

Law and Practice of Charitable Giving in Switzerland

The purpose of the present contribution is to give the reader a clear view of the practice and regulations on charitable giving in Switzerland, taken into account that Swiss Law specifically allows charitable activities to be totally or partially exempted from taxes. In this presentation, we shall take a closer look at (i) the nature of charitable organisations and their possible legal structures, (ii) the process of creation of a charitable foundation and its further monitoring and costs and, most important, (iii) tax issues and conditions to meet in order to be exempted.

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1 NATURE OF CHARITABLE ORGANISATIONS

Charitable Giving is essentially regulated by the two most important legal texts adopted in Switzerland, which are the Swiss Civil Code (“SCC”) and the Swiss Code of Obligations (“SCO”). Since they came into force in 1912, no significant changes were made in the area of foundations, associations or non-profit organizations until 2004, when legal amendments regarding foundations (articles 80 to 89 SCC) were adopted by the Swiss Parliament. A few modifications were also brought more recently. The objective was to confirm and strengthen good standing and flexibility of Swiss foundations and to improve transparency, which is in line with the Swiss liberal system. Aside from the SSC and SCO, amendments were also made to tax regulations in order to permit higher tax deductions (cf. 3.1).

1.1 Association, foundation or corporation ?

Under Swiss law, entities pursuing a purpose of public interest can be incorporated in the form of a foundation (80 to 89bis SCC), an association (60 to 79 SCC) or a corporation (620 § 3 SCO).

An association is, by definition, a group of persons organized as a corporate body. It acquires its legal entity status as soon as the will to be organized as a corporate body becomes apparent from the articles of association (60 SCC). The articles can determine any purpose that is not contrary to the law or the morality (ATF 97 II 333, JdT 1972 I 1648). Associations are usually created to promote interests that the members have in common, be they political, religious, scientific, artistic or charitable.

But when associations are characterized by their non-profit purpose, the founders, however, do not grant them initial funds to be used to achieve the corporate purpose. Indeed, associations' resources are mainly generated by the annual contributions and regular payments of their members.

Under Swiss law, the attribution of a specific asset to a specific purpose meets the definition of a foundation (cf. 2.1). As most of the Charitable Contributions are made by the way of donations, i.e. significant amounts, foundations seem to be a much more preferable instrument to transfer assets for a charitable purpose as their use and destination can be precisely determined by the founder, rather than simply relying on the good will of the directors of an association. Furthermore, it is also possible, even so seldom used, to create a corporation with a non-profit purpose (such as running a ward of palliative care or a local hospital). The corporation will have a minimum capital of CHF 100'000.- and is controlled by its shareholders and board of direction. Such corporations can be useful to split and limit the liabilities ensuing from risky activities. But the present contribution will concentrate on foundations, as they remain the most commonly used vehicle for charitable giving. But it has to be kept in mind that charitable contributions benefit in principle from a tax exemption, regardless of whether it is given to an association, a foundation or a corporation pursuing a public interest (cf. 3.2).

2 FOUNDATIONS

2.1 In general

Switzerland has long been a very attractive forum for foundations with charitable national and international activities. Switzerland has in total more than 20'000

foundations, two thirds of which are pension plans. In the discussions that led to the adoption of the new legal provisions in 2004, the Swiss parliament recognised that foundations can bring a very important contribution to many areas and help the State to accomplish its public duties. Thanks to Switzerland prosperity, many wealthy individuals have decided to contribute to the general interest and well-being of the community by creating foundations, which allow their memory to be preserved for posterity. Within the last ten years, the number of private foundations has significantly increased.

According to Swiss Law, a foundation can be defined as the endowment of assets for a particular purpose (80 SCC). Because of its asset-nature constitution, a foundation has neither members nor owner, only beneficiaries (CC, Commentaire Romand, 80 § 2).

New legal provisions, which came into force on January 1, 2006, aimed to modernise the original dispositions by adapting them (the initial provisions having remained untouched since 1912) and clarifying others in order to make foundations even more attractive. In the amendments are also included some tax changes, i.e. higher tax deductions, which encourage donors to be more generous.

Let us mention that a transparency law was introduced on July 1, 2006 (“LTRANS”) providing that any citizen can have access to official documents coming from the Federal Administration without having to justify his request. As we will see further down, foundations are subject to a supervisory authority, which is part of the administration (cf. 2.3.2). According to the LTRANS, personal data are however not available and the information provided by foundations to the surveillance authority cannot be disclosed to the public (see 3 § 2, LTRANS and 19, Federal Law on Data Protection). Besides, the Commercial Register of the Canton where the foundation has its registered seat holds general information about the foundation and may be easily consulted. Thus, the name of the members of the foundation’s direction, the auditors and the address of the foundation are easily available to the public but in principle, the privacy of any other information is guaranteed.

The high majority of foundations in Switzerland are “classical” foundation, i.e. pursuing a determined public interest. Three other particular types of foundations also exist, to which particular rules apply: family foundations (articles 87 and 335 SCC, subject to the prohibition of the so-called “fidéicommis de famille”, which is the establishment of perpetual trusts for the benefit of a family), ecclesiastical (religious) foundations (article 87 SCC) and domestic authority foundations (article 331 SCC). As none of these other types of foundations directly concern charitable giving, the present contribution is limited to the analysis of the classical type of foundation.

