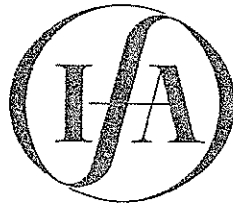


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Death as a taxable event
and its international ramifications



The Netherlands

Summary and conclusions

Portugal has had quite a favourable tax regime upon the death of an individual since the tax reform passed in 2003 which abolished gift and inheritance tax.

As a result, transmissions of assets caused by the death of an individual are subject to stamp duty, although there is an exemption applicable to legitimate heirs, which in practice means that no taxation arises when such heirs are the beneficiaries of the estate. Transfers of assets made for the benefit of other heirs or legatees are subject to a 10 per cent flat rate, established in order to simplify the tax system.

The above-mentioned exemption applicable to legitimate heirs combined with the fact that stamp duty is a territorial tax means that international double taxation situations are extremely rare. This is one of the reasons why Portugal has not entered into double tax treaties to eliminate international double taxation on estate and inheritance tax. All of these aspects reinforce the simplicity of the system introduced in 2003 which has produced positive results and facilitates the control of the transfers by the Portuguese tax authorities. The main purpose of the 2003 tax reform, which was to fight tax evasion, has definitely been accomplished.

In fact, the new regime has shown that this system has several advantages and has actually attracted many individuals to Portuguese territory in order to benefit from it. People are actually investing in assets deemed located in Portuguese territory as a succession tax planning strategy.

1. Introduction

1.1. The private law rules of succession

The Portuguese Civil Code defines the laws applicable to succession upon death.

In general, it is the personal law of the deceased which governs the succession. This law also governs succession by death and the powers of the administrator of the estate and the executor. This personal law is, in principle, the law of nationality.

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The main laws regulating inheritance are the Portuguese Civil Code, fifth book (articles 2024–2334) and book I (articles 62–65).

1.2. Pluralism of succession law: federal vs. regional rules

The private law rules for succession apply to the entire Portuguese territory, including the mainland and the autonomous regions of Madeira and the Azores.

The private law regime is consistent with the Portuguese tax system where taxes upon death are levied at national level as opposed to regional level.

1.3. Private law rules applicable to succession

1.3.1. *Intestate successions*

There are two types of successors under Portuguese law. Article 2030 of the Civil Code states that successors can either qualify as heirs or legatees.

Under the terms of the provision, an heir is a successor who succeeds in full or in a part of the deceased's patrimony whereas the legatee receives a particular asset or good (such as the usufructuary).

Succession law for Portuguese residents protects the rights of inheritance of certain heirs, known as "reserved (mandatory) heirs". These rights cannot be overridden by the terms of a will. They are therefore known as non-disposable property of the succession estate. Hence, a deceased person with wife and descendants cannot dispose of (by way of a will, gifts or advances) more than one-third of his succession estate; any disposals exceeding the value of the non-disposable property may be declared void and subject to restitution to the succession estate or, in relation to disposals of non-disposable property to mandatory heirs, be subject to special allotment and restitution rules.

The value of the estate for the determination of the non-disposable property is calculated as at the date of the death, taking into account:

- the aggregate of (a) the assets existing in the estate of the deceased person as at the date of his death; (b) the value of the donations made by a deceased person during his lifetime; and (c) expenses subject to restitution or to allotment (*colação*), less
- the liabilities of the deceased person.

Donations made in life by the deceased person to presumed mandatory heirs¹ should be allotted to the share of the succession estate attributed to the mandatory heir or, subject to the consent of the heirs, restitution to the succession estate.

Legitimate (or reserved) heirs include the spouse, biological descendants, adopted children, ascendants of the deceased and the state, as follows:

- only the spouse: the spouse will be entitled to the entire disposable succession estate;

¹ It is discussed by scholars whether the spouse of a deceased person should be treated as a mandatory heir for the purposes of the succession law provisions regarding allotment or restitution to the succession estate of donations received from the deceased.

- spouse and descendants: normally distributed per capita. If more than three children inherit, the spouse is entitled to one-quarter, and the remainder is distributed between the descendants;
- only descendants: this depends on the number of children;
- spouses and ascendants: two-thirds for the spouse and one-third for the ascendants;
- only ascendants: the closest ascendants have a preferential right over the succession estate.

If there is no will, and no spouse, ascendant or descendant, the estate passes to the siblings and their descendants, other collateral family up to the fourth degree, and finally to the state. Each subsequent class of heirs is only called upon if the previous class is not present.

1.3.2. Testate successions

Outside the reserved portion, the testator's freedom to leave the estate by will as he wishes is virtually unlimited, though certain persons cannot inherit, e.g. those deemed to be ineligible or unworthy, the deceased's last doctor who treated him, the priest of the community where he attended, or a curator, tutor, or administrator of the deceased (as stated in article 2194 of the Civil Code).

A will is likely to be made especially by a person who wishes to nominate someone (e.g. a friend) who is not a legitimate heir, and who would otherwise not be entitled to inherit. A person may also justify in a will that due to unworthy behaviour a particular beneficiary should be excluded from their part of the reserved portion, although challenges may subsequently be accepted by the court.

There are two types of will in Portugal (as foreseen under article 2204 of the Civil Code): (a) a public will, which may be made before a public notary and is kept in a vault, and (b) a closed will, which is made privately, signed by the author and then subject to the notary's review.

1.3.3. Meaning of "death", "ownership" and "estate"

1.3.3.1. Meaning of death

Although the Portuguese law foresees in article 68 of the Civil Code that an individual's personality ends with death, it does not clarify the meaning of death for civil purposes.

Nevertheless, under Portuguese law, death can be either natural or presumed.²

The Civil Code does not foresee a legal concept of natural death. However, as clearly explained by the Portuguese Supreme Court of Justice,³ since 1994 (when the declaration named "brain death criteria" "*Crítérios de morte cerebral*" issued by the Medical Association was published)⁴ the criterion to determine the time of

² As noted by Pires de Lima and Antunes Varela in *Código Civil Anotado*, vol. I, p. 102.

