

SWISS CHARITABLE FOUNDATIONS

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I. Preliminary Remarks

The Swiss charitable foundation is an estate planning vehicle suitable for international philanthropists. It provides a worldwide-recognized solution to private inheritance, while at the same time benefiting society as a whole. The Swiss Civil Code and Swiss tax legislation, the Guidelines on the Incorporation of Foundations issued by the Federal Department of the Interior and the Circular of the Federal Tax Administration dated July 8th, 1994 ensure a workable and secure legal framework.

II. Characteristics of Swiss Foundations

1. Incorporation

The incorporation of a foundation requires the assignment of assets for a specific purpose. There must be a reasonable relationship between the assigned assets and the purpose to be pursued. According to the practice of the Federal Supervising Authorities on Foundations, the initial capital must be at least CHF 50,000.

2. Form of Incorporation

A foundation is incorporated either by a public deed or by a testamentary disposition (last will and testament or inheritance agreement). The foundation is entered

into the commercial registry based on the Foundation Charter and indicating the members of the Foundation Council.

3. Organization

The Foundation Charter must indicate the organs of the foundation and the nature of its administration. For the most part, the foundation is free to determine its own organization. The way the foundation is organized can be set down in more or less detail, depending on the needs of the foundation. However, it is important that the organization fosters the most efficient use of the foundation's funds.

The superior organ within a foundation is the Foundation Council, which is responsible for the supervision of the foundation's business. The Foundation Council assumes all competences which are not expressly delegated to another body either in the Foundation Charter or the respective regulations. The Foundation Council performs the following unalienable tasks:

- regulation of the powers to represent the foundation or to sign on its behalf;
- election of the Foundation Council and the auditors;
- approval of the annual financial statements.

It is common practice that a Foundation Council consists of at least three natural persons or legal entities. Foundations with an international character must have at least one member of the foundation council with sole signature rights who is a citizen of Switzerland or any member state of the European Union and resident in Switzerland.

The Federal Supervising Authorities on Foundations assume that any activities performed as a member of a foundation council are unsalaried. Only actual costs and disbursements are exempt from this rule. In exceptional cases, a reasonable reimbursement of costs may be made to certain members of a charitable institution, where they have been involved in particularly time consuming activities, where such activities are per-

formed in addition to the usual meetings and work of the Foundation Council (e.g. drafting of strategies, projects, management work for special projects etc.). However, the current practice of the Tax Administration usually does not allow any prearranged payment agreements in the form of a lump sum, fees or reimbursements for meetings of the foundation organs.

4. Administration of the Foundation's Funds

Provided that neither the Foundation Charter nor the foundation's regulations stipulate investment rules, the principles of liquidity, return on investment, security, location of risk and safeguard of substance are to be observed when investing the foundation's assets.

5. Auditors and Accounting

The most superior organ of the foundation nominates the auditors. The foundation is further required to keep adequate accounting records.

6. Supervision and Reporting

Foundations are subject to supervision by the community (federal, cantonal and municipal) to which they belong according to their designation. Foundations with an international scope are usually supervised by the Federal Authorities. In order to perform the legally required controls, foundations are required to file an annual report on their activities, annual financial statements, consisting of the balance sheet, the profit and loss statement and attachments, the auditors' report, the approval of the reporting by the Foundation Council as well as an up-to-date list of the members of the Foundation Council.

7. Liquidation and Change of Purpose

The competent authority dissolves the foundation upon request or by operation of law if its purpose has become unattainable and the foundation cannot continue to operate by a simple change of the Foundation Charter, as well as if its purpose becomes illegal or immoral. However, Swiss law does not recognise a general right to dissolve a foundation. On the other hand, it is possible to change the foundation's purpose upon

request of the founder or based on his testamentary disposition if a change of purpose has been provided for in the foundation charter and if at least 10 years have elapsed since the foundation's incorporation or since the last change requested by the founder.

