Contributions to charitable foundations—French tax perspective

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Abstract

Gifting assets to foreign charitable foundations could constitute a taxable event in France under French gift or inheritance tax. Such gifts thus require careful planning, as, depending on the localization and nature of that foreign charitable foundation, they might be taxed in France and hence jeopardize the initially intended charitable project, at least from the standpoint of its financing. Assessing whether the charitable project would indeed qualify for French preferential tax rules, requires a good understanding of both the respective foreign charitable institution and its French counterpart.

A charitable foundation can be chosen to receive either all or part of an estate in the form of a charitable grant to contribute to the foundation's specific goal. Such charitable grant can be made either as a lifetime gift or as a bequest.

In France, a charitable foundation receiving such charitable grant can be a *fondation reconnue d'utilité publique* (FRUP), which is a foundation recognized as "being in the public's interest." Provided that specific additional conditions pertaining to certain specific charitable goals are met, the gift to a FRUP can be completely exempted from French gift and inheritance taxes. If this is the case, FRUPs are deemed to qualify for the tax exemption.

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Indeed, such charitable contributions to foreign foundations must be well assessed before they are decided upon. If such a project does not comply with the French tax exemption regime, such gifts could be taxable due to French tax nexus rules and specific double tax treaty provisions, in the worst possible case, at

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A classic example of such a situation arises, for example, when one intends to gift valuable French real estate, which would be taxable in France both under the French tax nexus rules and most applicable double tax treaties, regardless of where the grantor of the gift is or was domiciled.

There is, however, the possibility to benefit from the tax exemption for gifts made to foreign establishments that are recognized as being in the public interest (such as FRUPs) and pursue certain (tax exemption qualifying) goals for the common good. In such a case, one has to draw parallels to the qualified French tax exempted FRUPs.

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This article aims to discuss the analytical process that leads to answering the question whether a gift made to a foreign charitable foundation can be exempted from tax by drawing a parallel to the French tax exemption for qualifying FRUPs.

A quick overview of tax-exempted gifts to specific French foundations

Among other special preferential regimes, there is a specific tax exemption regime for gifts made to an establishment that is recognized as being in the public interest, such as, a FRUP, if additional specific conditions pertaining to the activities and goals that such an establishment carries out are met (Article 795, 2° of the French Tax Code (*Code Général des Impôts* or "CGI")).

The FRUP

A FRUP is a special legal entity (foundation), destined to receive from one or several persons irrevocable property rights to assets in order to pursue a non-profit and charitable goal. It is created via a special administrative decree procedure and it is that very administrative decree that grants it the quality as being "recognized as being in the public's interest." Future FRUPs will need to use the model articles of associations prepared by the State Council (*Conseil d'Etat*).

Among other things, a draft FRUP project, in order to be approved, needs to show:

- a sufficient initial dotation capital, in general of a value of at least €1.5 million (above that amount, it is generally advisable to allot the surplus to another reserve fund), which, for instance, can be comprised of cash, shares or real estate. The dotation capital shall in principle not be consumed.
- and that it would be able to cover its expenses for the next three consecutive years from the income generated from that initial dotation (notwithstanding the precedent, a FRUP can have other income sources, such as, but not limited to, future gifts and public subsidies).

Hence, a FRUP needs to be able to have a sufficient starting capital, which would enable it to have its

financial autonomy. As an interesting side note, it must be mentioned that FRUPs can also be constituted *post mortem* (Article 18-2 of the French law 87-571 of 23 July 1987 on the development of philanthropy), when the initial grantor decides that the dotation property will be transferred to the future FRUP upon his death, always subject of course to its successful accreditation as a FRUP.

The qualifying charitable goals for the tax exemption

In order to be gift/inheritance tax exempted, a charitable capital contribution, i.e., a gift (since no shares of the benefiting charitable foundation are issued to the grantor as consideration in exchange for the gift), needs to be made to a FRUP, qualifying for a tax exemption, meaning one:

- which is of general interest, requiring the foundation: (i) not to engage in a lucrative activity, (ii) that its management has no financial incentives or interests and (iii) that it does not operate for the benefit of a restricted circle of people,
- and which carries out one of the following goals, such as, but not limited to, goals of a philanthropic, educational, scientific, social, humanitarian, sporting, family or cultural nature.

Hence, the mere fact that a gift has been made to a FRUP does not automatically lead to that gift being tax-exempted. All the more, the FRUP must qualify for the exemption through the nature of its activities and the way it operates.

