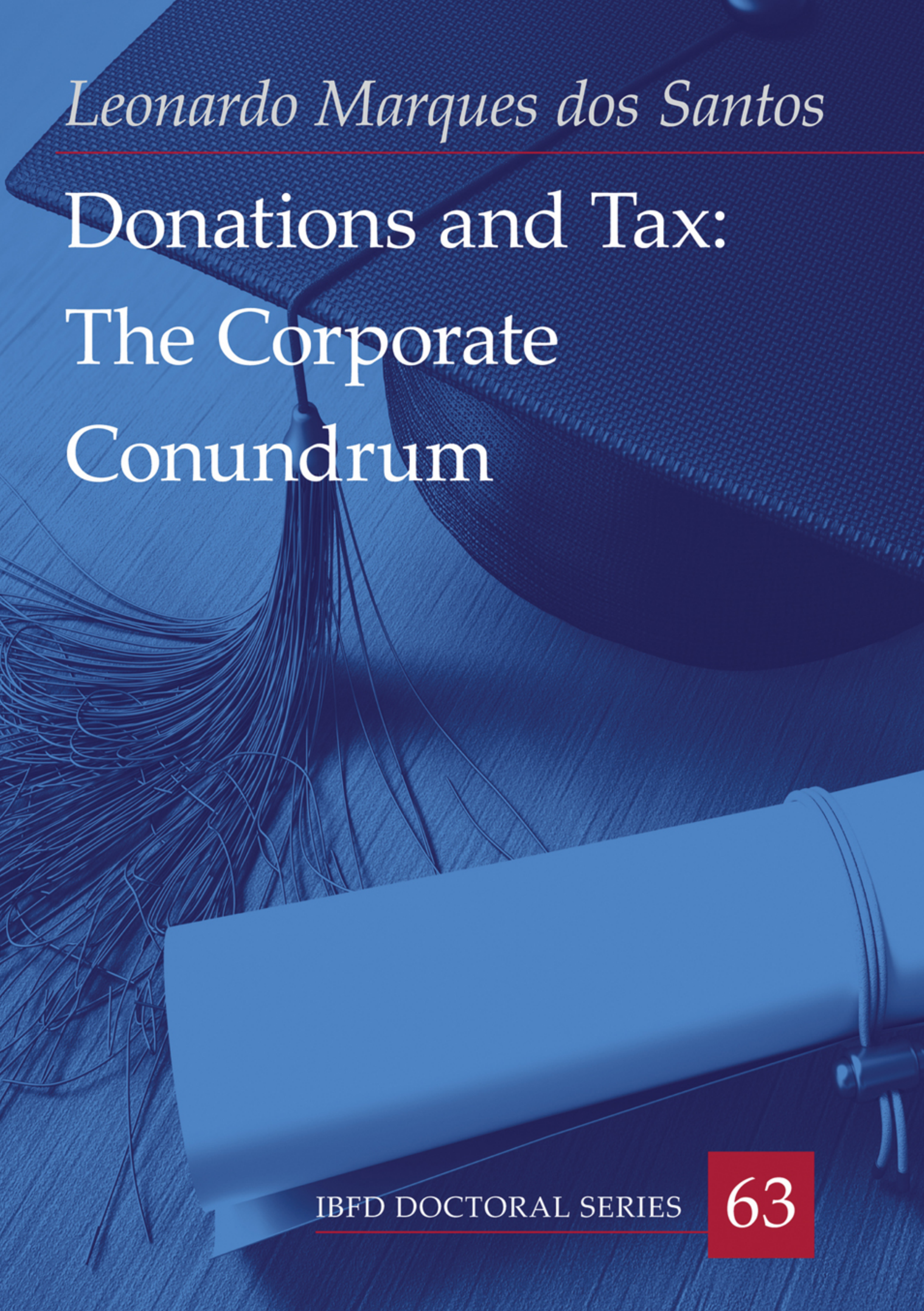
Leonardo Marques dos Santos

Donations and Tax: The Corporate Conundrum



IBFD DOCTORAL SERIES 63

Donations and Tax: The Corporate Conundrum

Why this book?

This book is focused on the concept and functions of corporate charitable donations.

Charitable giving practices have always been a feature of society and will continue to be so in the future. In any case, the current and more widespread understanding of what corporate charitable donations are and of what their functions are, i.e. as mostly altruistic and non-commercial actions, is obsolete. There is still a prevailing misconception regarding the absence of economic benefits for corporations that grant charitable donations. This misconception leads to a misunderstanding of what motivates corporations to donate. This greatly impacts the way tax systems are designed and drafted. In addition, it generates suspicion regarding corporate charitable actions.

