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THE 1928 DRAFT CONVENTION FOR THE PREVENTION OF DOUBLE TAXATION IN THE SPECIAL MATTER OF SUCCESSION DUTIES. THE CONVENTIONS CONCLUDED BY ROMANIA

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Abstract: *Romania has concluded two conventions for the avoidance of double taxation on estate and inheritance tax during the interwar period. Since one of these conventions is still in force and the difficulties caused by the burdens resulting from inheritance tax in cross-border situations are of great importance to the proper functioning of the EU and of the internal market, this short article aims to compare the solutions proposed by the 1928 Draft Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties and the conventions concluded by Romania in 1932 and 1934, considering that at some point our legislator may want to reintroduce an inheritance tax.*

Key words: *double taxation, inheritance taxes, death duties, succession duties, draft tax convention, League of Nations.*

1. Introduction

According to recital (9) of *Regulation (EU) no 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, the scope of the regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death. However, certain civil-law aspects were deliberately left out from the enforcement area of this regulation (Nicolae, 2015a, p. 62-68) and also, according to recital (10), the regulation does not apply to *revenue matters*. Therefore it's for national law to determine how taxes and other liabilities of a public-law nature are calculated and paid, whether these are taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. As such, double taxation of inheritances is not currently being resolved comprehensively on the basis of Union law.

The European Commission recommended to the member states to continue working on possible ways to improve the cooperation of tax authorities in order to assist taxpayers

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who are subject to double taxation (Recommendation 2011/856/EU of 15 December 2011 regarding relief for double taxation of inheritances). One of the ways to tackle inheritance cross-border tax is the conclusion of bilateral conventions to relieve double taxation of inheritances.

Romania concluded during the interwar period the "Convention on the Elimination of Double Taxation in the Field of Inheritance Rights between the Kingdom of Romania and Hungary" *(Convention pour éviter la double imposition dans la domaine des droits de succession entre le Royaume de Roumanie et le Hongrie)*, signed in Bucharest on 16 June 1932, and the "Convention between the Kingdom of Romania and the Czechoslovak Republic on the double taxation in the field of inheritance duties" *(Convention entre le Royaume de Roumanie et la République Tchécoslovaque relative à la double imposition dans la domaine des droits de succession)*, signed in Bucharest on 20 June 1934 (Șchiopu, 2017, p. 69). These conventions were concluded after The League of Nations published their draft of a *Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties* (League of Nations, 1928, p. 22-23).

2. The 1928 Draft Convention v. the Conventions Concluded by Romania

2.1. Object of the Conventions. Taxes Covered

Article 1 of the 1928 Draft Convention states the purpose of the convention – to prevent tax payers of the contracting states from being subjected to double taxation in the matter of succession duties – and makes provision for indicating what taxes are to be regarded as succession duties in each of the contracting states for the purpose of the convention.

The inheritance tax may be calculated and placed on the entire succession asset, as it remains from the deceased or we may have succession duties levied on the shares of the heirs. Also, the tax may be proportional or progressive and it may have a differential amount by the degree of kinship (Badea, 1938, p. 82-88).

As well, the article 1 of the conventions concluded by Romania state the purpose of the conventions, these tending to avoid the double taxation in the matter of inheritance tax for the taxpayers of the contracting states. Forwards, there are indicated the taxes that should be considered, in the sense of the conventions, as inheritance taxes in each of the contracting states. Thus, there are treated as inheritance taxes the taxes that, according to the legal dispositions or the prescriptions that replace them or that would come to replace them, are charged for the transfer of the assets upon death.

Although Romania still has an inheritance tax, this tax does no longer show the characters of a genuine inheritance tax, being established not only to provide state revenues, but rather to constrain the heirs to conclude the notarial succession procedure within a reasonable time (Nicolae, 2015b, p. 102), so that it rather has the nature of a fine for the unfinished succession procedure within two years from the death of *de cuius*.

