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Opinion Statement FC 12/2014

on cross-border inheritance tax problems within the EU

Prepared by the CFE Fiscal Committee

Submitted to the European Commission

in July 2014

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 25 European countries (22 EU member states) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.
CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions you may have concerning CFE's comments outlined below. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Sincerely yours,
Confédération Fiscale Européenne

1. Cross-border bequests within the EU and taxation issues encountered

a) Have you yourself encountered or are you aware of any specific problems resulting in cross-border double taxation of inheritances or donations in the EU in recent years?

CFE comment:

Yes. We have been provided with examples of double tax situation by our Spanish member association AEDAF. We do not have information on the number of cases affected by double taxation of inheritances or gifts but we stress that the mere existence of double taxation resulting from inheritance tax may hinder EU citizens from fully benefiting from their right to move and operate freely across the EU.

Characteristics of the Spanish inheritance tax regime:

In Spain, individuals who are deemed to be resident in Spain for tax purposes are subject to the Inheritance and Gift Tax (IGT) on a worldwide basis, i.e., for all assets and rights acquired regardless of the country where these assets and rights are located. For the purpose of determining the residence of the taxpayer, the IGT Law refers to the rules contained in the Personal Income Tax Law.

Non-resident individuals are only subject to IGT in Spain for the gifted or inherited assets located in Spain and rights that may be exercised in Spain (e.g., real estate, shares of Spanish companies or bank accounts). Nationality does not determine whether the tax is payable in Spain or not.

Non-resident individuals (other than the policyholder) collecting an insurance are also subject to IGT in Spain where the relevant insurance policy has been entered into with a Spanish company (unless acting through a permanent establishment abroad) or has been entered into in Spain with a non-resident company operating in Spain.

As Spanish residents are subject to IGT on a worldwide basis, it may well be the case that they are also taxed abroad when the inherited or given rights or assets are located or are exercisable in a third country, which also taxes the inheritance or gift on a territorial basis. In these cases, the IGT Law allows the deduction of the taxes paid abroad against the IGT liability, in order to avoid double taxation. In particular, it will be possible to deduct: (i) The amount of foreign tax paid; or, if lower, (ii) the result of applying the average rate of IGT on the relevant inheritance or gift to those foreign assets on which foreign tax has been paid.

Besides, Spain has concluded double taxation conventions on gift and inheritance tax with France, Greece and Sweden. These international bilateral treaties concerning taxes on inheritances and gifts establish special subjection rules.

Remaining double tax situations in Spain:

Double taxation cases may take place if non-residents (i) inherit assets in Spain and (ii) their country of residence provides no mechanism that allows for the inheritance tax paid in Spain to be offset against the inheritance tax to be paid in such country. For example, in the case C-67/08, *Margarete Block*, the inheritance left by a deceased individual who was resident in **Germany** and had some financial investments in **Spain**, was taxed both in Germany and in Spain. In this particular case, the German authorities did not allow the Spanish inheritance tax to be offset against the German inheritance tax because Spain determined the territorial scope of the inheritance tax differently. **Slovenia** is another country that does not allow this.

There may also be double taxation from complex situations involving more than two member states (e.g. if a Spanish resident inherits an asset located in the Netherlands from an individual who was resident in Belgium).

b) Have you encountered or are you aware of any specific problems of discrimination experienced by somebody who has received a bequest within the EU in recent years (through a donation or an inheritance) with a cross-border element (i.e. liquid assets invested abroad, real estate abroad, a person who is resident or domiciled in one country receiving a donation or inheritance from another country)?

CFE comment (relating to the Spanish situation):

Yes. Gift and inheritance tax are similar across all the Spanish autonomous regions. The central government regulations set forth a broad scale ranging from 7.65% to 34%, which must be applied on the value of the assets and rights to be transferred so as to determine the amount to be paid by the taxpayer depending on the specific circumstances. However, the autonomous regions have approved several amendments to the general gift and inheritance tax rules that give rise to significant discounts on the tax base or even tax exemptions in specific cases. For example, in the Autonomous Region of Madrid, the inheritance of a deceased's descendants are taxed at 1% if the deceased was and his or her heirs are tax resident in Spain and the deceased individual had mainly lived in the Autonomous Region of Madrid during the last five years. Likewise, the Autonomous Region of Valencia has created some tax advantages depending on relatedness between donor or heir and recipient or deceased provided that both were/are resident in the Autonomous Region of Valencia.