This book provides a unique insight into the essential features of corporate charitable donations and their respective functions. It suggests a paradigm shift from an altruism-based approach to a functional approach that allows viewing donations as intrinsically bilateral relations, with benefits arising for both donor and donee. Building on this analysis, and with due consideration for constitutional and international law constraints, the book analyses how to improve the tax technical treatment of corporate charitable donations and perfect tax policy choices behind the tax system. It also provides a research breakthrough in legal and policy analysis, allowing for a move beyond the status quo, which is still mainly grounded in the understanding that any measures associated with donations are exceptional, qualifying as incentives or benefits that do not really form part of the structural features of a sound tax regime.

This book is of value to academics, tax practitioners, tax policymakers and politicians, but also to non-profit organizations, as well as to anyone interested in the topic of taxation of charitable donations and of the charitable sector.

Title:	Donations and Tax: The Corporate Conundrum
Author(s):	Leonardo Marques dos Santos
Date of publication:	12 May 2022
ISBN:	978-90-8722-750-0 (print), 978-90-8722-751-7 (ePub), 978-90-8722-752-4 (PDF)
Type of publication:	Book
Number of pages:	556
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 120 / USD 145 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 96 / USD 116 (VAT excl.)

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ISBN 978-90-8722-750-0 (print)
ISBN 978-90-8722-751-7 (eBook, ePub); 978-90-8722-752-4 (eBook, PDF)
ISSN 1570-7164 (print); 2589-9619 (electronic)
NUR 826

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Preface

This book is focused on the concept of corporate charitable donation. It aims to explore the different tax policy considerations that should be taken into account by decision makers around the globe in the design of philanthropic regimes that are adjusted to their specific temporal and geographic idiosyncrasies. The book is also intended to suggest a legal setting able to stimulate the social functions of donation for the fulfilment of critical societal challenges and needs. It aims to provide a research breakthrough in legal and policy analysis, allowing progression beyond the current predominant legal theory, which is still mainly grounded in the understanding that any measures associated with donations are exceptional, qualifying as incentives or benefits that do not really belong to the structural features of a sound tax regime.

The book is based on the understanding that corporate charitable donations are evolutive. They are pre-regulatory realities grounded in social, behavioural, moral, ethical and even religious elements. This factor needs to be considered in the design of any philanthropic regime.

In addition, the research aims to allow a paradigm shift from an *altruistic approach* to a *functional approach*. It departs from the fundamental premise that a disposal should be considered a corporate charitable donation depending on the *societal functions* achieved. As such, a donation will exist as long as a disposal contributes to the reduction of charitable shortages, to further social integration, to promote widespread values or to raise awareness of social issues, even if there is no *animus donandi*. This allows viewing donations as occuring in the context of intrinsically bilateral relations, with benefits arising for both donee and donor.

There is certainly a material/physical dimension to most donations. However, and breaking with some traditional approaches, this book acknowledges that there is also an important immaterial dimension, as many charitable donations have effects at the level of the habits, knowledge and/or personal development of community members (e.g. cultural development). The acceptance of this immaterial facet is a first step towards an understanding of giving practices as bilateral relations, with benefits for both parties. Corporate donors, simply by participating in a philanthropic relationship, become exposed to a setting that allows them to be beneficiaries of their own donations (e.g. by donating to a museum, donors become exposed to a cultured setting).

In addition, charitable donations' societal functions go far beyond reducing shortages of charitable supplies. By allowing a strengthening of relationships between donors and charitable beneficiaries, donations also contribute to social integration, bringing together social classes and different segments of society. They further contribute to the dissemination of core societal values and principles worthy of protection and raise awareness of social issues that otherwise could remain unknown.

Moreover, in the current state of development, the survival of modern corporations depends on their social integration with the communities with which they interact. Anti-social behaviours tend to be frowned upon by the community and affect business. Thus, donations must be seen as instruments of communal integration that allow corporate donors to demonstrate their social concerns to their customers, and even to their collaborators and employees. Even if it seems counter-intuitive, corporate donations should not be seen as a conundrum but rather perceived as instruments allowing corporations to pursue their business objectives, observe social conventions and commercial practices and, in a nutshell, potentiate their search for profit.

