
Opinion Statement FC 4/2022 on Possible Solutions to Inheritance and Gift Double Taxation Issues Within the EU

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Bruno Gouthière, Chair of the CFE Fiscal Committee or Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

1. Introduction

CFE Tax Advisers Europe welcomed the work of the European Commission in their report¹ completed in 2016, in which an expert group assembled by the Commission examined methods of improving issues facing EU citizens in relation to cross border inheritance tax obstacles.

CFE Tax Advisers Europe also welcomed the European Commission initiative launched in 2021 to address administrative issues experienced cross-border by EU citizens. Although much has been achieved in the past, EU citizens continue to face excessively complex administrative procedures, other barriers, or divergent interpretation of tax treaties. As a result, citizens and companies often are prevented from fully exploring the possibilities of the Single Market and the four freedoms guaranteed within the EU treaties.

In recent years, there has been a raft of measures which seek to reduce tax evasion throughout the EU, the aims of which CFE has fully supported. However, CFE equally welcomes that more attention is now being brought to cases of double taxation throughout the EU, and hope EU Member States can arrive at unanimous solutions to these problems.

CFE believes cross border inheritance tax issues have only become more complex in recent years, and is taking this opportunity to highlight these issues experienced in practice by its members. CFE believes in addition that similar issues should be dealt with as far as gift taxes are concerned as the situation is generally similar or even worse as there are only relatively few tax treaties covering gift taxes.

2. Issues in Practice & Potential EU Commission Intervention

The European Commission 2016 report identified the main problematic situations as those involving member residence status and issues where taxation rests with the heirs and beneficiaries. These are issues that CFE Member Bodies continue to experience in practice.

Spanish real estate

CFE is aware of a Finnish case concerning cross-border inheritance taxes, KHO 2015:31, from the Finnish Supreme Administrative Court, in which a deceased person, B, was a Finnish tax resident at the time of his/her death in 2010. B had owned real estate in Spain. B had four heirs;

¹ European Commission, Directorate-General for Taxation and Customs Union, Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU : report of expert group, Publications Office, 2016, <https://data.europa.eu/doi/10.2778/83982>

heir A was a Finnish citizen but Luxembourg resident, another heir X who was a Swedish resident, and two other Y and Z were Finnish residents.

All heirs had to pay inheritance tax in Spain on Spanish real estate. The tax paid by Y and Z was credited in Finland from their Finnish inheritance tax due on Spanish real estate.

The tax paid by A was originally not credited by the Finnish tax office. Further, no tax credit was available in Luxembourg as no tax was imposed on the Spanish real estate by Luxembourg.

The Supreme Administrative Court held that the Finnish Inheritance and Gift Tax Act restricted the free movement of capital due to A would not had received tax credit whereas Y and Z benefitted from such a tax credit. Ultimately, a tax credit was granted to Luxembourg resident A.

Double taxation of movable property

If a European citizen has movable property abroad, there should be an avoidance of double taxation on the movable and immovable property alike. In Belgium, differences in treatment between movable and immovable property in inheritance tax law (double taxation was only avoided on foreign immovable property) was held to be unconstitutional, in the judgment of the Belgian Constitutional Court nr. 80/2021 from 3 June 2021. The Court held that given that when the law was instated in the beginning of the 20th century the legislator's arguments from that time were no longer valid anymore.

Deduction of costs

In the ECJ Case C-394/20 from 21 December 2021, a deceased person and their heir were Austrian residents, and the heir inherited immovable property situated in Germany. Due to the German inheritance tax law the liabilities under the reserved portion were not deductible as debts under the succession, from the value of the inheritance, as neither the deceased nor the heir had their place of residence or habitual residence in Germany. The same liabilities might be deducted in full if at least one of them had his/her place of (habitual) residence in that Member State. This means that inheritances between non-residents relating to such immovable property are subject to a heavier tax burden than those involving at least one resident and therefore has the effect of reducing the value of the inheritance.

The ECJ concluded that such national legislation constitutes a restriction of the movement of capital within the meaning of art. 63(1) and 65 TFEU.

Harmonisation?

CFE is of the view that some sort of harmonisation should exist at EU level concerning inheritance taxes, at a minimum in the form of an EU Recommendation. CFE wants to stress that avoidance of double taxation is critical, and cases such as the ones identified in Finland, Belgium and Germany are not isolated incidents. Often, taxpayers choose not to litigate cases of double taxation or denial of tax relief, due to the costs involved or because they don't realise that double taxation should be avoided based on constitutional or European freedoms.

Although CFE appreciate that unless there is a double tax treaty, there is not a problem from the EU law perspective, CFE also observes that there are very few double tax treaties on inheritance taxes and that many of these treaties have not been adapted/concluded in recent years, compounding issues experienced by increasingly more European citizens who avail themselves of the right of free movement in the EU (there are even less treaties covering gift taxes). CFE believe there should also be special rules for transfer of enterprises and taxes.

As more citizens exercise their right to the freedom of movement, avoiding double taxation in inheritance taxes should become increasingly important to the European Commission, and action can be taken, in particular where Member States have wrongly invoked *acte clair* in a situation, by following up with infringement proceedings. The fact there is very little ECJ case law in the field may be indicative of more instances where Member States have indeed wrongly invoked *acte clair*.

A multilateral treaty championed by the European Commission and/or Member States would also be in the interest of Member States and their citizens. Given double taxation is often not avoided as there are few double tax treaties, a potential solution is to develop a multilateral model to be issued at EU level, which would enter into force after a certain number of Member States adhere to it. By Member States considering where there are mismatches between the countries, and working to fill these gaps, concepts of inheritance tax that are problematic for its citizens could be harmonised.

4. Conclusion

CFE stands ready to support the Commission in addressing the issues identified in the above and in any Commission action that would alleviate the problems of double taxation in inheritance and gift tax.

From the CFE perspective, double taxation in general continues to be an issue, despite positive developments such as the enactment of the EU Dispute Resolution Mechanisms Directive. Relief of double taxation should continue to be a priority for Member States and the European Union in areas of shared competence.

From a legal theory perspective, double juridical taxation, if not relieved by a treaty or unilaterally, is in breach of the principle of fair and equal treatment. Relief of double taxation falls in the ambit of the principles of tax good governance and, also, the principle of good administration as established in Article 41 of the Charter of Fundamental Rights of the European Union. Double juridical taxation might be also seen as a violation of the principle ne bis in idem, which is enshrined in Article 4 of the European Convention of Human Rights.

From the CFE perspective it is not acceptable for citizens to be subject to double or multiple taxation due to lack of coordination by two or more Member States. Therefore, we support projects that eliminate this extra tax burden and as such can significantly improve the cross-border activity of EU citizens.