2.2 Creation of a foundation

A foundation can be established in the form of a public deed (*inter vivos*) or by a disposition upon death (*mortis causa*) (81 § 1 SCC). It has then to be entered in the Commercial Register (81 § 2 SCC) and becomes, once registered, a legal entity that acquires its own rights and obligations separately from any action taken by the beneficiaries or the founder (ZGB, Basler Kommentar, 81 § 25 – 28).

2.2.1 Deed of foundation

In order to be valid, the deed of foundation must (i) clearly express the founder's will to create a foundation, (ii) determine the assets that will be attributed to the foundation (iii) define the purpose of the foundation (CC, Commentaire Romand, 81 § 19). These three elements must be included in the deed of foundation. Neither the corporate bodies of the foundation nor any third party can determine these essential conditions instead of the founder.

2.2.1.1 Decision to create a foundation

The act of incorporating the foundation is a unilateral declaration which needs no acceptance from another party. The foundation can be created during the founder's life or after his decease, via a disposition upon death.

Before January 1, 2006, foundations taking effect at the death of the founder could only be established in a will, but not in a testamentary pact (agreement). From January 1, 2006, this limitation has been removed and it is now possible to set forth either in a will or in a testamentary pact that a foundation will become effective upon the death of the testator (81 § 1 SCC). Before the new article 81 paragraph 1 SCC came into effect, the Federal Supreme Court had prevented the creation of a foundation in a testamentary pact, unless the specific clause in the agreement could be interpreted as allowing the testator to freely and unilaterally revoke it. This case law has been widely criticized by legal writers and should not be applied anymore (ZGB, Basler Kommentar, 81 § 11-13a).

A foundation may be challenged by the heirs or the creditors of the founder in the same way as a donation (82 SCC). That means that they can bring an action against the founder if they consider to suffer from his lack of solvency as a consequence of the foundation's creation. This scenario however rarely happens and would essentially concern the hypothesis where a founder's heir is being deprived from its minimal inheritance right by the creation of the foundation. Indeed, the founder's creditors benefit from other types of legal actions and the article 82 SCC is consequently rarely used (CC, Commentaire Romand, 83 § 8 – 11).

2.2.1.2 Determined assets

The assets attributed to the foundation must be determined, or at least determinable (ZGB, Basler Kommentar, 80 § 6). The foundation assets can be of different nature: cash, shares, bonds, real estate (cf. 3.1.5.3), art collections, etc. As soon as the foundation is created, its assets leave the property of the founder and become the foundation's (ATF 108 II 278).

The amount of the funds initially distributed should be in accordance with the purpose of the foundation, otherwise authorities would have to use different remedies (cf. 2.3.2).

2.2.1.3 Purpose of the foundation

The founder must define the mission of the foundation, its beneficiaries (students, children, disabled people, etc.) and its tasks (scholarship awards, building of a hospital in a developing country, etc.). The founder is free to determine any purpose as long as it is not illegal (ATF 119 II 222, JdT 1994 I 598) or immoral (ATF 94 II 5). We will see hereunder that the purpose can be modified under certain conditions, in particular if the intentions of the founder can no longer be achieved (cf. 2.3.3).

2.2.2 Articles of foundation

Aside from these minimal requests, the deed of foundation can contain other precisions. In the case of a foundation created while the founder is alive, articles of foundation are usually part of the deed of foundation.

The deed of foundation shall state the corporate structure of the foundation and the form of its administration (83 SCC). Therefore, the articles of foundation should at least provide for the foundation direction and auditors. It is possible to provide for other corporate bodies, such as committees or special commissions.

Articles of foundation should remain brief and concise and only address the most important concerns regarding the foundation's organisation, (name of the foundation, place of the registered seat, organisation, auditors, possible amendments to the articles of foundation, potential causes of dissolution of the foundation). More detailed rules can also be adopted but it is not recommended to implement them in the deed of foundation. Indeed, articles of foundation can only be modified under strict conditions (cf. 2.3.3). It is thus preferable to allow more flexibility and leave the details to other complementary bylaws.

Should the organisation provided in the deed of foundation be insufficient, the Supervisory Authority shall take the necessary measures, in particular set a time limit for restoring the status required by law or appoint an administrator (83d § 1 SCC).

2.2.3 Board of foundation

The deed of foundation shall state the corporate bodies of the foundation and the form of its administration (83 SCC).

The Civil Code does not prescribe a particular form of direction and addresses “the supreme corporate body”. In the practice, it is rather called the “Foundation Committee” or “Board of Foundation”. It is the executive body of the foundation and its members, designated by the founder at the creation (and afterwards by co-optation), are in charge for a defined period of time and can be re-elected subsequently (CC, Commentaire Romand, 83 § 8).

The Board of Foundation is responsible for the managing of the funds or assets, which have to be used in accordance to the purpose of the foundation. Articles of foundation usually settle the questions related to the meetings and decision taking process (convening of meetings, quorum, majority, etc.).

The Board has the power to represent the foundation but can also designate a third party.

