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# Swiss foundations in an international context

## A discussion of selected tax law topics

IFMA Lunch Meeting  
Swissôtel Metropole, Geneva  
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LENZ & STAEHELIN

# *Outline*

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1. Growing importance of philanthropy
2. Switzerland as a destination for charitable foundations
3. Legislative changes and evolution

## **II. Selected tax law topics**

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## **III. Other tax law topics**

1. Board member compensation
2. Motion Luginbühl (20 March 2009) and Report of the Federal Council (27 February 2013)

# ***I. Introduction***

## **1. Growing importance of philanthropy**

- Great variety of needs to be fulfilled, e.g. :
  - fight against poverty and malnutrition
  - neglected diseases and access to health
  - access to water and sanitation
  - basic education
  - environment protection, etc.
- Higher attention from the public and the media
- Higher legal and accountability requirements

# ***I. Introduction***

## **2. Switzerland as a destination for charitable foundations**

- In 2011, 12'715 charitable foundations in Switzerland (of which 3'561 subject to federal supervision)
- More than 57% of the foundations subject to federal supervision have been constituted during the last 20 years
- Total annual distributions in 2010, estimate made by SwissFoundations of around CHF 1 billion = 2% of the Swiss annual budget
- Gfs-Zürich estimate of donations made by Swiss private households in 2011 of approx. CHF 1.3 billion ; 72 % of Swiss private households have made a donation of an average amount of CHF 694.

# ***I. Introduction***

## **2. Switzerland as a destination for charitable foundations**

- Tradition of humanitarian aid
- Proximity of seats of major global/ international organizations (e.g. WHO, WTO, WIPO, etc)
- Connecting link with Switzerland easily fulfilled
- Flexibility of Swiss foundation law
- Tax-exempt status

# ***I. Introduction***

## **3. Legislative changes and evolution**

- 2006: Partial revision of Swiss foundation law
- 2008: Revision of auditing requirements
- 2008: Host State Act
- 2009: Geneva Tax Law
- 2013: Motion Luginbühl and Report of the Federal Council in relation thereto

## II. Selected tax law topics



## *II. Selected tax law topics*

### 1. Charitable foundations

- Concept of “charity” is only a tax concept
- **Main conditions of tax-exempt status:**
  - a) Pursuit of a public utility purpose : (i) activities of a charitable, humanitarian, health, ecological, educational, scientific or cultural nature and (ii) unrestricted circle of beneficiaries
  - b) No self-interest : foundation serves the public interest and is based on altruism to the community
- **Other conditions of tax-exempt status:**
  - a) Exclusivity of the use of funds
  - b) Income from profit making activity (if any) exclusively affected to the public utility purpose
  - c) Effective activity
  - d) Irrevocable commitment of funds



## *II. Selected tax law topics*

### 2. Content of tax-exempt status

- Full exemption of income and net asset taxes at federal, cantonal and municipal levels
- Full exemption of gift tax on the initial capital as well as full exemption of gift tax and inheritance tax on gifts/ bequests made by Swiss residents
- Exemption of gift tax and inheritance tax at the level of the Swiss foundation on gifts/ bequests made by persons who do not reside in Switzerland

## ***II. Selected tax law topics***

### **3. Tax deductibility for donors in Switzerland**

#### **3.1 Donations to entities located in Switzerland**

➤ Individual donor

- Federal tax : up to 20% of taxable income
- Local taxes : up to 20% of taxable income (Geneva)

➤ Corporate donor

- Federal tax : up to 20% of taxable profits
- Local taxes : up to 20% of taxable profits (Geneva)

➤ Foundation as a donor

- gifts made by a tax-exempted foundation are not subject to gift tax, provided they are made in furtherance of the foundation's philanthropic purpose

#### **3.2 Donations to entities outside Switzerland**

➤ No tax deductibility

## ***II. Selected tax law topics***

### **4. Gift tax**

#### **4.1 Donation by Geneva based individual/corporation to Swiss charity**

- No gift tax since January 1<sup>st</sup>, 2009

#### **4.2 Donation by Geneva based individual/corporation to foreign charity**

- Up to maximum 54.6% gift tax
- Arguably, no gift tax if double income tax treaty with non-discrimination provision (e.g. Art. 23 of CH-UK Double Income Tax Treaty)

