

Taxation of Charities

National Report - Austria

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I. General questions

1. Are there special (preferential) tax rules for not for profit activities in general? Are these given in statutory law or have they been created by case law?

Austrian tax law includes special legal regulations for non-profit-activities. In 1945, the determinations of certain German regulations (Steueranpassungsgesetz [StAnpG] and Gemeinnützigkeitsverordnung [GemVO]) were set into force – by enacting an Austrian Law – in the republic of Austria. Therewith the austrian non-profit-law has its origin in the german non-profit-law. Since 1.1.1962, when the Austrian Tax Procedures Act (Bundesabgabenordnung [BAO] Federal Gazette 194/1961 as consolidated by Federal Gazette I 112/2011) was enacted, these special regulations were transferred in para 34 to 47 of the respective act (BAO). Non-profit activities are exclusively governed by statutory law; there is no case law in Austria.

In order to provide for a general definition, the BAO describes in para 35 to 47 what services are deemed to be “non-profit”: Non-profit services include services for the public good, for charitable or church purposes. The BAO, however, grants no tax release or tax exemption for such non-profit services, but it serves as a point of contact for different Austrian tax regulations: These regulations, which can inter alia be found in the Corporate Tax Act or the VAT Act, provide for different tax consequences (ie, tax release exemption from corporate tax or VAT). The tax releases or tax reductions provided for in regulations such as the Corporate Tax Act or the VAT Act apply in the case that the assumptions circumscribed in para 34 to 47 are fulfilled.

2. Which activities are within the scope of not for profit activities benefiting from special tax rules?

To achieve the preferential tax treatment connected with para 35 to 47 BAO, a corporation must exclusively and directly serve the public good, or charitable or church purposes.

Service for the public good as defined in para 35 of the BAO includes services resulting in a promotion of the general public. Funding for the general public is present when the activities of the corporation are useful in intellectual, cultural, moral or material sphere of the public interest. Austrian tax law provides only for a negative definition of services to the general public: A group of people is not to be regarded as “public” if this group is closed by a narrow band, ie belonging to a family, to a family group or to a club with a closed membership, through employment at a particular institution and so on. A group of people is also not regarded as “public” when the number of eligible persons is permanently very small (due to local, vocational or other attributes). Para 35 BAO provides for a (non-complete) list of examples for services for the public good, ie promotion of art and science; health care; children, youth and family welfare; care for elderly, sick or physically infirm persons; body sport - but neither professional sport nor operation of leisure facilities - preservation of historic sites; natural, animal and cave conservation; documentation of local history; maintenance of the homeland and control of natural forces.

Charitableness as defined in para 37 BAO means the support of people dependent on help. The law makes a distinction between the need for help due to personal reasons and the physical or economic need for help. The personal need for help is a physical, emotional or mental condition that makes a person dependent on the help of others. It is not necessary that there is, in addition, a material plight. Economically needy are persons who are not capable to pay all the necessary living expenses for themselves and their families - not even by drawing on their income and their assets. Charitableness in this sense is the financial support to reduce such a plight. However, it does not make any difference whether the economic need for help is caused by a person's own fault.

The privilege of religious purposes relates only to the benefit of legally recognized churches and religious communities (para 38 BAO). A recognized church in the sense of this definition means any legally recognized community, consisting of physical persons, which is permanently organized and whose members are committed to a common Christian religion, provided that the Community aims to arrange the whole life of its members according to their religious principles. A religious community on the other hand has all features of a church, but refers to non-Christian religions. Para 38 BAO does intend to favour activities of private entities in (indirect) support of their recognized churches or religious communities rather than such activities which are directly carried out by churches or communities (churches or communities are already subject to tax exemptions or tax limitations, since they are public entities).

3. Are there special forms of legal entities required for non-profit status?

Para 34 sec 1 BAO refers to corporations, associations and funds. Para 39 et seq BAO mention only "corporations". From a practical viewpoint, the non-profit status as defined in para 35 to 47 BAO is basically available for corporations. Nevertheless, other entities such as associations of persons without legal capacity, institutions, foundations or trusts do also qualify for this status provided they are subject to corporate tax (see also para 34 sec 2 BAO).