As a general rule, habitual residence is the connection to determine the applicable regional regulations regarding the tax. This connection rule does not apply to non-residents, who must pay the tax by applying the central government regulations and not those passed by the autonomous regions. Thus, Spain gives residents a wide number of tax advantages which means that they pay less tax than non-residents. We believe that this creates a disincentive for EU citizens and businesses to exercise their fundamental freedoms.

The European Commission referred Spain to the European Court of Justice on 7 March 2012 (case C-127/12) as it claimed that Spain gives unequal treatment to non-residents in relation to the application of its gift and inheritance tax. The judgment of the European Court of Justice has yet to be issued. We see our view that the Spanish regulations cannot be justified confirmed by the ECJ´s

decision of 17 October 2013 in case C-181/12, *Yvon Welte*, stating that the German rules at issue were contrary to EU law because they contain discriminatory conditions based on residence.

The Spanish regulations on gift and inheritance tax have been also appealed under domestic law. The Supreme Court of Spain has considered that the inequalities between nationals that result from the regulations of each autonomous region do not necessarily entail the violation of the equal treatment and non-discrimination principles[1].

2. Efficiency of EU countries' existing tax relief measures and implementation of the principle of the 2011 Commission's Recommendation on relief for double taxation of inheritances

a) Have the tax rules on cross-border inheritances been amended in your country (-ies) since 15 December 2011 when the Commission Recommendation on relief for double taxation of inheritances was adopted?

If so, please provide details on how your Member States' rules were amended, whilst providing reference to the national law/ administrative measure and its relevant provisions:

b) Do the amendments of the cross-border inheritance tax rules in your country in any way follow the principles of the Commission's Recommendation on relief for double taxation of inheritances?

CFE comment:

To our knowledge, no member state has amended its inheritance tax laws in the sense and as a result of the Commission´s 2011 Recommendation.

c) Are you aware of any plans in your country to amend its rules on the taxation of cross-border inheritances?

CFE comment:

The Spanish government is not currently planning to amend the regulations on the taxation of cross-border inheritances. However, the *Convergència i Unió* parliamentary group has recently submitted a proposal[2] that urges the government to eliminate any discrimination between residents and non-residents regarding taxation on cross-border inheritances.

On the other hand, it is rumoured that the government intends to amend the gift and inheritance tax law by setting minimum national rates that would prevent any *de facto* exemptions or disproportionate discounts proposed by the autonomous regions and based on the place where the taxpayer is resident. The ruling of the ECJ in case C-127/12 (*Commission v. Spain*) may result in a revision of the Spanish rules in a way that is unfavourable for the majority of Spanish taxpayers.

3. Your views on the principles included in the 2011 Recommendation regarding relief for double taxation of inheritances

a) Do you consider the Commission's recommendation to EU countries to give up or reduce inheritance tax if the inheritance is more closely connected with another country is a proportionate and sufficient solution?

CFE comment:

[1] Decision of 8 May 2014, TS JUR/2013/173218.

[2] Proposición no de ley 161/002782, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, 26 May 2014, Serie D, Núm 464, p.6.

As a first step, yes. We agree with the overall approach of the 2011 Recommendation to establish criteria to determine an order of taxing rights of member states and a mechanism resulting in a tax credit for tax paid in another member state.

In particular, it is not sufficient if a member state allows a taxpayer to deduct the amount of tax paid to another member state only from the *tax base*.

Although the recommended solution does not prevent the application of several jurisdictions´ tax laws to a given estate, it would prevent that the total amount of tax to be paid exceeds the higher of the tax burdens in either member state. This would constitute an improvement to the existing situation.

At the same time, it appears to be a proportionate solution, creating little interference with the member states´ tax laws. It also appears to be a politically realistic solution.

b) Do you agree with the use of the tie breaker rule proposed by the Commission to establish which personal link is closer and thus to determine the country having priority right to tax (Article 4.4 of the 2011 Recommendation)?

Explanation: The Commission has proposed to solve potential conflicts of many personal links to several EU countries on the basis of a mutual agreement procedure involving tie-breaker rules to determine the closest personal link. The tie breaker rule is to some extent based on Article 4.2 of the OECD Model Tax Convention on Income and Capital. The tie breaker rule assumes that the person has closer links with one of two or more states, if that person has a permanent home available in one of those states. If that person has such homes available in more than one states, then the priority is given to a country with which his/her personal and economic relations are closer. If the above cannot help then the decisive factors would be the habitual abode (where the person usually lives) and, finally, the nationality.

