

Portugal

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 Portugal 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?

Portuguese tax law foresees tax incentives for donations to public-benefit foundations. According Portuguese Income Tax law, the donor can deduct the amount of the donation in his/her tax declaration (tax credit) in the following way:

Individual donors – tax credit - donations in cash only.

The Tax Benefits Statute, which was approved by Decree-Law 215/89, 1 July, with later amendments, grants tax incentives to individual donors in accordance with the regime applicable to corporate donors. Individual donors can subtract 25% of the amount donated from their total

income tax in the respective year in cases where there is no limit on deduction for corporate donors. Also, individual donors can subtract 25% of the amount donated, as long as the amount does not exceed 15% of their total income tax in the respective year, in cases where there is a limit on deduction for corporate donors (Art. 63.1).

Corporate donors – tax deduction - any kind of donation qualifies for tax relief.

Corporate donors are not subject to limits on tax deduction when donations benefit foundations to whose initial assets the state, autonomous regions or local councils have contributed. Similarly, subject to recognition by a joint decision of the Ministry of Finance and the ministry relevant to the activities of the concerned entity, no limits apply when donations represent the endowment of private origin foundations that pursue predominantly social or cultural aims (Tax Benefits Statute, Art. 62.1 c and d and 9. See, also, regarding science patronage, Law 26/2004, 8 July, Art. 8.1). Art. 62.3 sets out certain limits: Donations made to support private welfare institutions and legal entities of administrative and simple public utility whose main purposes are in the area of charity, assistance, benevolence and social solidarity are regarded as operational costs or losses up to a maximum of 8/1000 of the revenues from sales or services. The same limit is valid regarding family patronage and in the field of information technology (Arts. 62.5 and 65). It is also applied to science patronage (Law 26/2004, Art. 8.2). Donations to support foundations working in the field of culture, environment, sport or education are regarded as operational costs or losses up to a limit of 6/1000 of the revenues from sales or services (Art. 62.6). In this case, some tax privileges depend on the previous recognition of the status of the beneficiary by the ministry relevant to the activities of the concerned entity (Art. 62.10). Aggregate tax deductions are subject to a global ceiling of 8/1000 of the revenues from sales and services (Art. 62.12). In any case, beneficiaries must provide the tax authority with thorough information regarding all donors (Art. 66. See also, regarding science patronage, Law 26/2004, as amended by Law 67-A/2007, 31 December, Article 11-A).

Calculation of the tax incentive: Donations are regarded as a cost for the donor. The calculation of this cost varies depending on the status and purpose of the organisation to which the donation is granted. It ranges from 120% of the monetary value of the donation (when made to a foundation working in the field of culture, environment, sport or education, according to Art. 62.2 and 7) to 150% (family patronage – Art. 62.5).

Do the incentives apply in cross-border scenarios?

Though not clearly stated, public-benefit status seems to be available only to domestic foundations or, at least, to domestically operating foundations.

Portuguese tax law formally (according to the wording of the law) only provides tax incentives for donors if the recipient public-benefit foundation is resident in Portugal. However, some references made by the Tax Benefits Statute to NGOs and other entities in general as beneficiaries (Art. 62.3 d, e and f) may exceptionally serve as a legal basis to grant tax incentives to corporate and individual donors when donating to non-resident public-benefit foundations. Thus the Portuguese law does not appear to correspond with the Persche decision of the ECJ.

1.2. Procedures for tax incentives/the comparability test

Not applicable.

1.3. Criteria for the comparability test

Not applicable.

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?

Portuguese tax law does not foresee gift and inheritance tax but stamp duty tax.

However, there also exists a tax benefit for public-benefit foundations. According to the Stamp Duty Code, public utility foundations are exempt from stamp duty (Art. 6c and d).

Do the exemptions apply in cross-border scenarios?

Exemption is awarded to legal entities of public utility. Considering that the status requires the pursuance of aims of general interest for domestic benefit, exemption seems restricted to resident public-benefit foundations. Though not clearly stated, the public-benefit status seems to be available only to domestically operating foundations. Even so, some references made by the Tax Benefits Statute to NGOs and other entities in general as beneficiaries (Art. 62.3 d), e) and f)) may exceptionally serve as a legal basis to grant tax incentives to non-resident public-benefit foundations in the case of stamp duty tax.

