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By PwC Deutschland | 21 July 2022

Inheritance under Italian law may trigger German inheritance tax

When evaluating inheritance transactions with cross-border implications, a distinction must be made between inheritance law and inheritance tax law. Inheritance transactions subject to foreign inheritance law may also be subject to inheritance tax in Germany. Such a case was decided by the Supreme Tax Court in a situation where the beneficiary was resident in Germany whilst her deceased father was an Italian citizen and resident there.

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Italian woman in Germany inherits from her father in Italy:

A peculiarity in the Italian inheritance law has become the focus in the case of dispute. According to German Civil Law the heir assumes the legal status of the deceased immediately after his death, Sec. 1922 (1) German Civil Code, whereas under Italian law the status as heir becomes effective only upon acceptance of the inheritance. Until then, there is a "void" (suspended status) for which the legacy (estate) is without legal owner. The subsequent formal acceptance of the inheritance has retroactive effect to the date of the testator's death.

The plaintiff (P) is an Italian citizen. Her father, also an Italian citizen, died in August 2015 with last residence in Italy and estate (assets) there. P was living in Germany at the time of death and had been appointed as co-heiress. In November 2015, she informed the competent tax office about the facts of the matter, but also that she had not yet accepted the inheritance as required by Italian law for the transfer of the estate to be legally valid.

In September 2016, P stated that she had given up her residence in Germany at the beginning of July 2016 and moved abroad. Thereafter, she had declared acceptance of the inheritance in three steps in Italy on July 19, 26 and 29, 2016. The German tax office was of the opinion that the inheritance tax was already due at the time of her father's death and not at the time of acceptance of the inheritance.

The Tax Court of Hesse, as court of first instance, had ruled that the inheritance of the plaintiff from her father was subject to German inheritance tax under the German Inheritance Tax Act. The tax arose at the time of her father's death. At that time, the plaintiff at least had her habitual place of residence (usual abode) in Germany as provided for in Sec. 2 (1) no. 1 sentence 2 of the German Inheritance and Gift Tax Act (*IGTA*).

Supreme Tax Court confirms obligation to pay inheritance tax in Germany:

If a domestic person (with residence or their usual abode in Germany) is the beneficiary of the testator’s assets and the inheritance is executed according to Italian inheritance law, German inheritance tax nevertheless arises at the time of the decedent's death and not – as provided under Italian civil law - with the heir's acceptance of the inheritance.

If the acceptance of the inheritance were to be considered as an acquisition subject to a condition precedent, then the tax would in principle have arisen not until the condition had been met, i. e. upon acceptance of the inheritance by the plaintiff. Therefore, the Supreme Tax Court had to take a closer look at Sec. 9 IGTA which deals with such a situation and which reads as follows:

(1) ***The tax arises***

1. in the case of inheritance by reason of death, ***upon the death of the testator****, however*

(a) ….in the event the acquisition (i. e. the legal *transfer of value) is* ***subject to a condition precedent*** *… and for* ***claims subject to a condition precedent*** *or limited in time in the course of an acquisition,* ***the tax***

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arises at the time the condition or event occurs.

However, in the case of dispute the Supreme Tax Court considered the Italian situation, i. e. the state of uncertainty until the inheritance is finally and officially accepted, not as consistent with the objectives of the statute and thus not comparable to a condition precedent covered by Sec. 9 IGTA. The overriding characteristic and "intrinsic reason " for granting the tax deferral under Sec. 9 (1) No. 1 (a) is that the deferral always takes effect *ex nunc*, i.e., at the time the condition occurs. Whereas the essential feature of the Italian rule applies to past events and has retroactive effect (*ex tunc*) to the time of death.

In summary, the Supreme Tax Court stated that in cases of transfers by reason of death and where the inheritance is executed in accordance with foreign civil law, German inheritance tax may nevertheless become payable if – from an economic point of view - the acquisition of assets is equivalent to an acquisition covered by the German Inheritance Tax Act. Both, the legal consequences and the economic effects must be comparable to a (otherwise) chargeable (taxable) event under German inheritance tax law. This was the case here.

Note: Had the Supreme Tax Court decided otherwise and confirmed the comparability of Italian and German inheritance law, the transaction at issue would have been tax-exempt in Germany since the plaintiff, who initially had his place of abode in Germany, had given up her residence in Germany after the death of her father and prior to her acceptance of the inheritance.

Source:

Supreme Tax Court, judgment of 17 November 2021 (II R 39/19), published on 7 April 2022.

Keywords

foreign inheritance, inheritance tax