Charitable organisations in Switzerland: overview

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Country Q&A | Law stated as at 01-Mar-2020 | Switzerland

A Q&A guide to charity law and practice in Switzerland.

The country-specific Q&A guide provides a structured overview of the key practical issues concerning charity law in this jurisdiction, including the legal framework and legal definition of a charity; principal sources of law; forms of organisation used for charitable purposes, and the qualification requirements/formalities to set these up; main regulatory authorities; management; accounting/financial reporting requirements; tax; overseas charities; and reform.

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Overview and main trends

1. What is the historical background to charity law and charitable organisations?

In Switzerland, charitable organisations appeared in the Middle Ages. They were essentially rooted in the concept of Christian charity and enabled notably the construction and/or support of hospitals, alms houses and orphanages.

Those organisations form the basis of some charitable organisations that still exist today in Switzerland. For example, one of the oldest Swiss charities, the Inselspital in Bern, was founded in 1354 and is still operating today, more than 660 years later.

During the 18th century, non-profit organisations fulfilled an important relief function as a consequence of the general scarcity following wars in Europe which also had consequences on the Swiss territory.

One century later, under the influence of the liberal policy which dominated Switzerland following the adoption of the federal Constitution in 1848, several civil society organisations emerged. The most flourishing non-profit organisations in the 19th century were associations which still play today a major role in various fields such as the regulation of economic activities, civil rights, education, social causes and sport. Later in the 19th century, during the industrialisation period, political and social organisations were founded to support the rural population, urban workers and orphans suffering from social deprivation. From 1804 to 1824, the Swiss Johann Heinrich Pestalozzi,

father of modern pedagogic, founded several orphanages and schools to support children in need and provide them with education.

Following the aftermath of the wars devastating Europe during the century, in 1863 a Swiss citizen, Henry Dunant, founded the International Committee for Relief of the Wounded in Geneva which intended notably to guarantee the neutrality, protection and relief of wounded soldiers. This organisation later evolved into the International Committee of the Red Cross (ICRC) (*Comité international de la Croix-Rouge* (CICR)) which has its seat in Switzerland.

In the 20th century, Switzerland's policy of external neutrality and its strong domestic federalism regime resulted in non-profit organisations becoming important vehicles of social dialogue and communication between regions of Switzerland. In addition, the adoption of the Swiss Civil Code in 1907 marks the birth of modern foundation and association law by harmonising at the federal level the legal regimes of foundations and associations.

The expansion of the ICRC and the formation of the League of Nations in Geneva in 1925 bolstered the development of Switzerland, and Geneva in particular, as a hub for the incorporation of charitable foundations of international scope.

More recently, in the mid-1990s and following the adoption by the United Nations of the Millennium Development Goals in 2002, the Swiss charitable sector experienced an increased trend in addressing issues of disparity and the gap between the richest and the poorest countries. This marks the starting point of a succession of major new foundations and associations of international scope which pursue their charitable objectives abroad. Key actors in the field of charity worldwide have their seat in Switzerland and play an important role in the main charity fields, such as the defence of human rights, the relief of the poor, education, health, environment, disaster relief, science and research as well as art.

> 2. Are independent charitable organisations common and significant? What is the current size and scope of the sector and the main trends?

The charitable sector plays a significant role in Switzerland. Both foundations (*Stiftung/fondation*) and associations (*Verein/association*) are commonly used vehicles of philanthropy. Other Swiss legal forms are not excluded from pursuing public utility purposes and benefit from a tax exemption. However, these legal entities will not be discussed in this article.

Associations

The registration in the Register of Commerce is not mandatory for associations having a non-profit purpose. Therefore, there is no reliable data available on the number of associations established in Switzerland. Consequently, a central picture of the entire Swiss non-profit sector is currently not available. Associations are a common legal form used in particular by international sports federations.

Foundations

In 2018, there were 13,169 charitable foundations registered in Switzerland, over half of which have been established in the past 20 years. 301 new foundations were created in 2018 alone (*Centre d'Etudes de la Philanthropie en Suisse* (CEPS), *Université de Bâle, SwissFoundations, association des fondations donatrices suisses et Centre pour le droit des fondations, Université de Zurich, Swiss Foundation Report 2019 (Swiss Foundation Report 2019)*). The number of foundations deleted from the Register of Commerce has also increased over the past years with more than a thousand estimated removals since 2009. According to the statistics of the Federal Supervisory Authority of Foundations, in 2018 4,453 foundations were supervised at the federal level. This represents the number of Swiss foundations which are active in Switzerland and abroad and not just locally. Thus, approximately one third of Swiss foundations have an international scope of activity which outlines the trend emphasised above towards global philanthropy that has been in constant progression in Switzerland, especially since the mid-1990s (*see Question 1*).