2.3 Monitoring after initial registration and regulations

Once the foundation is established and registered, it acquires the legal personality and becomes a distinct legal entity. We will see that, once created, the Board of foundation must designate an auditor - unless exceptions provided by the law (i). Then a foundation has to be placed under the supervision of a Supervisory Authority (ii). Under specific circumstances, the foundation’s organisation and purpose can be modified (iii). Foundations are created to last indefinitely but can possibly be brought to an end (iv).

2.3.1 Auditor

The Board of foundation shall in principle designate an auditor (83b SCC).

For each accounting year, the Board prepares a budget and a written report which includes a brief summary of its activities. The Board is also responsible for establishing the accounting documents (balance sheet and profit-and-loss account) in accordance to the principles of commercial accounting under the regulations provided for in the Swiss Code of Obligations.

Since January 1, 2006, these documents shall be reviewed by an auditor who shall then present a report to the Board and to the Supervisory Authority (articles 83 a and 83 b SCC).

Upon request to the Supervisory Authority, a foundation can be released from its duty to audit if (i) the balance sheet does not exceed CHF 200'000.- during two consecutive years, (ii) the foundation does not raise funds in the public and (iii) review of the accounting documents is not necessary to give a clear picture of the amount and nature of its assets and benefits (83b § 2 SCC and 1 § 1, Federal Council Decree on Foundations' Auditor).

If the foundation does not fulfil the above mentioned conditions, it will be subject to the duty to review like any other commercial company (83b § 3 SCC). Depending on its size, the foundation will have a duty to either ordinary or limited audit. New thresholds have just been introduced by the Swiss Parliament and are applicable since 1st of January 2012. As a result, foundations exceeding in two consecutive business years (i) balance sheet total of CHF 20 mios or (ii) revenues of CHF 40 mios or (iii) annual average of 250 full-time employment positions (previously 10 mios, 20 mios and 50) must submit their annual financial statements to the auditors for an ordinary examination (727 § 1 SCO). Under these thresholds, any foundation is subject to a limited audit, that means a lighter, less intrusive, thus less expensive form of audit (728 ff and 729 ff SCO).

Even if the foundation is only subject to a limited audit, the Supervisory Authority can require an ordinary audit, if it is necessary to reveal the amount and nature of its assets and benefits (83b § 4 SCC).

Let us mention that the Parliament recently accepted a modification of the SCO concerning the presentation of the accounting documents and compiling of the financial statements. As the deadline to file a referendum will only expire on the 13th of april 2012, the date of the entry into force of these amendments is not yet determined. It will have for principal consequence that the foundations that are released from their duty to audit (cf. above) will be subject to lighter requirements for preparing and presenting their financial statements.

2.3.2 Supervisory Authority

Foundations are subject to the supervision of a Supervisory Authority. Depending on the scope of their activity, foundations shall be supervised by either the Federal authorities or the Cantonal authorities where they have been incorporated (84 § 1 SCC). If the foundation conducts activities in several cantons or outside of Switzerland, then it will be supervised by the Federal Supervisory Authority. If on the contrary its activities are limited to one or two cantons, its supervision will be attributed to the Cantonal Supervisory Office where the foundation has its registered seat (CC, Commentaire Romand, 84 § 8 – 9). Even if exempted from its obligation to audit, a foundation remains subject to the control of the Supervisory Authority (1 § 4, Federal Council Decree on Foundations' Auditor).

On a Federal level, the supervision of foundation is attributed to the Secretary General of the Department of Home Affairs (3 § 2, Federal Council Decree on the organisation of the Department of Home Affairs). In the Canton of Geneva, the Supervisory Authority is assigned to a public institution created by a decree of the Cantonal Parliament (1 and 2, Cantonal Law on Supervision of Private Law Foundations and Pensions Institutions).

The Supervisory Authority has to control that the funds are used in accordance with the mission of the foundation (84 § 2 SCC). Moreover, it is entitled to take any necessary measure (such as appointing an administrator) if the organisation provided is not sufficient, if the foundation lacks one of the required bodies, or if one of these bodies is not lawfully composed (83d SCC). The Supervisory Authority can also have an important role in the case where the foundation is considered as over-indebted or insolvent. It can instruct the Board to take corrective measures and, should the Board remain inactive, it has the power to introduce bankruptcy procedures (84a SCC).

Any dispute arising from the Supervisory Authority's decisions shall be resolved by a Court.

Recently, the Federal Council proposed several amendments to the dispositions on the supervision of foundations, the main objective being to give precise criteria which the Supervisory Authority should rely on to determine if the assets of the foundation are properly allocated. The idea to create a High Supervisory Authority that would coordinate and have authority on both Cantonal and Federal supervisory authorities has also been examined by the Federal Council. Two reports, one of the Justice and Police Federal Department and the other of the Home Affairs Federal Department are awaited by the end of 2012 (cf. Federal Council Press Release of 23rd of February 2011). So far, the reaction among the foundations is rather tempered, as they quite unanimously consider that the supervision as it is regulated today is quite efficient and that any amendments would lead nowhere but to additional costs and expenses.

