

FDA fondation
pour le droit de l'art
art law foundation

12.2016
*art law
magazine*

#04

Table des matières / Table of content

- p. 4 Case Note: Gift or theft? *Picasso et al. vs Pierre and Daniele L.*
By Anne-Sophie Nardon
- p. 10 L'expert en œuvres et objets d'art : des compétences reconnues,
mais un métier à risques
Par Karine d'Oria
- p. 18 Patronage of Swiss or foreign cultural institutions –
Which tax treatment applies?
By Julie Wynne
- p. 23 France : une nouvelle rémunération pour le référencement d'œuvres d'art
plastiques, graphiques ou photographiques
Par Philippe Mouron
- p. 30 Rapport de conférence : Risques, règles et opportunités dans les investissements
en art, Paris, 12 février 2016
Par Tibériade Allibert, Arsène Boutemy, Adriana Bustamante, Myriam Chair
- p. 34 Conference report: Kunst & Recht / Art & Law 2016,
Art Basel, 17 June 2016
By Niklaus Glatthard
- p. 40 News suisses / *Swiss News*
- p. 41 Nouveautés législatives suisses / *New Swiss Legislation*
- p. 42 Acquisitions récentes du Centre de documentation du Centre du droit de l'art
- p. 44 Rendez-vous de la FDA / ALF's agenda

Patronage of Swiss or foreign cultural institutions – Which tax treatment applies?

By Julie Wynne*



You are an art lover residing in Switzerland and you wish to support cultural institutions in Switzerland and abroad. Is this possible in a tax-efficient way and if so, under what terms?

From a tax point of view, two issues must be considered: firstly, the tax exemption for a gift in favour of a cultural institution, and secondly, the tax deductibility of the donation from the donor's taxable income.

This article reviews two scenarios: (i) providing support to Swiss cultural institutions and (ii) providing support to foreign cultural institutions.

1. Patronage in favour of Swiss cultural institutions

This section examines the regime applicable to patronage in favour of Swiss cultural institutions which is governed by both cantonal and federal laws.

The institutions that may benefit from this regime are cultural ones serving as public establishments (e.g. museums, operas or theatres held by the State) or private non-profit organisations.

For an institution to be recognized as being for **public benefit**, it must pursue a non-profit purpose. Activities of a charitable, humanitarian, health-related, environmental, educational, scientific or cultural nature generally fall under this notion of public interest. In addition to this objective requirement, the notion of public benefit includes a subjective element, which is « selflessness ». Within the meaning of tax law, an activity is selfless if it serves public interest and is based on altruism, in the sense of a dedication to the community.¹

In cultural matters, to be considered as for public benefit, a cultural event should be open to the general public. For example, « *productions of high artistic level that are offered to a wide audience, those with a general education program, those promoting the general interest as well as those which, from a religious viewpoint,*

* Attorney at Law, partner, FRORIEP, jwynne@froriep.ch.

¹ Federal Tax Authority, Circular no 12 "Exonération de l'impôt pour les personnes morales poursuivant des buts de service public ou de pure utilité publique (art. 56 let. g LIFD) ou des buts culturels (art. 56 let. b LIFD); déductibilité des versements bénévoles (art. 33 al. 1 let. i et art. 59 let. c LIFD)", 8 July 1994.

shape the character » are also considered to be for public benefit.² As regards the notion of selflessness in cultural matters, public cultural or artistic events are for public benefit when they do not pursue the private interests of an institution and its members but are instead oriented towards the interests of third parties and the general public. Therefore, local theatre clubs and bands would not be considered for public benefit. In light of the tax practice and depending on the cultural activities of the art institution and its audience, authorities do not easily grant the tax exemption based on public benefit; therefore, it is essential to draft the tax exemption application carefully.

At the cantonal level where estate and gift taxes are levied, a non-profit organisation will also benefit from a tax exemption from the gift and estate tax for donations to non-profit organisations and public institutions, e.g. museums, operas or theatres.

In addition to this exemption from donation and estate tax for contributions in favour of a public cultural institution or a non-profit private cultural institution, both federal and cantonal laws provide for certain requirements in order to deduct a donation from the donor's income.