³ Please refer to the judgment of 31 March 2009 with reference to judicial procedure no. 09A0507.

⁴ National Journal (*Diário da República*), series II B, of 11 October 1994.

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natural death corresponds to the death of the brain, the simplest criterion having been abandoned (namely, the heart and lung criterion).⁵

The Supreme Court of Justice adds that "As a result, from a legal perspective, death is a statutory process, resulting in a search for the criteria applicable in the definition of the time when the individual's legal personality ends".⁶

In fact, the concept of natural death has been generally accepted by the medical community, even at an international level, as a "definition of an irreversible coma".⁷ Even the Catholic Church considered in the International Congress of the Transplant Society⁸ that the total and irreversible cessation of the brain activity as a criterion for death certification did not conflict with the essential elements of an anthropological conception.

Presumed death is dealt with in article 114 of the Civil Code. Under this provision, the spouse, the heirs and all the interested parties who hold rights over the assets of someone who is absent (i.e. someone who has disappeared without leaving a legal representative), the absentee's death being a condition for the effectiveness of such right, may request that the court declares the individual's presumed death, if: (a) ten years have passed after the date when there was any knowledge of the individual's whereabouts; or (b) five years have passed after the date when there was any knowledge of the individual's whereabouts and, meanwhile, he would have reached 80 years of age.

Under article 115 of the Civil Code, the presumed death has the same effects as natural death, except for marriage dissolution purposes, the assets of the presumed deceased being distributed by the heirs on the usual legal terms.

1.3.3.2. Meaning of ownership

The right to private property is protected under the Portuguese Constitutional Law, including its transmission in life or in death (article 62).

Portugal is a civil law jurisdiction which adopts the absolute theory of property. The Civil Code foresees the concept of absolute and full ownership in article 1305 by stating that "The owner has full and exclusive rights of use, fruition and disposition of the assets that belong to him, within the legal limitations, and considering the restrictions that such law imposes." This means that the Code does not allow fragmentation of the absolute right of ownership.

Additionally, the Civil Code includes a *numerus clausus* rule under which no restrictions to ownership are allowed unless mentioned under Portuguese law.

Portuguese law also foresees the concept of ownership by adverse possession (*usucapião*), which corresponds to the acquisition of a title through the lapse of time. If someone who is not the registered property owner lives in a property for a

⁵ Despite this, some authors and experts still have some doubts with respect to this definition, since the human body has several cells, tissues, organs and systems. As an example, Dra. Cristina Lina, *Do Conceito ao diagnóstico de morte: controvérsias e dilemas éticos*, 2004.

⁶ Free translation.

⁷ In the *Journal of the American Medical Association*, published in 1968 and updated by the North American Presidential Commission for the Study of Ethical Issues of UDDA (Uniform Determination of Death Act).

⁸ Which took place on 29 August 2000.

minimum period of 20 years, as if he were the real owner, then it may be assumed under Portuguese law that this individual is the property owner.

As a result of the *numerus clausus*, the means by which transmission of property may occur are specially foreseen under article 1316 of the Civil Code: contract (*inter vivos*), succession (*mortis causa*), adverse possession, occupation and accretion. The time when the property right is considered to be acquired depends on the type of transmission, under the terms of article 1317 of the Civil Code. Consequently, when the transmission occurs by contract, the acquisition is deemed to occur upon signature of contract (except in certain special circumstances, such as acquisition of future assets). On the other hand, when the transmission is *mortis causa*, it occurs at the time when the succession is declared opened (which under article 2031 of the Civil Code is the time of the former owner's death).

1.3.3.3. Meaning of estate

For the purposes of civil law, the concept of estate has been defined by several authors. Professor Nuno Sá Gomes, in his study entitled *Estate Taxation (Tributação do património)*,⁹ refers to several of those definitions, such as the following: a group of juridical relations which belong to a person and have economic utility, it therefore being possible to value them from a financial perspective (Professor Dr José Tavares); the complexity of assets or economic juridical relations (rights and obligations) in private commerce and therefore able to be valued in money (Dr Mário Raposo); the group of the net pecuniary values (active values less passive) which a certain person is entitled to have (Professor Teixeira Ribeiro); the relevant estate for tax purposes corresponds currently to all wealth manifestation exteriorized either by ownership, by the use and fruition of certain immovable property and movable property subject to register, and also by the acts of onerous or gratuitous acquisition of assets which are themselves subject to taxation (Professor Sousa Franco, former Minister of Finance who formed a commission which issued the *Report for a Tax Reform in the XXIth Century*).

For succession purposes, a succession estate is indirectly defined under Portuguese civil law as the object of succession, i.e. the group of patrimonial juridical relations of the deceased which are transmitted in favour of other persons due to the death of the deceased. In this respect, article 2024 of the Civil Code states that succession is the calling of one or more persons to the entitlement of patrimonial juridical relations of a deceased person and the devolution of the assets and goods that belong to the latter. If a person dies without any patrimonial juridical relations, the doctrine concludes that there is an "empty succession estate".¹⁰

Article 2025 of the Civil Code clarifies that juridical relations that are extinguished by means of death, due to their nature or as a legal imperative, are not transmitted and, as a consequence, are not part of the succession estate.

Depending on the specific situation of the succession estate, it can assume different forms and correspond to different concepts which are legally foreseen.

If the succession estate has neither been accepted yet by the heirs nor declared vacant in favour of the state, article 2046 of the Civil Code determines that there is

⁹ Nuno Sá Gomes, *Tributação do Património*, Almedina.

¹⁰ Ana Prata, in *Dicionário Jurídico*, 3rd edn, Almedina, p. 501.

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an estate in abeyance (*herança jacente*). In other words, this refers to the patrimony of the deceased during the period between the calling of the heirs and the effective acceptance of the succession estate or legacy.¹¹

On the other hand, an undivided succession estate (*herança indivisa*) has already been accepted but not yet divided between its beneficiaries. As a result, the heirs do not hold ownership rights over any of the assets that form the succession estate, but instead they are all owners of the patrimony as a whole.