2.3.3 Modification of the organization or purpose

In principle, the structure of foundations has to remain unchanged and modifications are possible only if unavoidable for pursuing its purpose (ZGB, Basler Kommentar, 85/86 § 10). It means that it cannot be departed from the intention of the founder, event if another way of organising the foundation might seem preferable or more efficient (ZBG, Berner Kommentar, 85/86 § 50). On the other hand, as the existence of foundation is not limited in time, a certain flexibility must be preserved in order to allow them to adapt their activity to an increasingly developing (legal, commercial, technological, etc.) background.

As a result of this principle, the Civil Code states that the organisation of the foundation can be modified if it is absolutely necessary for the preservation of the assets or the protection of the purpose of the foundation (85 SCC). This should apply if the organisation becomes, in time, too complicated, unproportionate, too expensive, or impossible (CC, Commentaire Romand, 85/86 § 4).

Likewise, the purpose of the foundation can be modified if the character or effect of the original purpose has changed to a point where the foundation manifestly can no longer meet the intentions of the founder (86 SCC). That will be the case if the purpose has become absurd or completely outdated (ZGB, Zürcher Kommentar, 85/86 § 5), for example if the class of intended beneficiaries has disappeared.

In both cases, the modification is decided upon request from the Board of foundation or from the Supervisory Authority. If the Foundation is subject to a Cantonal surveillance in Geneva, the request is addressed to the State Executive Council (96, Cantonal Law of application of the Civil Code). If the foundation is of a Federal scope, the request is addressed to the Secretary General of the Department of Home Affairs (3 § 2, Federal Council Decree on the organisation of the Department of Home Affairs).

The modification of the purpose of the foundation may, under certain circumstances, also be requested by the founder himself (86a SCC). The right to modify the purpose must have been reserved in the deed of foundation and a change can only be made every ten years. A request to change can also be included in a last will. If the founder is a corporation, that right will expire twenty years after the establishment of the foundation (86 a SCC).

2.3.4 Costs of the creation of a foundation

When establishing a foundation, several costs have to be taken into account.

As the foundation has to be created by public deed or testamentary disposition, notary fees will apply, proportionate to the foundation's initial capital. In the Canton of Geneva, rates vary from 7 ‰ (CHF 50'000.- capital) to 0,5 ‰ (CHF 10 mios and more). In addition, a fee from CHF 500.- to 2'000 related to the deed of foundation is perceived (25, Cantonal Regulation on notary fees). The notary's timesheet is not here taken into account.

Placing the foundation under the surveillance of a Supervisory Authority also involves a few costs, depending whether it is the Federal or Cantonal authority. The Federal Supervisory Authority will demand a fee varying from CHF 100.- to 5'000.- according to the tasks that is requested. As an example, the approval of the annual accountings and report, which has to be obtained on a yearly basis, cost from CHF 200.- to 1'000.- (3, Federal Council Decree on the supervision of the foundations fees). Should the foundation be subject to a Cantonal supervision in

Geneva, fees are annual and depend on the foundations balance sheet total, from CHF 250.- if less than CHF 100'000.-, up to CHF 2'500.- if CHF 10 mios and more (17, Cantonal Law on Supervision of Private Law Foundations and Pensions Institutions ; “Barème 2011 de l'émolument annuel de surveillance”).

To illustrate these rules with an example, the establishment of a foundation with an initial capital of CHF 1 mio would cost approximately CHF 2'000.- of notary fees at its creation and 1'100.- CHF of supervisory fees every year if it is subject to the Geneva Supervisory Authority and at least CHF 300.- per year if subject to the Federal Supervisory Authority.

2.4 End of a foundation

Unless provided otherwise by the founder, the devotion of a foundation is not limited in time.

However, the competent Federal or Cantonal authority can dissolve a foundation upon request or on its own initiative if its purpose has become unachievable and the foundations cannot be maintained by a modification to the deed of foundation or if the purpose has become illegal or immoral (88 SCC).

The first assumption relies on the principle that a foundation must remain the way it was originally created according to the founder's will. Therefore, it is only if a modification of its organisation or purpose cannot be achieved that a foundation can be dissolved (ATF 119 Ib 46). The second assumption addresses the hypothesis of a purpose that has become illegal, for example after a change in the legislation or jurisprudence (CC, Commentaire Romand, 88 § 23).

Once decided, the dissolution of the foundation will have for consequence that its remaining assets will be, to the greatest extent possible, be used in accordance with the foundation's purpose (57 § 2 SCC). If the purpose has become illegal or immoral, the assets shall devolve to the public corporation at the place of its incorporation (57 § 3 SCC).

3 TAX ISSUES

3.1 Taxation of charitable organisations

3.1.1 Introduction

As mentioned previously, recipients of charitable gifts under Swiss law are organised as legal entities (as opposed to individuals), mainly in the form of foundations (articles 80 and following SCC) or, more rarely, associations (articles 60 and following SCC) or corporations (620 § 3 SCO).

Legal entities, including foundations, associations or coproations are subject to corporate taxation (as opposed to individual's taxation) with respect to their income and their capital/wealth (49 § 1 let. b, Federal Direct Tax Law ("DTL"); 20 § 1, Federal Tax Harmonization Law ("THL")). Foundations are further subject to all other taxes due in Switzerland such as, in particular, inheritance and gift taxes, stamp taxes, withholding tax, value added tax and special taxes on real estate transactions.

