



Spain

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 tax 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 Spain 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?

Spanish tax law foresees tax incentives for donations to certain public-benefit foundations/organisations according to article 16 of Law 49/2002 of December 23rd. The donor can deduct the amount of the donation in his/her tax declaration (tax credit) in the following way:

Personal Income Tax: According to art. 19.1 of Law 49/2002, taxpayers can deduct an amount equivalent to 25% of the deduction base as determined under article 18 of Law 49/2002 off the total amount payable of their income tax (in the case of cash donations the deduction base will be the total amount donated), up to 10% of their taxable income base (article 69 of Law 35/2006, of 28 November, concerning Personal Income Tax). Article 68 of Law 35/2006 provides the possibility of deducting 10% off the amounts donated to legally recognised foundations which render

accountability to the corresponding protectorate body, as well as to declared public interest associations, which do not benefit from Law 49/2002. This deduction has the same limit as mentioned above (up to 10% of their taxable income base).

Corporate Donors: According to art. 20.1 of Law 49/2002, corporate tax taxpayers can deduct from the amount of tax payable, reduced by certain deductions (due to double domestic or international taxations) and allowances (e.g. the provision of public services, amongst others), an amount equivalent to 35% of the deduction base, determined under article 18 of Law 49/2002 as above) The deduction base cannot exceed 10% of the taxable base for the corresponding taxable period. All amounts which exceed said limit may be applied to the following ten taxable periods (article 20.2 of Law 49/2002).

For individual and corporate donors, there are cases in which the amount of the deduction, as well as the limits, can be increased by five percentage points. This is the case of the Priority Activities of Patronage approved by the State Budget Act on a yearly basis.

For corporate and individuals ruling economic activities some donations may be deducted as special expenditure (business co-operation agreements, expenses for general interest activities, support programmes declared by law to be of special interest).

Do the incentives apply in cross-border scenarios?

Gifts to a foreign public-benefit organisation cannot be deducted for income tax purposes in Spain, unless a delegation of a foreign public-benefit organisation is registered in the Spanish Register of Foundations to carry out its activities in Spain and the public-benefit organisation meets all the requisites required by tax law for a tax exempt status under Law 49/2002.

Although recent judgments have recognised the discrimination suffered by foreign foundations taxing the dividends that they received, there has not been any judgment regarding taxation of donors.

Spanish tax law and civil law requires foreign EU-based public-benefit foundation to register in a civil law register and to fulfil all legal requirements that a resident foundation has to fulfil before a donor would be able to get a tax incentive for his/her donation. The fact that foreign EU based public-benefit foundations would need to register in a Spanish register does not correspond with the Persche decision of the ECJ, which only requires a comparability test.

1.2. Procedures for tax incentives/the comparability test

Not applicable. There is no comparability test for foreign-based foundations without a registered delegation in Spain.

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?

Spanish tax law foresees a Gift and Inheritance Tax (Law 29/1987, of 18th December), which is transferred to the Autonomous Communities, however this only applies when the gift or legacy is received by a natural person, not by a legal entity.

In addition, a Tax on Capital Transfers and Documented Legal Acts exists. However, there also exists a tax benefit for public-benefit foundations. According to Article 45.1 of the Tax on Capital Transfers and documented Legal Acts there will be tax for transfers to organisations, which fall under Law 49/2002.

Do the exemptions apply in cross-border scenarios?

Following a recent consultation (V1950-12) of the Directorate of Taxation dated October 9th 2012, a donation made to an entity established in another European country is not considered taxable in Spain (the case concerned a Spanish company giving to a foreign based public benefit foundation). This means that gifts/legacies to foreign public-benefit foundations/organisations are not subject to gift- and inheritance tax and the tax on Capital Transfers and documented Legal Acts. Thus the Spanish law corresponds with the Missionswerk decision of the ECJ since it does not discriminate foreign based public benefit foundations.

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 Spain – does the foreign foundation get a tax exemption?

3.1. Legal situation

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

Spanish tax law foresees (partial) tax incentives for public-benefit foundations in the following cases (Law 49/2002):

Purpose related economic activity - if activity is needed to fulfil the purpose: Article 7 of Law 49/2002, states that the organisation's income from certain economic activities is exempt from Corporate Income Tax, as long as such activities are undertaken to fulfil their specific purpose, such as: hospitalisation services, economic exploitation of assets declared of cultural interest, promotion and management of social action work, economic exploitation of hospitalisation services or sanitary assistance, including auxiliary or complementary activities, museum, libraries, archives services, etc., amongst others. There is no limit, as long as the activity is included in said list in Article 7.

There is a limit applicable to (i) the auxiliary or complementary activities: these must not exceed 20% of the total revenues of the entities, and (ii) to the activities considered of little economic significance: these must not exceed from €20,000 annually.