Considering all of the above, this book suggests a tax concept of corporate charitable donations and describes how corporate philanthropic regimes should be designed from a tax policy perspective. The proposal is a particularly broad-minded one in terms of eligible objects, in that it sustains the admissibility of in-kind donations, notably volunteer work or assignments of use. It also recommends expanding the scope of beneficiaries, whether they be individuals or other for-profit entities. Driven by the need to maximize the business objectives underlying most corporate charitable donations, the proposal describes which economic benefits can be derived from giving practices that do not disqualify a donation (by constituting a consideration).

The impact of international law on the design of domestic philanthropic regimes is also considered. The case law of the Court of Justice of the European Union on cross-border donations is critically reviewed, in a way that allows for a wider reading of the court's rulings. Despite the limitations, the book clearly points out that Member States retain much more leeway than traditional doctrine recognizes, particularly in the inclusion of certain territorial features.

Despite the absence of specific international law instruments regulating the subject matter, the book provides new insights into the functions and limits emerging from the non-discrimination provisions included in most tax treaties. Inter alia, those provisions clearly point in the direction of requiring a mandatory deduction of corporate charitable donations in a significant number of cases.

As in any regime, the prevention of abusive practices and the fight against the traditional veil of suspicion hovering over the use of resources by charities are also a concern. As such, a cross-checking methodology is suggested. Accordingly, both donors and donees should contribute to controlling the accuracy of the elements to be taken into account for the production of any legal and tax entitlements.

Based on the understanding that charitable deductions/credits should mostly be seen as structural features of each tax system, the book suggests the elimination of any tax incentives or benefits from philanthropic regimes (e.g. incremental deductions).

In conclusion, this book aims at leading to a new understanding of the concept, role and functions of corporate charitable donations. Besides its theoretical merits, this new understanding is used as the basis for a discussion of the tax policy elements that should be used by decision makers throughout the world in the design of new philanthropic regimes. Their revision in the light of the coordinates provided by this book is crucial, since this allows, on the one hand, reconciling the regimes with constitutional imperatives and, on the other hand, strengthening the role of corporate charitable donations in the construction of better communities and societies.

Note to Readers

The research that forms the basis of this book was concluded on 30 September 2020, prior to its submission as a doctoral thesis to the Portuguese Catholic University, and updated on July 2021, following the defence of the thesis. Subsequent developments in legislation and case law have not been considered.

Foreign research materials were quoted in their official or authorized English translations. All other translations not specifically attributed to a source are the responsibility of the author.

Chapter 1

The Conundrum

1.1. Gifts and donations as a pre-regulatory reality

Giving is an existential imperative inherent in the cooperation that entails being – as man is – a social creature.[1]

As Francis Bacon stated, "the inclination to goodness is imprinted deeply in the nature of man".[2] Mutual help and support, as well as feelings of personal satisfaction and accomplishment that arise from helping or pleasing someone, have always featured in human relationships. To quote from the Prayer of Saint Francis, "it is in giving that we receive". The human ability to love and care for others, which involves the capacity to give without receiving back, has, in effect, been reported since the beginning of time.[3]

Giving thus predates modern legal and tax systems. It is a pre-regulatory reality associated with the very existence of human beings and their organization in communities.[4] As noted by Bruce R. Sievers, the "allocation of private resources to important public needs is an idea deeply grounded in human history".[5] This implies a concept of charitable donation strongly linked to each society and culture, with well-known anthropological,

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1. *See* Aristotle, *Politics*, translated by C. Lord (University of Chicago Press 2013).
2. F. Bacon, *Essays of Francis Bacon* p. 54 (Charles Scribner's Sons 1908).
3. *See* R.H. Bremner, *Giving: Charity and Philanthropy in History* p. 5 (Transaction Publishers 2000); and F.H.M. Grapperhaus, *Taxes through the Ages: A Pictorial History* p. 4 (IBFD 2009).
4. For feelings of love and benevolence, as well as acts of sharing in animal and vegetable species, *see* C. Darwin, *The Descent of Man, and Selection in Relation to Sex*, vol. II, p. 109 inter alia (Princeton University Press 1981); and L.A. Dugatkin, *Cooperation among Animals: An Evolutionary Perspective* (Oxford University Press 1997).
5. B.R. Sievers, *Civil Society, Philanthropy and the Fate of the Commons* p. 12 (Tufts University Press 2010). For examples of charitable giving throughout the ages, *see also* P.D. Hall, *Historical Perspectives of Nonprofit Organizations in the United States*, in *The Jossey-Bass Handbook of Nonprofit Management and Leadership* p. 3 (R. Herman ed., 2nd ed., Jossey-Bass Publishers 2004); *Charity, Philanthropy, and Civility in American History* (L.J. Friedman & M.D. McGarvie eds., Cambridge University Press 2004); P.D. Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000*, in *The Non-Profit Sector: A Research Handbook* p. 34 (W.W. Powell & R. Steinberg eds., 2nd ed., Yale University Press 2006); and G. McCully, *Philanthropy Reconsidered: Private Initiatives – Public Good – Quality of Life* (AuthorHouse 2008).