The vacant succession estate (*herança vaga*) corresponds, under article 2152 of the Civil Code, to the succession estate which has been judicially declared in favour of the state when the deceased has no living heirs. Under these circumstances, the state acquires the succession estate automatically (no acceptance is required and its repudiation is not admissible).

1.4. Private law rules applicable to the administration of the estate

The administration of the succession estate varies according to the different phases of the succession procedure (which correspond to the different succession estate concepts described above).

However, in general terms, the succession estate must support the funeral expenses and other expenses arising from its administration, payment of debts of the deceased and from the fulfilment of legacies (article 2068 of the Civil Code).

An estate in abeyance is administered by the heirs (who have already been called but have not accepted or repudiated the estate yet). However, the appointment of an administrator *ad litem* is admissible as a means to avoid the loss or deterioration of the estate for not having a special legal administrator (cf. articles 2047 and 2048 of the Civil Code).

The head of the family (*cabeça-de-casa*) is in charge of administering the patrimony which constitutes the undivided succession estate, under article 2079 of the Civil Code, without receiving any income in return. The head of the family is designated by the following order: (a) the spouse (if not judicially separated and as long as he/she is one of the heirs or holds a share in the couple's assets); (b) the special administrator (*testamenteiro*); (c) the relatives who are legal heirs; or (d) the heirs designated as such by will.

The head of the family must present the accounts related to the administration of the succession estate annually. Any of the heirs can ask for a distribution of half of the income generated by the succession estate that is attributable to him or her, except when such income is required to satisfy expenses or charges due by the succession estate.

The vacant succession estate should be liquidated, the debts being charged, the assets judicially sold and the remainder being attributed in favour of the state (as mentioned in articles 2152 *et seq.* of the Civil Code).

1.5. Domestic conflict of law rules

The inheritance process in Portugal is generally governed by the laws of the deceased's nationality, thereby avoiding potential conflicts of law; however, if spouses have

¹¹ As noted by Pires de Lima and Antunes Varela in *Código Civil Anotado*, vol. VI, p. 68.

different nationalities, Portuguese law determines that the national law of the country where they both usually reside is applicable. In the absence of a usual place of residence, Portuguese law provides that the applicable law is that of the country where both spouses have a close family connection.

In certain circumstances, the law of the country where the property is located may become applicable. For example, if the deceased was an owner of property in Portugal, and the law of his/her nationality or residence determines that the law of the country where the deceased's property is located takes precedence, then Portuguese inheritance law becomes relevant.

All inheritance issues concerned with residents and non-residents, including disputes relating to property located in Portugal, and those outside Portugal where Portuguese law applies, are brought before the Portuguese civil courts.

Generally, Portuguese courts have jurisdiction to settle international disputes in respect of which at least one of the defendants is habitually resident in the Portuguese territory. Moreover, specifically in respect of proceedings aimed at the recognition of an individual's capacity as heir of the deceased and the carrying out of the inventory of the succession estate's assets, Portuguese courts will hold themselves as having international jurisdiction if the deceased had, at the time of his/her death, his/her habitual residence in Portugal.

It results from the Portuguese international private law on matters relating to inheritance that the succession to the property of deceased persons is a matter governed by the law of the nationality of the deceased person. As a result, a Portuguese court holding jurisdiction to settle a dispute will apply Portuguese laws in the resolution of a dispute between the heirs of a Portuguese national, regardless of the actual location of the assets forming part of the deceased's estate.

Considering the above, for foreigners who pass away in Portuguese territory, the deceased's national law takes precedence, which means that Portuguese succession laws will not apply.

1.6. International conventions on private law

The Hague Convention concerning the International Administration of the Estates of Deceased Persons (of 2 October 1973) has been in force in Portugal since 1 July 1993. However, due to the very small number of signatories, its application is very limited.

In relation to formal aspects, the Convention Providing a Uniform Law on the Form of an International Will (of 26 October 1973) has been in force in Portugal since 9 February 1978.

2. Taxes applicable on the death of a person

2.1. List of relevant taxes

No inheritance or gift taxes are levied in Portugal. Instead, upon the death of an individual, stamp duty applies on the transfer of the assets that constitute the succession estate. However, since there is an exemption on transfers upon death made

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for the benefit of descendants, spouses, people living as married couples and descendants (which correspond to the legitimate heirs according to civil law, except for people living as married couples), no taxation occurs in practice.

2.2. Taxes levied on the deceased

2.2.1. Inheritance and estate taxes

2.2.1.1. Legal sources and history

Inheritance tax laws in Portugal date back to 1838. However, transfers by death from ascendants to descendants were only subject to taxation as of 24 May 1911.¹²

In general terms, taxes due upon succession can assume two forms: estate taxes (meaning a tax that is levied on the succession estate as a whole without consideration of how it will be distributed among the heirs) and inheritance taxes (to be assessed on the respective quota of each heir and considering exemptions, deductions and different tax rates which vary according to the value of the heir's quota and of the relation between the heir and the deceased). Portugal adopted the latter system with respect to former inheritance and gift tax which was in force until 31 December 2003.

Prior to the tax reform of 2003 pursued by Decree-Law no. 287/2003 of 12 November, gifts (*inter vivos*) and transfers by death were subject to gift and inheritance tax which was payable by the recipient. The Gift and Inheritance Tax Code (approved by Law no. 41969 of 4 November 1958) determined that the assessment of such tax was based on both the relationship between the donor and the recipient as well as the value of the capital items. It was in fact a progressive tax conceived in order to promote equality between taxpayers (as required by the Portuguese Constitutional Law at the time),¹³ although some authors (such as Professor Teixeira Ribeiro) argued that there was in fact no equality since such a requirement would imply that the succession estate would be taxed as a whole at the first stage and, only afterwards, on the heirs' quota (at progressive rates).¹⁴ Inheritance tax was assessed on the real and effective transfer of the goods, implying that transmissions which depended on the effectiveness of a certain condition were not considered as transmissions for the purposes of gift and inheritance tax, the same applying to donations by death (only taxable upon the death of the donator). Relationships were separated into four classes with values divided into seven bands. This resulted in a liability of up to 50 per cent depending on the relationship and value. The resultant tax was payable in six monthly instalments and full payment benefited from a discount of 1 per cent per month.

