

European Commission Takes Belgium to Court About Inheritance and Gift Tax

Overview

Does Walloon inheritance and gift tax discriminate against foreign public benefit organisations? The European Commission is of the opinion that it does, and announced that it will take Belgium to the European Court of Justice on 14th July 2005. The Walloon inheritance and gift tax provides for reduced taxation of donations (legacies and gifts) to Belgian public benefit organisations, which do not apply for donations to foreign public benefit organisations. The Commission considers that this violates the prohibition of discrimination on grounds of nationality and the freedom of establishment (Articles 12 and 43 and 48 of the EC Treaty).

In 2002 the European Commission already requested Belgium to modify its legislation on gift and inheritance tax. The request took the form of a so-called 'reasoned opinion'¹. The Belgian law was seen to be incompatible with EU Treaty rules, and in particular discriminatory, as regional laws included preferential rates for public benefit organisations established in Belgium in comparison with organisations established in other Member States (breach the freedom of establishment principle). The legislation was also seen as a breach of the freedom of movement and discrimination of workers of other Member States taxed in Belgium when they wish to donate to public benefit organisations in their country of origin. In 2003, the Flemish and Brussels gift- and inheritance tax legislation was modified in response to the Commission's request. Accordingly the revised Flemish and Brussels tax laws, extend reduced rates to donations made to public benefit organisations based in EU countries and the European Economic Area (EEA) countries. However, the Walloon inheritance and gift tax law was not brought into line within the required period, which explains why the Commission is now taking the matter to the EU 's Court of Justice.

Walloon tax provisions² still include some "residency" clause. They provide for a reduction of inheritance and gift taxes but only for donations to two types of organisations as follows:

- public benefit organisations resident in Belgium; and
- for the application of the inheritance tax law, public benefit organisations established in the EU Member State in which the person making the legacy effectively resided or had his/her place of work at the time of his/her death, or in which he/she had previously effectively resided or had his/her place of work and (for the application of the gift tax law) organisations in the EU Member State in which the donor effectively resides or has his/her place of work at the time of the donation, or in which he/she has previously effectively resided or had his/her place of work.

This means that the reduced tax rate is not applied when Walloon residents make donations across-border to public benefit organisations in other EU Member States unless they work(ed) or live(d) in this Member State (before).

The European Commission indicated that the rules are not in line with Articles 12, 43 and 48 of the EC Treaty and the corresponding articles of the Agreement on the European Economic Area.

¹ This is the second stage in the infringement procedure laid down by Article 226 of the EC Treaty

² Article 60 of the Walloon "*Code des droits de succession*" and Article 140 of the Walloon "*Code des droits d'enregistrement, d'hypothèque et de greffe*"

These articles prohibit discrimination on grounds of nationality, restrictions to freedom of establishment and discrimination between companies of a Member State and natural persons who are nationals of that Member State.

What impact on other legislations across the EU?

The essence of the 2002 decision of the European Commission which would in principle also apply to other EU jurisdictions is the following: as far as gift- and inheritance tax is concerned, donations to foreign EU-based public benefit organisations should be treated as donations to resident public benefit organisations. A series of national gift- and inheritance tax laws do not treat donations to resident and foreign public benefit organisations on an equal footing and they would therefore be in conflict with the EU Treaty. The European Commission could be asked to go to other EU countries to review their legislation in this respect. The Belgian case(s) could be an important break-through for cross-border giving in Europe with regard to gift- and inheritance tax.

The way forward

The Walloon laws should be amended along the lines of the new regimes applied in other Belgium regions. The Flemish and Brussels regions tax codes foresee reduced rates for donations made to public benefit organisations based in EU countries and European Economic Area (EEA) countries.

Promoting tax-effective cross-border giving is one of the key objectives of the EFC European Union Committee, and its Legal and Tax Task Forces. They have developed a series of comparative charts of the different fiscal systems affecting foundations and their donors in the EU. This is intended to benchmark favourable fiscal provisions at the national level, thereby having an impact on those countries revisiting their taxation laws. The charts are available on the EFC website at <http://www.efc.be/projects/eu/tax/default.asp>

The King Baudouin Foundation set up an online database “Giving in Europe” which provides information about the national legal and fiscal treatment of cross-border gifts, donations and legacies, and serves as an information tool for donors, intermediaries and beneficiaries about the best options for tax-effective cross-border giving, see www.givingineurope.org.

The EFC organised a seminar on the issue in Spring 2004 in cooperation with EFC members the Charities Aid Foundation and the King Baudouin Foundation, as well as the European Association for Planned Giving. The event addressed current obstacles as well as potential solutions to improve the situation. A summary of the seminar can be downloaded on the EFC website at www.efc.be/ftp/public/eu/tax/Tax04ex_summary.pdf

Unfortunately, not much has happened at the level of national and European authorities to enhance the situation. The EFC developed a *Model Law* for public benefit foundations to facilitate the review of national-level legislation, where it urges national legislators to treat domestic and foreign organisations equally with regard to gift and inheritance tax as well as income tax³.

At EU level, a European legal form for foundations could potentially improve the situation of cross-border giving. The EFC adopted some recommendations on a European Foundation Statute in this regard, which are available at www.efc.be/projects/eu/legal/european_statute.asp

EFC members are invited to contact the EFC secretariat at eu@efc.be for further information.

³ The EFC Model Law for public benefit foundations is available at www.efc.be/projects/eu/legal/model_statute.asp