sociological, psychological and even religious roots.[6] The result is that humans, formally or informally, to a greater or lesser extent, volunteer time, services, resources and goods to help others.[7]

Gifts and charitable donations, as well as other types of disposals, are on the border of what is subject to legal protection. Some disposals do not even match any legal concepts and only bear significance in terms of societal notions of honour.[8] Melvin Aron Eisenberg goes so far as to defend the claim that the affective values of love, friendship, affection, gratitude and comradeship, which are the prime motivating forces behind acts of giving, are too important to be enforced by law.[9]

Bearing in mind the above, the social "genetic markers" that feature charitable donations must be duly appreciated if one intends to fully understand the concept. Also, given that donations are a pre-regulatory reality, it is difficult to ignore the fact that, to a certain extent, the tax concept of charitable donation is, or should be, built upon societal, behavioural, moral, ethical and even religious rules of conduct.[10] Thus, when it comes to the regulation of charitable donations, the law cannot stand isolated from the social setting it aims to regulate. The law comes second to an already existing (and socially regulated) reality.

The consequences of such non-legal roots are, as far as the author is concerned, many:

– the core characteristics of the concept of charitable donation tend to remain unaltered. However, being a social phenomenon, the specific features of corporate charitable donations change according to the

6. *See* K.C. Robbins, *The Nonprofit Sector in Historical Perspective: Traditions of Philanthropy in the West*, in *The Nonprofit Sector: A Research Handbook* (W.W. Powell & R. Steinberg eds., 2nd ed., Yale University Press 2006); H.K. Anheier & L.M. Salamon, *The Nonprofit Sector in Comparative Perspective*, in *The Non-Profit Sector: A Research Handbook* pp. 13-31 and 89-114 (W.W. Powell & R. Steinberg eds., 2nd ed., Yale University Press 2006); and R.L. Payton & M.P. Moody, *Understanding Philanthropy: Its Meaning and Mission* pp. 13-14 and 31 (Indiana University Press 2008). For references to giving in literature throughout the ages, *see The Perfect Gift: The Philanthropic Imagination in Poetry and Prose* (A.A. Kass ed., Indiana University Press 2002).

7. *See* R.L. Payton & M.P. Moody, *Understanding Philanthropy: Its Meaning and Mission* p. 16 et seq. (Indiana University Press 2008).

8. *See* J.M. Vieira Gomes & A.F. de Sousa, *Acordos de Honra, Prestações de Cortesia e Contratos*, in *Estudos dedicados ao Prof. Doutor Mário Júlio de Almeida Costa* pp. 861-862 (Universidade Católica Editora 2002).

9. *See* M.A. Eisenberg, *The World of Contract and the World of Gift*, 85 California Law Review 4, p. 849 (1997).

10. *See* A. Luks & P. Payne, *The Healing Power of Doing Good* p. 157 et seq. (iUniverse.com 2001).

geographic and temporal framework of the charitable actions. This requires not only the periodic revision of philanthropic regimes but also accepting an evolving understanding of the functions that donations serve for society and for donors. Important tax policy ramifications result from this assertion;

- there is a pre-legal understanding of the features of the concept of charitable donation;
- the law often relies on pre-existing notions to implement specific philanthropic policy options;
- the legal and tax features of both the notion of charitable donation and philanthropic regimes should not be bluntly disruptive of their ontological characteristics. What can be considered admissible as a token of appreciation when receiving a charitable donation, for instance, is based on a sociological understanding. That understanding must be taken into consideration when drafting tax regimes; and
- the ontological concept and, consequently, the tax concept of charitable donation may not fully match with any (or any single) legal regime.

