



Tax and Business lawyers

NEWSLETTER

Nº 38/25

27 AUGUST 2025

ESTATE PLANNING IN PORTUGAL - CIVIL AND TAX PERSPECTIVES

In Portugal, succession is currently governed not only by domestic rules, namely the Civil Code and national tax legislation, but also by European instruments, particularly Regulation (EU) No. 650/2012, which harmonized the rules regarding jurisdiction and the applicable law in cross-border successions within the European Union. This Regulation introduced criteria such as the habitual residence of the deceased at the time of death and the possibility to choose the law of nationality to govern the entire succession.

Private Team



INTRODUCTION

In today's context of increasing mobility and globalization, inheritance planning has become increasingly complex, particularly when involving connecting elements to more than one jurisdiction. Determining the competent State to govern a succession is, therefore, an essential legal matter requiring a careful analysis of conflict-of-law rules and applicable legislation.

In Portugal, this process is currently governed not only by domestic rules, namely the Civil Code and national tax legislation, but also by European instruments, particularly Regulation (EU) No. 650/2012, which harmonized the rules on jurisdiction and applicable law in cross-border successions within the European Union. This Regulation introduced criteria such as the habitual residence of the deceased at the time of death and the possibility to choose the law of nationality to govern the entire succession.

In this context, it is important to clearly and systematically analyse the legal criteria for determining the competent State to manage a succession, the principles of Portuguese succession law, and the main tax obligations arising from the opening of a succession.

It is important to understand the rules for determining the applicable law in force and applicable in Portugal, as well as the Portuguese law relating to succession and its taxation.

DETERMINING THE COMPETENT STATE TO MANAGE THE SUCCESSION

When 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 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.

It is important to understand the existing and applicable rules for determining the applicable law in Portugal, as well as the Portuguese law relating to succession and its 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 a 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 4 July 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 17 August 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 considering “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 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 (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 favour 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, the event of death may constitute a taxable event, as it can result in the transfer of assets between taxable persons.

It is commonly stated that Portugal does not tax inheritances, as there is no inheritance tax, which is used as an argument to promote the national legal-tax system as more attractive compared to others (particularly in Europe).

However, this does not mean taxpayers are exempt from tax obligations, namely declarations triggered by the death of relatives or, even, upon the division of the estate, payment of taxes such as Stamp Duty, Property Transfer Tax (IMT), and PIT.

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

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 relieved 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

Pursuant to the European Regulation applicable to this matter, succession jurisdiction shall be attributed to the State of the deceased’s last habitual residence or, if such choice was made, to the State of their nationality.

When Portuguese law is the applicable law to the succession, it is important to emphasize that mandatory rules protecting heirs exist and cannot be disregarded.

As for taxation, it is worth noting that, in cases where the undivided estate continues to generate income, such income must continue to be declared, either by the head of the household or by the heirs themselves, as it remains subject to personal income tax, except in certain specific cases.

Nonetheless, it should be emphasized that the Portuguese legal-tax system does not provide for an inheritance tax, that is, a tax levied on the transfer of assets from the estate of the deceased to that of the heirs.

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