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PHILANTHROPIC ORGANIZATION AND BUSINESS ACTIVITY: WHAT ARE THE TAX ISSUES?

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INTRODUCTION

Prof. **Henry Peter**

Head, Geneva Centre for Philanthropy (GCP)

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PANEL

MODERATED by

Dr. Giedre Lideikyte Huber

Senior research associate,
Geneva Centre for Philanthropy

Prof. **René Bekkers**

Director of the Center for Philanthropic Studies,
Vrije Universiteit (VU) Amsterdam, Member of
the Scientific Committee of the Geneva Centre
for Philanthropy

Prof. **Xavier Oberson**

Professor of Swiss and International Tax Law,
University of Geneva

Dr. **Raphaël Gani**

Judge, Swiss Federal Administrative Court

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Culture change takes time



Prof. dr. René Bekkers

Center for Philanthropic Studies

VU University Amsterdam



What can other countries learn from the Dutch Experiment?

Prof. dr. René Bekkers

Center for Philanthropic Studies

VU University Amsterdam



Charity law reform

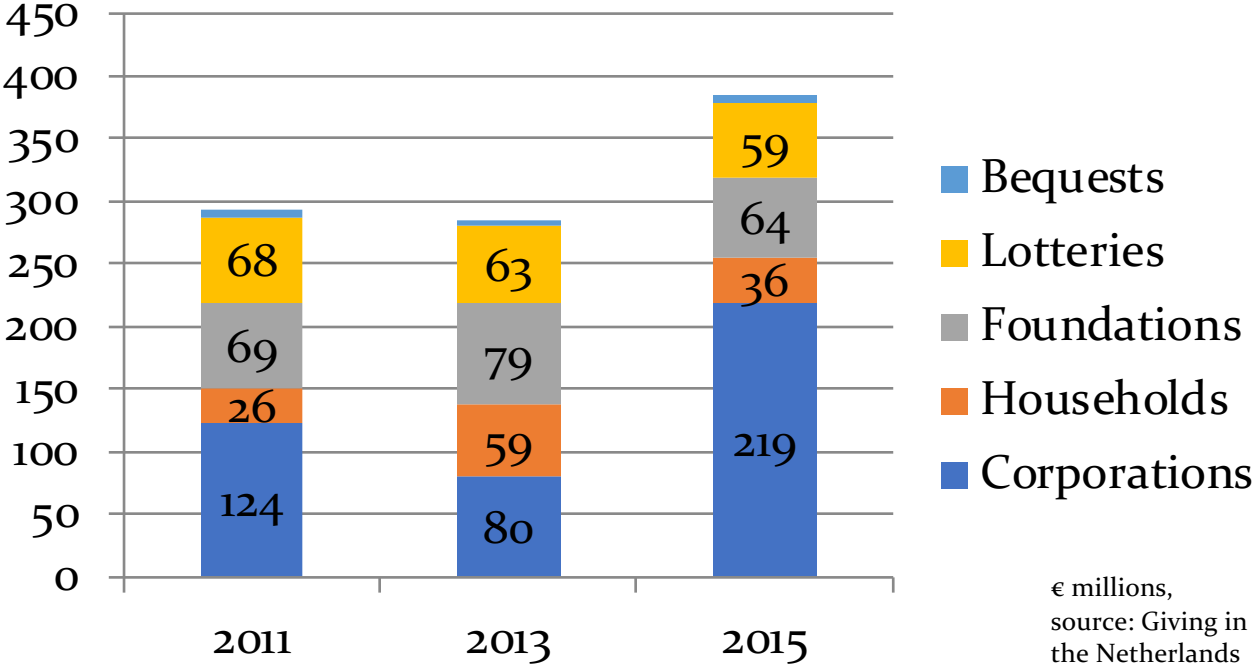
In 2012, a charity law reform in the Netherlands (“Geefwet”) enhanced the deductibility of donations to cultural nonprofit organizations and the freedom for organizations to earn commercial income. Also 20% of the government budget for the arts was cut.

The objectives were: (1) to *increase donations* and income raised from commercial activities; (2) to *decrease dependence* on government funding.

Entrepreneurship

- The cultural sector has been criticized for not being creative in earning income.
- Skills and capacity for fundraising and commercial activities were lacking.
- The Ministry of Culture subsidized the creation and participation of two programs, one in cultural leadership, and another in fundraising.
- Also a public awareness campaign was designed to inform the public about the Charity Law Reform.