1.2. The subjective benefits of giving

Most of the literature on the underlying reasons for giving acknowledges some form of subjective advantage for the donor emerging from the donation.[11]

Research carried out in different fields of knowledge reveals that charitable actions among humans lead to a sense of self-fulfilment, happiness and success, or even to future benefits for the donor.[12] It has also demonstrated that acts of generosity, such as volunteering, activate a part of the brain usually

11. *See* L. Anik et al., *Feeling Good about Giving: The Benefits (and Costs) of Self-Interested Charitable Behavior* pp. 1-22 (Harvard Business School Working Paper 10-012 2009); M.A. Livingston & D.S. Gamage, *Taxation: Law, Planning, and Policy* p. 387 (LexisNexis 2010); and E.W. Dunn, L.B. Aknin & M.I. Norton, *Prosocial Spending and Happiness: Using Money to Benefit Others Pays Off*, 3 Current Directions in Psychological Science 1, pp. 41-47 (2014). Michael Gurven et al. also propose that certain animals that gather more food than they consume and share the remainder are also more likely to receive additional food during hard times (e.g. in the face of sickness, disease, injury or accidents). *See* M. Gurven et al., *It's a Wonderful Life: Signaling Generosity among the Ache of Paraguay*, 21 Evolution and Human Behavior, pp. 263-282 (2000).

12. On the practical effects derived from the premise that helping others produces positive effects for the helper (e.g. so-called helper therapy and its application in the method of peer assistance used by Alcoholics Anonymous), *see* F. Riessman, *The "Helper" Therapy Principle*, 10 Social Work 2, pp. 27-32 (1965). *See also* W.D. Andrews, *Personal Deductions*

associated with the enjoyment of food, sex or drugs.[13] A landmark study conducted by Allan Luk refers to the term "helper's high" to describe such effects.[14] According to this author, regular helpers are much more likely to be in good physical and emotional health than non-helpers. James Andreoni, an economist, invokes the concept of a "warm glow" and maintains that people are impure in their giving actions (a phenomenon he calls "impure altruism"), as they gain benefits from donating, i.e. a positive emotional response derived from acts of charity.[15] Charlie L. Hardy and Mark van Vugt reached the conclusion that "in a reputation environment when contributions were public, people were more altruistic".[16] As noted by Mark G. Kelman, an altruistic action at least "buys the scarce resource of looking altruistic".[17]

Moreover, historically, there have even existed numerous contexts in which gifts are not truly unilateral, in the sense that there is a social obligation to reciprocate. The gift creates a bond between donor and donee, apart from the boundaries of legal regimes, based on honour or integrity, which imposes an obligation to reciprocate. Several societies have, in fact, been based on gifts (so-called gift-based economies). Traces of such principles still exist in current societies. A gift for a special occasion (a wedding or a birthday) creates an obligation to reciprocate both to the invitation and to the act of giving (the principle of *do ut des*: I give so that you may give in return).[18] This adds to the social and sociological background behind the concept of charitable donation.

in an Ideal Income Tax, 86 Harvard Law Review 2, p. 314 (1972); and H.K. Anheier & R.A. List, *A Dictionary of Civil Society, Philanthropy and the Non-Profit Sector* pp. 196 and 250-251 (Routledge 2005).

13. *See* D.J. Linden, *The Compass of Pleasure: How Our Brains Make Fatty Foods, Orgasm, Exercise, Marijuana, Generosity, Vodka, Learning, and Gambling Feel So Good* (Penguin Group 2011); and J. Santi, *The Giving Way to Happiness: Stories and Science behind the Life-Changing Power of Giving* p. 7 (Penguin Random House 2015).

14. *See* A. Luks, *Helper's High*, 22 Psychology Today 10, pp. 34-42 (1988); and A. Luks & P. Payne, *The Healing Power of Doing Good* (iUniverse.com 2001).

15. *See* J. Andreoni, *Giving with Impure Altruism: Application to Charity and Ricardian Equivalence*, 97 The Journal of Political Economy, pp. 1447-1458 (1989); and J. Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 The Economic Journal 401, pp. 464-477 (1990).

16. *See* C.L. Hardy & M. van Vugt, *Nice Guys Finish First: The Competitive Altruism Hypothesis*, 32 Personality and Social Psychology Bulletin, pp. 1402-1413 (2006).

17. M.G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 Stanford Law Review 5, p. 880 (1979).

18. *See* M. Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (Routledge Classics 1990); and M.A. Eisenberg, *The World of Contract and the World of Gift*, 85 California Law Review 4, pp. 821-866 (1997).

Although there are multiple reasons to adopt giving patterns, as per the above, what is distinctive, as follows from research done in multiple areas, is that giving also results in benefits to the donor: if not other benefits, at least peace of mind, a sense of achievement that results from obeying the rules of society or avoidance of the guilt that arises as a result of breaching those rules.