The total amount of assets held by foundations in Switzerland has been estimated to exceed CHF97.4 billion in 2017 (*Swiss Foundation Report 2018*). Comparatively, these assets were estimated to amount to CHF70 billion seven years ago. As far as foundations of international scope (subject to federal supervision) are concerned, their total aggregate assets have been estimated in 2017 at around CHF40 billion (*Swiss Foundation Report 2018*). It is submitted that these estimates are below the reality.

Legal framework

> 3. Is there a legal definition of a "charity"? What are the principal sources of law and regulations relating to charitable organisations and activities?

Definition of charity

As such, there is no legal concept of "charity" under Swiss law. The concept corresponding to the notion of charity is the tax law concept of "public utility" which is discussed in *Question 9*.

Principal sources of law

The principal sources of Swiss law relating to foundations and associations are included in the Swiss Civil Code (CC), in particular:

- Articles 80 to 89 of the CC concerning foundations.
- Articles 60 to 79 of the CC regarding associations.

As far as tax law is concerned, the Federal Direct Tax Act (*Loi fédérale du 14 Décembre 1990 sur l'impôt fédéral direct* (LIFD)) is applicable. Article 56g of the LIFD defines the requirements for public interest organisations to be tax exempt, which are laid out in greater detail in the Federal Tax Administration's Circular No. 12 of 8 July 1994 (Circular 12/1994) and Guidelines of 18 January 2008 established by the Swiss Tax Conference for the cantonal tax authorities (Guidelines 2008).

Legal bodies

4. What are the forms of organisations that are used for charitable purposes? What are their advantages/disadvantages?

In Switzerland, the two forms of legal entities that are commonly used for charitable purposes are foundations (*see below, Foundation*) and associations (*see below, Association*).

Foundation

A foundation is an autonomous legal entity consisting of a pool of assets irrevocably committed to one or more defined purpose(s) (*Article 80, CC*). As an autonomous and separate legal entity, it benefits from full legal personality.

A foundation is established by one or several founder(s), who can be Swiss or foreign individuals or a legal entity. International organisations and/or governmental entities can also be founders of a Swiss foundation. In practice, a minimum initial capital of CHF50,000 must be contributed by the founder.

A foundation can have any kind of clearly defined purpose(s) provided that it is lawful, not impossible nor immoral. The foundations are not required to pursue charitable purposes, that is, activities that are in the interests of the public or that can be considered as altruistic.

The founders' control over a foundation is essentially exercised at the time of the constitution of the foundation (for example, the founders typically select and appoint the members of the initial board of the foundation). Once constituted and enrolled in the Register of commerce, the foundation becomes an autonomous legal entity thus falling outside of the direct control of the founder. The founder, however, can retain the right to amend the purpose clause of the foundation provided that:

- Ten years have elapsed since the foundation's constitution or the last amendment.
- Such amendment is expressly provided by the statutes.

The supreme body of a foundation is the board of the foundation, which is vested with executive functions and in particular with the administration and the representation of the foundation (*see Question 7*).

Under Article 84 of the CC, Swiss foundations are subject to the supervision of a governmental authority (Supervisory Authority of Foundations) (*see Question 6*). Foundations having an international scope are subject to supervision of the Federal Supervisory Authority of Foundations based in Bern. In case a foundation has a local scope of activity, it can be subject to the cantonal Supervisory Authority of Foundations of its canton of seat.

Association

An association is an autonomous separate legal entity formed by individuals or corporate members. An association acquires legal personality as soon as its intent to exist as an independent corporation is made apparent from its statutes (*Article 60, CC*). Therefore, associations acquire their legal personality independently from their enrolment in the Register of commerce (*see Question 5*).

Contrary to foundations, associations are composed of members. In practice, there must be a minimum of two members to constitute an association.

Under Article 64 of the CC, the supreme body of an association is the general assembly which is also the general meeting of the members of the association (*see Question 7*). A membership fee can be imposed by the statutes (*Article 71, CC*). Since the members of an association exercise supervision of the association, an association is not subject to an external supervisory authority.

