



BENVALOR

ATTORNEYS AT LAW • TAX LAWYERS



Building Donor Trust in Cross Border Philanthropy

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General: philanthropic tax privileges are landlocked

Where non-discrimination is the norm in international taxation generally, philanthropic organizations still face discriminatory treatment:

- Potential high gift and inheritance tax liability on cross-border gifts
- No income tax deduction when donated abroad (treaties do not allow either)
- No equal exempt treatment for foreign philanthropic organizations (e.g. income tax, ECJ *Walter Stauffer*)
- International charitable flows of money are subject to discriminatory rules and scrutinized in detail (e.g. Germany, US)



Research ‘International taxation of philanthropy’

- Is there any sensible, discerning ratio for the landlock?
- Under what conditions or circumstances is it justified to resolve the landlock and can international philanthropy be freed from international tax barriers?
- Method: critical and functional comparison of law systems at supranational level, apart from national definitions and customs
- Conclusions: apparently there are large differences and distinctions between definition and regulations of charitable organizations for tax purposes, but in functional terms the similarities are far more obvious than the differences: resolution of landlock is possible, but should be aligned with proper control



Why tax privileges anyway?

- Political philosophy of pluralism – government does not have monopoly on public interest, charitable organizations are essential in a pluralistic democracy (direct democracy vs parliamentary democracy)
- Philosophy of pluralism leads to *principled tax relief, both domestically and internationally*; government should maintain a neutral position towards all plural powers in today's (international) society
- Tax Expenditure theory – relieving the state
- Tax expenditure theory leads to protectionism; what purposes are in the interest of a certain populace? Modern societies have an open relationship with the world and the definition of a populace' interest is therefore blurred



Rationale landlock

Results of research: the rationale of the landlock is not found in:

- a lack of a common concept of 'public benefit'
- A lack of actual national benefit
- A lack of confidence in foreign supervisory regimes
- Great differences in notion of and functioning of charitable organizations as a result of which non-discrimination is inappropriate

BUT is found in the legitimate concern of states on the control on the proper expenditure of the funds for public benefits and the maintenance of the effectivity of domestic requirements for tax relief



EU law

- Gift tax on gifts to foreign charities is in contrast with fundamental freedom of capital foreseen in the EU Treaty in most law systems
 - European Commission is active in this field backed up by (threat of) litigation of European Court of Justice
 - Walter Stauffer case (September 2006)
 - Persche (January 2009)
 - Denial of German income tax deduction for gift by German resident to Portuguese charity is overruled by the Court
- “Whilst it is lawful for a member state to restrict the grant of tax advantages to bodies pursuing certain of its charitable purposes, a member state cannot however restrict the benefit of such advantages only to bodies established in that state whose activities are thus capable of absolving it of some of its responsibilities” (par. 44).*



EU Law – Persche ct'd

- Germany, Ireland and the UK: it would be contrary to the *principle of proportionality* to constrain the donor's Member State to verify compliance with the requirements imposed on charitable bodies, or to have it verified, for each gift made by a taxpayer to bodies situated in one or more other Member States
- ECJ: Before granting a tax exemption to a body established in another member state, a member state is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the body meets the conditions imposed by national law and to monitor its effective management
- The same applies in the case of the taxpayer who claims a tax deduction in a member state for a gift to a body established in another member state, even if the taxpayer from whom the tax authorities have to obtain the necessary information is not the body which received the gift but, indeed, the actual donor. Whilst it is true that the donor does not himself have all the information necessary for the tax authorities to verify whether that body satisfies the conditions required by the national legislation for the grant of tax advantages, it is usually possible, for a donor, to obtain from that body documents confirming the amount and nature of the gift made, identifying the objectives pursued by the body and certifying the propriety of the management of the gifts which were made to it during previous years.
- In addition, where the Member State of establishment of the recipient body has a system of tax advantages intended to support the activities of charitable bodies, it will normally be sufficient for the donor's Member State to be informed by the other Member State, within the framework of mutual assistance under Directive 77/799, on the additional information which they need to verify whether the recipient body fulfils the conditions imposed by the national legislation for the grant of tax advantages.



Netherlands has entirely resolved the 'landlock'

- Gifts to foreign charities are exempt from gift tax and deductible for Dutch (corporate) income tax purposes since 2008
- Distinction between charities in EU, countries with tax treaties referring to both income and gift and inheritance taxes and 'third' countries as to onus of proof
- No material control upfront, formal recognition procedure
- Repressive control is possible (but only 6 fte..), charitable recognition may be withdrawn with retro-active effect
- Easy to abuse; no effective control on final destination of the funds or on maintenance of effectivity of domestic requirements



Responsible solution to the landlock: in control

- Development of proper due diligence procedures: Know Your Grantee provisions, effective oversight (funding agreement, backed up by reports from grantees) and audit trails of funds
- Development of normative equivalency requirements: which requirements of national legislations for exemption are 'essential' in an international context
- The use of so-called 'facilitators' (e.g. *Transnational Giving Network*) is not a conclusive resolution
- Possibility of withholding tax, remitted upon final expenditure by foreign charitable body and reports hereof to domestic tax authorities (*substance over form*)





