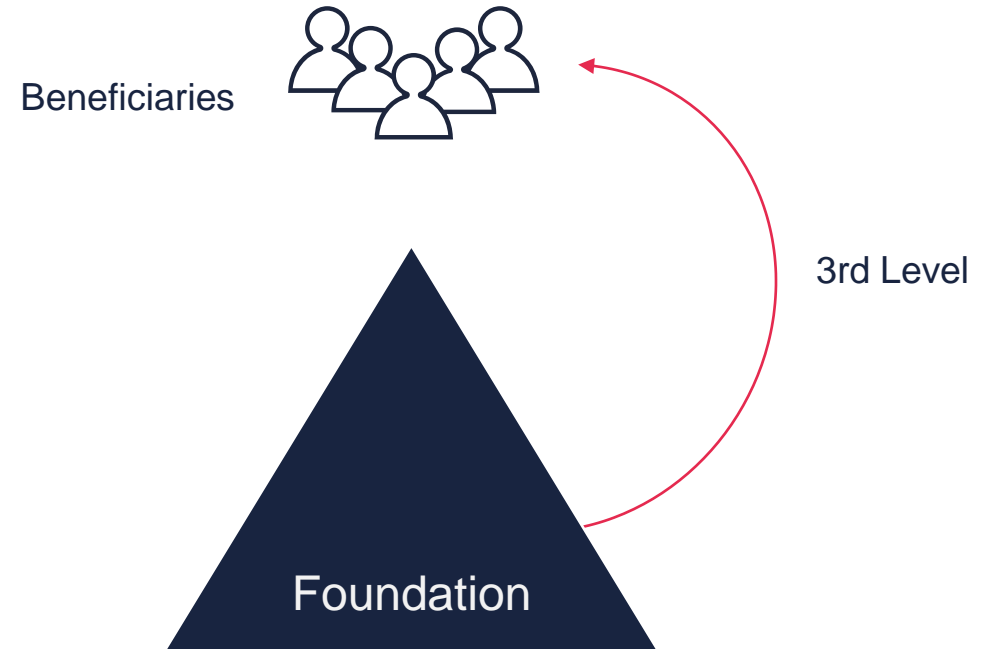
2nd Level

- Interim tax of 25% for
 - Interest on bank balances
 - Interest income from bonds
 - Income from realized capital appreciation
 - Income from derivatives as well
 - Income from private real estate sales
- Interim Tax is credited to beneficiaries in the event of subsequent benefits
- Dividends are exempt from tax due to the general exemption for investment income
- Exemption from capital gains from the sale of shares can be achieved subject to specific requirements

Taxation of benefits to beneficiaries

3rd Level

- Distribution from income of the foundation
 - Benefits to Austrian beneficiaries are taxed at 27.5% withholding tax (KESt)
- Contributions from the substance of the foundation are tax-free = tax-exempt capital payments
 - Exception: Assets were granted before 31.7.2008
- Distributions to persons who are not resident in Austria (no habitual place of residence) are subject to withholding tax, but this can be reduced to up to 0% (or 5% or 10%) in accordance with respective double taxation agreement



