

RECOMMENDATIONS

COMMISSION RECOMMENDATION

of 15 December 2011

regarding relief for double taxation of inheritances

(2011/856/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) Most Member States apply taxes upon the death of a person, notably inheritance and estate taxes while some Member States may tax inheritances and estates under other tax headings, such as income. All taxes applied upon the death of a person are hereafter called inheritance taxes.
- (2) Most Member States that apply inheritance taxes also apply taxes to gifts between living persons.
- (3) Member States may tax inheritances on the basis of varying 'connecting' factors. They may do so on the basis of a personal link such as the residence, domicile or nationality of the deceased, or the residence, domicile or nationality of the heir, or both. Some Member States may apply more than one of these factors or may apply anti-abuse measures that entail an extended concept of domicile or residence for tax purposes.
- (4) In addition to taxing on the basis of a personal link, Member States may apply inheritance tax to assets located in their jurisdictions. Tax may be applied on this basis even if neither the deceased nor the heir has a personal link with the country of location.
- (5) Increasing numbers of citizens of the Union are moving during their lifetimes from one country to another within the Union to live, study, work and retire, and are purchasing property and investing in assets in countries other than their home countries.
- (6) If these cases result in inheritances across borders upon the death of an individual, more than one Member State may have the right to apply inheritance taxes to those bequests.
- (7) Member States have few bilateral conventions to relieve double or multiple taxation of inheritances.
- (8) Most Member States provide, through legislation or administrative practices adopted unilaterally at national level, for double taxation relief for foreign inheritance taxes.
- (9) However, those national systems of relief for foreign inheritance tax generally have limitations. In particular they may have a limited scope as regards the taxes and persons covered. They may not allow credit for previously paid gift taxes on the same inheritance or for taxes applied at local or regional rather than national level, or for all taxes levied by other countries upon death. They may only grant relief for foreign taxes paid on certain foreign property. They may not grant relief in respect of foreign tax on a property situated in a country other than that of the heir or deceased. They may exclude foreign tax on assets located within the territory of the Member State granting relief. The national systems of relief may also fail because they do not have regard to mismatches with inheritance tax rules in other Member States, particularly regarding what is to be considered as a local compared to a foreign asset, and regarding the timing of the transfer of assets and the date when tax is due. Finally, tax relief may be subject to the discretion of the competent authority and may not, therefore, be guaranteed.
- (10) The absence of appropriate ways of relieving cumulative taxation of inheritances may lead to overall levels of taxation that are appreciably higher than those applicable in situations that are purely internal to one or other of the Member States involved.
- (11) This may hinder EU citizens from benefiting fully from their right to move and operate freely across borders within the Union. It may also create difficulties for the transfer of small businesses on the death of owners.

- (12) While revenues from inheritance taxes represent a relatively low share of the overall tax revenue of Member States, and cross-border cases alone account for far less, double taxation of inheritances may have a major impact on the individuals affected.
- (13) Double taxation of inheritances is not currently being resolved comprehensively at national or bilateral level, or on the basis of Union law. In order to ensure the smooth functioning of the internal market a more comprehensive system for granting relief for double inheritance tax in cross-border cases should be encouraged.
- (14) An order of priority of taxing rights or, conversely, of granting relief should be provided in cases where two or more Member States apply inheritance taxes to the same inheritance.
- (15) As a general rule, and in line with the practice predominantly followed at international level, Member States in which immovable property and business property of a permanent establishment is situated should, as the State with the closest link, have the primary right to apply inheritance tax to such property.
- (16) Since movable property that is not the business property of a permanent establishment can easily shift location, its link to the Member State where it happens to be located at the time of death is, in general, considerably less close than the personal links that the deceased or the heir may have with another Member State. The Member State where such movable property is situated should, therefore, exempt the property from its inheritance taxation if such taxation is applied by the Member State with which the deceased and/or the heir has a personal link.
- (17) Inheritances have often been accumulated over the lifetime of the deceased. Moreover, the assets contained in an inheritance are more likely to be located in the Member State to which the deceased has personal links than in the Member State to which the heir has such links, if different. When taxing inheritances on the basis of personal links to their territory, a majority of Member States refers to the links of the deceased rather than to those of the heir, albeit several also or only tax if the heir has a personal link to their territory. Because of the said nature and importance of the personal links of the deceased as well as for practical reasons, double taxation due to the fact that the deceased and the heir have personal links to different Member States should be relieved by the Member State to which the heir has personal links.
- (18) Conflicts of personal links to several Member States could be solved on the basis of a mutual agreement procedure involving tie-breaker rules to determine the closest personal link.
- (19) Since the timing for the application of inheritance tax may differ in the Member States involved and cases with cross-border elements may take significantly longer to be resolved compared to domestic inheritance tax cases due to the necessity of dealing with more than one legal and/or tax system, Member States should allow claims for tax relief for a reasonable period of time.
- (20) This Recommendation promotes the fundamental rights recognised in particular by the Charter of Fundamental Rights of the European Union, such as the right to property (Article 17), which specifically guarantees the right to bequeath lawfully acquired possession, freedom to conduct business (Article 16) and EU citizens' freedom to move freely within the EU (Article 45),

HAS ADOPTED THIS RECOMMENDATION:

1. Subject matter

- 1.1. This Recommendation sets out how Member States can apply measures, or improve existing measures, to relieve double or multiple taxation caused by the application of inheritance taxes by two or more Member States (hereinafter 'double taxation').
- 1.2. This Recommendation relates by analogy to gift taxes, where gifts are taxed under the same or similar rules as inheritances.

