



HAN KUN LAW OFFICES

Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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Comments on the New PRC Charity Law

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On March 16, 2016, the fourth session of the 12th NPC voted to approve and adopt the *Charity Law* (“**Law**”). The Law, which consists of 12 chapters and 112 articles, is a great supplement to the Law on Donations for Public Welfare (“**Donations Law**”). It is notable that although the content of both laws overlap in many respects, the Donations Law will continue to be in force following the introduction of the Law.

The Law has been slow in coming as it has taken ten years from the legislative proposal to its formal introduction.

Ushering in a new era

In general, the Law has more than a few highlights.

Firstly, the right to establish charitable organizations is open to the public, at least in form. In the past establishing a social organization was subject to a "dual license" system, under which the approvals of the competent business authority and the civil affairs department were both required. According to the Law, however, the charitable organizations may be directly registered in accordance with the law, which will significantly simplify the establishment procedures. This demonstrates the current government's confidence in its administrative capacity, as well as its determination to promote Chinese philanthropy.

Secondly, the right to engage in public fundraising is no longer monopolized. Before the promulgation of the Law, the right to engage in public fundraising was actually dominated by several major government-related charitable organizations and public fundraising foundations. The public fundraising process was also complex and painstaking. Under Article 22 of the Law, all charitable organizations are now entitled to engage in public fundraising. This will help to promote orderly and healthy competition among charitable organizations and encourage public donations.

Thirdly, the Law contains detailed provisions. For example, Articles 14 and 40 explicitly restrict and prohibit related party transactions. Article 27 puts restrictions on public fundraising carried out on the Internet, and Article 63 sets forth the standards for professional charitable services. These detailed rules demonstrate that the Law is relatively mature as it pays attention to the realities of charitable giving.

Overall, whether in terms of legislative level or content, the Law has ushered in a new era in the history of Chinese philanthropy. It has changed the situation from where charity work is government-led to where everyone may directly participate in charitable activities.

Shortcomings remain

Strictly speaking, the Law also remains to be improved in many aspects.

Firstly, by nature, the Law is a charity management law that focuses on the standardization of charitable activities and the management of charitable organizations, which is clear by comparing the proportion of such provisions to the entire Law. The rules with respect to encouraging charitable activities are still fragmented. Internationally, it is the trend for contemporary philanthropy law to employ taxation as a means of standardizing and encouraging charity. Although the Law shows signs of deregulation, it continues to adopt the attitude that “spiritual encouragement is primary, while tax preferences are secondary”.

Secondly, the provisions on charitable trusts are not comprehensive enough. The relationship between charitable and public welfare trusts (as defined in the *Trust Law*) is still unclear even though the Law has expressions such as “charitable trusts referred to in this Law shall be regarded as one type of public welfare trust.” Besides this, the Law fails to clarify whether public welfare trusts are exempt from the previous regulatory welfare agency approval requirement. In addition, there are no systematic provisions with respect to matters regarding the disposal of property after the term of charity trust expires or for special tax policies.

Matters with respect to the lack of tax incentives will be detailed in the following section.

Lack of tax preferences is a shortcoming that will limit the development of Chinese philanthropy

Although “tax preferences” is referenced seven times throughout the text, the Law makes no substantial progress in this regard when compared to the Donation Law. Tax incentives are still more like a slogan for propaganda purposes. Relevant tax treatment for charitable or public interest activities are still subject to provisions of the *Circular of the Ministry of Finance, the State Administration of Taxation and the Ministry of Civil Affairs on Relevant Issues of Pre-tax Deductions of Public Welfare Donations*. However, the Law may make a difference in this situation.

Firstly, if the right to establish a charitable organization is open to the public, it would be technically difficult for the Ministry of Finance, State Administration of Taxation and Ministry of Civil Affairs to continue jointly releasing an annual list of public welfare organizations that are eligible to receive tax deductions for charitable donations. Besides, this system would be contrary to government reforms to simplify the examination and approval process. Therefore, the first question for many newly established charitable organizations is whether they are eligible for tax deductions for purposes of charitable donations.

Secondly, the Law explicitly stipulates that "donors may make a donation through a charitable organization, or donate directly to the beneficiary." If donating directly to the beneficiary is determined to be an act of charity, such an act should be eligible for a tax deduction. However, under the current tax system, natural person beneficiaries will have trouble applying for and using receipts for public benefit donations.

Thirdly, there are no relevant provisions in the Law with respect to the tax treatment of charitable trusts at the time of establishment.

Besides the honor of charitable giving, tax incentives are also an important driving force for philanthropists. In the era of the Donation Law, when public welfare work was largely government-led, tax deductions for charitable donations were subject to central government management. With the introduction of the Law, we have entered the age of "mass charity," where the government will change its role from being a leader to being an administrator and supervisor. In that context, we still have much progress to make in answering how to improve tax incentive policies to promote charity and how to create a win-win between donors and beneficiaries.

● **Important Announcement**

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