III. Tax Exemption

1. General Remarks

Pursuant to Article 56(g) Federal Law on Direct Tax, Article 23 para. 1(g) Federal law of December 14, 1990 on the Harmonization of Direct Taxation of Cantons and Municipalities, legal entities which pursue a public or non-profit purpose are tax-exempt with respect to profit and capital that is exclusively and irrevocably dedicated to such purposes. In order to obtain a tax exemption, the following cumulative general requirements (according to the Circular of the Federal Tax Administration dated July 8th, 1994) must be met:

a) Legal entity

The taxpayer must be a legal entity. Foundations are – due to their legal nature – best suited for this purpose.

b) Exclusive application of funds

The tax exempt activity must be exclusively dedicated to a public purpose or to the benefit of third parties. The legal entity's corporate purposes may not be linked with income purposes or other interests of the legal entity itself or of its members. However, if the legal entity pursues both charitable and business purposes, it may under certain circumstances be able to apply for a partial tax exemption.

c) Irrevocable purpose

The funds dedicated to the tax exempt purpose must be irrevocably tied to such purpose. The Foundation Charter must exclude all possibility of redirecting the funds to the founders or benefactors. Consequently, the Foundation Charter must irrevocably provide that, in case of dissolution of the respective legal entity, its

funds will be transferred to another tax exempt entity with a similar purpose.

d) Effective activities

The main purpose of the entity must effectively be to carry out activities within the framework of the purpose set out in the Foundation Charter. For example, foundations that collect capital and/or funds by establishing reserves out of income in no reasonable relation to the future tasks of the foundation according to its purpose are not entitled to a tax exemption.

2. Requirement of charitable purpose

a) Public interests

The basic requirement for a tax exemption based on a charitable purpose is the pursuit of a public interest. Such public interest may be pursued through activities in general charitable, humanitarian, constitutional, ecological, educational, scientific or cultural areas. For example, activities in art, science and teaching may be qualified as pursuit of a public interest.

Whether a certain activity may be qualified as pursuit of a public interest will be decided with reference to public opinion. Principles of legal ethics as they are reflected in the Federal constitution, Swiss statutes and case law may serve as important sources for determining such public opinion. According to the Swiss legislative body, such public interest is not limited to activities carried out within the borders of Switzerland but may be extended to the worldwide activities of a Swiss legal entity as long as its activities pursue a public interest and are completely altruistic. An interest may only qualify as public if the range of third parties that benefit from the legal entity's sponsorship and support is in no way limited. A narrow range of parties receiving funds (e.g. if limited to family members, members of an association or craftsmen of a certain profession) will prevent the entity from obtaining a tax exemption based on pursuit of a public interest.

b) Altruism

The term "charitable purpose" contains not only the objective element of pursuit of a public interest but

also the subjective element of altruism. The existence of a charitable purpose in the sense of tax law will only be assumed if the activity is not only dedicated to pursuing a public purpose but is also based on an altruistic spirit. For an activity to qualify as altruistic, the members of the legal entity or third parties must sacrifice their own interests in order to pursue a public interest. Consequently, it is a requirement for obtaining a tax exemption that the activities of the entity applying for exemption do not involve any pursuit of personal interests. Self-help institutions and associations with the purpose of encouraging leisure activities lack such altruistic purpose.

Further requirements for a full or partial tax exemption based on a charitable purpose are the absence of any self-help purpose or any intention to generate income.

III. Summary

Swiss foundations which serve a public interest, e.g. by fostering activities in a charitable, humanitarian, health promotion, ecological, educational, scientific or cultural area, are exempt from taxes in Switzerland. In addition, Swiss law on foundations is extremely flexible and, with the considerable freedom of organization that it provides, ensures that wishes with respect to the structuring of a foundation may be realized in the best way. Efficient supervision ensures that the members of the foundation's organs observe the founder's will at all times. Switzerland's attractiveness as a place for foundations is further demonstrated by the fact that almost 3000 foundations with either Swiss or international management are active in this country. Switzerland is therefore an ideal place to incorporate foundations whose purpose is to encourage art and science, education, human rights, protection of landmarks, nature and animals, social goals or development aid.

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