At the federal level, individuals benefit from a tax exemption on income tax, and legal entities benefit from a tax exemption on corporate tax for donations

in favour of public benefit organisations or in favour of the Confederation, the Cantons, Communes and their institutions. Donations in cash and in the form of other assets (such as real estate or works of art) by individuals to non-profit organisations with their seat in Switzerland or to public institutions are deductible from their income up to a maximum of 20% of income as long as these donations amount to at least CHF 100 per fiscal year.³ Federal law provides for a tax deduction for donations made by companies up to a maximum of 20% of income.⁴

The principle of tax deductibility for donations to Swiss charitable organisations and Swiss public institutions is based for all Cantons on the Federal Tax Harmonisation Act⁵ according to which each Canton can determine the extent of tax deductibility for cantonal and communal taxes. The majority of the Cantons have aligned themselves with the federal rule of deductibility of up to 20% of taxable income. However, some Cantons offer a different deductibility rate such as Basel-Landschaft, which allows for 100% deductibility for donations made by individuals or legal entities, or Neuchâtel, which offers a limited deductibility of up to 5% of taxable income for donations from individuals and 10% for donations from legal entities.

² For more information on this notion, see Swiss Tax Conference, Circular "Exonération des institutions poursuivant des buts culturels", August 2010.

³ See Art. 33A of the Federal Income Tax Act (LIFD), RS 642.11.

⁴ See Art. 59, s. 1, let. c, LIFD.

⁵ Art. 9, s. 2, lit. i, LHID.

Considering the above, donors can make donations in Switzerland both to public cultural institutions, such as museums, theatres or libraries, whether they are dependent on or independent from the Confederation, Cantons or Communes, and to private non-profit cultural institutions. These donations are deductible from income up to a maximum of 20% of taxable income.

2. Patronage in favour of foreign cultural institutions

One of the requirements for a donation to a cultural institution to benefit from tax deductibility is that it has to be carried out in favour of a legal entity with its seat in Switzerland. Donations made directly by Swiss individuals or legal entities to foreign charitable organisations are in principle not exempted in Switzerland.

In *Hein Persche v Finanzamt Lüdenscheid*,⁶ the European Court of Justice (ECJ, now the Court of Justice of the European Union) confirmed the principle that a taxpayer should be allowed the same tax reliefs for a gift made to a charitable organisation established in another Member State in the same way as a gift made to a charity established on the taxpayer's home soil. This decision was important as it provided confirmation that refusal to

allow a deduction for tax purposes on the grounds that the beneficiary of the gift was not established in the Member State where the taxpayer was resident, constituted a restriction on the free movement of capital which is, as a rule, prohibited.

The ECJ ruling is a major step in favour of philanthropy without borders, even though the tax environment within the EU is still not yet satisfactory as highlighted by a study released in 2014 by the European Foundation Centre (EFC) and the Transnational Giving Europe network (TGE).⁷

The ECJ case law is unfortunately not applicable in Switzerland and a similar approach has not yet been recognized for cross-border donations from or to Switzerland even though it would be justified according to the principle of the free movement of capital.

In light of the above, how can donors optimise from a tax point of view, their support to a foreign cultural institution to be able to benefit both from the gift/estate tax as well as from the deductibility of the donation from the donor's income?

2.1 Transnational Giving Europe enterprise donation

A first option to support an EU cultural institution from Switzerland is to use the private initiative Transnational Giving Europe (TGE) network which

⁶ Decision of the European Court of Justice, 27 January 2009, C-318/07 *Hein Persche v Finanzamt Lüdenscheid*. See also Decision of the European Court of Justice, 14 September 2006, C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschafter*.

⁷ EFC, Taxation of cross-border philanthropy in Europe after *Persche and Stauffer* – From landlock to free movement?, 2014.

provides an effective solution for cross-border tax-efficient giving. The TGE network covers 18 countries and enables donors, both corporations and individuals, resident in one of the participating countries, to financially support non-profit organisations in other Member States, while benefiting directly from the tax advantages provided for in the legislation of their country of residence. The partner of TGE in Switzerland is the Swiss Philanthropy Foundation.⁸

Through this network, the donation can be made to a Swiss public benefit organisation which grants the donor a tax receipt allowing for the tax deductibility of the gift from the donor's taxable income. The donation is then wire-transferred to the counterpart organisation in the country of the beneficiary entity which will then forward it to the latter.

