



Nº 59/21

NEWSLETTER

ESTATE PLANNING FROM PORTUGAL (CIVIL AND TAX PERSPECTIVES)

This Information is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Information may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact contact@rfflawyers.com.

*

This Information is sent in compliance with articles 22 and 23 of Decree-Law no. 7/2004, of 7 January, regarding unsolicited e-mails. If you wish to be removed from our mailing list and avoid similar future communications, please send an email with "Remove" to the email address newsletter@rffadvogados.com.

Legal 500 – Band 1 Tax “Portuguese Law Firm”/ Band 1 Tax “RFF Leading Individual” and highlighted in “Hall of Fame”, 2013, 2014, 2015, 2016, 2017, 2018, 2019
 Chambers & Partners – Band 1 Tax “RFF Ranked Lawyer”, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and Band 1 “Private Wealth Law” - HNW “RFF Ranked Lawyer”, 2018, 2019, 2020
 International Tax Review – “Best European Newcomer” (shortlisted) 2013 / “Tax Controversy Leaders”, 2014, 2015, 2016, 2017, 2018, 2019, 2020 / “Indirect Tax Leaders”, 2015, 2016, 2017, 2018, 2019, 2020 / “Women in Tax Leaders Guide”, 2015, 2016, 2017, 2018, 2019, 2020 / “European Best Newcomer”, 2016 / “Tax Firm of the Year”, “European Tax Disputes of the Year” and “European Indirect Tax Firm of the Year”, (shortlisted) 2017
 Best Lawyers – “RFF Tax Lawyer of the Year”, 2014 / “Recommended Lawyers”, 2015, 2016, 2017, 2018, 2019
 Who’s Who Legal – “RFF Corporate Tax Adviser of the Year”, 2013, 2015, 2016 / “RFF Corporate Tax Controversy Thought Leader”, 2017 “Corporate Tax: Advisory and Controversy”, 2017, 2018, 2019
 Legal Week – RFF was the only Portuguese in the “Private Client Global Elite Lawyers” 2018, 2019
 STEP Private Clients Awards - RFF “Advocate of the Year 2019” (shortlisted)
 IBFD Tax Correspondent Angola, Mozambique and East-Timor, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020
 Bloomberg Tax and Accounting Author, 2020

SUMMARY

When a succession does not have contact with several jurisdictions, it will not be difficult, in principle, to determine the applicable national law. However, in the globalized world that we live in, there are ever more (personal, family and estate) situations that are linked to several locations.

Indeed, if an inheritance process has elements of connection with the Portuguese jurisdiction, but also with other jurisdictions, it is necessary to determine whether or not the Portuguese law shall rule such succession.

Thus, it is relevant to know the rules for determining the applicable law that exist and are applicable in Portugal and, also, the Portuguese law that rules succession and the respective taxation.





DETERMINING THE COMPETENT STATE TO MANAGE THE SUCCESSION

When a succession does not have contact with several jurisdictions, it will not be difficult, in principle, to determine the applicable national law. However, in the globalized world that we live in, there are ever more (personal, family and estate) situations that are linked to several locations.

Indeed, if an inheritance process has elements of connection with the Portuguese jurisdiction, but also with other jurisdictions, it is necessary to determine whether or not the Portuguese law shall rule such succession.

Thus, it is relevant to know the rules for determining the applicable law that exist and are applicable in Portugal and, also, the Portuguese law that rules successions and the respective taxation.

The Portuguese conflict resolution rules determine that the law applicable to the succession of an individual should be his personal law, which corresponds to the law of his nationality. However, there is an European Regulation, directly applicable to these situations and Portugal must comply with its rules.

Indeed, with the European Regulation (EU) no. 650/2012 of the European Parliament and of the Council, of July 4th, 2012, the rules for the determination of the competent jurisdiction and applicable law, in the matter of successions, have been modified.

This diploma applies to all successions opened from August 17th, 2015 onwards and, for these, the determination of the competent jurisdiction and the applicable national law becomes dependent on the habitual residence of the deceased at the time of his death.

According to this Regulation, the habitual residence of an individual must be considered taking into account “a close and stable relationship” with a given State, considering the specific objectives of the Regulation, as well as an overall assessment of the circumstances in the previous years and at time of death (which can be difficult to measure).

Thus, an “escape clause” is established, which allows, in exceptional cases, that the law of the State with which the deceased had a manifestly closer relationship at the time of death to be considered as competent one.

Nevertheless, there is a possibility of the individual choosing, beforehand, another law to regulate his entire succession, as long as that is the law of his nationality, at the time of choice or at the time of death. Such choice must be express and unmistakable (and it must, as a rule, be made by Will).

Thus, the application of the Regulation can determine that a third State (i.e., not a member of the European Union) should rule the succession.

Nevertheless, the Regulation only serves to determine the competent law to rule the succession process and does not push aside the application of the domestic law of each member State. In fact, after determining the competent State (within the European Union or a third State), it should be the internal law of said State to rule, globally, the succession process.

Therefore, the Regulation does not apply to tax, customs, or administrative matters. Being so, if the Portuguese law is appointed as the law applicable to the succession, it is important to know the legal and tax solutions envisaged by the Portuguese legislation on this matter.

THE PORTUGUESE SUCCESSION RULES

Portuguese law foresees rules that prevent the disinheritance of direct family members of the author of the succession. In fact, the figures of the **unavailable quota** (in Portuguese "*legítima*") and the **legitimate heirs** continue to exist under Portuguese law, and the rules concerning these matters cannot be set aside.