CFE Comment:

Yes, to the following extent: We agree with the criteria contained in the suggested tie-breaker rule and their priority. We believe that EU countries´ rules should follow the internationally recognised principles contained in Art.4 (2) of the OECD Model Convention.

The Recommendation suggests mutual agreement procedures (MAPs) to settle disputes between member states, including the determination of the member state which should provide tax relief in a given case.

Our experience is that MAPs are time-consuming. This applies in particular if there is no incentive to reach a solution, as a solution would mean that at least one member state would renounce to at least part of the revenue it would otherwise get. Delays caused by MAPs leave heirs with legal uncertainty and, if tax has to be paid to two or more member states upfront, cash-flow disadvantages or even serious liquidity problems. These inconveniences are added to the burden already resulting from the death.

We would favour the possibility to reach a binding solution within a certain amount of time. Such solution could be that if the member states involved fail to reach an agreement after expiry of a given time period, a fixed apportionment formula should determine the amount of tax to be paid to each of the member states involved. This amount should not exceed the higher amount claimed by any of these states. One possible solution could be that the average amount of tax claimed by the member states involved is evenly divided between these states.

We consider that six months would be sufficient for member states to reach mutual agreement. As long as no mutual agreement is reached, tax claims of the countries involved should be deferred. This should at least apply to any amount exceeding the amount payable if no agreement is reached (see previous paragraph).

The automatic application of an apportionment formula after expiry of a fixed time limit would help avoid time-consuming and potentially costly judicial proceedings or alternative dispute resolution.

c) Do you agree with the period of ten years as the time for using a possible tax credit as proposed in Article 5 of the 2011 Recommendation?

Please comment in more detail about the period of application of the double tax relief as proposed in the 2011 Recommendation:

Explanation: The Commission has proposed a period of 10 years to use the tax relief since the timing for the application of inheritance tax may differ in the EU countries involved and cases with cross-border elements may take significantly longer to be resolved compared to domestic inheritance tax cases. The Commission has considered that in cross-border inheritance tax cases citizens deal with more than one legal and/or tax system and therefore EU countries should allow claims for tax relief for a reasonable period of time.

CFE comment:

We agree. Although ideally, there should be no time limit for using a possible tax credit, we accept that there may be an interest in legal certainty.

d) In your opinion, does your country need to change its national legislation to grant relief from double taxation on inheritances in the way set out in the 2011 Recommendation or would it be sufficient to change its administrative practices or interpret existing relief provisions in a more flexible way?

CFE comment:

Member states should amend their domestic legislation to grant relief from double taxation on inheritance in the way set out in the 2011 Recommendation. Any measure other than a change in the national legislation would not be an effective solution. This applies in particular to changes of administrative practices or internal administrative regulations.

e) Do you think that the solutions proposed in the Commission's Recommendation and Working paper are sufficient to tackle the cross-border tax problems of SMEs or are there other – more targeted solutions needed for any such problems?

CFE comment:

The Recommendation should only be a first step, as soft law may be interpreted in a wrong manner and generate discrepancies.

4. Other possible solutions to the problems related to property donated or inherited across borders within the EU

a) Would you like to propose further possible solutions to the tax problems involving property donated or inherited across borders within the EU?

A simple solution would be to follow the line of the old OECD Model Convention. Making a distinction between immovable properties which would be taxed according to lex situs and movable property which would be taxed according to the law of the residence of the deceased.

CFE comment:

The Commission should explore the possibility of binding EU legislation dealing with the matters contained in the 2011 Recommendation, to overcome double taxation which we find fundamentally contrary to the Internal Market.

b) How should your suggested solution(s) be implemented e.g. by EU legislation or by changes in national laws by each EU country?

CFE comment:

There should be a binding piece of EU legislation. Given that this legislation would mainly deal with procedural matters not needing implementation into national law, the Commission should consider the legal possibility to propose an EU Regulation.

In contrast, given the unsatisfactory experience with the Arbitration Convention, a convention does not appear to be a promising tool for reaching binding solutions which effectively prevent double taxation.

c) Can you recommend any best practices in any EU countries or non-Member countries in the area of avoidance of double taxation on cross-border donations/successions?

CFE comment:

There should be a list of agreed definitions to prevent interpretative disputes regarding the localisation of the assets to be taxed. This could also be a first step to further coordination.

d) Do you have any other comments or thoughts to share as regards the avoidance of double taxation of cross-border donations/successions?

n.a.