However, to accept – as the author does – the premise that giving brings benefits to the giver implies that giving entails a mutually beneficial relationship between giver and receiver.

In the author's view, acknowledging the reciprocity of benefits leads to a change of paradigm in philanthropic relationships, because it means that donations, ontologically, are not (or are not always) disinterested. Donations are also triggered by donors' intentions of obtaining certain benefits. These benefits may be more or less explicit and may play a larger or a smaller role in the individual psychological decision to engage in an act of giving. But they do tend to be present.

Accordingly, from a tax policy standpoint, the mere existence of benefits per se should not disqualify a charitable donation. As stated by Mark A. Hall and John D. Colombo, "all gifts partake of some form of self-interest".[19] The existence of benefits just makes it harder to set the boundaries of the concept of charitable donation with precision.

1.3. From individuals to corporations

At first sight, the notion of *corporate* charitable donations seems almost paradoxical. The (apparent) paradox is due to the difficulties in reconciling fundamentally existential actions of individuals with legal entities and acts of giving with profitable activities: this is *the conundrum*.[20]

It seems difficult to reconcile a behaviour that is triggered, notably, by personal psychological feelings with acts of legal entities that are emotionally

19. M.A. Hall & J.D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 Ohio State Law Journal, p. 1406 (1991).
20. *See* I.C. Boúúaert, *Tax Problems of Cultural Foundations and Patronage in the European Community* pp. 50-51 (Kluwer Law and Taxation Publishing Division 1976); and J.L. Himmelstein, *Looking Good and Doing Good: Corporate Philanthropy and Corporate Power* p. 7 et seq. (Indiana University Press 1997).

detached and, in many cases, profit-driven.[21] Apparently, there is nothing more antithetical to profit than a donation (that does not require a consideration).

However, corporations do have an existential substrate. Though they do not have a physical existence, they do have a legal one, i.e. they also *exist*. Naturally, the feelings of satisfaction and self-fulfilment derived by individuals will not arise at the level of legal entities, as they are, after all, creatures of law.[22] In addition, the emotions that may arise for individuals in governance bodies do not allow the establishment of a direct parallel with the reciprocity identified at a purely the human level. This is because a legal entity cannot be misidentified with the individuals acting on its behalf.

Nonetheless, as the author will demonstrate, disposals in a corporate setting are not completely outside the paradigm of interpersonal relations.[23]

Corporations do not stand in isolation from the rest of society. Their existence, as well as their survival, depends, as with individuals, on the cooperative actions established between them and with human beings. Thus, corporate charitable donations are still granted based on an agenda ultimately linked to the survival of the entity.

Existence and survival in a corporate setting, however, differ from existence and survival in the case of human beings, as corporations rely on maintaining a reasonable level of earnings. It is true that, in some cases, corporations are not profitable and are mostly maintained for emotional reasons (for instance). However, this is neither the rule nor the real purpose of corporations, which exist to pursue profits. Thus, corporate giving actions still relate to the pursuance of economic or financial advantages (directly or indirectly, in the short run or in the long run).

Ultimately, by accepting that corporate donors derive benefits from charitable actions, one must also accept that the obtention of such benefits may drive donations. In addition, if the benefits to society arising from such giving actions are not diminished by the search for business advantages, the donor's intention is, to some extent, irrelevant to the concept of corporate

21. *See* A.M. Portugal, *A Dedutibilidade dos Custos na Jurisprudência Fiscal Portuguesa* p. 147 (Coimbra Editora 2004).
22. The expression "companies are creatures of the law" was disseminated in UK: ECJ, 27 Sept. 1988, Case 81/87, *The Queen v. H.R. Revenue and Customs of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483, Case Law IBFD, at para. 19.
23. *See* ch. 4.

charitable donation. Consequently, elements such as altruism or donative intent, for instance – which are more personal in nature – are not relevant to the concept either.

In the author's opinion, the qualification of a disposal as a corporate charitable donation mostly depends on the charitable function it achieves from a societal standpoint. As such, this research will demonstrate that corporate charitable donations can be construed as acts of business.[24]

To have corporations follow giving practices that, at their genesis, are linked to living beings is contingent on three requirements: (i) their being *possible*; (ii) their being *necessary*; and (iii) their being *adequate*.[25]

First and foremost, charitable donations are granted by corporations because this possibility tends to result from the legal framework applicable (i.e. corporate donations are *possible*). This *lapalissade* comes, however, with severe caveats. After all, corporate charitable donations – as any other corporate actions – may be restricted by the law, notably regarding the amount, the periodicity, the features of the donors and the sorts of beneficiaries.