## ***II. Selected tax law topics***

### **4. Gift tax**

#### **4.3 Donation by Geneva based charity to a Swiss or foreign charity**

- Donation within scope of Geneva based charity: no gift tax
- Outside scope of Geneva based charity: see 4.2 above

#### **4.4 Donation by foreign resident to a Swiss based charity**

- Gift tax exemption at level of Swiss charity
- Check foreign gift tax / tax deductibility

## ***II. Selected tax law topics***

### **5. Tax deductibility of cross-border donations**

#### **5.1 Tax deductibility under community law**

The free movement of capital guaranteed by Article 56 of the EC Treaty in relation to charitable institutions has been examined by the European Court of Justice in two cases :

- ***Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*** (ECJ C-386/04, 14 September 2006) : Germany had infringed the free movement of capital by differentiating between German charities and those based abroad on the sole basis of their State of establishment, although the activities of the foundation corresponded to those recognised by German law.
- ***Hein Persche v. Finanzamt Lüdensched*** ( ECJ C-318/07, 27 January 2009) : the Court judged that the principle of free movement of capital was breached by the exclusion *a priori* of the possibility for the taxpayer to show that a gift made to an entity established abroad satisfies the conditions set out in the taxing Member State's legislation.

## ***II. Selected tax law topics***

### **5. Tax deductibility of cross-border donations**

#### **5.1 Tax deductibility under community law**

- **In summary**, the principle of free movement of capital in relation to charitable institutions under community law implies that tax deductions for donations made by a resident of the State of taxation to charities within other Member States must benefit of the same considerations as those from the State of taxation.
  - In other words, a differentiation made on the sole basis of the State of establishment is not acceptable under community law.
- **However**, the State of taxation can refuse tax deductions if :
  - The evidence necessary for a correct tax assessment is not supplied, or
  - The objectives pursued by the beneficiary are not recognised by the taxation State's legislation

## ***II. Selected tax law topics***

### **5. Tax deductibility of cross-border donations**

#### **5.2 Tax deductibility of donations made by Swiss residents to charities established abroad**

- As regards deductibility of donations made to charities under Swiss legislation, it is still subject to two conditions: (i) the beneficiary must be registered in Switzerland, (ii) the beneficiary pursues one (or many) public utility purpose(s).
- **Swiss tax residents who wish to make donations to a charity registered abroad will not be entitled to tax deductions in Switzerland.**