Taxation

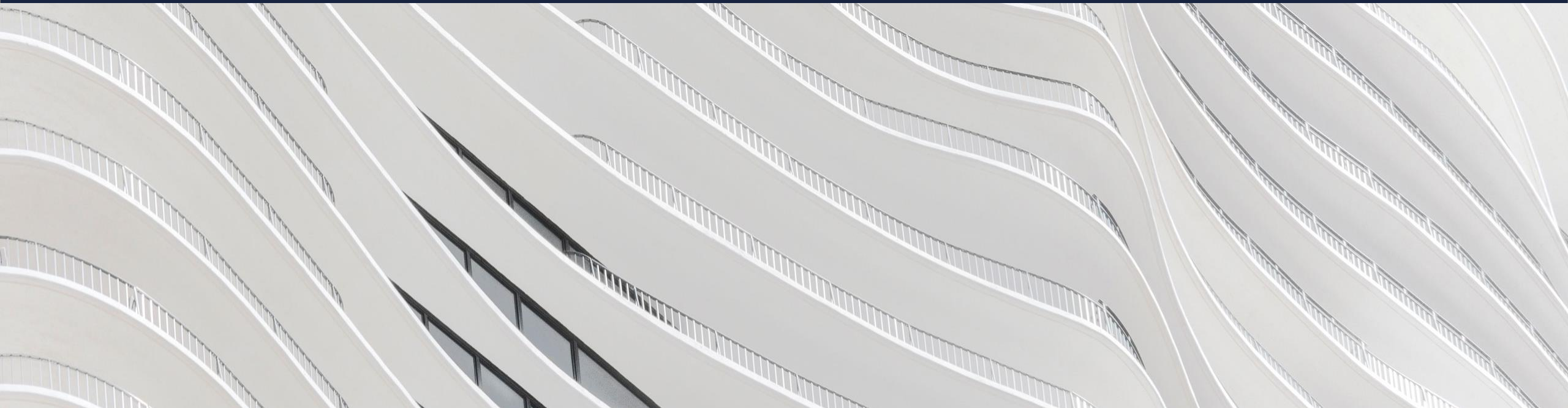
Tax treatment upon liquidation

- Distributions to beneficiaries upon dissolution or liquidation of a private foundation are subject to the final withholding tax of 27.5% (subject to tax treaties)
- A distribution of assets or capital, which was originally donated to the private foundation, to the beneficiaries is exempt from withholding tax if the following requirements are fulfilled:
 - the distribution exceeds the accumulated profits; and
 - the private foundation records the historical value of the contributed assets or capital donated to the private foundation in an evidence account
- A private foundation founded before 1 August 2008, distributions are only tax exempt
 - to the extent that the private foundation is revoked by the original founder
 - the contributed capital and assets are returned to him. Thus, no exemption applies if the capital or assets are distributed after the death of the founder to other persons

Tax Benefits of a Private Foundation

- Interest on securities and bank deposits is only subject to interim taxation (in the case of a corporation, these are subject to corporation tax and capital gains tax)
- Profit from the sale of shares (Austrian and international shareholdings) can be tax-exempt (transfer of hidden reserves) or is only recognized with interim taxation

TRUSTS IN AUSTRIAN CORPORATE AND TAX LAW



Trust

Overview

- A trust is an agreement between the settlor and the trustee whereby the settlor transfers legal ownership of his assets (trust fund) to the trustee for the benefit of third parties (beneficiaries)
- Internationally, the trust is a popular instrument of asset protection, especially in the Anglo-American legal area, but also in Liechtenstein
- The legal form of a trust does not exist in Austria

Trust

Taxation of Trusts in Austria

- First of all, it has to be determined whether a transparent or a non-transparent trust exists
- If the trust has no legal personality of its own and cannot sue or be sued, or if the settlor has extensive rights of influence, the trust is transparent
 - Neither the donation of assets to the trust nor the benefits from the trust are to be qualified as taxable transactions
- Ongoing taxation on the level of the settlor (0-55% income tax; 25% if beneficiary is a corporation)
- For income tax purposes, there may also be a gift from the settlor to the beneficiary
 - If applicable, notification of a gift in Austria

Trust

Taxation of Trusts in Austria

- In the case of a non-transparent trust, the income is attributed to the trust
- A trust is non-transparent if the trust
 - has been irrevocably established, and
 - Has been endowed with special-purpose assets similar to those of a foundation
- According to case law, a trust is non-transparent if the settlor has no power of disposition over the income of the trust
- Own offices and own staff are not necessary for a trust to be non-transparent

Trust

Taxation of Trusts in Austria

- If a non-transparent trust exists, a type comparison must be made in a second step
 - In a comparison of types, it must be determined whether the trust is comparable to an Austrian private foundation
- Essential criteria for the trust to be comparable to a private foundation
 - Ownerless assets
 - Dedication of assets by the settlor to achieve a specific purpose
 - Independent foundation bodies
 - Defined/definable group of beneficiaries
 - Limitation of liability by the assets of the trust

Trust

POEM

- A non-transparent trust is subject to unlimited tax liability in Austria if the place of effective management (POEM) is in Austria
- The POEM is in Austria, if the day-to-day management takes place in Austria
 - Day-to-day management includes the regular determination of the amount and timing of grants, asset dispositions for the purpose of preservation
- If these measures are taken in Austria because the trustee makes the decisions in Austria, the POEM is in Austria

