

# Tax Aspects of Philanthropy

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### The Art of Giving Art Law & Philanthropy L'art de donner Droit de l'art et philanthropie

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  2. Position of the entity (foundation, trust)
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## Structures

- Position of donor (collector)
  - Gift/Inheritance tax on attributions (?)
  - Recognition of the structure (control)
  - Wealth tax
  - Income tax (exemption of capital gains ?)



## Structures

- Position of the entity (foundation, trust, company)
  - Tax exemption
  - Profit tax (contributions / attributions/ gifts)
  - Capital tax



## Structures

- Position of the beneficiaries
  - Income or tax on distributions (or exemption as gifts ?)
  - Wealth tax (control over the structure)



## Swiss Foundations

- The foundation as a recipient

1. In General

**Profit tax at 4,25% (federal) and various rates (cantonal; i.e. Geneva new [5,144%]).**

**Cantonal capital tax (rules of individuals) (art. 29 par. 2 lit. c LHID).**

**Attributions by *founder* are exempt (art. 66 par. 1 LIFD).**

**Attributions from *third parties* could also be exempt (gifts with *animus donandi*) (art. 60 lit. a LIFD).**



## Swiss Foundations

### 2. Tax exemption

Foundations with a utility interest purpose may benefit, upon request, from a profit and capital tax exemption (Art. 56 lit. g LIFD).

The exemption may also be granted for gift and estate taxes.

Cumulative following conditions :

- i) General public interest goals
- ii) Disinterest
- iii) Effective activity
- iv) Irrevocability

Foundations with ideal goals are also exempt (federal limit of 20 000 CHF, cantonal limit fixed by the cantons (art. 66a LIFD)).

Ideal goal is broader than public interest.



## Swiss Foundations

- Position of the donor

1. Income tax

Donors (individuals legal entities) resident of Switzerland may deduct gifts to tax exempt entities, *residing in Switzerland*.

Maximum deduction is 20% of net income at federal level and varies in cantons (no limit in Basel Country).

Gifts to *foreign* tax-exempt entities are in principle not deductible.

Position of donors *abroad* will depend on domestic tax rules of their country of residence.

Private networks (e.g. *Transnational Giving Europe*) may allow to deduct gifts to a domestic entity, which would transfer it to a foreign beneficiary (costs will be charged).





## Swiss Foundations

### 2. Gift and inheritance tax aspects

Attributions to Swiss foundation (founder/third parties) may be regarded as gifts (gift tax, inheritance tax).

Exception for attributions to a **tax-exempt foundation**:

- Gifts from Swiss residents to such institution within the canton are tax exempt.
- Gifts in another canton may be subject to additional conditions, such as reciprocity.
- Gifts to tax exempt institutions abroad are usually subject to tax at the maximum rate (exceptions, e.g. Geneva, decision from State Council; Basel Country).
- Reciprocity agreements for attributions with religious, utility public or charitable purposes for gifts and inheritance tax purposes (23 cantons have such agreements with Germany, France, Israel and Liechtenstein).



## Swiss Foundations

- Position of beneficiaries

In general, distributions from the foundation to beneficiaries are regarded as income (art. 16 par. 1 LIFD).

Payments from the foundations in accordance with the statute are tax deductible as charges.

**Exception:** gifts? The taxpayer has to demonstrate the presence of an "*animus donandi*".



## Swiss Foundations

Various practices (controversial):

- Zurich (Administrative Court): gift could be admitted if such intention of the founder may be demonstrated (transparency approach).
- Supreme Court (ATF 22 Avril 2005): in general, a foundation does not act in its own will (no *animus donandi*). Payments from the foundations are income.
- Could an "*animus donandi*" be admitted if payments are not in accordance with the statute of the foundation ("free act")? (Question opened).

Personal opinion. In the case of a foundation, a transparency approach does not seem adequate. However, an "*animus donandi*" could exist on the side of the foundation (executing the intention of the founder).



## Non-Swiss Foundations (e.g. Liechtenstein family foundations)

- General overview
  - **Rule:** foreign-based foundations recognized in civil law qualify as tax subjects.
  - **Foreign entities** are assimilated to Swiss entities to which they correspond by form and structure (art. 49 par. 3 LIFD). A Liechtenstein **Anstalt** is closer to a foundation than a corporation (ATF 4 April 2019; 2C\_564/2017)
  - **Exception:** treated as transparent in case of **tax evasion**. Assimilation of a Liechtenstein Anstalt to a revocable trust? (question opened; ATF 4 April 2019, 2C\_564/2017).
  - Analysis on a case-by-case basis. The issue is who *is legally and effectively entitled* to dispose of the assets.
  - Distinction between non-controlled family foundations (NCFF) and controlled family foundation (CFF).