That is why, according to a report produced following the commissioning of a study by the European Commission, Directorate-General for Taxation and Customs Union, Romania in considered not to have an inheritance or estate tax (Copenhagen Economics, 2011, p. 17). Not even the report *Taxation trends in the European Union - Data for the EU Member States, Iceland and Norway* mentions that Romania would have estate and inheritance taxes (European Commission, 2017, p. 123-126).

However, the Romanian Fiscal Code (Law no. 227 of 8th September 2015 on the Fiscal

Code) provides that, in the case of not finishing the succession procedure within two years from the time of the death of the author of the succession, the heirs owe a tax of 1% calculated at the value of the succession mass.

2.2. Method for Elimination of Double Taxation

Article 2 of the 1928 Draft Convention sets forth the principle that it is the state in which the deceased was domiciled which may assess for taxation the whole of the estate of the deceased, regardless of where it may be situated but subject to certain deductions which are provided by article 4. It also defines the term "domicile". Article 3 of the 1928 Draft Convention states the principle that the state in which assets belonging to a deceased person are situated may, even if that person were domiciled abroad, levy a duty on such of these assets as are enumerated in article 4.

As well, the article 2 of the conventions concluded by Romania exposes the principle by virtue of which the domicile country of the deceased is the one that can establish a tax on the entire inheritance, no matter where the assets are located, subject of the provisions of the following article. Thus, the taxes on the successions are established by the state in which the deceased lived, on the entirety of the assets left by the deceased, including also the ones situated abroad, and they would be perceived by the state of the domicile, but for the exceptions provided by article 3. The deceased's domicile state is the one where the deceased had fixed residence, at the time of his/her death with the intention to maintain it. If the deceased had a domicile in each of the two states, or lacked a domicile in one of the two states, the state whose citizen was the deceased was considered to be the domicile state. If the deceased was at the time of his/her death, citizen of the two states and if it could not be established his/her domicile, the competent tax administrations were supposed to make an agreement.

2.3. Taxation of Immovable Property

Article 4 of the 1928 Draft Convention contains a provision which entirely prevents double taxation in the sphere of succession duties, as it lays down that, in respect of assets taxed by the country in which the property is situated, as provided in article 3, the country in which the deceased was domiciled shall allow the lesser of the two following amounts to be deducted from the amount of tax due to itself under article 2: *(a)* The actual amount of the duty levied by the country of domicile on assets situated in another country and taxed under article 3 above; *(b)* The actual amount of duty payable on such assets in the country in which the assets are situated. Article 4 further provides that the rule of taxation in the country in which the property is situated, with a corresponding deduction in the country of domicile, shall be applicable to immovable property and furniture and fittings belonging thereto, and to any other categories of property which may be agreed upon by the Contracting Parties.

Article 3 of the conventions concluded by Romania simplifies the provisions of the 1928 Draft Convention and excludes from the field of application of the previous article the immovable properties, wherever the deceased's domicile is. Thus, the immovable properties, together with the accessories, taking part in the succession of a citizen from one of the contracting states, will be subject to succession duties only in the state where these assets are located. The rights to which these prescriptions related to estates apply,

the rights of use of immovable properties, as well as the rights secured by the immovable properties or encumbering these assets are assimilated to the immovable properties.

The question of knowing if an object should be considered as immovable was supposed to be decided according to the law of the state in which the property was located. Likewise, to establish what should be understood by accessories, there must be a recourse to the right of the state where the immovable property is found. For example, according to article 537 from the Romanian Civil Code, there are considered to be immovable the estates, the springs and the watercourses, the plantations caught in roots, the constructions and any other permanent works fixed to the ground, the platforms and other underwater resource facilities located on the continental shelf, as well as everything that is, naturally or artificially, permanently incorporated in these. In addition, article 538 mentions that the materials temporarily separated from a building, in order to be used again, as long as they are kept in the same form, as well as the integral parts of a building that are temporarily detached from it, if they are destined to be reintegrated in it, remain immovable properties. Likewise, the materials brought to be used instead of the old ones become immovable property from the moment they acquired this destination.