Trust

Taxation of Trusts in Austria

- Tax consequences of a non-transparent trust that is not comparable to an Austrian private foundation
 - Foundation input tax of 25%
 - Ongoing taxation only in the country of residence/in Austria if the POEM is in Austria (25% corporation tax)
 - If the trust has a fixed group of beneficiaries, the first distribution to the beneficiaries is already taxable; in the case of a discretionary beneficiary structure, if the recurrence of the benefit (in terms of amount and time) is not foreseeable for a specific person, the one-off payment is not taxable
 - The progressive tax rate of 0-55% ITA is applicable; 25% if beneficiary is a corporation

Trust

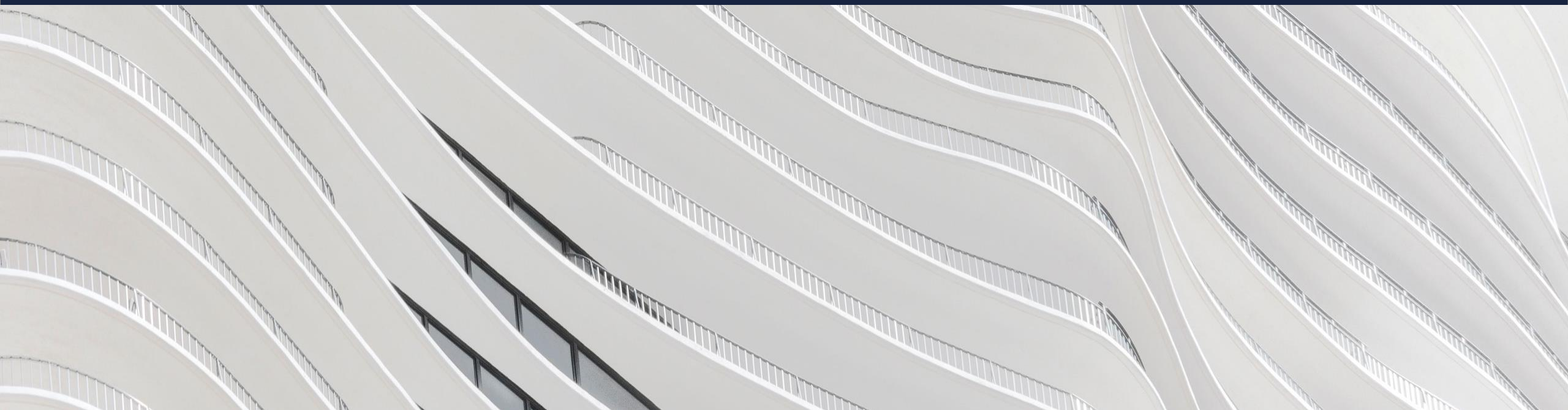
Taxation of Trusts in Austria

- Tax consequences of a non-transparent trust that is comparable to an Austrian private foundation
 - Foundation input tax of 2.5%; 25% if not all documents are disclosed to the competent tax office or there is no comprehensive administrative and enforcement assistance agreement
 - Donations to Liechtenstein foundations are taxed at a special rate of 5-10%
 - Ongoing taxation only in the State of residence/in Austria if the POEM is in Austria (25% corporation tax).
 - Benefits to beneficiaries are taxed at 27.5% withholding tax (KESt)
 - Contributions from the substance of the foundation are tax-free = tax-exempt capital payments
 - Exception: Assets were granted before 31.7.2008