If the particular FRUP does not qualify for the tax exemption, then the gift/inheritance tax rate is set at the marginal rate of 45% (the rate which is in principle applicable "between brothers and sisters" after a first tranche at 35% up to a taxable basis of €24,430, but which is still lower than the default maximum flat rate of 60% for non-relatives), as it is at least deemed recognized as an establishment being in the public interest.

Requesting the tax exemption when contributions have been made to foreign (i.e., non-French) charitable foundations

The situation becomes more complex if the grantor intends to contribute (i.e., gift) property to a foreign charitable foundation. Such gift could be taxable in France, especially if French real estate is contributed to the foreign charitable foundation. The question then arises, whether the contribution can be deemed tax exempted in France, if the foreign charitable foundation can, for instance, be deemed equivalent to a French *qualifying*

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(meaning one which pursues the adequate specific activities and goals as described above) charitable foundation recognized as being in the public interest (such as a FRUP).

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Generally speaking, the answer to this question depends on whether one deals with European or non-European foundations.

Gifts made to EU/EEA charitable entities

For European Union (EU)/European Economic Area (EEA) charitable entities, the tax treatment depends upon whether these entities have received a French tax exemption accreditation before the gift is made (Article 795-0 A, I CGI) or not (Article 795-0 A, II CGI).

Accredited charitable entities

Gifts made to foreign legal entities or organisms, which are of the same nature as the exempted French ones (for instance, those exempted under Article 795 CGI), and which are incorporated and based in the EU or the EEA and when the applicable double tax treaty has an administrative assistance clause against tax fraud and tax evasion, can also be exempted, provided these foreign legal entities or organisms have been accredited as tax exempted with the French tax authorities.

The tax exemption accreditation, which is requested via a specific tax ruling procedure, is being granted under the condition that those foreign legal entities or organisms pursue goals and have similar characteristics as their French counterparts (for instance, those exempted under Article 795 CGI), and that those gifts are being made to benefit activities which are mentioned in the French tax exempted regimes (again, for instance, those exempted under Article 795 CGI).

The ruling procedure for the tax exemption accreditation requires a foreign legal entity or organism to file a specific form to the French tax authorities and to provide, among other things, the description of its legal form (with the necessary legal documents, such as their charter and registry excerpts), its corporate management, the remuneration of its management (pay slips) and employees (pay grids), its resources (financial accounts of the last three years), the nature of their tax regime in the home country, specific activities and usage of received funds.

Without going into too much further detail at this stage, it shall simply be added that, should the accreditation be granted, it is generally granted for an initial period of three years. A three-year renewal can be requested within a certain timeframe before the current accreditation elapses.

The list of currently accredited foreign entities (for the currently discussed tax exemption as well as for other specific tax reductions) is published on the website of the French tax authorities under: https://www.impots.gouv.fr/portail/liste-des-organismes-europeens-agrees and is regularly updated.

How the foreign charitable foundation is compared to a French one is being described below.

Non-accredited charitable entities

In case the foreign charitable entities have not yet been accredited at the time of the making of the gifts, those gifts may still be exempted when the respective gift tax returns (gift made during the lifetime of the grantor) or inheritance tax returns (gift made upon death of the grantor) are filed, provided that it can be demonstrated that the foreign charitable beneficiaries pursue goals and have similar characteristics as the French ones (for instance, those exempted under Article 795 CGI) and that those gifts are being made for the benefit of activities which are mentioned in the French tax exempted regimes (again, for instance, those exempted under Article 795 CGI).

The required information/elements to be presented within the deadline to file the gift/inheritance tax returns are the same as those which must be presented in the tax accreditation ruling procedure.

Gifts made to other non-French charitable entities

In principle, gifts made to charitable entities which are not based in the EU/EEA are not eligible for the French tax exemption regime, except for cases when those charitable entities might be able to show the same qualifying characteristics under the same conditions as for the non-accredited EU/EEA ones (as provided for by Article 795-0 A, II CGI, see above).

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There is also the additional condition that there is some sort of reciprocity rule between France and the respective foreign country (BOI-ENR-DMTG-10-20-20 § 680). Such reciprocity rules are generally derived

from the respective applicable double tax treaty or through a special international agreement.

Consequently, non-French charitable entities which are not based in the EU/EEA could try to request the application of the tax exemption regime when filing the respective gift/inheritance tax return.

Specific analysis of the qualities and activities of foreign charitable foundations

In this last section of this article, we will briefly touch on the various qualities and activities that the foreign charitable foundations need to show, either for the tax exemption accreditation ruling procedure, or for the preparation of the respective gift/inheritance tax return, in order to be able to request the tax exemption for the gifts contributed.