As per the Portuguese Civil Code, the unavailable quota ("*legítima*") corresponds to the part of the assets that the author of the succession cannot dispose of and that will be inherited by the legitimate heirs (the spouse, the descendants and the ascendants of the author of the succession). If a spouse or a child is the only surviving heir, he/she shall receive at least half of the assets. For the remaining cases, the unavailable quota corresponds to 2/3 of the inheritance.

TAXATION OF INCOME GENERATED BY AN UNDIVIDED INHERITANCE

If the undivided inheritance (i.e., the inheritance that has not been shared between the heirs yet) continues to generate income subject to taxation, said

income must be reported by the representative of the heirs (in Portuguese “*cabeça-de-casal*”). However, there are cases where the heirs themselves will have to report such income in their respective annual Personal Income Tax (PIT or, in Portuguese, “*IRS*”) return.

In case the inheritance comprises industrial, commercial or agricultural income (i.e., arising from the exercise of one of those activities), the heirs may choose to keep it in the same situation, but they must request a taxpayer number for the undivided inheritance and submit a Change of Activity Form, so that the situation is properly framed for VAT and PIT purposes, and, subsequently, submit the PIT return(s).

Besides the undivided inheritance itself, the heirs may also be taxed upon the other income that the undivided inheritance continues to generate until the moment of its distribution. In such cases, such income will be taxed under the other income categories, namely:

- category E (investment income) if there continues to be interest income, for example;
- category F (rental income) if the inheritance continues to receive rents; and
- category G (moveable and immovable property capital gains).

In these cases, each co-owner of said income will have to mention, in the applicable annex, their share of the net income and indicate the deductions and amounts withheld at source, and the representative of the heirs does not have to report the total amount of income.

It should be noted that heirs can list the amounts of charges and debts incurred in favor of the author of the succession, deducting them from the value of the assets to be transferred, until the date of the opening of the succession.

INHERITANCE TAXATION IN PORTUGAL

In general and abstract terms, death may constitute a taxable event, as it may imply a transfer of assets between taxpayers.

It is common to say that Portugal does not tax inheritances, as there is no inheritance tax. This argument is commonly used as an attractive element of the Portuguese legal and tax system, that differentiates it from others (mainly, European) systems.

This does not mean, however, that taxpayers do not have to comply with tax

obligations, namely reporting obligation, triggered by the event of death of their family member, or even, as a result of the distribution of the inheritance, pay taxes, such as Stamp Duty, Real Estate Transfer Tax (in Portuguese, “*Imposto Municipal sobre as Transmissões Onerosas de Imóveis*”) and, furthermore, PIT.

Stamp Duty is levied on all acts, contracts, documents, titles, papers and other facts or legal situations provided for in the General Stamp Duty Table, including free transfers of assets by donation or succession.

In case of gratuitous acquisitions by succession, the 10% tax rate provided for in item 1.2 of the General Stamp Duty Table is applicable.

Nevertheless, Stamp Duty will not always be due, as the law foresees relevant exemptions.

In fact, transfers between spouses or members of a recognized civil union, descendants and ascendants are exempt of this tax (i.e., in case of succession by death, transfers of assets to legitimate heirs are exempt from Stamp Duty).

However, despite this exemption, taxpayers are not relived from complying

with reporting obligations, being mandatory to fill in the Stamp Duty return, reporting the transfer of the assets that were part of the inheritance of the deceased, as well as to communicate the death to the administrative and tax authorities.

The tax obligation arises when the succession is opened, and the reporting obligations resulting from the death must be fulfilled until the third month after the obligation being born (i.e., from the moment of the death of the author of the succession). This obligation falls on the representative of the heirs (which, in principle, will be the surviving spouse, executor or other heir, determined by law or by Will).

On the other hand, if the inheritance has real estate, Property Transfer Tax may also be levied on the excess of the share that belongs to the acquirer or on the sale of the inheritance or share in the inheritance.

It should also be noted that, if there should be a compensation to be paid between heirs (in Portuguese, “*tornas*”), whoever receives it may realize a capital gain, subject to PIT, and must, therefore, comply with all underlying reporting and payment obligations arising from that taxable event.

CONCLUSIONS

Under the terms of the European Regulation applicable, competence to decide succession issues is attributed to the State of the deceased's last habitual residence or, if he has made a choice, to the State of his nationality.

When the Portuguese law is the law applicable to the succession, it should be emphasized that there are imperative rules that protect heirs, and which cannot be overruled.

Furthermore, it should be noted that an undivided inheritance that continues to generate income should be taxed. In fact, it is mandatory to continue to report said income, either by the representative of the heirs or by the heirs themselves, as the income does not cease to be subject to taxation under PIT.

However, the Portuguese tax system does not have an inheritance tax (i.e., a tax applicable to the transfer of assets from the personal sphere of the deceased to the personal sphere of the heirs).

Nonetheless, a succession and the division of an inheritance may give rise to

the payment of Stamp Duty, Property Transfer Tax or PIT.

That said, it should be underlined that, despite there is no inheritance tax currently in Portugal, we believe that the hypothesis of it being created (or recovered, as it existed in the past) should not be totally ruled out, especially considering the Treasury difficulties that the country has been going through, and the difficulties for the national economy created by the pandemic situation that we are living.

**

Lisbon, July 20th, 2021.

Rogério M. Fernandes Ferreira
 Filipa Gomes Teixeira
 Duarte Ornelas Monteiro
 Joana Marques Alves
 Raquel Cabral Duarte
 Yasser Tavares Vali
 Ricardo Miguel Martins

(Private Clients Team)
www.rffadvogados.pt