UK

This document summarises information provided by national experts as to the tax treatment by the relevant EU Member State of public-benefit foundations and their donors both domestically and in cross-border scenarios. The information was collected for a joint project of the Transnational Giving Europe network (TGE) and the European Foundation Centre (EFC), "Taxation of cross-border philanthropy in Europe after Persche and Stauffer – from landlock to free movement?", which resulted in a comparative study to be downloaded in full, here. Following the ground-breaking decisions of the European Court of Justice, "Stauffer" (ECJ C-386/04) and "Persche" (ECJ C-381/07), most Member States have adapted their laws in order to comply with provisions of the Treaty on the Functioning of the European Union. The project mapped relevant laws and procedures across the European Union: Does a donor giving to a public-benefit organisation in another EU Member State obtain the same text reliefs as they would get if they donated to a local organisation? What do foreign EU based public-benefit foundations need to do to have their public-benefit status recognised by foreign tax authorities? Are the procedures in place adequate and are they clear for users? How close are we to genuine free movement for philanthropy? And what steps must be taken to bring us closer?

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To receive a hard copy of the full study or for further information, please contact: legal@efc.be.

1. Persche: A donor resident in UK donates to a public-benefit foundation registered in another EU country – does the donor get a tax incentive?

1.1. Legal situation

Are there tax incentives for giving?

The UK tax law foresees tax incentives for donations to public benefit foundations/charities in the following way:

Individual donors can make their cash donations to charitable organisations (organisations that have a UK charity status and pursue at least one of the charitable purposes as defined in the Charities Act 2011) under "Gift Aid". This means that their donations are deemed to be made under the deduction of basic rate tax which the charity or Community Amateur Sports Club (CASC) then reclaims from HMRC. The donor is entitled to claim higher rate tax relief. So for example if a 40% taxpayer makes a donation of £100 then the charity reclaims 20% basic rate tax - £25, and the

donor likewise claims £25 higher rate tax relief. If the donor was a 50% taxpayer they would claim £37.50 in tax relief. There is no ceiling for the relief.

Gifts of land and shares quoted on HMRC recognised stock exchanges qualify for income tax relief and capital gains tax relief. 100% of the tax relief is given to the individual – the charity can in this case not claim any tax repayment.

Corporate donors can claim a tax deduction for their gifts of cash, land, and quoted shares to charities and CASCs. 100% of the tax relief is claimed by the donor – the charity/CASC cannot claim a tax refund. There is no minimum or ceiling on which tax incentives can be claimed on corporate donations to charities and CASCs.

Do the incentives apply in cross-border scenarios?

Following a recent reform in the Finance Act 2010, UK tax law no longer makes a distinction according to whether the recipient public-benefit organisation/charity is resident in UK or in another EU or EEA country. However, donations to foundations based in other countries are excluded. The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident charity has to fulfil and must be included in a tax status charity list kept by HMRC. Thus the UK law corresponds with the Persche decision of the ECJ by requiring a comparability test.

1.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the donor must state in his/her tax declaration that the EU or EEA based public-benefit foundation/charity, which received his/her donation, fulfils UK tax law requirements and is on the charity list kept by HMRC. Likewise an EU/EEA based charity can apply to HMRC to receive Gift Aid tax repayments re the tax deducted from gifts of cash from UK donors.

The EU/EEA charity must prove to the UK tax authority, HMRC, that it would satisfy the tests for being a UK charity if it was established in the UK in order for donors to that charity to obtain tax relief on gifts to the charity and in order for the charity to be able to claim gift aid. It must also satisfy HMRC that it is managed by fit and proper persons. Managers in this context means not just the trustees of the charity but also any other officials who have general control over the running of the charity or the application of its assets.

The responsible UK tax authority performs the comparability test upon the request of the organisation. This decision is kept in a centralised list kept at HMRC.

The organisation has the burden of proof and the authority may require translated documents to prove the donation and the status of the recipient organisation, such as a receipt of the donation, the statutes of the foundation and the financial report of the recipient organisation.

To note that of around 50 EU/EEA charities that attempted to receive UK charity status in 2011, none was registered in the list.

1.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public benefit foundation fulfils the requirements of UK tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose according to the Charities Act 2011. This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.

- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must be reasonable.
- There exists a rule of timely disbursement of income under UK tax law.
- The foreign-based public-benefit foundations must also satisfy HMRC that it is managed by fit and proper persons.

2. Missionswerk/Gift and inheritance tax: Donor stipulates in their last will that a foreign EU-based public-benefit foundation should inherit a certain amount of money – is the donation subject to gift and inheritance tax?

2.1. Legal situation

Are there tax exemptions for legacies to public-benefit organisations?

A gift/legacy is taxed in UK as the state where the testator at his/her last residence.

UK tax law foresees a gift and inheritance tax.

The UK imposes a single tax, called inheritance tax, on lifetime gifts and gifts on death. The tax is levied on the donor, not the recipient of the gift.

However, there also exists a tax benefit for public benefit foundations/charities. According to UK tax law there will be no inheritance tax.