Obviously, requesting such a benefit is essentially a matter of argumentation and of the specific facts and circumstances at hand, as one is trying to demonstrate that the foreign legal concepts and requirements are similar to the French ones, which already imply that there can be no guarantee of success *ab initio* when requesting such a benefit.

As already described above, the foreign charitable foundation needs to show that: (i) it is equivalent to an establishment which is recognized as being in the public interest and (ii) it is of general interest and carries out a specific charitable goal covered by the French tax exemption regime.

Establishment recognized as being in the public interest

From a French standpoint, establishments that are recognized as being in the public interest are private organisms with their own legal personality whose general interest purpose has been recognized by the administrative authority (JurisClasseur Administratif, Fasc. 165: FONDATIONS, I. A. 1°-1). In France, those are generally the FRUPs as well as the *associations reconnues d'utilité publique* (ARUPs), which are associations recognized as being in the public interest.

Hence, the essential criterion seems to be some form of foreign local administrative recognition of the general interest purpose of the foreign charitable foundation. The legal notion of the general interest purpose will be discussed below.

A quick look at the list of accredited foreign entities in France, which grants the only external indication of the possible internal interpretation of the French authorities on the matter, shows that some foreign charitable foundations seem to have been accredited (with reference to the Articles 795-0 A and 795, 2° CGI, hence with reference to the tax exemption regime which is the topic of this article) without carrying the add-on title as being *reconnues d'utilité publique* (i.e., recognized as being in the public interest). However, one should not necessarily conclude that those did not have some sort of local administrative recognition of their general interest purpose *per se*.

In the end, it is essentially a matter of the specific foreign legislation characteristics of the respective foreign charitable foundation at hand and its presentation to the French authorities which will be decisive for its recognition as an establishment recognized as being in the public interest.

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Another central question, apart from the public interest quality of the foreign charitable foundation, is whether the corporate governance mechanisms of the foreign charitable foundation need to be the same as the French ones, such as those of the FRUP.

In the latter case, that would mean that the foreign charitable foundation would need to have similar corporate governance rules as the FRUP and especially an equally important dotation capital (€1.5 million),

which in principle cannot be consumed to finance its activities.

In the absence of clear indications given by the French tax authorities on the subject, the model form for the tax exemption accreditation ruling procedure should be used as a guideline, since the French tax authorities refer to it in cases of exemption requests (even if the situation is one where an exemption request can only be made while filing the gift/inheritance tax return).

As already mentioned above, the model form for the tax exemption accreditation ruling procedure requires showing the resources of the foreign entity as evidenced by the financial accounts of the last three years. This comes pretty close to the FRUP requirement, namely that the dotation capital should cover the foreign entity's expenses for the next three consecutive years. But the FRUP requires in addition that the dotation capital should in principle not be consumed and that solely the income generated from the dotation capital should cover the FRUP's expenses. But there is also some case law where FRUPs were temporarily allowed to consume part of their dotation capital to cover their costs due to extreme circumstances and with the assurance of a swift recapitalization.

Whether or not such strict French requirements, especially concerning the minimum donation capital of €1.5 million (which may not be consumed), can be imposed to foreign charitable foundations seems debatable, as each legal system has its own particularities.

At a minimum, a common-sense approach to the issue would conclude that the foreign charitable foundation requesting the tax exemption should at least be able to show its financial viability for the next three consecutive years, primarily from the income generated by its assets.

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Pursuing a general interest purpose

As already indicated above, having a general interest purpose requires that the foreign charitable foundation: (i) does not engage in a lucrative activity, (ii) that its management has no financial incentives or interests and (iii) that it does not operate for the benefit of a restricted circle of people.

Those are complex concepts but to give the reader a short glimpse we may summarize them as follows:

Non-lucrative activity

The non-lucrative characteristic is ascertained in negative terms, namely by verifying the absence of lucrative activities of the foreign charitable foundation.

The profit-making characteristic of an entity is in principle fulfilled, if one would consider that the entity competes with establishments in the profit-making sector under similar conditions to those of commercial enterprises.

Without going into too much detail, it shall only be mentioned that the French authorities check for various aspects of the operations of the entity, such as the "product" offered, the beneffiting "group of persons", eventual "prices" charged and the "advertisement" that is practiced (BOI-IS-CHAMP-10-50-10-20 § 570).

Absence of financial interest of the management

The management is in general deemed to have no financial interest if the following conditions are met:

- the organism is managed on a voluntary basis by persons who have neither a direct nor an indirect interest in the results of the organism;
- the organism does not distribute, neither directly nor indirectly, any form of profits;

- the members of the organism are not entitled to any of its assets but for the reimbursement of their contributions (when legally allowed).