The main purpose of an association cannot be economical, which means that it cannot procure to its members an advantage directly linked to its commercial or industrial activities. In other words, associations with an ideal purpose can carry out commercial activities to achieve their purpose(s) while associations with an economic purpose cannot carry out commercial activities to achieve their purpose(s), except if the economic purposes are secondary and ancillary to the association's ideal purpose(s).

Comparison between association and foundation

The two vehicles do not have the same features as such; both types have advantages and disadvantages. For example, the supreme governing body of an association is the general assembly of its members, whereas that of the foundation is its board. In addition, the members of a foundation's board have a fiduciary duty to act in the best interest of the foundation. There is no such duty for members of an association. Consequently, members of an association can vote on decisions and influence its activities based on their own interests, which may in some cases depart from those of the association and potentially also its donors.

Furthermore, the purpose of an association can be changed by the general assembly of members, however, in principle, the purpose of a foundation cannot be changed except in extraordinary circumstances. As a consequence, a foundation is in general preferred by donors as it offers an increased stability and security over time as regards the exclusive use of its assets in strict compliance with the purpose for which it is incorporated.

Moreover, unlike associations, Swiss foundations are subject to state supervision. This supervision provides an additional protection towards ensuring that the funds cannot be diverted from the purpose of the foundation.

5. What are the qualification requirements/formalities to set up these organisations?

Foundation

The first step in the constitution of a foundation is the drafting of its statutes: the foundation's purpose and its resources, its general organisation, bodies and their respective powers are set out in the foundation's statutes.

Once the statutes are approved by the founder, they must be cleared by the competent Supervisory Authority of Foundations, cantonal or federal, depending on the scope of the foundation's activity.

After the preliminary clearance of the statutes by the competent Supervisory Authority of Foundations, it is advisable to file a request for preliminary tax exemption with the tax authorities. Following the Supervisory Authority of Foundations' pre-approval and the granting of the preliminary tax-exempt ruling by the tax authorities, the foundation is formally constituted by public notary deed.

The foundation will acquire legal personality on registration in the Register of Commerce (*see Question 4, Foundation*). A bank account will then be opened in the name of the foundation and the founder will pay the initial capital to the foundation, following which the Supervisory Authority of Foundations will issue a decision assuming supervision.

Association

An association acquires its legal personality as soon as its members adopt written statutes laying down the members' intent to be organised as a corporate body. The statutes need to include provisions regarding the purpose(s), the resources and the organisation of the association (*Article 60 paragraph 2, CC*).

Thus, contrary to foundations, an association is easier to set up as its legal personality is not subject to the enrolment in the Register of Commerce. However, under Article 61 paragraph 2 of the CC, associations must be enrolled in the Register of Commerce if:

- It conducts a commercial operation in the pursuit of its purpose.
- It is subject to an audit requirement.

Similarly to the foundation, the tax exempt status can also be granted to an association, provided that the entity fulfils the conditions listed in *Question 9*.

Ongoing regulatory requirements

6. What are the main regulatory authorities for charitable organisations? What are their powers of investigation/audit/sanctions?

Regulatory authorities

Associations are not subject to any governmental supervision whereas foundations are subject to the supervision of the federal or cantonal Supervisory Authority of Foundations, depending on whether it will be active on a local, national, or international level (*Article 84, CC*).

In addition, if an association or a foundation benefit from a tax exemption for public interest, they must comply with the requirements for such exemption, not only at the time of the request but also on an ongoing basis. The tax authorities are thus entitled to regularly check whether this is effectively the case. This verification typically occurs when the entity files its annual tax return. In this context, the charity sends its audited accounts to the tax administration. Therefore the tax authorities also exercise some kind of supervision on charities in this respect.

Powers of the Supervisory Authority of Foundations

The Supervisory Authority of Foundations has the following prerogatives on foundations:

- It ensures that the foundation's assets are allocated according to the foundation's purpose(s). To warrant such compliance, each foundation must provide the Supervisory Authority of Foundations with an annual report including:
    - an annual activity report;
    - an audit report; and
    - the accounts of the foundation.

    In addition, each document must be approved by the board.
- It can intervene when needed in the organisation of the foundation (*Articles 81 paragraph 2 and 83d, CC*).
- Some activities of a foundation require preapproval from the Supervisory Authority of Foundations, for example for:
    - any modification of the statutes;
    - the adoption and/or modification of bye-laws;
    - the merger of a foundation; and
    - its dissolution.
- The Supervisory Authority of Foundations must be regularly informed about any modifications in the composition of the board.

