Germany

Legal framework

In Germany 'charity', or Gemeinnützigkeit, only has relevance as a legal term in tax law. Under the heading of 'tax-privileged purposes' (steuerbegünstigte Zwecke) the General Fiscal Code (Abgabenordnung or AO) clarifies the concept of charity (Gemeinnützigkeit). In contrast, there are no special rules for the variety of charitable (i.e. tax-exempt) legal forms in the law of foundations, associations, and companies.

In the charitable sector we find mainly three forms of activities, which are carried out by an independent legal person. These predominant forms are the registered association (Verein), the foundation (Stiftung), and the limited liability company (GmbH). In order to qualify for tax-exemption, both the articles and the de facto activities of the organisation must meet the requirements stipulated in relevant tax provisions.

Charity formation

A nonrecurring registration with the local fiscal authority is not sufficient because the tax privileges for charities are granted only for a certain tax period. In practice, the charitable status is only certified for an interim period and it is examined by the tax authority every three years. The usually light public oversight involves a routine inspection, and rarely a full audit. Charities violating the relevant tax laws may lose their tax-exempt status altogether with retrospective effect (10 years).

Also at the corporate level, charitable organisations (associations, foundations and limited liability companies) have to pass a registration procedure. The non-profit incorporated association will acquire the status of an independent legal subject upon registration at the federal Register of Associations (Vereinsregister). When such an association is registered, it receives the designation 'e.V.' (eingetragener Verein).

A foundation receives its legal personality upon recognition by the competent authority (Stiftungsaufsichtsbehörde) in the state (Bundesland) in which the foundation wants to be headquartered. Although the law does not specify a minimum capital for the establishment of a foundation, the authorities require at least 50,000 Euros. There is an ongoing oversight by the state authorities in order to compensate for the absence of members or stockholders.

The registration of a GmbH at the Commercial Register (Handelsregister) requires a minimum capital of 25,000 Euros. A limited liability company (GmbH) may be founded for any purpose permitted by law, and its form can therefore be used for charitable purposes. In 2008, the German legislator introduced a sub-type of the GmbH, the entrepreneurial company with limited liability (Unternehmergesellschaft (haftungsbeschränkt)), which can be founded with a minimum capital of only 1 EUR, but has to deposit financial reserves at the specific amount of 25 per cent of the annual surplus as long as the registered capital stays below the threshold value of 25,000 Euros.

Taxation issues

There are two kinds of tax privileges. First, charitable organisations pay no Inheritance and Gift Tax and basically no Corporate Income Tax. Second, and equally important in this context, donations and endowments can be deducted from the taxable income of the donors.

There are various tax benefits for organisations that pursue a charitable purpose in an altruistic manner. Indeed, there is no uniform 'tax law for charities'; instead, the recognition that an organisation is pursuing charitable purposes is reflected in the individual tax laws. Examples are the Corporate Income Tax Act (Körperschaftsteuergesetz or KStG) and the Inheritance and Gift Tax Act (Erbschaftsteuer- und Schenkungsteuergesetz or ErbStG). However, all special tax laws relate to the General Fiscal Code (Abgabenordnung) as the basic legal reference for the definition of tax-exempt status.

Tax-exempt status

An organisation is tax-privileged if its activities are directed towards benefiting the public materially, culturally, or morally in a selfless manner. The law mandates that the statutes must not limit the group of persons who benefit from the activity too closely. The tax-privileged purposes are enumerated within the General Fiscal Code using a final catalogue with an opening clause. In cases not listed a central agency - which is to be appointed by the federal states - is enabled to decide whether a purpose is accepted as charitable.

The catalogue of charitable purposes includes (amongst others): the promotion of science and research, education and teaching, art and culture, religion, international understanding, foreign aid, the protection of the environment, landscape and monuments, the promotion of youth welfare services, elderly welfare services, the public health-care system, social welfare, sport, the general promotion of a democratic state, the promotion of livestock breeding, plant breeding, garden plots, traditions and customs, amateur radio, model aircraft building, and dog sports.