This much is to say that, if corporate charitable donations were not legally possible (because they were null/void) or triggered severe consequences (incurring civil or criminal liability or leading to the dismantling of the legal entity), charitable donations would not be a legitimate option for corporations.[26]

Corporate charitable donations are also *necessary*. It is stressed that this necessity respects the needs of the community, but also the needs of corporations. Chapters 3 and 4 will expand on these issues. For now, let it be simply stated that corporate charitable donations are necessary, given the need to secure certain charitable functions. These relate to supplies of charitable goods and services that are not provided on the conditions and in the amounts necessary either by governments or by the market. Moreover, these functions also respect the need to further social integration, spread

24. *See* M.E. Porter & M.R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, 80 Harvard Business Review, pp. 5-16 (Dec. 2002).

25. For a conceptual analysis on adequacy, necessity and proportionality, *see* J.F. Pinto Nogueira, *Direito Fiscal Europeu – o paradigma da proporcionalidade, a proporcionalidade como critério central da compatibilidade de normas tributárias internas com as liberdades fundamentais* pp. 99-109 inter alia (Wolters Kluwer/Coimbra Editora 2010).

26. Note that, even though the legal capacity to execute liberalities is extremely debatable from a corporate law standpoint, the author will not tackle such issues in the current work.

(charitable) values deemed worthy by each society, induce social and democratic behaviours and raise awareness of social issues.[27]

The need for corporate charitable donations must not be based only on purely financial metrics but also on axiological advantages (the so-called moral imagination).[28] Corporations, being an essential part of society – and, in many cases, an instrument that shapes society – must respond to the same core moral standards as individuals. For this to happen, it is important to have them executing charitable donations.

To restrict acts of giving to individuals would also limit the efficacy of charitable donations. By broadening the range of donors by means of adding legal entities that feature specific (favourable) characteristics (e.g. access to funds, the need to pursue these actions and multinational influence), charitable giving becomes more effective.

Corporate charitable donations are also an *adequate* societal and corporate instrument, given that businesses will benefit from being fully integrated with society (i.e. in their relevant market).

Donations are, therefore, an efficient response to what makes corporate giving actions necessary. This ultimately means that corporations have an incentive to donate.[29] Otherwise, no donations would be granted and their charitable functions would not be fulfilled.

Corporations donate to charity because it is in line with their business agenda. As Ineke Koele notes, some authors even defend the proposition that "any expenditure not made for a business purpose must be inspired by the personal motive of the shareholders and, therefore, constitutes a dividend distribution. Thus, a true gift, that is, a donation with *animus donandi*, out of kindness, with no ulterior (business) motive – cannot be attributed to the corporation, but to its shareholders".[30]

Still, in the author's opinion, there are several underlying reasons for corporations to donate. These range from purely internally motivated to externally

27. *See* R.L. Payton & M.P. Moody, *Understanding Philanthropy: Its Meaning and Mission* p. 11 (Indiana University Press 2008).
28. *See* R.L. Payton & M.P. Moody, *Understanding Philanthropy: Its Meaning and Mission* p. 132 (Indiana University Press 2008).
29. *See* A. Malani & E.A. Posner, *The Case for For-Profit Charities*, 93 Virginia Law Review, p. 22 (2007).
30. I. Koele, *The Netherlands*, in *International Charitable Giving* p. 381 (C. Cutbill, A. Paines & M. Hallam eds., Oxford University Press 2012).

motivated decisions. Corporate charitable donations are internally motivated when they are actively used with a business agenda (e.g. promotion, in the same way as buying advertising time on television).[31] Corporate charitable donations are externally motivated when they are granted as a reaction to a social expectation that corporations should adopt a certain behaviour. The breach of such expectations may, notably, affect market demand. In addition, there may be externally motivated decisions of a legal nature. In these cases, the motivation (or main motivation) results from a specific tax/legal regime, such as tax incentives, tax benefits or other advantages.

According to Richard A. Posner, most people would feel guilty about stealing, even if not caught.[32] A similar point, so the author believes, can be made with respect to not giving, in specific settings. In such cases, there may be a sense of shame or embarrassment arising from not respecting what can be perceived as a social demand. This is because social censure may arise as a result of not meeting certain societal practical expectations.