Unrelated economic activities: are not accepted, if they exceed 40% of the total revenues (article 3.3 of Law 49/2002).

Asset administration: Article 6.2 of Law 49/2002 states that income from moveable and immovable assets, such as lease, dividends and capital shares, interests (fixed rate bonds), cannons and rents are exempt from corporate income tax.

If foreign public-benefit organisations gain income in Spain through an activity, they must register as delegations of a foreign public-benefit organisation in the Spanish Registry of Foundations and opt for the special regime of Law 49/2002 if they fulfil the requirements.

According to the civil law, a foreign foundation can get the same benefits as a national foundation by:

- Establishing a formal branch in Spain,
- Registration with the competent public body
- Purposes of general interest and fulfilment of legal requirements for foundations (at the national and regional level).

According to the tax law, they have to satisfy the same requirements as Spanish foundations in order to benefit from the special tax regime. When foreign foundations' sole activity in Spain is fundraising, civil law does not allow formal registration, and therefore the special tax regime will not be applicable.

Spanish tax law and civil law requires foreign EU based public-benefit foundations/organisations to register in a civil law register and to fulfil all tax law requirements that a resident foundation has to fulfil. The fact that foreign EU based public-benefit foundations (and only those with permanent activities in Spain) would need to register in a Spanish register before it could show that it is comparable to Spanish public-benefit tax exempt organisations does not correspond with the Stauffer decision of the ECJ, which only requires a comparability test.

3.2. Procedures for tax incentives/the comparability test

In order to get the tax exemption, the foreign public-benefit foundation/organisation must register its delegation with in the Spanish foundation registry and ask for a special tax treatment according to law 49/2002 with its tax declaration.

The responsible Spanish tax authority checks if the foreign based organisation is registered in the Spanish registry and otherwise fulfils the provisions of Law 49/2002 to get a special tax treatment.

In order for the foreign based foundation to be included in the register, it must submit the following: translated deed of incorporation, annual reports and financial statements). In order to get the special tax treatment of law 49/2002, it must fulfil the requirements of Article 3.

The Spanish tax authority performs the comparability test only for this specific case/request for a tax exemption. This individual decision is not kept in any register/list.

The foreign/EU based public-benefit foundation/organisation has the burden of proof and the tax authority may require translated documents to prove the status of the organisation, such as the statutes of the foundation and the financial report.

In order to get the tax incentive the EU or EEA based public-benefit foundation must register in the Spanish foundation registry and state in its tax declaration that it fulfils Spanish tax law requirements.

3.3. Criteria for the comparability test:

Tax benefits can only be applied to Foundations which are incorporated as per the requirements set forth in the Spanish regulations and to those delegations of foreign foundations registered in the Spanish Registry of Foundations which opt for the special regime set in Law 49/2002 and meet all the requisites set therein.

The tax authority checks during the comparability test, whether the EU or EEA based public-benefit foundation fulfils the requirements of Spanish tax law (49/2002), the core elements of which can be summarised as follows:

- The foundation pursues a public benefit purpose. 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 is not allowed and the administration costs must not be excessive.
- There exists a rule of timely disbursement of income under Spanish tax law. At least 70% of the income must be spent on the public benefit purpose (30% may be used to build reserves).

4. Practical information

4.1. Further resources

Legal references:

- Spanish Civil Code (specially, articles 806 et seq.):
<http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>
- Gift and Inheritance Tax Law: <https://www.boe.es/buscar/doc.php?id=BOE-A-1987-28141> and its implementing regulation:
<http://www.boe.es/buscar/doc.php?id=BOE-A-1991-27678>
- Tax on Capital Transfers and Documented Legal Acts Law:
<https://www.boe.es/buscar/doc.php?id=BOE-A-1987-28141>, and its implementing regulation: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1995-15071
- Personal Income Tax Law: <http://www.boe.es/buscar/act.php?id=BOE-A-2006-20764> and its implementing regulation:
<https://www.boe.es/buscar/doc.php?id=BOE-A-2007-6820> ;
- Corporate Tax Law: <http://www.boe.es/buscar/act.php?id=BOE-A-2004-4456>, and its implementing regulation:
<http://www.boe.es/boe/dias/2004/08/06/pdfs/A28377-28429.pdf>
- Non-Resident Income Tax Law:
<http://www.boe.es/boe/dias/2004/03/12/pdfs/A11176-11192.pdf> and its implementing regulation: <http://www.boe.es/buscar/act.php?id=BOE-A-2004-14532>
- Law 49/2002: <http://www.boe.es/boe/dias/2002/12/24/pdfs/A45229-45243.pdf> and its implementing regulation: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2003-19571

Other sources of information:

- The State Tax Administration Agency's webpage: www.aeat.es
- The Spanish Association of Foundations' webpage: www.fundaciones.org

4.2. Useful contacts

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