4. Are there special rules for non-resident or international non-profit entities?

Corporations (as well as associations and trusts), which have neither their corporate seat nor their place of management in Austria are required by para 34 sec 1 last sentence BAO to, upon request by the fiscal authority, provide proof that they fulfill the requirements of para 34 sec 1 first sentence BAO (ie, performing services for the public good or for charitable or church purposes). This enables non-national corporations to benefit from tax incentives intended for national corporations. The concrete conditions for which the non-national corporate has to provide proof are at the discretion of the fiscal authority. It may also be sufficient to provide a confirmation from the foreign fiscal authority instead. The final decision, however, has to be made by the austrian tax authority. According to the Federal law governing the issue of privileges to nongovernmental international organizations, the non-profit status may be granted to international organizations through a notice from the finance minister and a consultation with the foreign minister. This procedure is also admissible to organizations whose activities are not predominantly in austria and whose assets will flow to non charitable purposes. Under para 6 leg cit the non-profit status is granted for a maximum of five years.

II. Income tax

1. The material conditions for special tax status

First of all, it may be mentioned that the non-profit status in Austria is only available to entities (mostly corporations) which are subject to Corporate Income Tax. Therefore, the non-profit status is only relevant for corporate income tax purposes.

Para 1 sec 3 item 3 in connection with para 5 item 6 Corporate Income Tax Act (KStG – Federal Gazette 401/1988 as consolidated by Federal Gazette I 112/2011) states the material basis for the exemption from corporate income tax, which is intended to promote services for the public good or for charitable and church purposes (according to para 35 bis 47 BAO). Under para 1 sec 3 item 3 in connection with para 5 item 6 KStG such services are exempt from corporate income tax. This exemption is aimed at all legal entities under private law (ie, corporations) and, under some restrictions, to public law entities. The exemption has the consequence that those entities are subject to limited corporate tax liability rather than unlimited tax liability. The material scope for restricted tax liability is stated under para 21 sec 2 and sec 3 KStG in connection with para 44 and 45 BAO; it means that those entities are basically subject to withholding taxes only.

2. What are the formal conditions for special tax treatment?

There are no official (binding) permissions to achieve the non-profit status. The question whether a legal entity achieves such status is dealt with separately by the competent tax office in every single tax assessment for each tax year. Declaratory decisions to acknowledge or withdraw the status of non-profit corporate body are not intended.

3. + 4.) Tax treatment of income from purely non-profit activities and tax treatment of business income used to support non-profit activities.

The tax treatment of business income depends on the fact whether the business is “helpful and indispensable” (para 45 sec 2 BAO) for the services rendered for the public good or for charitable or church purposes or “helpful but dispensable” (para 45 sec 1 BAO). A dispensable business means that the business activities do not directly support the services for the public good or for charitable or church purposes, but the business’s profits are used for those purposes (ie, a sport association’s annual celebration party). In case of an “helpful and indispensable” business, business profits which are accidentally realized, are tax-exempt. However, such business profits shall usually not be realized since an indispensable business is required not to be profit-oriented. In case of a “helpful but dispensable” business, the profits realized are taxable. However, the existence of a dispensable business does not endanger the non-profit status (which means tax other income than business income may still be tax-exempt). Beside the “helpful and indispensable” and “helpful but dispensable” business activities, the law also provides for “non-helpful” (ie, “economic”) business activities (ie, a sports association’s cafeteria or canteen). The existence of such “economic” business activities results in the loss of the non-profit status in general. However, upon request a special permission may be granted by the competent tax office (para 44 sec 2 and para 45a BAO). In case of such permission, the non-profit status can be preserved. The profits from such non-helpful, “economic” business activities are generally taxable (even in case of a special permission).

5. Tax treatment of investment income used to support non-profit activities.

Rental income is not subject to tax provided that the legal person obtains the non-profit status. Investment income is, however, taxable if a withholding tax applies (see para 21 sec 2 Corporate Tax Act [KStG]). Such withholding tax applies for dividend and interest income as well as for capital gains from the sale of securities provided that there is a territorial link to Austria (ie, securities in an Austrian bank deposit, dividend paying company has its corporate seat or place of management in Austria).

6. Tax treatment of remuneration or reimbursement of expenses for employees, administrators, voluntary collaborators.

The law only requires such remuneration or reimbursement of expenses to be i) in accordance with the legal entity's purpose and ii) to be at arm's length (see para 39 no 4 BAO). No other restrictions exist.

7. Tax treatment of gifts, contributions and public subsidies in the tax base of the non-profit organisation, possibility of transferring gifts or contributions from one tax exempt organisation to another.

Membership fees are tax-exempt. Contributions – which are a kind of consideration for services rendered to members (ie, a sport association's members are entitled to use the facilities) – are, in contrast, taxable provided that either “helpful but dispensable” (para 45 sec 1 BAO) or non-helpful, “economic” business activities exist (see questions 3 + 4 above) and that the contribution is connected with these business activities. Subventions are also taxable in case either “helpful but dispensable” or non-helpful, “economic” business activities exist. In addition, it is required that the subvention is given for purposes of these business activities; “general” subventions are, however, tax-exempt.

