

Trends in cross border philanthropy in 2012

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Introduction

Under the heading 'International Philanthropy – a pipe dream?' I recently had the opportunity to discuss the matter of cross-border philanthropy with UK tax experts' who are awaiting further guidelines from the UK tax administration, to enable them to work with the amended legislation in the UK since this has been principally brought in line with the freedom of capital, as foreseen in the EU Treaty and emphasised by the European Court of Justice in a number of cases.

As per 2008, the Netherlands has been the first country in Europe, and to my knowledge in the world, to open its borders entirely for tax preferential charitable giving. As of that date, a Dutch resident individual or corporate is able to deduct a gift to a foreign qualifying philanthropic organisation against Dutch taxable income (providing for a refund at progressive income tax rates) and a full exemption of gift tax applies to such a gift. The foreign philanthropic organisation has to seek recognition as a qualifying Dutch 'public interest pursuing organisation', referred to as ANBI².

Dutch experience

Initially, the Dutch non-discrimination of foreign entities was formalised only for charities established in EU Member States or in countries with which the Netherlands has bilateral tax treaties in place – both on income tax and gift and inheritance tax - with appropriate exchange of information clauses: an important country in this category is the United States. As of November 2008, it was further announced that philanthropy bodies in any country could seek recognition as an ANBI; in such a 'third country' situation the tax inspector may want to seek more

adequate information in order to be convinced of the genuinely philanthropic nature of the activities of the foreign organisation and has the power to act accordingly.

It appears that the way the Dutch tax administration deals with the requests of foreign philanthropic organisations is rather practical. Where for example, the law now requires that a qualifying organisation takes some specific legal forms that are used in the Netherlands (foundation, association) it is not a hurdle for a foreign charitable trust or non-profit corporation to be recognised as a qualifying organisation in the Netherlands. The fact that a foreign regime approves and controls a foreign charity adds to the practical confidence the Dutch tax administration places in the genuine public interest pursuing character of its foreign activities. Where doubts remain from the various documents exchanged, executives of the foreign organisations are invited for a critical discussion at the office of the tax administration where the passion and intentions of a wholehearted philanthropist are seldom overlooked. All qualifying organisations, whether based abroad or in the Netherlands, are published on an official website³.

The Dutch requirements for a qualifying ANBI are mostly very straightforward⁴, but there are also a number of broad normative requirements. The application form requires the foreign organisation to answer a list of questions in the affirmative. The answers to the 'normative' questions require legal analysis of the situation. If the tax authorities at a later stage consider that the factual circumstances do not justify a positive answer to one of these questions, it may deny the philanthropic status in some situations with retroactive effect. The possibility of withdrawing the status retroactively entails that a written

explanation is added to the application form in which the rationale for positive answers to the critical questions are highlighted with the relevant facts, backed up as much as possible by annual accounts, policy plans, budgets etc. The positive reaction to an elaborated application creates confidence that the tax authorities may not withdraw retroactively the ANBI status, as long as the facts are in line with the presented facts and circumstances.

The normative questions are the following:

- 1) Does the organisation, according to both its organisational documents and its operational activities, operate on a non-profit basis?
- 2) Is the organisation, according to both its organisational documents and its operational activities, serving the public interest nearly exclusively (i.e. for at least 90%)?
- 3) Is it safeguarded that members of the board of directors or any other third party cannot dispose of the assets of the organisation as if it were their own?
- 4) Does the organisation not maintain more properties that are reasonably required for the continuity of the public benefit activities of the organisations?

The number of foreign charities that qualify as a Dutch ANBI are still relatively modest⁵. This may be explained by two valid reasons. It is still not widely known that foreign charities may easily seek recognition in the Netherlands as an ANBI and by doing so, enter into competition with Dutch domestic ANBIs in raising tax effective grants. Especially where foreign charities have adopted innovative methods and practices that improve their impact, they may find themselves in a strong competitive situation. Most Dutch charities are not very focused on major donors and their entrepreneurial spirits, and where foreign charities have adopted 'micro franchising' or 'venture philanthropy' schemes or offer Donor Advised Funds, the interest of Dutch wealthy philanthropists is attracted. I will come back to this below.

On the other hand, the modest number of foreign resident qualifying ANBIs may be explained by the fact that the Dutch tax administration is, in practice, rather critical when it comes to the recognition of foreign charities. For example, it cannot be said that many 'pet' philanthropic organisations from abroad have been recognised as qualifying organisations for Dutch purposes, if we concentrate on the listed foreign ANBIs on the official tax authorities' website. This may count as positive, since the possibility of abuse of foreign qualifying

organisations may seriously threaten the continuity of the tax relief philanthropic organisations have at home.