Giving to the arts in the Netherlands



€ millions,
source: Giving in
the Netherlands
2017

Increase in income from three sources



The Matthew effect

More successful organizations become even more successful

- Organizations that raise funds and develop sales activities generate income
- Prior experience and current income allow organizations to build capacity and invest in fundraising
- These investments generate income



“unto every one that hath shall be given” (Matthew 25:29)

What can other countries learn from the Dutch Experiment?

1. Do not expect miracles.
2. Teach institutions how to be entrepreneurial and raise funds.
 3. Be aware of adverse consequences.
4. Experiment: Design, Test, Learn, Adapt, and Share.

Contact

René Bekkers

r.bekkers@vu.nl

 [@renebekkers](https://twitter.com/renebekkers)

Center for Philanthropic Studies

VU University Amsterdam

www.giving.nl

renebekkers.wordpress.com



Tax Conditions

- The government of the Netherlands asked permission from the European Commission to benefit culture above other sectors.
- Institutions have to register as a public benefit organization (“ANBI”).
- Commercial income is permitted; as long as 90% of activities benefit a public goal, and total income does not exceed expenditure.

Philanthropic organization and business activity: what are the tax issues?

Geneva Center for Philanthropy
Wednesday, September 11, 2019

Xavier Oberson, Professor at Geneva University, Partner, Oberson Abels SA

I. Conditions for tax exemptions

II. Possibilities to pursue a business activity

1. An ancillary business activity
2. The case of the Holding philanthropic foundation
3. Partial exemptions

II. VAT aspects

*Philanthropic organization
and business activity: what
are the tax issues?*

Raphaël Gani

Dr. Jur., Judge Federal Administrative Court, St-Gall

Wednesday 11 September 2019

Introduction

Can a public utility or public-service goal be conciliated with a business activity? Is there a contradiction?



Introduction

My 1st point is that the issue – in the case law – is often not directly the economic activity but some of the « side » conditions of the exemption.

My 2nd point would be that the real issues with social economy is not yet in courts.

Introduction

In addition to the three general conditions, the entity has to pursue either :

- a public service or
- a pure public utility purpose.

Introduction

- **Separate specific conditions** apply to the exemption depending on whether it is based on the pursuit of a public service or pure public utility purpose.
- For what concerns the public service and economic activities see 2C_206/2018 23rd July 2019

Introduction

For what concerns the public utility purpose, **three more obstacles** for economic activities:

- Exercise of an public interest activity
- in favor of an open circle of beneficiaries
- in an making sacrifices for the sake of the greater public good.

Introduction

The definition of what is a public interest activity does not consist in adding all the interest of the collectivity but are of public interest the goals that from the perspective of the community as a whole, are particularly worth pursuing.

It could not be equivalent of adding of personal interests see 2C_147/2019 supreme court 20th August 2019.

Introduction

Step 1 “no economic purpose”:

- The exempted entity shall not have an economic purpose.
- Commercial activities are allowed as long as they remain secondary to the charitable activities and further the entity’s purpose (**auxiliary function**).
- A profit-making purpose exists when an entity requires, for its services, a remuneration similar to that which is usually paid in economic life.

Introduction

Motivation:

- Level playing field with non –tax exempted entities.
- The economic activity of the exempted entity must be a **means** and not an end in itself.
- It's more the **origine** than the destination of the earned income that matters.

Introduction

- **Partial exoneration** is also possible (economic activity vs public utility).
- Very seldom in tax practice (difficult to control).
- And needs absolutely a separate accounting.

Introduction

- **Partial exoneration may** also concern the beneficiaries.
- Main activity has public utility beneficiaries but one beneficiary (e.g member of the family) is not.
- E.g. global purpose “to help poor children in Switzerland” **and** to pay a lifetime pension to Mrs X of 500.-.

Introduction

- At least, the non public utility attribution must be lower than those of public utility.
- Only the part of the profit which relates to benefits of pure public utility must be exempted, the part relating to the benefits which are not of pure public utility being taxable (eg annuities paid to Mrs X).

Introduction

Step 2: a sacrifice is needed...

- A non-profit entity has to make sacrifices for the sake of the greater public good.
- This must also be reflected in the remuneration of the governing body of the non-profit entity.
- The entity however can mandate persons and pay them market fees if such activities are required under the entity's purpose.

Introduction

- No sacrifice recognized for economic or professional associations whose purpose is to defend the **interests of a specific profession** or limited economic sectors.
- Activity serves primarily the **private interests** of the association and above all of its members.