Trust

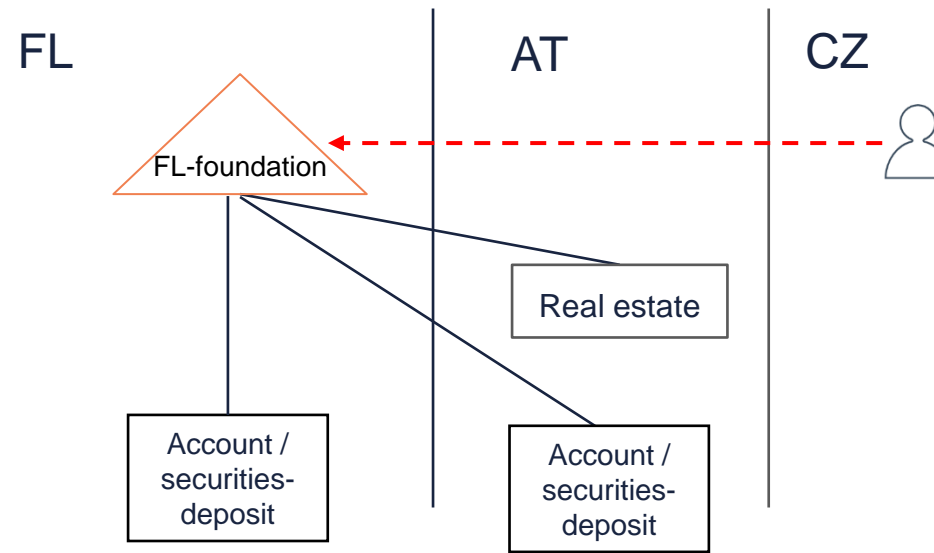
Trust	Foundation Input Tax	Ongoing Taxation	Taxation of benefits to beneficiaries
Transparent	Not taxable	Taxation on the level of the settlor	Not taxable/ under certain conditions notification of a gift in Austria
Non-transparent, but not comparable to a Austrian private foundation	25%	only in the State of residence/in Austria if the POEM is in Austria (25%)	0-55% ITA; 25% if beneficiary is a corporation
Non-transparent and comparable to a Austrian private foundation	2.5% or 25% if not all documents are disclosed to the competent tax office or there is no comprehensive administrative and enforcement assistance agreement	only in the State of residence/in Austria if the POEM is in Austria (25%)	27.5%/Contributions from the substance of the foundation are tax-free

CASE STUDIES



Case Studies

1. Use of FL-foundation by Czech investors

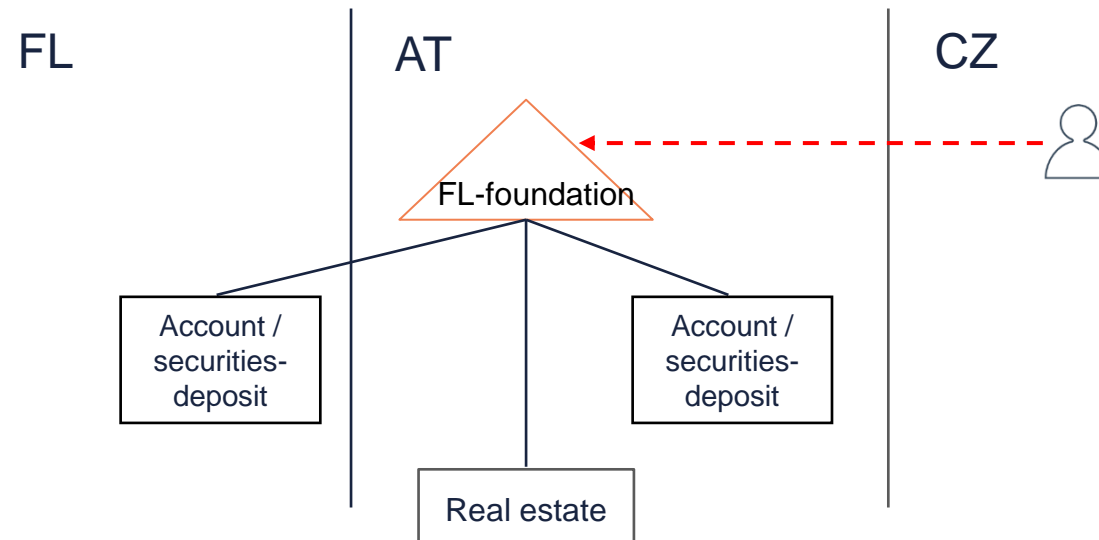


- Questions:

- CZ: income attribution vs. control/access possibilities;
- FL: Discretionary foundation; automatic exchange of information/ money laundering audit
- AT:
 - Real estate: land acquisition admissibility, taxation of real estate acquisition
 - Account/ securities-deposit: automatic exchange of information/ money laundering audit, substance of the FL foundation in connection with capital gains tax on income generation
- Usage of trust instead of foundation?