## ***II. Selected tax law topics***

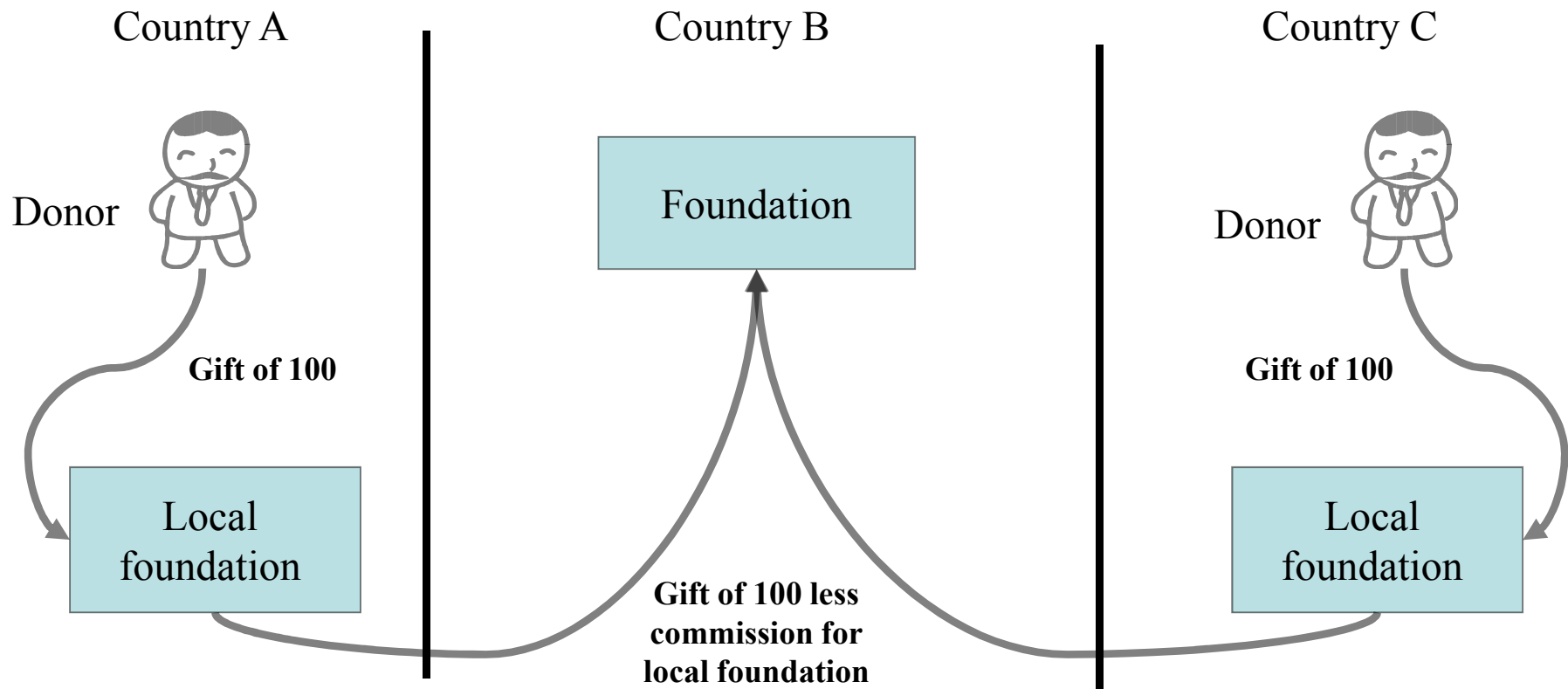
### **5. Tax deductibility of cross-border donations**

#### **5.3 Transnational Giving Europe**

- Transnational Giving Europe provides a cross-border giving framework in Europe ([www.transnationalgiving.eu](http://www.transnationalgiving.eu))
- How it works: donation are made to the national partner of the network which will then transfer the donation abroad.
  - In Switzerland : Swiss Philanthropy Foundation ([www.swissphilanthropy.ch](http://www.swissphilanthropy.ch))



### 5.3 Transnational Giving Europe



### ***III. Other tax law topics***

#### **1. Board member compensation**

Lack of self interest and prohibition  
of returning funds to the Founder

**vs.**

Increased need of professionalism of non profit Boards

### ***III. Other tax law topics***

#### **1. Board member compensation**

##### Perspectives of change?

Answer of the Federal Council of 13 February 2013 to PM  
Recordon:

*« On the basis of current law, the supervisory authorities cannot prohibit or prescribe an adequate compensation for board members; according to the circumstances, remunerated professionalism is preferable to voluntary amateurism ».*

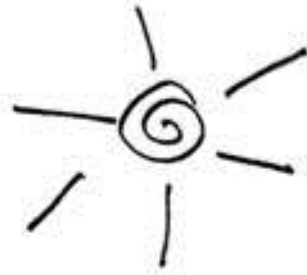
No signs of change in practice yet...

### ***III. Other tax law topics***

#### **2. Motion Luginbühl (20 March 2009) and Report of the Federal Council (27 February 2013)**

- Tax incentives discussed
  - Raising of the tax deductibility levels
  - Introduction of a deferral of donations
  - Introduction of a supplementary deduction for donations earmarked for the capital of foundations (in Germany, so-called “Vermögensstock”)
  - Deduction of donations made to foreign legal entities pursuing a public utility purpose
  - Deductibility of donations made by foreign taxpayers to foundations pursuing a public utility purpose in Switzerland
  
- These additional incentives are not recommended by the Federal Council

# THANK YOU FOR YOUR ATTENTION !



It's not the destination  
that matters,  
it's the journey itself



GABS.

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