Corporate Income Taxes are levied both at Federal and Cantonal levels, while Corporate Capital/Wealth Taxes, as well as Inheritance and Gift Taxes, are levied only at a Cantonal level.

Recipients of charitable gifts which pursue a goal of public service or of public utility can be exempted from these taxes, if the requirements as explained below are fulfilled.

3.1.2 Corporate Income and Capital Taxes

The normal Corporate Income and Capital Taxes applying to a foundation, an association or a corporation in the absence of tax exemption are as follows:

- at a Federal level, the net income in excess of CHF 5'000.- is taxed at a flat rate of 4.25% after tax (direct taxes being deductible in Switzerland, the effective tax rate is 4%), being noted that members' contributions to an association, as well as contributions to the wealth of foundations, are not part of the taxable income of the foundation (66 § 1, DTL); there is no Federal tax on the capital/wealth;
- at a Cantonal level (including municipalities), Income and Capital/Wealth Taxes are levied at rates and following methods which vary widely from a canton to another. In most cantons, the profits made by association and foundations are taxed according to the same principles that are applicable to commercial corporations, but applying a special scale. More rarely, some cantons apply the rates applicable to individuals.

The situation in the various cantons can be summarized as follows:

- Cantons where taxation is calculated according to the rules and scale applicable to corporations : LU, UR, SZ, OW, TR, AI, GR, NE and JU;
- Cantons where taxation is calculated according to the rules applicable to corporations, but with a specific scale:
 - Progressive scale: GE;
 - Proportional rate: ZH, BE, NW, GL, ZG, SO, BS, SH, AR, AG, TG, TI, VD and VS;
- Canton where taxation is calculated according to the rules applicable to corporations, but with the scale applicable to individuals: SG (minimum rate: 3%);
- In some cantons (OW, NW, BS, AR, AI, SG, GR and AG) there are no additional communal tax;
- Regarding the capital / wealth tax, all cantons provide that foundations and associations are taxed on the net wealth determined according to the provisions applicable to individuals. There is therefore no thin capitalisation issues for them;
- The scale applied to the taxable capital is the scale applicable to corporation in most cantons except for VD and VS, which apply the scale for individuals;
- GE, GR, FR and SH apply a specific scale or a fixed rate.

Regarding taxes in the city of Geneva, the current Income Tax rate is maximum 23.5% after tax, and the current Capital/Wealth Tax rate is maximum 0.95%, for associations and foundations; an increase of wealth resulting from inheritance, bequest or donation does not constitute taxable income (24 § 2 let. c THL) (but may be subject to Cantonal Inheritance or Gift Taxes, cf. 3.1.3).

Legal entities pursuing goals of public service or of public utility are exempted from Federal and Cantonal Corporate Income Taxes, and from Cantonal Corporate Capital/Wealth Taxes, on the income, respectively on the capital/wealth, which are exclusively and irrevocably allocated to these goals (56 let. g DTL and 23 § 1 let. f THL; for the Canton of Geneva: 9 § 1 let. f of the Geneva Law on Taxation of Legal Entities (“LTLE”)). Under these statutory provisions, economical goals can in principle not be considered as being of public interest.

Pursuant to the Circular Letter Nr. 12 of the Federal Tax Administration, a legal entity shall benefit from the tax exemption only upon request, and provided it can demonstrate that the requirements for exemption are fulfilled. Pursuant to the said Circular Letter, these requirements are as follows:

- The applicant must be a legal entity, usually a foundation or an association; if it is a corporation, the articles of association must exclude the distribution of dividends or profit sharing of directors.
- The funds must be allocated exclusively to the pursuit of the public service or public utility goals; if other goals are pursued in parallel, partial exemption may be granted provided that (i) the exempted part of the activity is important, and (ii) the funds for which the exemption is required are clearly separated from the rest of the income and capital/wealth.
- The funds must be irrevocably allocated to the pursuit of the public service or public utility goals, which means (i) that such allocation must be permanent, and (ii) that a return of the funds to the donor(s) or founder(s) must be excluded.
- The applicant must develop a real activity in pursuit of the public service or public utility goals.
- In the case of goals of public utility, the activity of the applicant must:
 - objectively, be of public interest; this is usually the case for charitable, humanitarian, sanitary, ecological, educative, scientific or cultural activities; public interest implies that the scope of potential beneficiaries is open; it is in particular not the case if the scope of potential beneficiaries is too strictly limited e.g. to members of a family or an association, or to persons with the same profession; for activities outside Switzerland, proof must further be provided that the means of the applicant are appropriate to realize the goals;
 - subjectively, be selfless, in the sense of dedicated to the community; such selflessness is in particular not given for organizations of mutual assistance or leisure organisations.
- In the case of goals of public service, the activity of the applicant must be closely linked with the tasks which are typically performed by the public community, but does not have to be selfless (the notion of “public service” has to be interpreted restrictively and the opinion of the concerned community must be requested).

However, the tax exemption does not apply to income deriving from the sale of real estate (23 § 4 THL), unless the Cantonal legislation provides for such exemption (which is not the case of the canton of Geneva, cf. 3.1.5.3).