2. Definitions

For the purpose of this Recommendation the following definitions apply:

- (a) 'inheritance tax' means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax;
- (b) 'tax relief' means a provision contained in legislation and/or general administrative instructions or guidance whereby a Member State grants relief for inheritance tax paid in another Member State, by crediting the foreign tax against tax due in that Member State, by exempting the inheritance or parts of it from taxation in that Member State in recognition of the foreign tax paid or by otherwise refraining from the imposition of inheritance tax;

(c) 'assets' means any movable and/or immovable property and/or rights that are subject to inheritance tax;

(d) 'personal link' refers to the link of a deceased or heir with a Member State, which may be based on domicile, residence, permanent home, centre of vital interests, habitual abode, nationality or centre of effective management;

For the purposes of point (a) previously paid gift tax on the same asset is considered as inheritance tax for the purposes of granting tax credit.

The terms 'permanent establishment', 'immovable property', 'movable property', 'resident', 'domicile/domiciled', 'national/nationality', 'habitual abode', and 'permanent home' have the meaning applicable under the domestic law of the Member State applying the term.

3. General objective

The recommended measures aim at resolving cases of double taxation, so that the overall level of tax on a given inheritance is no higher than the level that would apply if only the Member State with the highest tax level among the Member States involved had tax jurisdiction over the inheritance in all its parts.

4. Provision of tax relief

When applying inheritance taxes, Member States should grant tax relief in accordance with points 4.1 to 4.4.

4.1. Tax relief in respect of immovable property and movable property of a permanent establishment

When applying inheritance taxes, a Member State should allow tax relief for inheritance tax applied by another Member State on the following assets:

(a) immovable property situated in that other Member State;

(b) movable property which is the business property of a permanent establishment situated in that other Member State.

4.2. Tax relief in respect of other kinds of movable property

In respect of movable property other than business property as referred to in paragraph 4.1(b), a Member

State with which neither the deceased nor the heir has a personal link should refrain from applying inheritance tax provided that such tax is applied by another Member State by reason of the personal link of the deceased and/or the heir to that other Member State.

4.3. Tax relief in cases where the deceased had a personal link to a Member State other than that to which the heir has a personal link

Subject to paragraph 4.1, in cases where more than one Member State can apply taxation to an inheritance on the basis that a deceased had personal links with one Member State and the heir has personal links with another Member State, then the second Member State should give tax relief for the tax paid on the inheritance in the Member State with which the deceased had personal links.

4.4. Tax relief in cases of multiple personal links of a single person

Where, on the basis of provisions of different Member States, a person is deemed to have a personal link with more than one taxing Member State, then the competent authorities of the Member States concerned should determine through mutual agreement, in accordance with the procedure set out in point 6 or otherwise, the Member State that should grant tax relief if inheritance tax is applied in a State with which the person has a closer personal link.

4.4.1. A closer personal link of an individual could be determined as follows:

(a) he could be deemed to have a closer personal link with the Member State in which he has a permanent home available to him;

(b) if the Member State referred to in (a) does not tax or if the individual has a permanent home available to him in more than one Member State, he could be deemed to have a closer personal link with the Member State with which his personal and economic relations are closer (centre of vital interests);

(c) if the Member State referred to in (b) does not tax or if the Member State in which the individual has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in any Member State, he could be deemed to have a closer personal link with the Member State in which he has an habitual abode.

(d) if the Member State referred to in (c) does not tax or if the individual has an habitual abode in more than one Member State or in no Member State, he could be deemed to have a closer personal link with the Member State of which he is a national.

4.4.2. In the case of a person other than an individual, such as a charity, its closer personal link could be deemed to be with the Member State in which its place of effective management is situated.

5. Timing of application of the tax relief

Member States should allow tax relief for a reasonable period of time, e.g. 10 years from the time limit by which inheritance taxes that they apply have to be paid.

6. Mutual agreement procedure

Where necessary in order for the general objective set out in point 3 to be attained, Member States should operate a mutual agreement procedure to deal with any disputes connected with double taxation, including conflicting definitions of movable and immovable property or of the location of assets or the determination of the Member State which should provide tax relief in a given case.

7. Follow-up

7.1. Member States should continue working on possible ways to improve the cooperation of tax authorities, including at local and regional level, in order to assist taxpayers who are subject to double taxation.

7.2. Member States should also adopt a coordinated position in discussions at the Organisation for Economic Cooperation and Development (OECD) on inheritance taxes.

7.3. The Commission will follow up on the Recommendation with Member States and publish a report on the state of play of cross-border relief for inheritance taxes within the Union three years after the adoption of the Recommendation.

8. Addressees

This Recommendation is addressed to the Member States.

Done at Brussels, 15 December 2011.

For the Commission
Algirdas ŠEMETA
Member of the Commission