The 2003 tax reform was imposed by the economic reality underlying the application of gift and inheritance tax, since tax evasion was recurrently used by

¹² As mentioned by Professor Soares Martinez, in *Direito Fiscal*, Almedina, p. 589.

¹³ Meanwhile, there was a revision of the Portuguese Constitutional Law which eliminated the reference to gift and inheritance tax (due to the intention of eliminating such tax) and introduced in art. 104 a brief reference to taxes on estates, in order to establish that these should promote equality between taxpayers.

¹⁴ Manuel Henrique de Freitas Pereira, *Fiscalidade*, Almedina, pp. 110 and 111.

taxpayers. As a result, the tax reform intended to pursue several goals: (a) the reduction of injustice; (b) the reduction of the tax rates applicable on the transmission of assets upon the death of a person; and (c) to fight tax evasion.

As a result of the above, gift and inheritance tax was abolished and the Stamp Duty Code (approved by Law no. 150/99 of 11 September) was reformulated¹⁵ and republished in order to foresee its application to gratuitous transfers of movable or immovable property, both *inter vivos* (donations) and *mortis causa* (by death).

As a consequence, stamp duty kept its traditional incidence rules, which have, nevertheless, been enlarged in order to include a second group of rules with respect to the taxation of gratuitous transfers. In practice, the Stamp Duty Code includes provisions related to two different taxes (although their designation is the same): traditional stamp duty and gift and inheritance stamp duty.

In general terms, the main changes introduced by the tax reform correspond to the following:¹⁶

- abolition of gift and inheritance tax and replacement of the tax by stamp duty applicable to the gratuitous transfers of goods;
- the establishment of a 10 per cent flat rate (instead of a progressive rate as was the case with gift and inheritance tax) applicable to gratuitous transfers;
- gratuitous transfers in favour of collective persons are liable to corporate income tax (and not to stamp duty);
- a stamp duty exemption applies to gratuitous transfers for the benefit of legitimate heirs (spouses, descendants or ascendants);¹⁷
- elimination of gift and inheritance tax applicable on dividend distribution related to shares, bonds, titles and public debt certificates (previously liable to gift and inheritance tax at a 5 per cent rate), considering the jurisprudence of the European Court of Justice with respect to the application of article 5 no. 4 of Directive 90/435/CEE of 23 July issued by the Council;
- exclusion of several gratuitous transfers from the incidence rules, namely the following: (a) goods for personal and domestic use; (b) monies up to 500 euro (including amounts deposited in bank accounts); (c) family allowances due at the time of death of the deceased;
- stamp duty is assessed on the total value of the succession estate (as opposed to the hereditary quotas, as in the gift and inheritance tax rules)¹⁸ and should be paid by the head of the family regardless of the income that he/she obtains from the succession estate (prior to the reform, under gift and inheritance tax rules, the transmission was not deemed to have occurred while the beneficiary was still unable to receive the income required to pay the tax due).

Finally, with respect to stamp duty, the tax reform applies to gratuitous transfers made since 1 January 2004.

¹⁵ Stamp duty was created in Portugal by a licence dated 24 December 1660 (in *Breves notas sobre o imposto de selo nas transmissões gratuitas* [Brief notes on stamp duty on gratuitous transfers], Joana Paiva Manso Pedroso, Faculdade de Direito da Universidade do Porto.

¹⁶ As described in *ibid.*

¹⁷ By means of the State Budget for 2009 (Law no. 64-A/2008, of 31 December), this exemption is also currently applicable to people living as couples (*de facto* unions).

¹⁸ According to the understanding of Professor Nuno Sá Gomes, the succession estate itself is the taxpayer for stamp duty purposes, represented by the head of family. Nuno Sá Gomes, *Tributação do Património* [Estate taxation], Almedina, p. 89.

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2.2.1.2. Taxable event

In the event of death, the taxable event is the transmission of the assets, goods or rights at the time of the death of the deceased.

Gratuitous transfers in general are subject to stamp duty,¹⁹ but since the Stamp Duty Code does not include a definition of "gratuitous transfer" this is interpreted as having the same meaning given to it under Portuguese civil law, according to which a gratuitous transfer is a transfer (either *inter vivos* or *mortis causa*) made for no economic consideration.

Although the Stamp Duty Code does not foresee any specific rule in this respect, article 5 paragraph (p) clarifies that the obligation to pay the tax due arises at the date of the opening of succession which, according to article 2031 of the Civil Code, is the date of the death of the deceased.

This has also been generally accepted by the jurisprudence of the Supreme Administrative Court, which has concluded that "By the acceptance of the succession estate, its transmission produces its effects with reference to the time of the opening of the succession which is the death of the *de cuius*";²⁰ "The succession is opened at the time of death of the deceased, the purpose of the inheritance tax being to subject to tax the wealth that arises from the assets of the deceased precisely at the time of death"²¹ (reporters' translation).

2.2.1.3. Rates

A 10 per cent flat rate applies to gratuitous transfers upon death, as stated in article 1(2) of the Stamp Duty General Schedule, but only to non-legitimate heirs.

2.2.1.4. Exemptions

Legitimate heirs (including spouses, descendants and ascendants) and people living as married couples are exempt on transfers upon death, regardless of their tax residency, according to article 6 paragraph (e) of the Stamp Duty Code and article 1(2) of the Stamp Duty General Schedule.

Free transfers made for the benefit of any other heirs are subject to stamp duty, unless made for the benefit of the state in which case they are also exempt.