Recognition as a tax-privileged organisation does not depend solely on the pursuit of charitable purposes in accordance with the statutes. Charitable organisations have to pursue such aims selflessly, exclusively, and directly. Furthermore, a charitable organisation is not allowed to accumulate income. The definition of 'selflessness' given by the legislature is based mainly on a negative description: an organisation is not acting selflessly if its chief aim is profitability. An organisation's aim is profitability if it promotes its own financial interests or those of its members as its prime concern, not just incidentally. In other words, the activities of a charity must not be directed primarily towards making a profit.

Charities derive their legal recognition as 'tax-exempt' entities from the recognition of the charitable nature of their objectives as stated in their statutes. Logically, those organisations may pursue only and exclusively these objectives (as is stated in Grundsatz der Ausschließlichkeit).

In addition, a charitable organisation must carry out its activities as stated in the statutes 'directly' (Grundsatz der Unmittelbarkeit). An organisation directly pursues its tax-privileged statutory purposes if it serves these purposes 'itself'. Depending on the circumstances of the

case, the above requirement can still be fulfilled even if an auxiliary person (Hilfsperson) is in charge of pursuing the charity's goals.

A charitable organisation must use its funds in a timely manner for its tax-privileged purposes stipulated in the articles (Grundsatz der zeitnahen Mittelverwendung). The income cash flow is the relevant factor for calculation of the required distributions. It is irrelevant whether the distributions are rather small compared to the fair market value of the charities´ assets. The timely disbursement requirement is fulfilled if the funds are spent for tax-privileged purposes stipulated in the articles of association by the end of the calendar year or the taxable year following the receipt of the funds.

Donor reliefs

Individuals and corporate donors receive similar tax benefits for their charitable contributions. They can deduct the amount of the donations from their pre-tax income up to 20 per cent for all charitable purposes. Alternatively, 4 per mill of the total turnover plus wages and salaries expended during the calendar year can be deducted and temporarily carried forward. Donations to a foundation's capital endowment up to the amount of 1 million Euros are additionally deductible.

Cross-border giving

Until lately, German tax law generally did not accept the establishment or the support of a charity in a foreign country with tax-deductible domestic funds. Due to some recent rulings of the European Court of Justice, the possibilities to deduct cross-border gifts within the European Union have been improved and the German legislation has been amended.

As a first step, cross-border gifts to charitable organisations established in other Member States of the European Union and being subject to limited tax liability in Germany have become deductible.

Furthermore, in 2010 the German Parliament has adopted provisions enabling the deduction of cross-border gifts. Donations for charitable, benevolent or religious purposes to EU corporate bodies under public law or to EU entities, that would be tax-exempt if subject to tax liability in Germany, shall be deductible, if the Member State provides administrative assistance and assistance as to the collection of taxes. Additionally, it is required that individuals resident or domiciled in Germany benefit from the entity's activities or that the activities may contribute to the prestige of the Federal Republic of Germany.

However, in practice, the tax authorities concerned can ask the German taxpayer to provide such proof as they may consider necessary to determine whether the above mentioned conditions for deducting expenditure have been met. Thus, the new provisions may have only a low practical impact.

Donations to foreign charities may be exempt from Inheritance and Gift Tax if the country of residence of the beneficiary has entered into a reciprocity agreement (Gegenseitigkeitserklärung) with Germany. Such an agreement is contained, for example, in Article 10 of the Convention between the Federal Republic of Germany and the United States

of America for the Avoidance of Double Taxation with respect to Taxes on Estates, Inheritance, and Gifts.

Country summary written by Dr. Andreas Richter LL.M. (Yale), Attorney at Law, P+P Pöllath + Partners Berlin, Germany
andreas.richter@pplaw.com
www.pplaw.com

Updated November 2011.

Philanthropy Impact: www.philanthropy-impact.org

Philanthropy Impact (incorporates EAPG, Philanthropy UK and the Philanthropy Advisors Forum). It was launched on 3 December 2012.