Hence Portuguese tax law appears to formally (according to the wording of the law) only provide tax exemption for resident public-benefit foundations and does appear not correspond with the Missionswerk decision of the ECJ and the TFEU.

2.2. Procedures for tax incentives/the comparability test

Not applicable.

2.3. Criteria for the comparability test

Not applicable.

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

3.1. Legal situation

A foreign-based foundation is taxed in Portugal as far as it generates income in Portugal.

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

According to Art. 10 CITC (Corporate Income Tax Code), legal entities of administrative public utility, social welfare institutions and legal entities of simple public utility whose main purposes are in the area of science, culture, charity, assistance, benevolence, social solidarity or environmental protection, are exempt from corporate income tax. The exemption of the latter must be recognised, at the request of the foundation, by the Ministry of Finance, which, through a dispatch published in the Official Gazette, will define its scope.

Pursuant to Art. 10.3 CITC, with the amendments of Law 60-A/2005, 30 December, tax exemption does not apply to income from bearer securities and unrelated economic activities.

Foreign foundations are subject to the general non-resident income tax of 25% (Art. 87.4 CIRC).

To get equal tax benefits to a national foundation, the foreign foundation has to apply for public utility status under the general terms of the law (Arts. 24 and 25 FLF). To do so, it must have a permanent office in Portuguese territory and must be recognised as a foundation/legal entity or be based in one Member State of the Council of Europe, because the rules contained in the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations apply to foundations covered by that Convention (Art. 5.3 FLF). It must secondly be recognised as being of “public utility”, a concession issued by the Prime Minister. The tax status of the organisation will depend on this public utility status.

Hence Portuguese tax law does allow foreign (but legally recognised) income generating public-benefit foundations to qualify for public utility status and hence a tax exempt status. The foreign public-benefit foundation must fulfil all legal requirements that a resident foundation has to fulfil and apply of a specific public utility status with the Prime Minister. However this public utility status is dependent on the pursuance of national Portuguese or regional interests. Thus the Portuguese law does not appear to correspond with the “*Stauffer*”) decision of the ECJ since foreign based public-benefit foundations have to qualify for the specific public utility status.

3.2. Procedures for tax incentives/the comparability test

Hence in order to get the tax incentive the EU or EEA based public-benefit foundation must have been granted the public utility status. The recognition of the exemption from corporate income tax is done by the Ministry of Finance for legal entities of simple public utility. There are two other categories of organisations with public utility status which get the tax exemption automatically.

The responsible Portuguese authority (Prime Minister) will perform the comparability test to assess whether the foreign based public-benefit foundation fulfils the requirements of Portuguese law and is eligible for public utility status. It performs the comparability test upon the request of the organisation. Public utility status is requested via the filling in of an appropriate electronic form in line with the indications set out on the Presidency of the Council of Ministers’ website (Art. 25.2 FLF). This decision is not kept in any register/list. Public utility status is granted for a period of five years. This may be successively renewed for equal periods, on presentation of a request for renewal (Art. 25.5 FLF).

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

3.3. Criteria for the comparability test:

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

- The foundation pursues a public-benefit purpose as listed in the law, correct setting up of the foundation and regulation of its activity by statutes drawn up in accordance with the law, the impossibility of carrying on, as its main activity, economic activities in competition with other entities which do not have the benefit of the public utility status, and the existence of sufficient human and material resources to achieve the objectives set out in the statutes (Art. 24.1 FLF). Private foundations may only request public utility status after they have been operating in a relevant manner for three years, unless the majority founder(s) already hold the status of public utility, in which case this status may be requested immediately (Art. 24.2 FLF). The organisation must pursue aims of general interest either the interest of the national community or of any region or district. The interest of the public at large (and just the interest of a small circle of beneficiaries) is promoted.
- The pursuance of the public-benefit purpose has to be exclusive, meaning that, there exists a so-called 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 Portuguese tax law. The foundation must spend, in the following four financial years, 50% of its net income in the fulfilment of its purpose. Otherwise this tax benefit will be withdrawn. The process does not have to be repeated every year.

4. Practical information

4.1. Useful contacts

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