## Non-Swiss Foundations (e.g. Liechtenstein family foundations)

- Tax aspects

1. The foreign foundation as an independent tax subject ?

- a. CFF

Founder has retained effective control over the assets of the foundation, or he/she can instruct the foundation's council, or effectively indirectly control it.

CFF is treated as transparent. The assets remain attributable to the founder



## Non-Swiss Foundations (e.g. Liechtenstein family foundations)

- Tax aspects

1. The foreign foundation as an independent tax subject ?

- b. NCFF

Founder does retain control over the assets; administration remains exclusively by the foundation's council; founder has effectively relinquished the transferred assets (eg. no power to liquidate or modify the statutes).

The **NCFF** is regarded as an independent legal entity. Assets are attributable to the Foundation.

The NCFF may be subject to an unlimited Swiss tax liability if the *place of effective management of the foundation* is in Switzerland.



## **Non-Swiss Foundations (e.g. Liechtenstein family foundations)**

### **2. Taxation of the Foundation**

#### **a. CFF**

CFF are transparent. No gift tax is due at the time of the transfer of assets.

Distributions to beneficiaries qualify as donations (gift tax).

In case of death of the founder, inheritance tax is levied (depending of the cantonal tax rules).



## **Non-Swiss Foundations (e.g. Liechtenstein family foundations)**

### **2. Taxation of the Foundation**

#### **b. NCFF**

NCFF are regarded as a separate entity. A contribution may be regarded as a gift (cantonal gift tax) (rate vary depending on the canton of residence).

In general, family foundation may not qualify as charitable (restricted scope of beneficiaries) (e.g. Graubünden 2013, p. 22).





## Non-Swiss Foundations (e.g. Liechtenstein family foundations)

### 3. Taxation of Swiss resident beneficiaries

#### a. CFF

Founder continues to be taxed as the sole owner of the assets of the foundation and related proceeds.

Distributions from the CFF to beneficiaries may generate gift or inheritance tax.



## Non-Swiss Foundations (e.g. Liechtenstein family foundations)

### 3. Taxation of Swiss resident beneficiaries

#### b. NCFF

Same consequences as with Swiss foundations (Graubünden 2013, p. 5).

At the level of the foundation (*internal phase*), attributions in accordance with the purpose of the foundation may be charges.

Beneficiaries (*external phase*), may be subject to Swiss income or gift taxes, depending on cantonal practice.

In general, beneficiaries will be subject to income tax on distributions, unless they can prove a gift (“*animus donandi*”).



## Trusts

- Characteristics

Trusts do not exist under Swiss law but foreign trusts are recognized since the ratification of The Hague Convention (2007).

A trust is not a legal entity.

From a tax standpoint, recognition could be challenged if the transfer of assets is a sham, or the founder retains control over them.

According to practice, trust settled by Swiss resident (ordinary) are not recognized (Circular 2008).



## Trusts

- Taxation (overview)
  1. Swiss resident settlor

*A revocable* trust is transparent.

In an *irrevocable* trust, the transfer of assets is a gift/inheritance subject to gift/inheritance tax (based on relationship between settlor and beneficiaries)



## Trusts

### 2. Distributions to Swiss resident *beneficiaires*

In *revocable* trust, distributions may generate gift or inheritance tax.

In an *irrevocable* trust, distributions from accumulated income will in principle be subject to income tax, subject to **exceptions**: distribution from capital gains or from the initial capital may be exempted (documented proof).

Beneficiaries may be exempted from *wealth* tax, only to the extent that the trust is a *bona fide* discretionary trust (subject to careful analysis by the tax administration).

In a *fixed interest* trust, beneficiaries are treated as usufructuaries subject to wealth tax.



## Offshore entities

The establishment of a foreign entity entering into philanthropic activities is theoretically possible.

There are various anti-avoidance rules that may be applicable, among others:

- (i) Tax avoidance doctrine (look-through approach)
- (ii) Effective management doctrine
- (iii) Deemed distributions of profits doctrine

In practice, it is only under strict conditions and economic justification that the transfer of assets to an offshore entity could be recognized for tax purposes.