The request for exemption, including the necessary supporting documentation, must be filed with the Cantonal authorities, which are competent both for the Cantonal and Federal Taxes.

Even if they are exempted, charitable organizations still have to comply with all procedural obligations under the tax legislation, which include in particular the duty to file annual tax returns.

The exemption from Federal Taxes is valid for an unlimited period of time.

For the exemption from Cantonal Taxes, the validity period may vary from one canton to another and are usually of five years.

3.1.3 Inheritance and Gift Taxes

There is no Inheritance or Gift Taxes at a Federal Level.

Practically all Swiss cantons levy taxes on the transfer of assets via inheritance and donation, except for Schwyz, which has no Inheritance and Gift Taxes at all, and Luzern, which only levies Inheritance but no Gift Tax (references hereinafter to “all cantons” do not include Schwyz, nor Lucerne as far as Gift taxes are concerned).

All cantons treat the allocation of assets for the creation of a foundation (mortis causa, or inter vivos) and the devolutions, donations, to an existing foundation or to an association as taxable devolutions or gifts under their Inheritance and Gift Tax laws, provided that the donor is domiciled in the concerned canton (movable property), that the real estate is located in the canton (immovable property).

However, the taxation systems, rules and rates vary from one canton to another. In general, the applicable rates and, in most cantons, the taxation as such, will depend on the degree of relationship between the donor/testator and the recipient. Since a foundation or an association represents an unrelated party for the donor/testator, the applicable rates are the highest and the reductions or even complete exemption for close relatives are not applicable.

Charitable organizations may however be exempted from the Cantonal Inheritance and Gift Taxes. All cantons grant certain exemptions to organizations pursuing public utility goals, but the requirements for and conditions of such exemptions differ from one canton to another. The principle of the exemption or its extent may

in particular vary depending on the type of public utility goal, the place where the organization has its seat, or the identity and domicile of the beneficiaries.

As it is not possible to detail the situation prevailing in each of the 26 Swiss cantons and half-cantons, the rules applicable in the canton of Geneva will be described hereinafter as an example.

In the canton of Geneva, apart from the few institutions explicitly mentioned as exonerated in the relevant laws (such as e.g. the canton of Geneva itself, its municipalities and related institutions), entities or institutions having legal personality can be exempted totally or partially from Inheritance and Gift Taxes if they carry out an activity which is of public, cultural, charitable or philanthropic interest, and provided that Inheritance Taxes are not born by the heirs according to the will of the testator.

The request for exemption, including the necessary supporting documentation, must be filed with the competent Cantonal authority (in the canton of Geneva: Head of the Department of Finance, by delegation from the State Council).

The criteria applied to rule on the exemption from Inheritance and Gift Taxes are the same as those for the Corporate Income and Capital/Wealth Taxes (cf. 3.1.2).

If the conditions for exemption are met, a charitable organization in the form of a foundation will, according to the practice of the Geneva Tax Authorities, be completely exonerated for the initial contribution to such foundation's wealth.

For subsequent donations or devolutions to existing foundations, as well as for donations or devolutions to organizations in the form of an association, a complete exoneration from Inheritance and Gift Taxes shall be granted to organizations which:

- have their registered seat in Switzerland;
- are exempted from Income and Capital/Wealth Taxes thanks to their purpose of public service or public utility (or religious purpose);

If donations or devolutions are made in favor of a charitable organization having its registered seat abroad, pursuing goals considered as of public service and public interest, the State Council of the Canton of Geneva may exempt these transfers of assets, partially or totally. However the decision taken by the competent Cantonal authority cannot be challenged, since it is considered as a political decision.

The exoneration is granted for a period of maximum ten years, after which it can be renewed, upon request, if the conditions are still met upon the expiration of the initial term.

3.1.4 Value Added Tax

A new law on the Value Added Tax (VAT) has come into effect as of January 1, 2010 and has modified substantially this field of taxation. The VAT is a consumption tax levied at every stage of production or distribution on the value added of taxable supplies. The input tax paid by a VAT registered tax-payer at one stage is deductible from the output tax to be paid at the next stage.

Taxable supplies include the supply of goods or services sold or rendered within the Swiss territory, the acquisition of services from enterprises located outside Switzerland and the import of goods in Switzerland.

If the taxable turnover of a charitable organization (which does not include subsidies or donations since these elements are not considered as taxable turnover) does not exceed CHF 150'000.-- per year, such organization shall be exempt from VAT, unless it decides to renounce to the exemption (10 § 2 let. c and 11 § 1, Federal Law on Value Added Tax ("VATL")).

If the charitable organization chooses to be subject to VAT, it would allow a deduction of the input VAT paid on goods and services purchased by the organization.

In addition to these general principles of exemption from VAT, certain activities are excluded from the scope of VAT due to their public utility character (meaning that there is no VAT levied on the supply of goods or services in connection with such activities, but also that any input VAT that the supplier may have paid can not be deducted either). These activities (e.g. the transport of sick, injured or disabled persons in special vehicles; operations carried out by social assistance institutions) are detailed in 21, VATL. For these activities as well, the charitable organization may opt for taxation (22, VATL), which would allow it to deduct the input VAT paid on goods and services purchased by the organization.