Case Studies

2. Use of AT-foundation by Czech investors

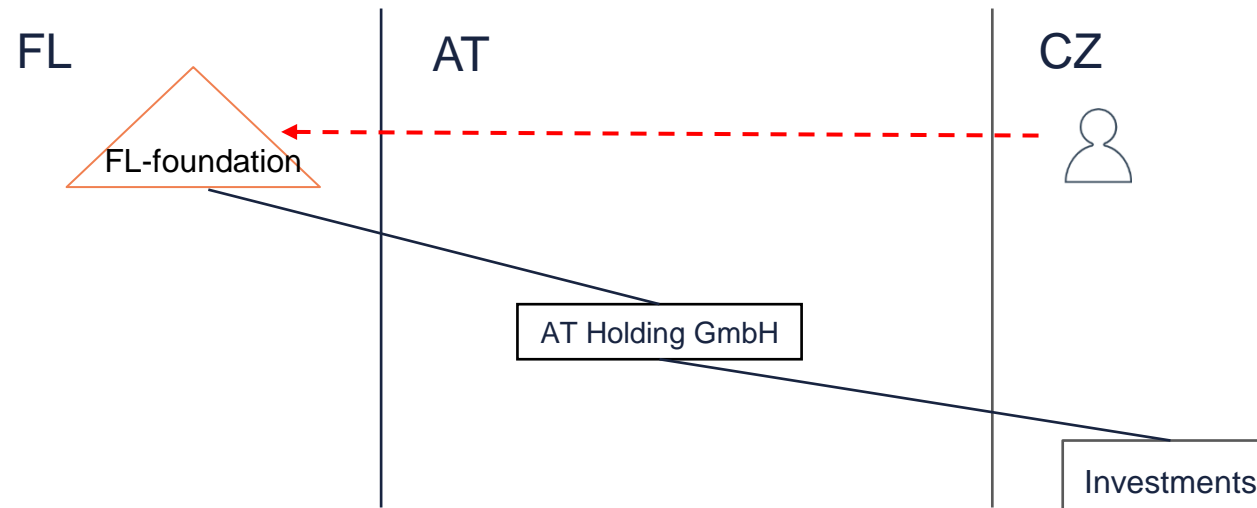


- Question

- CZ: income attribution vs. control/ access possibilities;
- FL: Discretionary foundation in connection with withholding tax, tax agreement AT-FL; automatic exchange of information/ money laundering audit
- AT:
 - Arrangement possibilities of the foundation/ taxation of income and benefits
 - Real estate: property acquisition, taxation of real estate acquisition
 - Account/ securities-account: automatic exchange of information/ money laundering audit, capital gains tax
- Usage of trust instead of foundation?

Case Studies

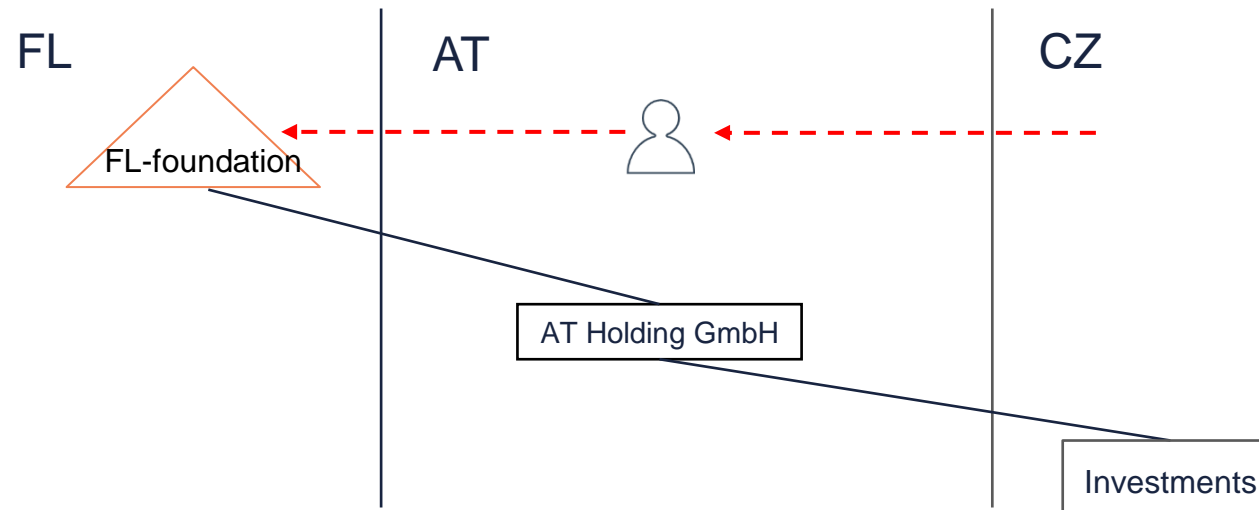
3. FL- private foundation/trust in combination with AT Holding