Introduction

- The required altruistic disinterest is also denied when a legal person is essentially limited to **accumulating capital** or excessively high reserves and to using only a very small part of its resources for the pursuit of the statutory purpose

Case law – commercial activities

- 2C_592/2008 2nd February 2009
- 2C_835/2016 21st March 2017
- 2C_206/2018 23rd July 2019

Supreme court
2C_592/2008 2nd February 2009

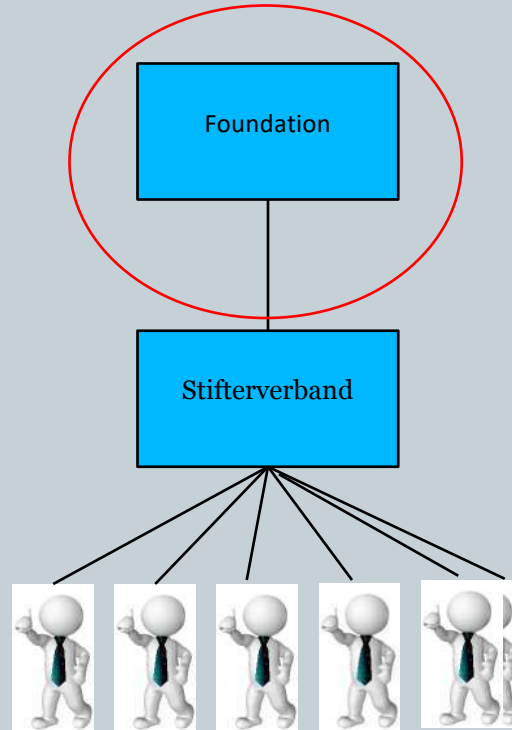
- Foundation which purpose is to promote education and training in the saddler, travel goods, bodywork saddler, upholsterer, floor layer, interior decorator and furniture retail trade as well as in other related professions.

Supreme court
2C_592/2008 2nd February 2009

- The foundation's assets consist in particular of real estate property, a bank account and a loan to the training center of the industry association.
- Two thirds of income came from interest of the loan and one third from rent of the real estate.

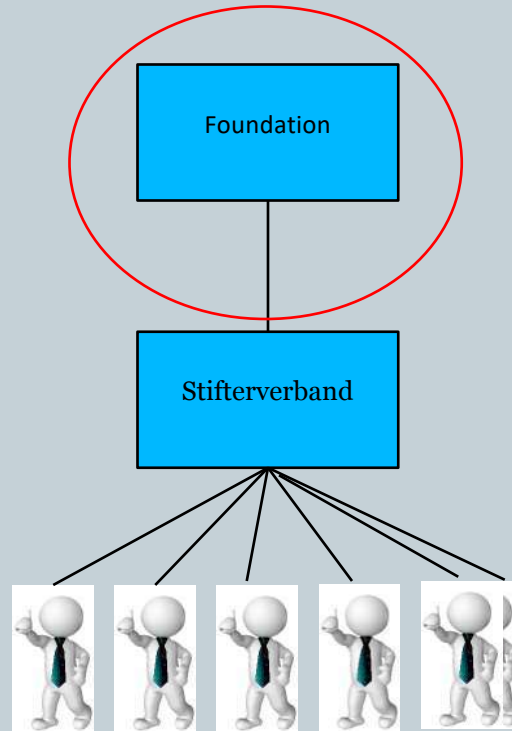
Supreme court 2C_592/2008 2nd February 2009

The entity has only one single beneficiary: no "integrated approach" or consolidated approach" : it is not allowed to attributes the activities of the Stifterverband in the field of training to her own.



Supreme court 2C_592/2008 2nd February 2009

But even if an "integrated approach" were permissible, the circle of beneficiaries would be too narrow because it extends only to a few professions



Supreme Court

2C_835/2016 21st March 2017

- Association to support people in difficulty by providing **financial support to the poor** and in particular by supporting the most deprived in the form of emergency assistance, counselling, integration and reintegration for children, adolescents and young adults through integration, basic training and continuing education.
- This assistance must reach people **regardless of their origin, gender or nationality.**

Supreme Court
2C_835/2016 21st March 2017

- **In reality**, distribution were made **exclusively** for the benefit of the members of **one religious** community.
- Actual activity of pure public utility has not been **sufficiently proven**, so that it was not possible to know whether the funds have actually been used for the benefit of people in need or in distress or whether the funds have been accumulated.

Supreme Court
2C_835/2016 21st March 2017

- Moreover, the entity was charged with a loan interest of 10%, the lender being a lady who lives in the same Israeli town as the two brothers who founded the complainant and financed it with considerable donations.
- No market interest.