There are, however, other free transfers that are not exempt but instead are excluded from taxation, such as the following:

- family allowances becoming due upon the death of the respective title-holder, credits from life insurance as well as pensions and allowances attributed by social security schemes, even if they are paid as a death allowance;

¹⁹ In this respect, art. 1 of the Stamp Duty Code states that gratuitous transfers of goods are subject to stamp duty. Under art. 1(4) of the Stamp Duty Code and art. 3 of the Transfer Tax Code, the transmission of property by will with the settlement of a tax sum related to debt or pension payments due to the heir (exceeding his part of the succession estate debts) or legatee or to a third party is deemed simultaneously as a free and onerous transfer of goods, meaning that it will be subject to stamp duty and to transfer tax. This happens irrespective of whether the goods on which the tax is established are determined in the will or not.

²⁰ Decision issued on 16 June 1999, with reference to judicial procedure no. 021389.

²¹ Decision issued on 27 October 1999, with reference to judicial procedure no. 023915.

- amounts invested in retirement savings funds, education savings funds, retirement and education savings funds, stock savings funds, pension funds or movable and immovable investment funds;
- gifts granted under the provisions of the Patronage Law;
- gifts of goods or values not included in the above paragraphs, according to common use, up to 500 euro;
- transfers on behalf of taxable persons subject to corporate income tax, even if exempt therefrom;
- goods for personal and domestic use.

2.2.1.5. Transfers of family owned and closely held businesses

For these purposes, we are only referring to the stamp duty particularities arising from the transfer of family owned and closely held businesses upon death (and therefore no other tax implications are analysed). Any aspect that is not detailed below follows the general stamp duty rules.

The Stamp Duty Code includes under article 16 a special rule for determining the taxable value of family owned and closely held businesses, if their free transmission does not benefit from any of the above-mentioned exemptions (namely, when the beneficiary is not a legitimate heir of the deceased).

Under this provision, the taxable value of any commercial, industrial or agricultural businesses subject to personal income tax and not obliged to have organized accounting should be determined based on an inventory made for this purpose that includes the business assets, equipment, credits, brands and similar rights, and existing debts, all with reference to the date of transmission (which in this case corresponds to the date of the death of the deceased), according to the highest of the following values:

- (a) value granted by the head of family;
- (b) value of the transfer of business (*trespasse*), which is obtained through the application of a factor between 5 and 10 to the average taxable income determined in the last three years for income tax purposes. These factors are established in accordance with the location coefficients defined for the area where the business property is located (as laid down for property tax purposes):
 - businesses located in property to which a coefficient up to 1.2 applies – 5;
 - businesses located in property to which a coefficient between 1.2 and 1.8 applies – 7;
 - businesses located in property to which a coefficient between 1.8 and 3 applies – 10;
 - business which is not located in urban property – 5.

Property, vehicles and motorcycles, as well as tourism planes and recreation boats, are taxed autonomously in accordance with the respective rules for determination of their taxable value.

Despite the above, the taxable value of the businesses should be the respective value granted in a judicial liquidation or distribution process or, if the liquidation or distribution does not occur by judicial means, the value granted, if higher.

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Article 17 of the Stamp Duty Code establishes the rules for determining the taxable value of companies taxed under the tax transparency regime²² and of businesses used for the exercise of independent activities. This value is the value of a business transfer declared by the head of family or the value determined in accordance with the above described factors, if higher.

In addition, article 18 of the Stamp Duty Code states that the value of commercial, industrial or agricultural businesses obliged to have organized accounting as well as the value of the companies which are not shareholding corporations (such as quota companies – *sociedades por quotas*) can be indirectly determined if one of the following situations occurs (as laid down under article 88 of the General Tax Law):

- non-existence or insufficiency of accounting or declaration elements, lack of delay in keeping the registered accounting books or irregularities concerning its organization or execution which are not corrected in the legal deadline, even if the lack of such elements is merely accidental;
- a refusal to disclose the accounting and other documents legally required, as well as their concealment, destruction, forgery or vitiation;
- the existence of several accounts or groups of registered books with the purpose of simulating the reality of the business before the tax authorities, as well as mistakes in the accounts not corrected within the legal deadline;
- the existence of a clear difference between the declared value and the market value of goods or services, as well as of identified facts through which it is possible to conclude that the taxpayer has a higher liability to pay taxes than the liability that arises from the respective tax returns.

Under these circumstances, the value of the business will be determined through the application of the factors above described, laid down in article 16, to a presumed income for the purposes of stamp duty (if the tax authorities have not yet determined a presumed income for income tax purposes) determined under the terms of article 90 of the General Tax Law.

The above also applies to companies taxed under the tax transparency regime and to businesses used for the exercise of independent activities which are not required to keep organized accounting and that, in the three previous years, presented a negative medium of taxable income for personal income tax purposes.

2.2.1.6. Value of assets and rights

Articles 13 to 21 of the Stamp Duty Code establish specific rules for determining the value of assets and rights which are transferred without charge.

According to article 13, in general, the taxable value of immovable property is the tax value (*valor patrimonial tributário*) for municipal property tax purposes at

²² According to art. 6 of the Corporate Income Tax Code, the tax transparency regime applies to (a) civil partnerships not incorporated under a commercial form; (b) professional partnerships; and (c) partnerships dedicated to the simple administration of assets, the majority of the shareholding capital belonging, directly or indirectly, for more than 183 days of the tax year to a family group, or, on any day of the tax year, to a number of partners not higher than five where none of them is a collective person of public law. Under this regime, the income obtained is deemed as distributed and subject to personal income tax or corporate income tax with reference to each partner individually considered.

the date of transfer, or the value determined by valuation (under the municipal property tax rules) for non-registered property for tax purposes or property registered but without a tax value for municipal property tax purposes.

With respect to movable property (and excluding the transfer of businesses which has already been referred to in section 2.2.1.5 above), the following general rules apply:

- the value of any movable property that is not specifically determined under the terms of the Stamp Duty Code corresponds to its official value (if it exists), or to the value declared by the head of family if higher. This value should be close to the market value;
- the value of vehicles, motorcycles, tourism aeroplanes and recreational boats should be the market value or the value determined under article 24(7) of the personal income tax code (which refers to the determination of the taxable value for the granting of such goods as employment income);
- the value of objects of art, collection and antiques should be determined by (a) an official valuation; (b) the application of 60 per cent over the substitution or loss value established under an insurance agreement on such goods (but only if the insurance companies provide such information directly to the tax authorities); or (c) a valuation performed by the tax authorities.