Challenges induced by international philanthropy

That the liberation of tax obstacles for international philanthropy leads to challenges at home is keenly illustrated by the suggestion by UK 'Treasury sources' that the recently proposed cap on the income tax deduction for charitable gifts was motivated by the extension of charitable reliefs to eligible organisations in the EU, Norway and Iceland since there have been high income UK taxpayers making gifts to foreign organisations and then fraudulently misusing those funds for non-charitable purposes. Although the proposal recently has been withdrawn after a successful lobby of the 'Giveitback George' campaign and the focus is back on tackling fraud or abuse on charitable giving to foreign charities by appropriate measures, there is still a debate on the justification for unlimited tax relief for charitable giving. Karl Wilding, the head of policy and research at the National Council for Voluntary Organisations, says that the sector must develop 'much better arguments' to defend itself against policies aimed at reducing the sector's tax relief where the 'evidence' for the practical difference that tax relief makes to the donor is not strong enough⁶. In the Economist of 9 June, the lines of defence for 'the great exemption' were discussed under the reference of 'Sweetened Charity'. It ends with the notion that 'assuring Mr B that he is not paying more tax simply so that well-off Mr A can feel better about himself would in itself benefit the community' thereby referring to the demagogue words of George Osborne when he justified the cap on the tax break that in every case exemption of tax means a relief to A at the charge of B.

Another price that may have to be paid for enhanced tax preferential cross-border charitable activity is the introduction in the UK Finance Act 2010 of the 'fit and proper person' test which apparently has attracted a significant degree of controversy since it was published. Where the charity status of both foreign and domestic charitable organisations now are determined according to the propriety of its 'managers', which the tax administration may consider 'in its discretion', this opens up an entire new set of reference for charities and their benefactors to deal with.

Illustrative for the thirst of the European Commission after a fully liberalised European charitable giving market is that now, after liberation of

its laws since 2008, the Netherlands has been the subject of an infringement procedure before the European Court of Justice. The Dutch have resisted compliance with the requirement of the European Commission that in addition to its existing procedure of 'recognising' ANBI's whether resident within the Netherlands or abroad, an individual donor should have the possibility to prove that his or her donation to a foreign organisation satisfies the Dutch requirements – even if the foreign organisation has not sought recognition as an ANBI. This goes further than the Dutch mechanism, since there is no possibility in general for donors in this respect and accordingly, there is no discriminatory treatment between Dutch and foreign organisations. Without recognition as an ANBI no tax relief for the donor, is the general rule. This poses a problem for the Dutch Ministry of Finance, since there is no budget for an additional preventive control of gifts to foreign causes and accordingly, no intention to comply with the wishes of the European Commission. The European Commission loses sight of the realistic possibilities of tax authorities to control effectively international flows of philanthropic money and induces solutions that in theory might work, but in practice may harm the domestic landscape for charitable giving.

Opportunities induced by international philanthropy

Despite the challenges on the path of liberating international philanthropy, undoubtedly there is only one way forward: globalisation is a fact and non-discrimination of philanthropic flows of money is the future norm. In pursuing this way forward, opportunities may also be found to strengthen the domestic landscape for charitable giving.

First of all, the international liberation of tax obstacles for international flows of money puts emphasis on the real justification for the special tax treatment of philanthropy. Rather often, the justification is presented in a form of tax expenditure, since the activities of philanthropic entities unburden the government from costs and activities which otherwise would have been dispensed, directly or indirectly, by the government itself. This, however, is incorrect in western democratic societies. Philanthropic organisations are independent from the government and are not controlled in the pursuance of its activities by government, and therefore it cannot be said that the tax relief is an expenditure. The legitimacy of tax exemptions for philanthropic flows of money is found in a principled rather than a practical sense, where

government is obliged to maintain a neutral position towards all plural powers in society, since it does not have a monopoly in the realisation of public purposes. It is the reflection of the public policy from inhibiting, through taxation, the activities of qualified organisations which are beneficial to society, that has been identified across the globe as the justification of a principled tax relief of genuine philanthropic flows of money⁷. The actual debate on whether evidence may or may not be found for the direct relationship between the tax break and the amounts of charitable giving may be valuable in the context of evaluating a tax expenditure, however it is unjust in the context of the principled justification of philanthropic flows of money.

