Expanded abstract

Unpaid nature of the position of trustee in a preferential tax regime. Critical analysis and reform proposal

Objectives

The possibility of foundations opting to apply for a preferential tax regime provided by Law 49/2002, of December 23, depends on whether these entities meet the requirements established in Art. 3 of this law. Among these requirements, the most important one in our opinion is the condition that trustees carry out their roles without remuneration. This paper examines the voluntary nature of the position of trustee and the operational issues that arise from this for the foundation, and reflects on ways of managing this situation.

Methodology

We refer to the legal requirement of the unpaid nature of the position of trustee both in the substantive and fiscal fields and we venture to suggest the inconsistency of this obligation. We study the varying degrees of rigour which are applied when assessing the unpaid nature of the position of trustee and the other conditions required for the application of the preferential tax regime as well as the consequences of this legislative option, drawing conclusions which may indicate appropriate reforms to this law.

Approach

The Third Sector, of which foundations form a part, looks to meet the needs of people and of processes worthy of special protection. This is upheld in the words of the Constitutional Court (STC 18/1984, of February 7), which declare that a characteristic of the social and legal state is that general interests are defined through an interaction between the state and social agents, where foundations play a role of crucial importance.

In our system, the non remuneration of trustees is absolute. Their remuneration implies the impossibility that the foundation can choose the preferential tax regime established by Law 49/2002. The basis for this requirement stems from purely historical reasons and from the need to prevent trustees receiving indirect financial benefit from their involvement in the foundation. However, the unpaid position of trustee is not part of the so-called "essential content" of the right to create foundations; it is simply a legislative option for the foundation.

Results

If we compare the required unpaid position of trustee with the rest of the requirements that Law 49/2002 demands for the application of the preferential tax regime we see that its practical translation is quite different. If gratuity is absolute, the remaining requirements of Art. 3 of the LRF-ENL (with the sole exception of the destination of their assets in the event of dissolution) are softened doctrinally, jurisprudentially and legally.

Essentially, due to either the forced evolution in jurisprudence (pursuit of the general interest indirectly in Article 3.1), or to the limitations expressly established by the legal text itself (obligatory destination of at least 70% of certain income or revenue of Article 3.2; a limit of 40% to be dedicated to economic activity other than its statutory objective or purpose of article 3.3; impossibility that certain people are main recipients or might benefit from special conditions in the use of their services of Art. 3.4), or due to different doctrinal considerations (retroactive application of the preferential regime to the foundation in formation in the case of Art. 3.7; relative tolerance in the preparation of accounts and preparation of an annual report of numbers 8, 9 and 10 of Article 3); and with the sole exception of the obligatory destination of the patrimony in case of dissolution of Art. 3.6 (really a prolongation of the need to allocate any income and revenue for purposes of general interest), there is no doubt that the requirements demanded for the application of the preferential tax regime operate, in practice, with a lower rigour than that stipulated in Law 49/2002, which, we insist, contrasts significantly with the robustness that the legislation called for when considering the trustee's position of non remuneration.

Implications

The unquestionable altruistic convictions of trustees, including the social recognition that comes with their appointment, may be sufficient reward for those who accept the position. However, with this recognition comes responsibility, a solidarity with the rest of the trustees, including even any moral damage that may be caused to the foundation by a trustee, a responsibility that many trustees overlook. Trustees are clearly accountable in the event that the foundation is immersed in a bankruptcy or tax procedure, or fails to meet its duty to ensure compliance with the legal responsibilities of data protection, or criminal compliance, or its obligation to ensure that the foundation is not used for money laundering or to channel funds or resources to persons or entities linked to terrorist groups or organizations.

Practical conclusions and original significance

The name "Trustee" encompasses two very different realities: on the one hand, purely honorary trustees who, detached from the daily life of the foundation, limit themselves to lending their good name to an altruistic cause with no liability and, on the other hand, the trustees who are involved in the day-to-day management of the foundation. We understand, however, that the trustee we call "honorary" cannot be subjected to a liability regime such as the one that exists, and, yet, with respect to the "manager" trustee, foundations need financial stability,

not related to the initial endowment, which requires progressive streamlining of its operating capacities, bringing its responsibility more in line with commercial matters while, at the same time, allowing remuneration for services provided.

Recognizing the difficulties of the task, it would seem that the solution must be inspired by STC 18/1984, cited above, according to which "one of the characteristics of the social and legal state is that general interests are defined through interaction between the State and the social agents... that transcends the field of organization, where foundations play a role of crucial importance". For this, we insist, it is necessary to overcome the wary statist view that currently limits the undertaking of industrial or mercantile activities by foundations. That is, it is necessary to allow without prejudice the execution of economic activities by foundations, establishing the necessary controls and repositioning the trustee in a more appropriate role as a true manager of economic operators in the market.

In short, the problem of non remuneration of the trustee must be framed within a global rethinking of the tax regime of non-profit entities and of patronage in light of a constantly changing environment. This rethinking has as a premise the change of attitude of the public authorities who, overcoming their mistrust and paternalism, must establish open collaboration with civil society, especially with foundations that are not, as described by the dictionary mere "fruits of human vanity" but, in the words of Óscar Alzaga "one of the great bridges that must be built to safeguard the abyss between individuals and the State". With our paper we have tried to broaden the doctrinal debate by providing a redefinition of the figure of trustee on whom, ultimately, rests the future of a foundation.

Keywords: Third Sector, Foundations, Patronage, Taxation, Administration.