2.2.1.7. Deductions

According to article 20 of the Stamp Duty Code, the amount of the charges and debts in favour of the deceased up to the date of his/her death arising from acts or agreements over the assets included in the succession estate plus the value of taxes where the respective taxable event has occurred up to the date of death will be deducted from the value granted to the transmission.

2.2.1.8. Anti-abuse provisions

Although Portuguese law foresees a general anti-abuse provision, in article 38 of the General Tax Law, horizontally applicable to all taxes, there are no specific anti-abuse rules for succession purposes.

Pursuant to the anti-abuse rule, transactions will be deemed null and void for tax purposes – and only for these purposes – if it is proved that the operation has been performed principally or solely for tax avoidance purposes.

In this field, however, reference can be made to Law no. 39-A/2005, of 29 July which introduced a new rule in the Stamp Duty Code (in paragraph (c) of article 1(3)) establishing that free transfers (including therefore succession) of monetary values (cash) were deemed as gratuitous transfers for stamp duty purposes and are, therefore, subject to taxation accordingly. Free transfers of such goods were previously excluded from taxation under the terms of article 1(5) paragraph (a) of the Stamp Duty Code and the legislator eventually became aware that a substantial amount of revenue was not obtained since people sold their assets prior to their own death and the non-legitimate heirs (who do not benefit from stamp duty exemption) received, by means of this operation, cash excluded from taxation instead of the transfer of the estate's assets subject to the 10 per cent flat tax rate. As a result, the above-mentioned provision was introduced in order to avoid tax evasion.

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2.2.1.9. Revenue

According to the official data available on the internet site of the Portuguese tax authorities²³ only available in respect of the period between January and August of 2009, stamp duty has fallen 5.9 per cent in comparison with the tax year of 2008, since the revenue amounts to 1,149.60 million euro while in the same period of 2008 it corresponded to 1,221.70 million euro.

Unfortunately, the information available does not allow a differentiation of the amount of revenue arising from succession stamp duty only.

2.2.1.10. Interaction with gift taxes

As previously mentioned, as a result of the 2003 tax reform, gift and inheritance tax was abolished and instead the free transfer of goods and rights is now liable to stamp duty. The above described rules apply also to gifts (donations), since they also qualify as free transfers (i.e. transfers made for no economic consideration) under article 940 of the Portuguese Civil Code.

2.2.1.11. Recent developments

The new regime implemented by the 2003 tax reform has, nevertheless, raised some doubts and controversial major issues which have been widely discussed.

First of all, there was a discussion regarding the concept of taxpayer for the purposes of stamp duty with respect to transmissions upon the death of a person. Article 2(2) of the Stamp Duty Code (in the original version) stated that upon gratuitous transfers, the taxpayers were the individuals who qualified as beneficiaries of such transfers and, in particular, in the case of succession upon death, the tax was due by the succession estate, represented by the head of family and the legatees. In addition, article 3 of the Stamp Duty Code stated that the tax should be charged to the person entitled to an economic interest which, in the case of death, would be the succession estate and the legatees.

As a result of the above described subjective incidence rules a question was raised by the doctrine, since the applicable tax regime would depend on the respective answer: who was the taxpayer in the case of succession? The individuals who were beneficiaries of the succession estate, or the succession estate itself (although represented by the head of family)?

The authors who defend the first solution argue that the individuals who are beneficiaries of the succession have the responsibility of communicating the transmission to the Portuguese tax authorities and must bear the burden corresponding to the tax due to be paid by the succession estate. On the other hand, the authors who defend that the succession estate is the taxpayer (such as Professor Nuno Sá Gomes) argue that the legislator did not make any reference to the beneficiaries of the succession estate as taxpayers but instead established clearly the succession estate as the taxpayer of the tax due upon death. However, Professor Nuno Sá Gomes believes that the regime currently in force under which the succession estate is the taxpayer (according to his understanding) and the head of the family is obliged to

²³ http://info.portaldasfinancas.gov.pt/pt/dgci/noticias/destaques/NEWS_Receita_Fiscal_08_2009.htm

pay 10 per cent over the succession estate regardless of the income that he/she obtains from the succession estate violates the Portuguese Constitutional Law.²⁴

In order to fully understand this reasoning, it is necessary to have knowledge of certain dispositions of the Portuguese Constitutional Law: articles 13, 103 and 104.

Article 13 is included in Title I dedicated to "Fundamental rights and duties".

"Article 13
(Principle of equality)

1. All citizens have the same social rank and are equal before the law.
2. No one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances."

Article 103 and Article 104 of the Portuguese Constitutional Law are within Title IV of the Constitution which is dedicated to the "Financial and Fiscal System". These provisions establish the following:²⁵

"Article 103
(Fiscal system)

1. The fiscal system shall aim to satisfy the financial needs of the state and of other public bodies and to ensure a just distribution of income and wealth.
2. Taxes shall be created by laws, which shall determine their applicability and rate, fiscal benefits and such guarantees as may accrue to taxpayers.
3. No one shall be obliged to pay taxes that are not created in accordance with this Constitution, are retroactive in nature, or are not charged or collected as laid down by law.

Article 104
(Taxes)

1. Personal income tax shall aim to reduce inequalities, shall be single and progressive and shall pay due regard to family needs and incomes.
2. Businesses shall essentially be taxed on their real income.
3. The taxation of assets shall contribute to equality between citizens.
4. Consumer taxation shall aim to adapt the structure of consumption to changes in the requirements for economic development and social justice, and shall increase the cost of luxury consumer items."

It is unanimous among the doctrine that article 13 lays down the principle of the contributive capacity (or of the ability to pay taxes) as arising from the equality principle and directly related to the principles of justice or equity, which is particularly developed in article 104(1) for personal income tax purposes. Such a principle can be considered either from a horizontal or a vertical perspective,²⁶ meaning in the

²⁴ Gomes, *op. cit.*, p. 90.