Transferring gifts or contributions from one tax exempt organisation to another is admissible; however, the transfer or contribution may not be tax-deductible.

For the sake of completeness, it should be mentioned that the services for the public good or the charitable or church purposes – which are required for the non-profit status – must be directly rendered by the tax-exempt organisation. This practically means that a legal entity which restricts itself to the collection of funds – which are handed over to another entity distributing them to needy persons – will not qualify for the non-profit status.

8. Special rules for the accumulation of income and/or wealth in non-profit organisation.

No such rules exist. However, from para 35 to 47 BAO a general principle may be derived which states that income or wealth accumulated – eventually – has to be used for the public good or charitable or church purposes.

9. Tax treatment of the liquidation of a non-profit organisation

The statute of a non-profit legal entity (corporate body) has to define that in case of liquidation its assets are used for charitable causes. The termination of a commercial business can be made through disposal or sale of the business which in both cases is regulated by common tax regulations.

10. Tax treatment of the deductions of gifts and contributions in the person of the donor or contributor.

Especially donations to universities, research centers, the national library and museums are deductible by the donor as “special expenditures” (para 18 sec 1 no 7 Income Tax Act [EStG] Federal Gazette 400/1988 as consolidated by Federal Gazette I 112/2011). Under para 18 sec 1 no 7 second sentence EStG the amount of such donations is, however, limited: They are only deductible as if the donated amount in combination with donations from business assets does not exceed ten percent of the donors yearly gross income (after offsetting of losses). Donations to charitable organizations are likewise deductible due to para 18 sec 1 no 8 EStG.

III. VAT/GST or turn over taxes:

1. What are the material conditions of special VAT status?

The material conditions are the same as for income tax purposes (as defined in para 35 to 47 BAO). VAT law provides for a reduced tax rate of ten percent (para 10 sec 2 item 7 VAT Act [UStG] Federal Gazette 663/1994 as consolidated by Federal Gazette I 76/2011) rather than for a complete tax exemption (para 10 sec 2 item 7 UStG: Services of corporations, associations and trusts which pursue charitable, services for the public good or church purposes are subject to the reduced tax rate of ten percent). However, several types of revenue are subject to a tax exemption due to the Art 132 VAT directive:

para 6 sec 1 no 14 UStG: Revenues of non-profit sports clubs that have declared in their statutes that their main purpose is exercising or promoting physical sports.

para 6 sec 1 no 12 UStG: Revenues from courses, lectures and screenings of scientific or educational nature by public law entities or certain associations if they are used primarily to cover the costs arising.

para 6 sec 1 no 25 UStG exempts services mentioned in no 18, 23 and 24 of § 6 section 1 VAT if they are accomplished by corporations, associations and trusts which pursue charitable or church purposes or services to the public good (within the meaning of para 34 ff BAO). This does not apply to services within the field of agriculture or forestry or by a non-helpful, "economic" business (within the meaning of para 45 sec 3 BAO). The above-mentioned rule applies to the following services:

- Revenues from hospitals and nursing homes, elderly care, homes for the blind, infirmaries and institutions which are licensed as a sanatorium, provided that the services are directly related to the care, treatment or spa treatment of persons being cared for (para 6 sec 1 no 18 UStG)
- Services in the field of youth caring, schools for education or training, and rest homes for people not older than 27 years, if those services consist of support, housing, catering or are directly related to them (para 6 sec 1 no 23 UStG).
- Services that are regularly associated with the operation of a theater, music and vocal performances, especially by orchestras, ensembles and choirs, as well as the services that are regularly associated with the operation of a museum, botanical and zoological gardens as well as a nature park (para 6 sec 1 no 24 UStG).

2. Are there specific formal conditions for special VAT status?

Austrian VAT law does not require formal conditions for special VAT status (the same is true for corporate tax; see II/2) provided that the conditions as set forth in para 35 to 47 BAO are met (the legal entity performs services to the public good or for charitable or church purposes).

3. Are there any special rules with respect to the operation of the VAT exemption?

If services governed by a VAT-exemption (ie, para 6 sec 1 no 12, 14, 25 UStG) are rendered by a non-profit legal entity (see III/1), the legal entity has the right of deduction if goods or services received by the non-profit legal entity are connected with the tax-exempt services rendered. In case of mixed activities (business and non-profit), the non-profit legal entity is entitled to a tax deduction which is calculated proportionally.