The application of tax relief to international philanthropic flows of money easily demonstrates as well that the tax relief does not reflect a tax expenditure by the government, since most public purposes of foreign qualifying organisations cannot be said to 'unburden' the government in this sense. A modern democratic society is an international society and government is obliged to maintain a neutral position towards the plural powers in today's international society. As a conclusion, it can be said that albeit within a strong conditional framework, there is a principled tax relief for international philanthropy. In other words, pursuant to current political philosophies and consistency, states should strive to release landlocked tax provisions that hamper international philanthropy by imposing an effective conditional framework regarding control and enforcement of domestic legislation⁸. The public policy of promotion of a healthy pluralism in society, that is considered very efficient and responsive to public needs if compared to the less flexible allocation process of government administration, is based on the social notion of interdependency and partnership between the state and the non-profit sector. Where however, the state considers the non-profit sector as a competitor, an entirely different society will emerge that reflects the time of centuries ago before sophisticated democracies were erected. In such a state, the philanthropic sector will be viewed as a sector that 'escapes' tax and philanthropists will be seen as 'tax dodgers'.

Furthermore, the liberation of tax obstacles in international philanthropy creates a healthy international competition within the philanthropic sector. Where, for example, debate is currently held on the most effective ways of organising development work, donors increasingly

may choose to support newly emerging (foreign) qualifying charities that have embraced business methods to scale and leverage their activities in an impressive pace. A new generation of philanthropists are adopting business-like approaches to pursue their public interest purposes, such as impact investing, micro franchising and micro financing and various mixed types of mezzanine financing. Where most philanthropists have limited themselves to provide donations to qualifying charitable or philanthropic organisations, it is undoubtedly of huge importance for these philanthrocapitalist organisations to raise donations from the public in countries where they are accepted as such for tax purposes as well. Tax administrations face new challenges in defining the exact line between 'charitable' or 'philanthropic' organisations adopting business methods and business organisations on the other hand.

We have seen in the Netherlands, that the philanthrocapitalist type of philanthropic organisations, established abroad, are favoured by Dutch 'entrepreneurial' type major donors compared to the more 'NGO' style domestic philanthropic organisations.

In the Netherlands, recent budgetary restrictions on subsidies for example for the cultural sector have prompted a new approach on the allowance of commercial activities by qualifying philanthropic organisations. As of this year, philanthropic organisations are allowed to perform related or unrelated commercial activities unrestrictedly in order to raise funds or pursue their activities, if the proceeds are used to expend for the public interest purpose as well. This will not only change the features of domestic organisations but also may create opportunities for philanthrocapitalists wherever in the world, seeking to raise funds from entrepreneurial spirits that want to do good. They may seek recognition as a qualifying ANBI in the Netherlands and seek for Dutch major donors. Major donor giving is still in its early development in the Netherlands. An easy way to reach access to this major donor market in the Netherlands, is to use the new platform of Shared Giving⁹, which refers to a new way of giving by major donors that has received affirmation of the Dutch tax administration. Under a shared gift, the donor may withhold an income interest in the capital donated to charity, whereas the charity immediately receives the actual value of the gift. The income tax deductions received on the gift add to the annual income and together create a substantial net income for the donor during his life, while the (foreign or domestic) charity can expend the value of the gift for its public purposes in the

meantime. This 'win win approach' of giving may count as a 'philanthrocapitalist' way of giving that inspires a new audience for philanthropy.

Conclusion

Discussions on the role, definition, requirements and function on philanthropic organisations will increasingly become globalised. Governments all face the same challenges of budget restrictions and need to undertake care for the relationship between the state and non-profit sector. Philanthropic organisations and donors increasingly tend to philanthrocapitalist approaches of philanthropy that will require governments to draw reasoned new lines between the philanthropy sector with tax relief and the business sector. International philanthropy is a fact, non-discriminatory tax relief has to follow. This will create greater transparency and competition within the non-profit sector which will add to the impact of the energy and funds put at the disposal of the sector. Governments have to set the conditional framework in order to avoid abuse in practice. The Netherlands tax administration has given an example by not being fearful in theory but acting prudently in practice.

END NOTES:

1. Event, organised by EAPG and STEP in London on 12 June 2012. For more information, see www.eapg.org.uk.
2. Algemeen Nut Beogende Instelling, which may be translated as a Public Interest Pursuing Organisation. Reference is made herein to the Dutch acronym: ANBI.
3. http://www.belastingdienst.nl/rekenhulpel/giften/anbi_zoeken/.
4. Such as e.g. it should be safeguarded that the members of the board of directors both factual and according to the regulations perform their activities without remuneration (except for attendance fee and/or expense allowances).
5. See former footnote: when selecting on jurisdiction, it may be gleaned from this website that approx. 10 to 30 foreign organisations based in each of UK, US, Switzerland have been recognised in the Netherlands.
6. Third Sector Online, 29 June 2012.
7. See I.A. Koele, *International taxation of philanthropy*, p. 61-68, IBFD 2007.
8. I.A. Koele, *International taxation of philanthropy*, p. 355-358.
9. See www.gedeeldgeven.nl.



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