Gifts made to qualifying charities established in the UK will be free of inheritance tax provided that the gift meets the following criteria: The asset given is used solely for charitable purposes. The gift takes immediate effect in possession. The transfer must not depend on a condition that is not satisfied within 12 months of the transfer. The gift must not be defeasible (i.e. it cannot be annulled). The transfer is not for a limited period. No interests must be retained in the property transferred. The donor must give away his entire interest

There are also provisions in the inheritance tax code that allow owners of land and "pre-eminent" objects to trade in those objects in lieu of an inheritance tax liability to sell them to certain museums or national institutions and obtain a discount on their tax liability.

Do the exemptions apply in cross-border scenarios?

Gifts to foreign charities qualify for relief from inheritance tax only if the foreign charity has been registered by HMRC as comparable to a UK charity (see the above conditions for registration).

Following a recent reform in the 2010 Finance Act UK tax law no longer makes a distinction according to whether the recipient public-benefit foundation/charity is resident in UK or in another EU or EEA country. However donations to foundations based in other countries are excluded. The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil and must be included in a tax status charity list kept by HMRC. Thus the UK law corresponds with the Missionswerk decision of the ECJ by requiring a comparability test.

2.2. Procedures for tax incentives/the comparability test

The EU/EEA charity must prove to the UK tax authority, HMRC, that it would satisfy the tests for being a UK charity if it was established in the UK in order for getting the inheritance tax exemption. It must also satisfy HMRC that it is managed by fit and proper persons. Managers in this context means not just the trustees of the charity but also any other officials who have general control over the running of the charity or the application of its assets.

The responsible UK tax authority performs the comparability test upon the request of the organisation. This decision is kept in a centralised list.

The organisation has the burden of proof and the authority may require translated documents to prove the donation and the status of the recipient organisation, such as the statutes of the foundation and the financial report of the recipient organisation.

2.3. Criteria for the comparability test:

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of UK tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose according to the Charities Act 2011. This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under UK tax law.
- The foreign-based public-benefit foundations must also satisfy HMRC that it is managed by fit and proper persons.

3. Stauffer: Foreign EU-based public-benefit foundation generates income in UK – does the foreign foundation get a tax incentive?

3.1. Legal situation

According to the applicable double tax treaties a foreign-based foundation is taxed in UK as far as it generates income in UK. Examples are:

- Income generated from purpose-related economic activities (e.g. Museum which promotes the foundation's public benefit purpose (art and culture).
- Income generated from purpose-unrelated economic activities (e.g. noodle factory which just generates income that is used to promote the public-benefit purpose, but does not in itself directly promote the public-benefit purpose).
- Income generated from renting out property, fixed rates bonds, dividends

UK tax law foresees (partial) tax incentives for public-benefit foundations in the following cases:

Foundations established in the UK exclusively for charitable purposes are generally exempt from tax on all capital gains and most forms of income, provided they are spent on charitable activities. Exempt income includes:

- Rental income from lands and buildings
- Interest and other investment income
- Capital gains/dividends
- Profits from the charity's "primary purpose trading". This means a trading activity that's carried out as part of the charitable purpose or aim, for example a theatre charity could sell tickets for a theatrical production they put on.
- Non primary purpose trading is exempt if it is small scale/ancillary

Following a recent reform, UK tax law no longer makes a distinction according to whether the income generating public-benefit foundation is resident in UK or another EU or EEA country. However foundations based in other countries are excluded. The foreign EU or EEA based public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil and must be included in a tax status charity list kept by HMRC. Thus the UK law corresponds with the Stauffer decision of the ECJ by requiring a comparability test.

3.2. Procedures for tax incentives/the comparability test

In order to get the tax incentive the EU or EEA based public-benefit foundation must state in its tax declaration that it fulfils UK tax law requirements and is included in the list of qualifying charities kept at HMRC.

The EU/EEA charity must prove to the UK tax authority, HMRC, that it would satisfy the tests for being a UK charity if it was established in the UK in order for getting the income tax exemption. It must also satisfy HMRC that it is managed by fit and proper persons. Managers in this context means not just the trustees of the charity but also any other officials who have general control over the running of the charity or the application of its assets.

The responsible UK tax authority performs the comparability test upon the request of the organisation. This decision is kept in a centralised list.

The organisation has the burden of proof and the authority may require translated documents to prove the donation and the status of the recipient organisation, such as the statutes of the foundation and the financial report of the recipient organisation.

3.3. Criteria for the comparability test

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of UK tax law, the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose according to the Charities Act 2011. This includes that the interest of the public at large (and not just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public benefit purpose has to be exclusive. That means, there exists a non-distribution constraint. In case of dissolution the remaining assets have to be used for the public benefit, and the remuneration of board members and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under UK tax law.
- The foreign-based public-benefit organisation must also satisfy HMRC that it is managed by fit and proper persons.

4. Practical information

4.1. Further resources

- UK tax authority – HMRC: http://www.hmrc.gov.uk/charities-donors/
- “The Taxation of Charities” by James Kessler QC

4.2. Useful contacts

For specific guidance please contact The Charities Aid Foundation’s (CAF) Taxation Manager, Bill Lewis: blewis@cafonline.org