Supreme Court

2C_206/2018 23rd July 2019

- Profit of almost six hundred thousand Swiss francs in the electricity sector in 2006, while the entity made a loss in the water sector, and distributed a dividend of 300,000 Swiss francs to its public shareholders.
- **No tax exemption** in principle if a legal person primarily pursues profit-making purposes, even if these simultaneously serve public purposes.

Supreme Court

2C_206/2018 23rd July 2019

- It is true that the distributed dividend benefits the community and thus has also a public purpose.
- However, the law expressly requires that the profit be devoted exclusively to public purposes.
- Thus, the profit is not exclusively and irrevocably dedicated to the public purpose of electricity supply.

Case law – cultural activities

- ATF 113 Ib 7 (= RDAF 1990 197)
("Welttheatergesellschaft Einsiedeln") tax exemption must be interpreted strictly and that public activity does not mean every activity enriching the community in cultural or artistic terms.
- One cannot speak of public utility with regard to manifestations of **pure entertainment** (ATF 63 I 316).

Case law – cultural activities

- Subsidies from a public authority are not enough.
- But public artistic events promoting, in a disinterested manner, artists who need such support is of public utility.
- Public interest = high-level artistic production offered to a broad audience that is not merely for entertainment, but has a general cultural character that promotes development of the population.

Case law – cultural activities

- Supreme Court considered the Zoologischer Garten Basel AG not only for the entertainment and amusement of visitors, but - with a scientific direction - has also an important social function and therefore a public utility in that it contributes to the promotion of animal understanding, animal protection, etc. (unpublished recital 9 of the ATF 109 Ia 335)

Case law – cultural activities

- Orchestergesellschaft Baden: exemption was refused, even though it was subsidized by public funds.
- Mainly amateur musicians engaged in classical music and enlightened leisure activities.
- The requirement of altruistic activity was not considered to have been fulfilled (AGVE 1980, p. 332).

Case law – cultural activities

More recently two cases:

- On one hand the Fribourg cantonal Court rule that the association "Festival d'été de Morat", which organizes the music festival "Murten Classics", fulfils the conditions for exemption for the purpose of pure public utility (RDAF 2012 II 569).
- On the other hand, a jazz festival was denied the tax exemption by the cantonal Court in Vaud (FI.2012.008).

Case law – cultural activities

Conclusions - in favor of a tax exemption:

- Cultural importance.
- Multi-year contributions from public subsidies (or the Loterie romande).
- No pure entertainment.
- Altruistic engagement: committee members and about 100 volunteers work for free.

Case law – cultural activities

Conclusions – against a tax exemption:

- Cultural nature but also entertainment ("The cultural nature of such events cannot be denied, bearing in mind that they are also entertainment", recital 3a of Vaud cantonal Court).
- Own revenues are at 65% of the budget.
- Real commercial activity.

QUESTIONS ?





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CONCLUSION
Prof. **Henry Peter**

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UPDATE ON THE GENEVA CENTRE FOR PHILANTHROPY

Laetitia Gill

Executive Director, Geneva Centre for Philanthropy

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TEACHING

- ▶ Semester course **«The Ethics of Philanthropy» - Autumn 2019**
Every Monday, 4:00 - 06:00 p.m. from 23.09 to 16.12. 2019 - Uni Bastions, Room B109
- ▶ Semester course **«Philanthropy and its main legal implications» - Autumn 2019**
Every Thursday, 4:15 - 6:00 p.m. from 19.09 to 19.12.2019- Uni Mail, Room MR 030
- ▶ Semester course **«La philanthropie culturelle et le droit» - Spring 2020**
Every Wednesday 4:15 -06:00 p.m. from 17.2.2020 au 23.5.2020 - Uni Mail, Room 1150



NEXT EVENTS

- ▶ **01.10.2019:** Opening conference of Uni3 «**Vers une nouvelle philanthropie?**» - Uni Dufour U300
- ▶ **01.10.2019:** Forum des fondations «**Meilleures pratiques de gouvernance pour répondre aux besoins sociétaux**» - IMD Lausanne. Organized by Swissfoundations, in partnership with proFonds, AGFA, IMD and the GCP
- ▶ **15.10.2019:** Inaugural lecture of the Edmond de Rothschild Foundations Chair in Behavioural Philanthropy «**Philanthropy meets neurosciences**» - Uni Dufour, room U300
- ▶ **17.10.2019:** Colloque «**The art of giving – Art Law and Philanthropy**» - Maison des fondations Annual conference of the Art Law foundation and the Centre for Art Law, in partnership with the GCP



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CONTACT

Geneva Centre for Philanthropy

Uni Dufour

24, rue du Général-Dufour

CH-1204 Geneva

W: www.unige.ch/philantropie

T: + 41 22 379 76 18

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