The supervisory power of the Supervisory Authority of Foundations is broad and covers all the activities of the foundation. If a foundation does not comply with its statutes or Swiss law, the Supervisory Authority of Foundations can intervene and render binding decisions. In serious cases, the Supervisory Authority of Foundations has the power to revoke board members.

However, according to the Swiss Supreme Court, the Supervisory Authority of Foundations should refrain from intervening and acting instead of the board of the foundation. The Swiss Supreme Court held that the Supervisory Authority of Foundations could not exercise an opportunity control over the decisions of the board (for example in relation to the choices made by the board to attain the purpose of the foundation) (*Swiss Federal Court Ruling, 5A_232/2010 of 16 September 2010, paragraph 3.2*).

7. Which bodies or persons manage charitable organisations and what general requirements must they meet?

Foundation

The board is the supreme governing body of the foundation and is vested with management duties. The governance structure of a foundation is very flexible. Therefore, the statutes of a foundation can provide for an unlimited number of other corporate bodies. For instance, the statutes can provide for an executive committee and/or a managing director to whom powers can be delegated by the foundation board, a secretariat, permanent or ad hoc committees or other bodies such as advisory boards.

Minimal number of board members. Swiss law does not impose a minimal number of board members. However, according to the practice of the Federal Supervisory Authority of Foundations (*www.edi.admin.ch/edi/fr/home/das-edi/organisation/services-specialises/autorite-federale-de-surveillance-des-fondations.html*), the board should be composed of a minimum of three board members. The Swiss Foundation Code further recommends that the board should be composed of between five and seven members (*Swiss Foundation Code 2015, Recommendation 6*). The foundation board must be composed of individuals. Legal entities cannot be foundation board members (*Article 120, Federal Ordinance on the Register of Commerce* (ORC)).

According to the practice of the Federal Supervisory Authority of Foundations, at least one foundation board member with signatory power must be:

- A Swiss citizen.
- A citizen of a member state of the EU or of the European Free Trade Association (EFTA) with his/her domicile in Switzerland.

Qualifications of board members. Swiss law does not provide for a specific threshold of knowledge or qualifications to be met. Therefore, each board member must have the knowledge and qualifications enabling him/her to carry the foundation's aim in its best capacity. In particular, a prospective board member should accept this mandate solely if he/she is able to execute it correctly. In this respect, the Swiss Foundation Code foresees that the prospective board members must have the abilities and the time enabling and allowing for the good fulfilment of their mandate (*Swiss Foundation Code 2015, Recommendation 6*).

Appointment procedure. The procedure is generally set out in the statutes. The initial board members are appointed by the founder in the foundation deed and the foundation board in practice renews itself by co-optation. The appointment must be done either through:

- A circular resolution.
- Minutes of meeting.

After the appointment of the new board member, the member must be enrolled in the Register of commerce and the Supervisory Authority of Foundations must be informed about the appointment (*Article 95 letter i and j, ORC*).

Association

The managing committee and the general assembly are the two bodies of an association (*Articles 64 to 69, CC*). The general assembly is the association's supreme governing body whereas the managing committee is the executive body of the organisation.

All members of the association collectively form the general assembly. However, an association's general assembly can also be composed of delegates to whom the members' voting rights are delegated from.

The general assembly holds the following inalienable powers (that is, powers it cannot delegate):

- The power to adopt and amend the statutes.
- The control over the association.
- The power to discharge and dismiss members of the managing committee.
- The power to dissolve the association.

Furthermore, the general assembly holds all powers that are not vested in other corporate bodies of the association (*Article 65 paragraph 1, CC*). In this context, unless provided otherwise in the statutes of the association, all members have equal voting rights in the general assembly.

Under Article 69 of the CC, the managing committee is the managing body of an association. It can be composed of members of the association or of third parties. The managing committee is responsible for the daily management of the affairs of the association, such as delegated to by the general assembly and all other powers that have been delegated by the general assembly (*Article 69, CC*). Any legal entity must present consolidated accounts if it controls other legal entities (*Article 963, Swiss Code of Obligations*).

8. What are the accounting/financial reporting requirements?

Foundation

Under Article 83b of the CC, a foundation must appoint an external and independent auditor in Switzerland, which is in charge of the audit of the annual financial statements of the foundation and its financial situation. The establishment and presentation of these accounts must comply with generally approved accounting principles, such as the Swiss GAAP RPC 21 or the International Financial Reporting Standards (IFRS).