²⁵ The English version of the Portuguese Constitutional Law currently in force is available online at http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf.

²⁶ Manuel Henriques de Freitas Pereira in *Fiscalidade (Taxation)*, Almedina, p. 67.

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first case that persons with identical ability to pay taxes should be taxed in equal ways and, in the second case, that persons with different abilities to pay taxes must pay taxes differently by consideration of such differences in the assessment process.

Considering in particular the above-mentioned provisions, Professor Nuno Sá Gomes argues that it is quite "shocking" that even if the succession estate does not generate enough income to pay the 10 per cent tax due, the tax must be paid despite that fact (in particular, the author raises the issue noting that the head of family only has administration rights over the succession estate under the civil law and is not entitled to sell any of its assets). As a result, if there is not enough income to pay the tax due, the head of family has no other option than to miss the payment and consequently let an execution procedure be reinstated by the tax authorities which may consequently harm the hereditary rights of each heir. This clearly violates the principle of the ability to pay, in the view of the authors who defend such a position.

There were, however, two other issues raised by the 2003 tax reform, with respect to stamp duty in the case of succession.

One of them refers to the determination of the tax regime applicable to the transmission upon death of movable property such as antiques, artistic or collection objects that are simultaneously objects of personal or domestic use. The question is pertinent since article 1(5) paragraph (f) of the Stamp Duty Code clarifies that the transmission of goods of personal and domestic use is not deemed a gratuitous transfer for stamp duty purposes. As a result, the transfer by death of such goods is excluded from taxation which implies that the beneficiaries are not obliged to inform the tax authorities of such transfers since this obligation only applies with respect to exempt transmissions (and not to transmissions which benefit from tax exclusion).

The regime may be confused, however, since article 14(3) of the Stamp Duty Code lays down the rules applicable to the determination of the taxable value upon free transfers of antiques, artistic or collection objects. The only possible solution to conciliate both regimes is to accept that the former only applies when the antiques, artistic or collection objects are not for personal or domestic use (meaning, when they are transferred by a businessman or a collector) and, consequently, are subject to stamp duty. Otherwise, the respective free transfers will be excluded from taxation.

Lastly, the new regime also raised a query with respect to the determination of the local tax office that should be in charge of the tax assessment since the general rule of article 25 of the Stamp Duty Code simply states that it should be the tax office of the residence of the deceased and it still does not clarify what happens when the deceased has several residences (a situation which can happen under civil law as the Supreme Court of Justice has already recognized) and, consequently, a conflict arises. In general, the doctrine recognizes that there is not a solution foreseen under Portuguese law for such cases and, as a result, the solution must be pursued on a case by case basis, preferably through an understanding between the local tax offices corresponding to the different residences of the deceased.

Since a revision of the 2003 tax reform should take place in the near future, the legislator will have the possibility of clarifying some of the above issues.

2.2.2. Income and capital gains taxes

No such taxes are levied upon the deceased.

2.2.3. Other taxes

No other taxes apply.

3. Tax jurisdiction

3.1. Description of tax jurisdiction criteria

3.1.1. Territorial systems

The Portuguese inheritance stamp duty system is mainly a territorial system since article 4(3) of the Stamp Duty Code states that stamp duty shall be levied on free transfers of goods located in Portuguese territory regardless of the tax residency of the respective beneficiaries or authors. The preamble of the Stamp Duty Code is very clear in this respect since it states that "As for territoriality, the rule of submitting the transmissions of goods located in Portuguese territory to taxation is kept, regardless of the residence of the beneficiaries of such transmissions and of the respective author" (reporters' translation).

Apart from the above, article 4(2) refers to certain goods or rights that are liable to stamp duty in Portuguese territory regardless of the territoriality rules (nevertheless, this does not represent any deviation to the territoriality rule, since, even in such cases, there is a connection with Portuguese territory).

Relevant territoriality rules for free transfer purposes (including succession) are described in detail in section 3.3.1 below.

3.1.2. Worldwide systems

Portugal has adopted worldwide systems only with respect to income taxes.

3.2. Subjective territorial link

3.2.1. The nature of subjective links

The subjective link is domicile. However, transmissions of goods located in Portuguese territory are subject to stamp duty, regardless of the residence of the beneficiaries of such transmissions and of the author, since stamp duty is a territorial tax.

Despite this, the Stamp Duty Code clarifies that for free transfer purposes, an individual is considered to be domiciled in Portugal if the following requirements laid down in article 16 of the personal income tax code are fulfilled (with reference to the year in which the transfer occurs). The individual:

- ° has been in the country for more than 183 days, consecutive or otherwise;

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- spends fewer than 183 days in the country but has, on 31 December of that year, living accommodation in circumstances which indicate an intention to keep and occupy it as his habitual abode; or
- on 31 December, is a member of the crew of any ship or aircraft that is in the service of a company having its residence, head office or place of management in the Portuguese territory; or
- discharges functions or commissions of a public character outside Portugal in the service of the Portuguese state.

3.2.2. The link with the deceased

All assets deemed owned by the deceased upon his/her death which are located in Portuguese territory are subject to stamp duty upon their transfer to the heirs, except when they qualify as legitimate heirs, in which case an exemption applies and, in practice, no tax is due.

3.2.3. The link with the heir

As described in section 3.2.1 above, upon death, transmissions of goods located in Portuguese territory are subject to stamp duty, regardless of the residence of the beneficiaries of such transmissions and of the author. As a result, the law does not require a specific link with the heir.

3.2.4. The definition of territorial links with special reference to "residence" and "domicile"

Since the subjective link under the Stamp Duty Code for free transfer purposes is domicile, the Stamp Duty Code clarifies that an individual is considered to be domiciled in Portugal if the requirements laid down in article 16 of the personal income tax code and described in section 3.2.1 above are fulfilled (with reference to the year in which the transfer occurs).

This means that the concept of domicile for stamp duty purposes with respect to free transfers between individuals is equivalent to the concept of residence for personal income tax purposes.