Several capping mechanisms apply to the amount of remuneration granted to the management and employees, but a further discussion of this would be outside of the scope of this article.

Absence of operation for the benefit of a restricted circle of people

Very broadly, an organism works for the benefit of a restricted circle of people when it pursues personal interests of one or more clearly identified persons, regardless of whether they are members or non-members of the organism. For instance, organisms are considered as working for the benefit of a restricted circle of people, when their activities benefit personal interests, whether material or moral, of one or more persons, families, enterprises or of some particular artists or scientists (BOI-IR-RICI-250-10-10 § 130).

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The broadness or narrowness of that group of persons is of course a matter of interpretation.

Carrying out specific tax exemption qualifying activities

As already mentioned above, the foreign charitable foundation also needs to carry out a specific qualifying activity, such as, but not limited to, an activity of a philanthropic, educational, scientific, social, humanitarian, sporting, family or cultural nature (Article 200, 1-b CGI).

The remaining question is, whether those activities need to be carried out in France or not. The answer is far from being self-evident, as the French tax authorities, in their treasury regulations relating to the specific gift/inheritance tax exemption (Articles 795-0 A and 795, 2° CGI), do not seem to clearly address this point.

However, since the gift/inheritance tax exemption makes reference to a specific list of qualifying activities, specifically, among other references, to the one of Article 200, 1-b CGI (which constitutes also an income tax reduction in its own right), it is the opinion of the author, from a conservative standpoint, that the treasury regulations to apply to answer this question are those relating to Article 200 CGI. And according to these (BOI-IR-RICI-250-10-10 § 230 and BOI-BIC-RICI-20-30-10-10 §§ 220 and following), the foreign entities, presented in a simplified manner, need to:

- carry out a qualifying activity in France, in an EU country or in an EEA country when the relevant double tax treaty has an administrative assistance clause against tax fraud and tax evasion,
- and if the activities are carried out outside of the EU or EEA, then only the following would be deemed qualifying:
- humanitarian activities,
- activities made to strengthen the artistic, cultural and linguistic French heritage as well as French scientific knowledge,
- activities for defending the environment,
- scientific research (as long as the results are to be used in France or the EU/EEA).

In the absence of clear rules confirming this conservative interpretation/restriction of the possible places where the foundation carries out its activities, the list of accredited foreign entities in France seems to provide again some indication of the possible internal interpretation of the French authorities in this matter.

As an example, the Oorlogsgravenstichting, a Dutch foundation that endeavours to build and maintain graves everywhere in the world for casualties from the World War II conflict as well as any other conflicts, has been accredited for a tax exemption on gifts (with reference to Article 795-0 A CGI), however *exclusively* (emphasized by being underlined in the official published accreditation confirmation) for activities realized in an EU country or in a EEA country when the relevant double tax treaty has an administrative assistance clause against tax fraud and tax evasion. Although it is an indication of the internal interpretation of the French authorities on the matter, clear treasury regulations relating to Articles 795-0 A and 795, 2° CGI (the specific gift/inheritance tax exemption), regarding the place where the foundation should carry out its activities, would be preferable.

Finally, one should not forget that if a gift is made to a foreign charitable foundation that does not carry out eligible tax exemption *qualifying* activities, one should envisage to at least try to request that the gift shall be taxed at the marginal rate of 45% (instead of the default maximum flat 60% rate), but on the condition, like for French non-tax-exemption qualifying FRUPs, that the foreign charitable foundation would at least be recognized as an establishment being in the public interest. Unfortunately, there is practically no legal doctrine or treasury regulations on this specific situation to guarantee such an analogy and if so how it might (eventually) be limited in its scope. However, one should consider nonetheless trying to request such an analogy. But likely, the author assumes, the French tax authorities will request in return the same or similar very specific requirements for the recognition of foreign charitable foundations as discussed above, for instance depending on the country in which they are domiciled and how and where they operate (but for the specific *qualifying* activities).

Conclusion

Gifting assets to foreign charitable foundations could constitute a taxable event in France under French gift or inheritance tax. Such gifts thus require careful planning, as, depending on the localization and nature of that foreign charitable foundation, they might be taxed in France and hence jeopardize the initially intended charitable project, at least from the standpoint of its financing.

Assessing whether the charitable project would indeed qualify for French preferential tax rules, requires a good understanding of both the respective foreign charitable institution and its French counterpart.

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