2.2 Donation through a « Friends of » organisation or the Swiss fundraising foundation

A second option is to make a donation to a Swiss association or foundation whose (sole) purpose is to support the said cultural organisation. Thus, it is common to have Swiss organisations such as the «Swiss Association of Friends of ...» which include the friends and patrons of the foreign cultural organisation. These associations can benefit from a tax exemption as long as

their by-laws and their tax exemption application demonstrate sufficiently that the activity of the association is altruistic and that the circle of beneficiaries is open enough to be able to serve a public interest.

Therefore, it is possible to make donations to a Swiss charitable organisation that pursues activities abroad and supports a foreign cultural institution. Indeed, the liberal Swiss system allows the authorities to exempt the worldwide activities of a Swiss charitable organisation to the extent that its activities pursue the public benefit purpose and are disinterested.

In the case of Swiss charitable organisations acting as fundraisers for foreign charities, the Swiss tax authority requires before granting the tax exemption, a great degree of transparency with regard to the relations between the Swiss entity and the foreign entity benefiting from donations. It is in fact necessary to provide them with the tax exemption decision of the foreign organisation, its by-laws and its annual accounts. Similarly, the foreign entity must also comply with the Swiss tax exemption requirements.⁹

For activities carried out outside Switzerland, the Federal Supervisory Authority for foundations and the Tax Authority exercise great control over the Swiss charitable organisation and require, in particular, appropriate forms of evidence of the achievement of the

⁸ For more information, please refer to the website of Transnational Giving Europe, available at <http://www.transnationalgiving.eu/> (accessed 13 September 2016).

⁹ For more information, consult the website of the Swiss Philanthropy Foundation, available at <http://www.swissphilanthropy.ch/> (accessed 13 September 2016).

organisation's goals (activity reports, annual accounts, etc.).

2.3 Special regime for donations to a French organisation

A special regime applies for donations to French organisations based on a bilateral Agreement between the Swiss Federal Council on behalf of several Swiss Cantons and France regarding the tax treatment of donations to public benefit organisations.¹⁰

According to this bilateral Agreement, donations and bequests of movable or immovable property in favour of the French Republic (State, territorial communities and regions) are exempt from gift and inheritance taxes if made by a donor domiciled in one of the Cantons party to the Agreement. The same tax exemption applies to donations and bequests in favour of French public benefit organisations under the following requirements: (1) the organisations operate in particular in the scientific, artistic, cultural or charitable field, and (2) similar organisations could be granted a tax exemption in the relevant Canton.¹¹

However, this bilateral Agreement only allows the donor to be exempt from gift and inheritance taxes but not to deduct the donation from the donor's taxable income.

10 Accord entre le Conseil fédéral Suisse et le Gouvernement de la République française concernant le traitement fiscal des libéralités faites dans des buts désintéressés, 30 October 1979, RS 0.642.034.91.

11 Art. 2 of the above-mentioned bilateral agreement

3. Conclusion

Cultural patronage benefits from a favourable system in Switzerland, even though the established incentives are not as attractive as those of other countries, such as the United States and France, due to the lower deductibility of donations in Switzerland.

We are now awaiting an improvement of the tax regime under Swiss law applicable to cross-border donations, in particular to those in favour of EU countries. In particular, the prevailing « Euro-donor » regime as established by ECJ case law in the Stauffer and Persche judgments should be applicable to Switzerland. This regime provides that tax deductions for gifts to non-profit organisations must not be restricted to charities established in the same national territory.

In parallel, it would be desirable for Switzerland to conclude specific bilateral agreements relating to the tax treatment of donations to charities, similar to the one which exists with France; or, alternatively, to include in its Double Tax Treaties rules on non-discrimination in regard to the deductibility for cross-border donations.

Given the increasing development of cross-border collaboration between cultural organisations, there is no justification for the system whereby tax incentives should exist only for patronage in favour of Swiss organisations but not in favour of foreign organisations.