3.2.5. Emigration of individuals

Since stamp duty is a territorial tax, where free transfers of assets located in the Portuguese territory are subject to taxation (except when exempt) regardless of the residence of the beneficiaries or of the deceased, tax avoidance is not possible through the emigration of individuals.

Furthermore, Portuguese law does not establish an exit tax at the time of exit or at the time of death of the individual.

3.2.6. Immigration of individuals

As long as the assets are deemed located in Portuguese territory the immigration of individuals will not be relevant for stamp duty purposes upon their death.

3.3. *Situs of property*

3.3.1. *Relevance of situs of assets*

For the purposes of determining the assets or rights subject to stamp duty in the case of free transfers (including succession), article 4(4) of the Stamp Duty Code clarifies that the following goods or rights are deemed to be located in Portuguese territory:

- rights over immovable or movable property situated in Portuguese territory;
- movable property registered or subject to register or licence in Portuguese territory;
- credit or patrimonial rights over individuals or entities when the debtor is resident or has its head office, effective management or permanent establishment in Portuguese territory, as long as the beneficiary is also domiciled in this territory;
- shareholdings when the participated company has its head office, effective management or permanent establishment in Portuguese territory, as long as the beneficiary is also domiciled in this territory;
- monetary values deposited by institutions with their head office, effective management or permanent establishment in Portuguese territory, or in the case of non-deposited values, if the author of the transmission is domiciled, has its head office, effective management or permanent establishment in Portuguese territory;
- industrial property rights, author rights and similar, if registered or subject to register in Portuguese territory.

3.3.2. *Relevance of situs of debts*

The Portuguese Stamp Duty Code does not lay down any criteria for the purposes of determining the *situs* of debts of the estate.

3.3.3. *Discrepancies between situs rules for death duty purposes and situs rules for income tax*

Considering that succession concerns only free transfers between individuals, one should consider, for the purpose of this analysis, the *situs* rules laid down for personal income tax purposes. However, personal income tax is based on the worldwide tax system and, as a result, *situs* rules are only applicable with respect to income obtained by non-resident taxpayers.

Such rules (included in article 18 of the personal income tax code) include, for example, the following: (a) income arising from work performed in Portuguese territory or due by entities that qualify as Portuguese tax residents or that have their head office, effective management or permanent establishment in Portuguese territory; (b) income arising from immovable property located in Portuguese territory (including capital gains arising from its sale); (c) investment income due by entities that have their head office, effective management or permanent establishment in Portuguese territory; (d) capital gains arising from the sale of shares in Portuguese companies.

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From the above, the main conclusion is that the systems show certain similarities in the sense that the *situs* rules are, in both cases, based on assets (such as immovable property) deemed located in Portugal or situations where there is a territorial connection with a Portuguese entity due to the fact that the entity bears payments made or issues shares transferred or sold. However, the systems are incompatible by nature since personal income tax is a worldwide system tax and therefore *situs* rules only apply to non-residents, as opposed to stamp duty which is a territorial tax, meaning that *situs* rules apply regardless of the residency of the beneficiaries or authors of the free transfer.

3.3.4. *Situs* rules as a cause of double taxation

Since stamp duty is a territorial tax, double taxation issues upon death only arise when the country of residence of a person who holds assets in Portugal that are transferred by means of his/her death, or the country of residence of the beneficiary is also entitled to subject such transfers to taxation.

Since stamp duty does not qualify as an income tax for the purposes of applying the double tax treaties entered into by Portugal and other states, there is not, in practice, any mechanism to deal with such double taxation issues, as better explained in section 4 below.

4. Avoidance of double taxation under domestic law

4.1. Introduction

Portuguese law includes domestic methods for the elimination of international double taxation with respect to income taxes only (corporate income tax and personal income tax).

The Stamp Duty Code does not include any domestic mechanism for the elimination of international double taxation.

4.2. Exemption vs. credit

No relief is granted with respect to international double taxation under the Stamp Duty Code. As a result, no method is adopted.

5. Avoidance of double taxation under treaties

5.1. Tax treaties for the avoidance of double taxation on estate inheritance and gift taxes

In 1982 the OECD Committee on Fiscal Affairs launched a report containing a model double taxation convention on estates and inheritances and on gifts (here-

inafter called the 1982 model convention), thereby replacing the draft convention for the avoidance of double taxation on estates and inheritances of 1966.

The signatories to the convention were Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the USA. A number of countries subsequently acceded to this convention.

Despite this, Portugal did not sign any conventions with respect to the elimination of international double taxation on estates and inheritances, which is mostly due to the fact that stamp duty is a territorial tax and not a tax based on a worldwide system, which reduces the incidence of international double taxation.

There are currently no official attempts to prepare and sign any conventions with respect to the elimination of international double taxation on estates and inheritances.

5.2. Tax treaties for the avoidance of double taxation on income and capital

As previously mentioned, stamp duty does not qualify as an income tax for the purposes of applying the double tax treaties on income and capital entered into by Portugal and other states.

With respect to the eventual qualification of the estate as a taxpayer for income tax purposes (and, consequently, the possibility of the estate benefiting from the double tax treaties as a Portuguese resident entity), please note that certain estates can in fact qualify as taxpayers for corporate tax purposes, according to article 2 of the corporate income tax code (when, for instance, the estate includes a business which generates income prior to its division between the heirs).

In this sense, if the estate obtains income abroad, it will be possible to qualify as resident in Portugal under the residence clause of the double tax treaty entered into between Portugal and the country of source (based on article 4 of the OECD model tax convention) and obtain relief from double taxation under the treaty.

Since the taxpayer, in this case, is the estate and not the heirs, it will not be possible for the heirs to obtain direct relief under the treaty if, in the country of source, taxation is levied at the level of the heirs (and not of the estate). In practice, this means that the heirs will not be able to obtain any relief.

5.3. Non-tax treaties

Apart from the Hague Convention concerning the International Administration of the Estates of Deceased Persons and the Convention Providing a Uniform Law on the Form of an International Will, no other treaties refer to civil estate issues.

6. Compatibility with supranational law

There are no issues of compatibility with supranational law raised in respect of succession issues.