- Question
 - CZ: income attribution vs. control/ access possibilities
 - FL: discretionary foundation; Income taxation and taxation of contributions
 - AT:
 - Arrangement of NewCo GmbH and taxation of income
 - Bank compliance here is usually very strict
 - Taxation of distributions from NewCo GmbH
 - Usage of trust instead of foundation? Why no usage of Austrian Foundation?

Case Studies

4. Migration of Czech investors to Austria - combination AT/ FL

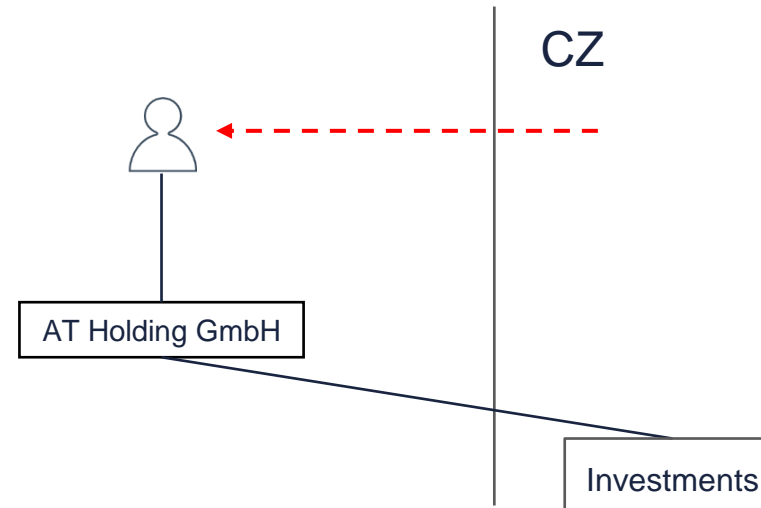


- Question

- CZ: Implementation of the residence change
- FL: discretionary foundation; income taxation and taxation of contributions
- AT:
 - Arrangement of NewCo GmbH and taxation of income
 - Bank compliance
 - Taxation of distributions from NewCo GmbH
- Usage of trust instead of foundation? Why no usage of Austrian Foundation? Is Foundation/Trust in general necessary for migration to Austria?

Case Studies

5. Migration of Czech investors to Austria without foundation/trust structure?



- Question
 - CZ: Implementation of the residence change
 - AT:
 - Arrangement of NewCo GmbH and taxation of income
 - Bank compliance
 - Taxation of distributions from NewCo GmbH to individual avoidable!

Personal information and contact data

Dimitar Hristov, Partner

Dimitar Hristov leads the Tax group in DLA Piper's Vienna office. As an attorney-at-law with completed tax advisor education he has vast experience in international tax law, corporate taxation, tax planning and tax advice in connection with international restructurings and reorganizations, mergers and acquisitions, corporate finance transactions, venture capital and private equity structures.

Dimitar advises wealthy private individuals and their Family Offices especially from Germany, the CEE area, Russia and Ukraine in asset planning, succession planning and tax planning, usage of foundations and trusts for tax purposes and the migration of wealthy private individuals to Austria.

His doctor thesis: "Business taxation of the liquidation of corporations", was published in 2011 by Lexis Nexis.



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Education

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Vienna University of Economics and Business
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Admissions

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Steuerberater, Kammer der Steuerberater und
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Languages spoken

German

English

Bulgarian

Russian

Thank you