The auditor must submit its annual report to the foundation board, which in turn will notify it to the competent Supervisory Authority of Foundations. This annual report constitutes an important aspect of the supervision

conducted by the Supervisory Authority of Foundations. In addition, the auditor is also responsible for verifying that the foundation's activity is in compliance notably with its statutes and bye-laws, if any.

Depending on the size of the foundation, this review can either be an ordinary audit carried out by an expert auditor or a limited audit carried out by an approved auditor. A foundation may exceptionally be exempted from its obligation to appoint an external auditor when:

- The foundation's balance sheet total is below CHF200,000 for two consecutive terms.
- The foundation does not undertake any public fundraising.
- An audit is not necessary to reveal exactly the assets and results of the foundation (*Article 1, Federal Ordinance on Foundations Audit*).

Under Article 84a of the CC, in case the board of foundation suspects that the foundation is in long-term insolvency or in an over-indebtedness situation, the foundation board must do an intermediary balance sheet and notify it to the auditor. If the auditor finds that the foundation is insolvent or in an over-indebtedness situation, the auditor must transmit the report to the Supervisory Authority of Foundations.

Association

A Swiss association is in principle not required to have external auditors, unless:

- It is considered a large entity.
- A member of the association so requires.

An association is considered a large entity if two of the following figures are exceeded in two successive business years:

- Total assets of CHF10 million.
- Turnover of CHF20 million.
- Average annual total of 50 full-time staff.

In this context, the association will be subject to the ordinary audit.

The establishment and presentation of these accounts must comply with generally approved accounting principles, such as the Swiss GAAP RPC 21 or the International Financial Reporting Standards (IFRS).

Tax

9.How are charities taxed, and what (if any) principal exemptions and/or reliefs from taxation apply to them?

Tax on income, capital gains and property used by the organisation

If an association or foundation operates exclusively to serve a public utility purpose, it can be exempt from all direct taxes in Switzerland, including income and wealth taxes, if it meets the various other conditions for tax exemption discussed below.

The criteria to determine whether a legal entity qualifies for tax exemption are:

- Set out in Article 56g of the LIFD and Article 23 paragraph 1f of the Federal Law on Harmonisation of Direct Taxes of Cantons and Communes (LHID).
- Laid down in greater detail in Circular 12/1994 and in the Guidelines 2008 (*see Question 3*).

Conditions. The following cumulative conditions must be fulfilled:

- **Swiss based entity.** Firstly, the legal entity must be subject to Swiss tax law, which means that it must be incorporated under Swiss law.

  In theory, but this is quite rare in practice, a for-profit legal entity, such as a company limited by shares or a co-operative company that pursues a public utility purpose, can also be totally or partially tax exempt if the statutes expressly exclude any distribution to its shareholders and directors. A non-profit organisation is in essence barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.

- **Pursuit of a public utility purpose.** The legal entity must pursue a public utility purpose. Public utility is not defined in generic and abstract terms in the Circular 12/1994, which merely provides examples of such activities, which include activities of a charitable, humanitarian, health, ecological, educational, scientific or cultural nature.

  For a purpose to be considered of general interest, the activity must be aimed at an unrestricted circle of beneficiaries. General interest is not recognised if the circle of beneficiaries is too narrowly limited.

  Public utility within the meaning of the LIFD is not limited to activities carried out in Switzerland. It is thus possible to exempt the worldwide activities of a Swiss based entity if these activities pursue public utility purposes and the entity meets the other conditions of tax exemption.

- **Lack of self-interest.** The notion of public utility includes a subjective element, that is, the lack of self-interest. An activity only meets this condition if it serves the public interest and is based on altruism in the sense of devotion to the community. The absence of self-interest requires on the part of the members of the foundation board/or executive committee of an association a sacrifice in favour of the general interest which overrides their own interest.

  Practical consequences of this requirement are as follows:

- board members of a foundation or members of the executive committee will in principle not be remunerated;
- in certain cantons, such as Geneva, the practice of the tax administration allows a remuneration for time spent. However, the remuneration cannot exceed the one paid for attendance of official commissions in Geneva;
- the remunerated employees and the chief executive officer of a non-profit entity cannot serve on the foundation board of a Swiss foundation (except without voting rights);
- for activities exceeding the usual scope of duties of a board member, such as, for instance, a board member providing services at arm's length in his field of expertise (services that would in any case have to be obtained from third parties), an appropriate compensation can be paid.