4. What are the VAT rules for cross-border services or supply of goods?

Due to the VAT directive, intra-community acquisition also takes place if the vendor of goods is a legal person. Therefore, even a legal person being a non-profit corporation or association can be subject to tax. A non-profit corporation or association is therefore required to pay VAT in Austria if the goods are delivered from an EU country. The supplier is subject to a tax exemption in return.

However, such taxation only takes place if the total value of intra-community acquisitions in the current and the previous calendar year exceeds a threshold of EUR 11.000,- (the legal person can, however, opt to waive the application of this threshold).

IV. Inheritance, estate and gift taxes

Inheritance and gift tax

As of 7/31/2008, the inheritance and gift tax have been repealed by the Austrian constitutional court. Inheritances and gifts are therefore no longer taxable. Instead of the gift tax, an obligation to notify tax authorities was introduced (this notification obligation shall eliminate tax evasion).

Para 121a sec 2 letter c BAO provides for an exemption in case of donations of goods and monetary claims against non-profit national legal persons (see also para 15 sec 1 no 14 letter a inheritance and gift tax Act [Erbschaftssteuergesetz - ErbStG]).

Real estate tax

In Austria, a real estate tax (which revenue is distributed to local communities) is triggered. The real estate tax Act (Grundsteuergesetz [GStG] Federal Gazette 149/1955 as consolidated by Federal Gazette I 34/2010) does not provide for a general exemption for non-profit legal entities.

However, exemptions apply in certain cases:

- Under **para 2 no 3 letter b real estate tax Act**, real estate is exempt from tax for the following entities: local authorities, domestic corporations, association or trusts (which by their statutes and their management pursue exclusively and directly charitable or benevolent and charitable purposes). The real estate has to be used for these charitable purposes. However, no exemption is provided for those entities which pursue services for the public good purposes and which use their property only for such services.
- Under **para 2 no 4 real estate tax Act**, property of a sports club, which is used by the club for athletic purposes, is exempt from tax.
- Due to **para 2 no 2 letter b real estate tax Act**, property of a State Fire Department and its affiliated volunteer fire department used for their specific purposes is exempt from tax.
- Due to **para 2 no 2 letter a real estate tax Act**, property of the Austrian Red Cross and its affiliated organizations is tax exempt, if the land is used for their purposes.
- Due to **para 2 no 5 real estate tax Act**, land which is dedicated to the service of a legally recognized church or religious community or used by such for the purpose of pastoral care or religious instruction, for administrative purposes, or as universally accessible home for the elderly is tax-exempt.
- According to **para 2 no 7 real estate tax Act**, property which is used for purposes of science, teaching or education, especially for schools, educational institutions, student hostels, apprentice homes, kindergardens, etc. If the user is not a public law

entity, the Minister of Finance has to acknowledge - in accordance with the competent minister - the public interest.

- Due to **para 2 no 8 real estate tax Act**, property which is used for hospitals (para 1 and 2 Hospitals Act), is exempt if the hospital is to be regarded as charitable (in accordance with para 35 to 47 BAO).

In all above-mentioned cases the property is required to be used directly for the purposes described above.

V. Other taxes

Capital Transfer Tax

In Austria, capital transfer tax is triggered upon the transfer of funds in a corporation (ie, Aktiengesellschaft or Gesellschaft mit beschränkter Haftung). The Austrian capital tax Act (Kapitalverkehrsteuergesetz [KVG] Federal Gazette 57/1948 as consolidated by Federal Gazette I 111/2010) however provides for an exemption from capital transfer tax for corporations having a non-profit status (see para 6 sec 1 no 1 letter a KVG). This status refers to the conditions as set forth in para 35 to 47 BAO. If the corporation loses its charitable status, all transfers of funds that have occurred within the last five years before the loss will be taxed.

Stamp Duties

The Austrian stamp duty act (Gebührengesetz [GebG] Federal Gazette 129/1958 as consolidated by Federal Gazette I 76/2011) does not provide for a general exemption for non-profit-organisations. However, exemptions apply in rare cases: Regarding their correspondence with public authorities and agencies, all public entities and all organisations which achieve exclusively scientific, humaneness or charitable purposes, are exempt from stamp duties. This exemption is, however, limited on applications or petitions to public authorities or courts as defined in para 14 TP 6 GebG and para 14 TP 5 GebG.

Municipal tax

Municipal tax comprises the wages paid to workers attributed to a domestic permanent establishment. Its revenue is exclusively distributed to local communities. Para 8 no 2 of the municipal tax Act (Kommunalsteuergesetz [KommStG] Federal Gazette 819/1993 as consolidated by Federal Gazette I 76/2011) exempts charitable and/or corporations rendering services for the public good from municipal taxation if they operate in the field of health care, children, youth, families, disabled, blind and elderly care.