According to the *Methodological Norms for the application of Law no. 227/2015 on the Fiscal Code* the tax is calculated and charged at the value of the real estates included in the succession. Consequently, in the light of the conventions concluded by Romania, as the convention from 1934 remains in force in the relationships between Romania, on the one hand, and the Czech Republic and the Slovak Republic, on the other hand (Şchiopu, 2017, p. 69), in the case of a Romanian citizen domiciled in the Czech Republic or in Slovakia and who leaves an inheritance consisting of immovable assets situated in Romania, the inheritance tax on the immovable properties would be charged only by the Romanian state, but the other state would charge the inheritance tax on the movable properties regardless of where they are located - Romania or the Czech Republic/Slovakia – to the extent that such assets do exist and its own legislation provides such a tax.

2.4. Deduction of Debts and Legacies

Article 5 of the 1928 Draft Convention deals with the question of debts. It provides that debts which are secured on or relate to specific assets shall be deducted from the value of those assets. As regards other debts, the Contracting States are left to make such detailed administrative arrangements as may suit their particular circumstances. It is intended that normally the term “debts” shall include “legacies”.

Likewise, article 4 of the conventions concluded by Romania deals with the issue of debts. Thus, the debts that encumber the immovable assets or that are guaranteed through this kind of assets are placed in the charge of these assets. All the other debts will be charged on the assets targeted by article 2, proportional to the value of the succession located on the territory of each of the two states, only the part that could still remain uncovered would be taken from the immovable assets in the same way.

Article 5 regards the legacies that do not report to a particular object or to the rights regarding a particular object. These legacies can be only legacies under particular title, the legatee being the holder of a debt claim on the inheritance (Nicolae, 2016, p. 338), so that these legacies have the nature of some debts that encumber the inheritance. The legacies will be charged on the assets targeted in art. 2 and, only in the case that these assets are not enough, they will be charged on the immovable properties. If the assets

belonging to a succession are located in the two states, the legacies will be taken over these assets, proportional with the value of the parts of the succession which can be found on the territory of each of the two states.

2.5. Disputes as to the Interpretation or Application of the Conventions

Article 6 of the 1928 Draft Convention provides the procedure which should be followed in the event of a dispute as to the interpretation or application of the Convention. Likewise, article 6 of the conventions concluded by Romania provides the solution for the disputes regarding the interpretation and the application of the convention.

In the case of the Convention on the Elimination of Double Taxation in the Field of Inheritance Rights between the Kingdom of Romania and Hungary, if there were any doubts regarding its interpretation and application, the supreme financial authorities of the two states had to make an agreement on the cases in question. A different mechanism to solve the disputes is provided by the Convention between the Kingdom of Romania and the Czechoslovak Republic on the double taxation in the field of inheritance duties. Thus, if a dispute appeared between the contracting states regarding the interpretation or the application of the provisions of the convention and if that dispute could not be solved, either directly between the states, or by means of friendly arrangement, this dispute would be the subject of any technical body designated for that purpose by the Fiscal Committee of the Society of Nations. This body gave an opinion after hearing the parts and in case of need would have reunited them. The opinion was mandatory and without call for the contracting states. Neither the procedure opened before this body, nor did the opinion given by it involve the suspension of the measure that was the subject of the dispute.

3. Conclusion

As we have seen, the Convention on the Elimination of Double Taxation in the Field of Inheritance Rights between the Kingdom of Romania and Hungary and the Convention between the Kingdom of Romania and the Czechoslovak Republic on the double taxation in the field of inheritance duties closely follows the pattern provided by the Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties elaborated for the Financial Committee of the League of Nations.

However, in what concerns the method of avoiding the double taxation, the conventions concluded by Romania provide a solution which departs from the pattern provided by the Committee of Technical Experts on Double Taxation of the League of Nations. Romania preferred a simpler and more elegant solution, respectively that the immovable properties to be taxed exclusively in the state where these were located, while the state of the deceased's domicile was to perceive the inheritance tax only in terms of movable properties, including the ones situated in the other state.

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