- **Exclusion or limited profit-making activity.** The tax exempted activity must be exercised exclusively for the benefit of public utility. The condition of the exclusivity of the use of the funds for the benefit of public utility or common good does not prevent the legal entity from carrying out income generating activities, if the income resulting from such activities is used exclusively for the public utility purpose and that the commercial activity remains secondary. A legal entity that combines commercial purposes with its purposes of public utility can benefit from a partial exemption.
- **Effective activity.** The public utility purpose must be effectively pursued. In other words, the mere fact that a legal entity claims that it exercises an activity which is tax exempt is not sufficient. Entities whose principal purpose is to constitute capital or accumulate the proceeds of their investments without specific goals to carry out future tasks are not entitled to tax exemption. The fulfilment of this requirement is monitored regularly both by the Supervisory Authority of Foundations (for foundations only) in the context of the annual filing of the foundation's activity report and by the tax authorities to which the audited annual accounts are filed on a yearly basis. It is also verified in the context of the renewal of an organisation's tax-exempt status (usually granted at the cantonal/municipal level for a ten-year period).
- **Irrevocable use of funds.** The funds used in furtherance of the purposes which justify the tax exemption must be irrevocably (that is, forever) committed to these purposes. In the event of liquidation of the legal entity, its remaining assets must be entirely assignable to one or several public utility and tax-exempt entities pursuing similar objectives to those of the entity. In no case must the entity's assets be returned to the founder or board members or to any of their successors or assignees, or be used in any way for their profit, in whole or part.

These conditions must be expressly stated in a provision of the foundation's statutes which cannot be modified.

The exemption can only be granted on request, with the applicant having to prove that it meets the above legal conditions. Such request must be addressed to the cantonal tax authorities since the cantons are competent to rule on tax exemption requests.

Despite the fact that under Article 129(2) of the Swiss Constitution, the harmonisation of direct taxes imposed by the Confederation, the cantons and the communes applies to tax liability, the object of the tax and the tax period, procedural law and the law relating to tax offences, and that the principle of tax exemption at the cantonal level of public utility entities is anchored in Article 23 paragraph 1f of the LHID, differences may appear in cantonal laws and practices with respect to the conditions of tax exempt status. The differences in interpretation of the exemption conditions relate mainly to the remuneration of the board, the exemptions of activities carried out only outside Switzerland and profit-making activity of the tax-exempt entity. For instance, canton Thurgau has adopted a very

restrictive approach regarding the exemption of activities carried out abroad, considering that only entities pursuing a "Swiss" public interest can be exempted. In other cantons, the conditions of tax exemption are applied with a certain degree of protectionism.

Content of the tax exemption. If the above requirements are met, a Swiss based legal entity can benefit from a full exemption of all direct taxes, including:

- Federal and cantonal profit taxes.
- Wealth taxes levied at cantonal level on the net wealth.
- Gift tax on the initial capital.
- Gift tax and inheritance tax on gifts/bequests made by Swiss residents.
- Gift tax and inheritance tax on gifts/bequests made by foreign resident.

Value added tax (VAT)

Following a partial revision of the VAT Act which entered into force on 1 January 2010, the situation of charities regarding VAT has been improved in several aspects. Charities that generate less than CHF150,000 of taxable turnover in Switzerland within a year are exempt from the obligation to register themselves as VAT taxpayers. However, each potential taxpayer has a general option right, which allows any entity to voluntary register as VAT taxpayer. As a consequence, any charity which carries on a business activity can register itself as a VAT taxpayer, irrespective of the amount of its taxable turnover or of its net profits.

Furthermore, the input tax deduction is no longer reduced if gifts (donations), dividends, and any other non-VATable revenues are made by the VAT taxpayer. This last rule, combined with an easier access to VAT registration, should significantly improve the input VAT recovery rate of Swiss charities.

Finally, the new VAT Act states that advertising services provided by charities for the benefit of third parties or provided by third parties for the benefit of charities must be considered as non-VATable activities with no right to claim back the VAT input tax (that is, VAT exempt transactions).

However, in such case it is possible for the charity to opt for the voluntary taxation of these activities. Therefore, VAT must be openly disclosed on the invoice and the advertising services are considered as ordinary VATable transactions. The option mechanism transforms an out-of-scope transaction into a VATable transaction. As a consequence, the input VAT deduction has no longer to be reduced proportionally.