A frequently debated question in connection with charitable organization is the differentiation between donations, which do not attract VAT as there is no taxable consideration in return for the donation, and other types of contributions, in particular sponsoring, where the person making a contribution to the charitable organization receives a consideration, usually in the form of publicity for the contributor.

The contribution will be considered as sponsoring if there is a publicity or image-promoting service that is internally linked with the contribution in the sense that the contribution would not have been made without this service.

However, charitable organizations do not provide a (sponsoring) consideration subject to VAT when they mention the name of the donor and/or the name of his/her/its company, or reproduce its logo, in a neutral form in publications.

This provision is based on the principle that the public recognition of the donor's contribution does not as such result in the provision of a taxable advertising or image-promoting service, provided that such recognition occurs in a neutral manner. The neutrality of the publication might in particular be questionable if additional information on the donor is also published which may have a promotional or image-enhancing effect.

In contradiction to the Tolsma jurisprudence of the Court of Justice of the European Communities, Switzerland does not require the existence of a legal relationship between the contributor and the recipient for submitting to VAT a certain performance.

Donations made to a charitable organization allow the deduction of the input VAT, without reduction of said input VAT, whereas subsidies distributed to such an organization shall imply a proportionate reduction of the input VAT.

Although the political decision to bring modifications to the VAT is quite clear, the two Chambers of the Swiss Parliament have not yet managed to find an agreement. Discussions are planned for 2012 but the results are so far unpredictable, as the modification could follow many different directions (unification of VAT rates, repeal of tax exemptions, etc).

3.1.5 Other Taxes

3.1.5.1 Stamp Tax

With regards to Swiss Stamp Taxes, a distinction is to be made between the Issuance Stamp Tax and the Securities Transfer Stamp Tax, which are both based on the Swiss Stamp Tax Law ("STL").

Issuance Stamp Tax : The Issuance Stamp Tax is levied on the issuance of shares or other securities by Swiss corporate entities at the rate of 1% calculated on the value of the amount paid in exchange for the issued shares or other securities (in excess of an initial exempted amount of CHF 1'000'000.-). However, such Issuance Stamp Tax does not apply if the shares or other securities are issued by recognised charitable corporations, under the condition that the articles of the corporation provide for restrictions on corporate distributions and for the attribution of the remaining assets to similar purposes in case of liquidation (6 § 1 let. a, STL). Furthermore, the Issuance Stamp Tax does not apply to contributions (whether initial or subsequent) granted to foundations or associations.

Securities Transfer Stamp Tax : The Securities Transfer Stamp Tax applies to the transfer against valuable consideration of the ownership of taxable securities involving one or more Swiss securities dealer(s). The tax rate is 0.15% or 0.3% of the transaction price, depending whether the transferred taxable securities are issued by a Swiss or a foreign company. Taxable securities are (13 § 2 let. a, STL): share/participation certificates or profit-sharing certificates in Swiss or foreign corporations, limited liability companies or cooperatives. Swiss securities dealers include:

- Banks and similar financial institutions (as defined by Swiss banking law), investment fund managers, individuals, companies, partnerships and branches of foreign entities whose activity consists in trading or acting as intermediaries in transactions involving taxable securities;
- Specific provident entities (which may be incorporated under the legal form of a foundation);
- Other specified corporate entities owning taxable securities with a book value in excess of CHF 10'000'000.-. Such “asset test” does not apply to foundations or associations, which may therefore only qualify as Swiss securities dealer in the unlikely event that their activity consists in trading or acting as intermediaries in transactions involving taxable securities.

Regarding recognized charitable corporations, the law does not provide for a general exemption. Therefore, in the very rare case where a charitable corporation would own taxable securities with a book value in excess of CHF 10'000'000.-, it would be considered as a Swiss security dealer, and any transaction on shares or other taxable securities operated by such entity would be subject to the Securities Transfer Stamp Tax.

3.1.5.2 Withholding Tax

Under the Swiss Federal tax legislation, a 35% withholding tax is levied on certain types of investments income (interest bonds and other similar debt instruments, interest on deposits with Swiss banks, dividends, profit distributions from investment funds), lottery gains and insurance benefits from Swiss source.

However, distributions by recognised charitable organizations in conformity with their public interest goal are not in the scope of the Swiss withholding tax.

3.1.5.3 Taxes on Real Estate Transactions

Real estate disposals are subject to two types of tax:

- (i) **Cantonal Real Estate Transfer Tax** : This tax is levied on the disposal of real estate and real estate rights. In principle, it is due by the purchaser and it is

based on the value of the transferred real estate. The tax rate depends on the legislation of the canton where the transferred real estate is situated.

Nevertheless, most of the Cantonal legislations provide that recognised charitable organizations are exempted from the Real Estate Transfer Tax. Such exemption may be subject to specific Cantonal conditions that should be checked on a case-by-case basis.

In the canton of Geneva, since January 1, 2009, an exemption is granted to all Swiss or foreign recognized charitable organizations acquiring real estate located in the canton of Geneva provided that such real estate is attributed to an activity of public interest.

- (ii) Cantonal Real Estate Capital Gain Tax : This tax is based on the capital gain realised on the onerous disposal of real estate.