In the corporate context, in contrast to the individual context, guilt cannot be, using Posner's expression, a "self-enforcing" sanction, given that corporations are per se amoral entities.[33] In any case, further to the individuals presiding over corporate bodies, compliance with ethical standards or social conventions may affect businesses because of the perceptions created among consumers or stakeholders, who might not be able to understand why a corporation would not show any social concern.

Broadly speaking, in many marketplaces, especially consumers' markets, there is a corporate downside to not showing any real social integration. Studies conducted in this field, notably by Baruch Lev, Christine Petrovits and Suresh Radhakrishnan, do point to an increase in customer satisfaction when corporations engage in charitable actions.[34]

Donations are also made to incorporate social status, to develop networking channels, to open new markets, to promote future business deals and to access qualified employees, among other reasons.

31. *See* ch. 3.
32. *See* R. Posner, *Frontiers of Legal Theory* p. 291 (Harvard University Press 2001).
33. *See* R. Posner, *Frontiers of Legal Theory* p. 291 (Harvard University Press 2001).
34. *See* B. Lev, C. Petrovits & S. Radhakrishnan, *Is Doing Good Good for You? How Corporate Charitable Contributions Enhance Revenue Growth*, 31 Strategic Management Journal, pp. 182-200 (2010).

The above-described motives trigger – willingly or unwillingly – corporate donations, making them *adequate* to meet a corporate function and, consequently, allowing them to comply with their social functions.

1.4. Overcoming the conundrum: A roadmap of the thesis

As described in section 1.3., corporate charitable donations are triggered by different underlying motivations, have different features and are used to pursue different goals. In this book, the author argues that corporate charitable donations can be a business instrument, motivated by reasons either internal or external to the corporation. That is to say, corporate charitable donations must, in non-pathological scenarios (i.e. when corporate assets are not used abusively, notably by individuals wanting to pursue personal agendas), be treated as a business expense.

The refusal to identify altruism as a sine qua non requirement for a corporate charitable donation and the acceptance of the notion that benefits may arise for donors as a result of their giving actions are the elements that solve the (apparent) corporate conundrum. Removing altruism from the equation means that an underlying business purpose may exist in corporate charitable donations, and this leads to accepting the proposition that corporations may grant donations and still be pursuing their corporate agenda. In short, by accepting the idea that benefits arise for the donor and that these do not disqualify the charitable donation, even ontologically, it must also be accepted that the trigger for the donation may be the attainment of such benefits. Thus, donations may be (and in most cases are) business-driven.

In any case, the settings in which corporate charitable donations are granted and the aims pursued by corporate charitable donations, as well as the very elements of the concept of a corporate charitable donation itself must be broken down so that its tax regime can be accurately built up.

Michael E. Porter and Mark R. Kramer identify a "convergence of interests", as, in many cases, corporate charitable expenditures produce, on the one hand, social benefits but, on the other hand, bring economic advantages to corporate donors.[35] These authors defend the claim that such a convergence of interests does not happen in all situations. However, to accept that

35. *See* M.E. Porter & M.R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, 80 Harvard Business Review, pp. 5-16 (2002).

these social expenditures may yield economic benefits automatically allows, at least, an assessment of whether the decision was business-driven.

The existence of a business intent, being a subjective element, is extremely difficult to define from a theoretical standpoint, and even harder to prove. In the author's opinion, the business driver cannot be assessed by trying to find the donor's intent. Simply put, in cases in which the business driver is not evident, there must be a consistent line of reasoning by the donor demonstrating that, in each specific context, there is a link between the donation and the business activity.

Given that donations will not have a consideration, the elements that allow a more objective assessment are more difficult to find. However, difficult as it may sometimes be to confirm the business driver of corporate charitable donations, questions as to the business link of expenses are not an issue that is specific to charitable giving. Such uncertainties regularly exist in corporate settings regarding several types of expenses incurred.

In addition, one should never discount the existence of a certain level of promiscuity in respect of business expenses. There is always a certain degree of confusion between the private lives of businesspeople and the business sphere (e.g. taking the family out to dinner with the family of an important client who is particularly fond of these contexts). The two spheres can and do overlap, even in the absence of any abuse. This confusion adds complexity to the act of distinguishing between cases in which the business driver is present and those in which it is not.

This much is to say that the business-purpose test must not be based on suspicion just because donations do not trigger a consideration. A business-purpose test must, however, be carried out.

In this regard, the author will expand on the most paradigmatic business drivers in chapter 4 in order to demonstrate how such a business test must be carried out in the case of corporate charitable donations.

Notes

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