The various rules summarised above, if correctly implemented by Swiss charities, can result in significant tax savings. This, however, requires that those organisations perform at least business/commercial activities, irrespective of whether the latter are profitable or not.

The VAT exemption can be granted through a formal request made according to the provisions set out in the Federal Act on Privileges, Immunities and Facilities (LHE). The LHE provides certain types of privileges to international organisations headquartered in Switzerland. Privileges can be granted in the fields of tax (exemption of VAT) and immigration (possibility to hire foreign workers without having to comply with ordinary proceedings and conditions of Swiss immigration law).

On 1 January 2018, the partially revised Swiss Value Taxation Act entered into force. The reforms introduced, in particular, the obligation for public utility organisations to inform donors that they are not to receive any counterpart to their gift (in order to be exempt from tax).

10. What, if any, are the taxation benefits for donors to charities?

Advantages for individual donors

At the federal level, donations by Swiss residents over the annual amount of CHF100 made to legal entities pursuing objects of pure utility are fully deductible up to an aggregate cap of 20% of the donor's annual net taxable income, provided the donations are made to entities located in Switzerland.

At the cantonal level, the deductibility of donations made to charitable foundations for individuals depends on cantonal legislation and can go up to the same cap of 20% of the annual net taxable income. In Geneva, permitted deductions have increased up to 20% of the donor's annual income under the legislation which entered into force in 2009.

Advantages for corporate donors

Under federal law, payments made to charitable foundations can be deducted from the profits of a company up to a maximum of 20% after tax and deduction of the donation, provided that the foundation:

- Has its registered offices in Switzerland.
- Is exempt from taxes because its purpose and activity are for the benefit of the public and common good.

Payments made to charitable foundations and other entities can be deducted up to a maximum of 20% of profits, depending on cantonal legislation. In Geneva, deductions are allowed up to an amount of 20% of taxable profits, provided that the above conditions are fulfilled.

Foundation as donors

In case of a donation made by a charitable foundation, the charitable foundation might be subject to taxes on donations it makes. According to a long-standing practice of the tax authorities, gifts made by a non-profit foundation are not subject to gift tax. However, if a foundation makes a gift which is not considered to be in furtherance of its philanthropic purpose, it could be subject to gift tax.

Disadvantages

11. What are the main disadvantages of charitable status?

The disadvantages, if any, result from the restrictive conditions imposed to receive and keep a charitable status that limits the activities the entity can carry out and the way it does so.

For example, a charity can hold participations in commercial companies but cannot be actively engaged in the direction/management of such companies. In addition, the dividend received by the charity must be irrevocably allocated to its charitable purpose/activity.

Another example is the current restrictive practice regarding remuneration of foundations' board members. In most cantons (and notably in Geneva), the tax authorities are very reluctant to allow any remuneration for directors, arguing that this would violate the condition of altruistic use of funds.

Overseas charities

12. Is it possible to operate an overseas charity in your jurisdiction? What are the registration formalities? How (if at all) are overseas charities treated differently in your jurisdiction from charities set up under domestic law?

In principle, only foundations incorporated in Switzerland are subject to Swiss law and to the supervision of a Swiss Supervisory Authority of Foundations. Under Swiss international private law, with the exception of rare cases, a foundation or association is subject to the legal order of the state where it was incorporated, in particular to the extent that it had to comply with certain publicity or registration requirements.

In the case of charities incorporated abroad and carrying out certain activities in Switzerland, legal presence can be established through:

- A branch.
- A representative office.

Branch office

According to Swiss private international law, branch offices in Switzerland of companies with headquarters abroad are governed by Swiss law. Therefore, branch offices of companies with headquarters abroad can merely be established in Switzerland if they meet regular requirements of Swiss law on the establishment of branch offices. Branch offices must be entities with business operations. Therefore, entities which do not effectively conduct operations cannot be established as branch offices in Switzerland.

The Swiss branch of an entity with headquarters abroad is independent from an economic point of view of the parent entity but is not legally separate from the latter and therefore does not enjoy legal personality. The Swiss branch has no separate legal personality and therefore cannot enter into agreements in its own name but only on behalf of its foreign parent entity. There are no mandatory corporate bodies in a Swiss branch.

Under Article 935 of the Swiss Code of Obligations, a representative having its domicile in Switzerland must be appointed and registered with the competent trade registry. The powers of representation of the Swiss branch are decided by the parent entity.