At a Federal level, real estate capital gains are, in principle, subject to the corporate Income Taxes as “other operational net profits”. Therefore, real estate capital gains realized by charitable organizations that are exempted from the Federal Corporate Income Taxes (see above) shall be exempted at a Federal level, if the profit generated is dedicated to purposes of public service or public utility.

At a Cantonal level, charitable organizations might be exempted depending on the specific legislation of the canton where the real estate is located.

In the canton of Geneva, there is no such exemption. Consequently, capital gains realized by charitable organizations upon the onerous disposal of real estate located in the canton of Geneva shall be taxed at the applicable tax / scale rate for association and foundations. The gain corresponds to the difference between the sale’s price and the book value. It has to be noted that revaluation of real estate is also taxable.

3.2 Donors of Charitable Gifts

Donors may benefit from tax relief related to donations contributed to recognized charitable organizations.

Further to the revision of the legislation on foundations, which entered into force on 1 January 2006, Swiss tax laws now grant tax relief not only on cash donations, but also on all types of donations, including movable and immovable property, intellectual property and claims.

3.2.1 Swiss domiciled corporate donors

At the Federal level, donations (cash or any other kind of gift, as mentioned above) granted by a corporate donor to a recognised charitable organization domiciled in Switzerland are fully tax deductible up to a maximum amount/value of 20% of the annual net profits of the corporate donor (59 § 1 let. c, DTL). The portion of the donation value in excess of this threshold (which has been increased from 10% to 20% further to the revision of the legislation on foundations, in force since 1 January 2006) is not tax deductible.

At the Cantonal level, the same principle applies. The Cantonal threshold of tax deductibility may vary depending on the canton where the corporate donor is domiciled. In the canton of Geneva, donations granted by a corporate donor domiciled in Geneva to recognised charitable organizations domiciled in Switzerland are fully tax deductible up to a maximum amount/value of 20% of the annual net profits of the corporate donor (13 let. c, LTLE) (according to an amendment of the Cantonal Geneva tax legislation which is in force since January 1, 2009).

3.2.2 Swiss domiciled individual donors

At the Federal level, donations granted by an individual to a recognised charitable organization domiciled in Switzerland are fully tax deductible up to a maximum amount/value of 20% of the annual net income of the individual donor (33a DTL). The portion of the donation value in excess of this threshold (which has been increased from 10% to 20% further to the revision of the legislation on foundations, in force since as 1 January 2006) is not tax deductible.

At the Cantonal level, the same principle applies. The Cantonal threshold of tax deductibility may vary depending on the canton where the individual donor is domiciled. In the canton of Geneva, donations granted by an individual domiciled in Geneva to recognised charitable foundations domiciled in Switzerland are fully tax deductible up to a maximum amount/value of 20% of the annual net revenue of the individual donor (37 of the Geneva Law on Taxation of Individuals).

3.3 Transborder charitable giving

3.3.1 Indigenous charities operating overseas

Many Swiss charities being foundations or associations conduct operations outside of Switzerland. This does in no way limit its rights to be tax exempt. In its Circular

N° 12 the Federal Tax Administration has confirmed that a Swiss charity can have worldwide activities, but that they will request proof that the purpose is realized by the appropriated means. Therefore the Federal Supervision Authority requests the activities report and the annual accounts to verify the reality and conformity of the activities.

Therefore it is clear that Swiss charities can have representations and employees stationed abroad and expenses would be deductible like any other business. There are no restrictions, but the Federal Supervision Authority will want to check that the expenses are normal and legitimate as mentioned above.

3.3.2 Indigenous charities applying funds to foreign charities and not-for-profit organizations

Swiss charities have the right within the scope of their purposes to donate funds or assets to foreign charities and not-for-profit organizations, which have the same purpose or similar purposes. In fact most Swiss charities distribute their wealth by giving to other charities, which know how to operate in their home countries. So long as the Swiss entity qualifies as a charity, it can distribute its assets worldwide tax-exempt. We could add that private foundations, which would not qualify as charities, can distribute their income or assets after taxation without any further Gift or Withholding Taxes.

3.3.3 Individual/corporate donors giving to foreign charities

3.3.3.1 Inheritance and Gift Taxes

Donations or devolutions granted by Swiss domiciled individuals or legal entities persons to foreign charitable organizations can be subject to Inheritance and Gift Taxes in the canton of domicile of the donor (movable property) in the case of immovable property in the canton where the real estate is located.

In such a case, tax relief may be available depending on the legislation and practice of the concerned canton.

The rules applicable in the canton of Geneva have already been detailed above (cf. 3.1.3).

3.3.3.2 Tax relief for donors

No Income Taxes relief is available for Swiss domiciled donors (whether individual or corporate donors) on contributions in favor of foreign charitable organizations, unless an International Tax Agreement has been concluded with the State where the

foreign organization has its seat (e.g. Agreement between France and certain Swiss cantons regarding the tax treatment of donations made with selflessness purposes). Deductions are only available for contributions granted to Swiss domiciled recognized charitable organizations.

To avoid these difficulties, several national foundations have been created which will receive donations from Swiss domiciled donors and therefore a tax exemption should be granted. These foundations will distribute the funds abroad in accordance with the purpose specified by the donor.

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