Only a local office that conducts effective business activities with its own personnel and in its own premises independently from the parent entity qualifies as a branch. In other words, a certain degree of autonomy from the parent entity is necessary for the local office to qualify as a branch.

Regarding taxation, a Swiss branch will most likely qualify as a permanent establishment of the parent entity from a Swiss tax law perspective and could consequently be subject to taxation in Switzerland. It could benefit from tax exemption if the parent entity meets the Swiss conditions for tax exemption. The statutes of the foreign parent entity will be examined in light of Swiss tax law. A particular difficulty lies in the fact that a specific clause of non-return of the funds must appear in the statutes of the parent entity for its Swiss branch to benefit from tax exemptions.

Representative office

The Swiss representative office of an entity abroad conducts mere preparatory work for the parent company and is not independent from the latter, neither from an economic nor from a legal point of view.

As a consequence, if the representative office in Switzerland does not qualify as a branch within the meaning of Swiss private international law, establishing the representative office in Switzerland does not grant Swiss courts general jurisdiction over the parent charity, even for claims or disputes relating to the activities of such representative office.

The Swiss representative office does not have separate legal personality and cannot enter into any agreements. Therefore, it conducts mere representative functions and/or preparatory work. There are no mandatory corporate bodies in a Swiss representative office or any requirement to register a representative in the Register of Commerce (as the Swiss representative office cannot enter into contracts).

A representative office does not usually qualify as a permanent establishment from a Swiss tax law perspective and is not subject to taxation in Switzerland, considering that its scope of activities should be limited to mere preparatory work. It is, however, advisable to seek a ruling from the tax authorities in order to confirm that the Swiss representative office does not have a permanent establishment in Switzerland and is not subject to taxation in Switzerland.

Giving to overseas charities

In most cantons, such as Geneva, gifts and bequests by Swiss residents in favour of foreign resident charities are subject to gift and inheritance taxes, unless a reciprocity agreement is concluded with the country where the foreign charity is registered. In Geneva, it is possible to apply for a partial exemption which may amount to at least 25%, however, the relevant rate is determined on a case-by-case basis. The Geneva Government is also authorised to conclude reciprocity agreements with foreign countries.

Gifts and bequests by non-Geneva residents to Geneva resident charities have always been exempted from Geneva gift and inheritance taxes.

The deductibility of donations made to charitable entities under Swiss legislation is subject to the conditions that:

- The beneficiary is registered in Switzerland.
- It pursues objects of public utility.

Therefore, if a Swiss tax resident, individual or corporate, wishes to make a donation to a charity registered abroad, there will be no deduction allowed in Switzerland. The *Persche* case (*ECJ C-318/2007, 27 January 2009*) does not extend its effects to donations made by Swiss nationals to EU-based charities. However, for a beneficiary of charitable contributions registered in Switzerland, the domicile of the donor is of no relevance: the tax exemption still applies. Whether donors domiciled abroad are entitled to a deduction in their home state ordinarily depends on their home state laws.

13. Is it possible to register a domestic charity abroad, and has your jurisdiction entered into any international agreements or treaties in this area?

Currently, Switzerland has not entered into any international agreements or treaties regarding the possibility to register a domestic charity abroad.

Reform

14. Are there any proposals for reform in the area of charity law?

A parliamentary initiative entitled "Reinforcement of the attractiveness of Switzerland for foundations" (Luginbühl Initiative) was launched in December 2014 by the Counsellor of State, Werner Luginbühl. It contains eight proposals aimed at increasing the availability of general data relating to the sector of tax-exempt foundations in Switzerland, introducing some specific modifications of Swiss foundation law and increasing the attractiveness of the tax law regime applicable to charitable foundations. The Luginbühl Initiative was approved by both Chambers of the Swiss Parliament in 2017.

In November 2019, a preliminary draft for the legal implementation of the Luginbühl Initiative was presented for public consultation.

Notably, it contains the following proposals:

- To publish a list of tax-exempt public utility entities.
- To explicitly allow any person with a legitimate interest to lodge a complaint at the Supervisory Authority of Foundations.
- To limit the liability of benevolent board members by excluding liability for "light" negligence under certain conditions.
- To maintain the tax-exempt status in favour of foundations that pay a market rate honorarium to board members.

Following the public consultation, a definitive proposal for a revision of federal law will be drafted and will then be voted on by the two Chambers of the Swiss Parliament, foreseeably in 2021.

Contributor profile

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