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Estate tax treaties signed by France
A general presentation

1. Presentation of the French treaty network

France has signed Treaties with several countries (34 as of 2024) to avoid double taxation in respect of inheritance tax and, where applicable, gift tax (9 treaties) or other registration and stamp duties (hereinafter referred to as the "Estate tax treaties").

The format of these agreements can differ. Some take the form of a separate tax treaty on successions (and gifts sometimes), usually the more recent ones. Some take the form of specific clauses on inheritance tax and/or gift tax included in another treaty, usually older treaties covering also income taxes and sometimes registration duties (e.g. treaties with African countries) or because the contracting State levies taxes upon inheritance based on a different system (e.g. Canada).

The French treaty network for inheritance tax and gift tax is not expected to be expanding. At least this does not seem to be the position of France's central administration.

There are several reasons for this, apart from the obvious fact that negotiating a Treaty requires a long diplomatic process of discussion to reach an acceptable balance for each party, which takes time. First, many countries have no inheritance tax at all, so the risk of double taxation is limited. In addition, French domestic law provides for very broad inheritance tax attachment criteria (notably on the basis of the heir's/beneficiary's residence in France) and has no interest in losing this tax base, being specified that this broad scope of inheritance tax application is in any case matched by a tax credit mechanism provided for by domestic law to limit or avoid double taxation.

Of course, the content of these Estate tax treaties differs from one Contracting State to another, although some trends can be identified. The purpose of the presentation below is to expose how the provisions of France's Estate tax treaties can reflect the specificities of French domestic law on inheritance taxes and gifts, while taking of course into account the Contracting States' approaches on taxation of inheritance (and gifts, where applicable).

2. General comments on the main trends which can be observed in the provisions of the Estate tax treaties signed by France

2.1. Typology of the co-contracting States

In a nutshell, the Estate tax treaties signed by France can be divided in a few categories, being specified that the typology of the treaties is in line with four geographical groups, for which the following trends can be observed:

- Historically, treaties signed by France with its former African colonies, which is the most represented group:

  16 treaties, which are old treaties (mainly signed in the years 60ies or 70ies, and sometimes amended later on). As a general rule, these treaties cover both income taxes, inheritance tax (not gift tax however) and stamp duties.

- Treaties signed with States of the Middle East:

  The treaties with these states (notably Saudi Arabia, United Arab Emirates, Qatar, Oman and Bahrain) are more recent (mainly signed in the years 80ies or 90ies) and also cover both income taxes, inheritance tax (not gift tax however). None of them include provisions relating to companies with real property assets (see § 2.2.1.3), so France cannot exercise its right to tax French real estate held indirectly.

- Treaties signed with States of European countries

  The treaties signed with European countries offer a much more varied typology, since they reflect more bilateral negotiations on a case-by-case basis.

- US and Canada, finally, are the two sole American States with which France entered into agreements on inheritance tax.

  The US-France Estate tax treaty reflects the specificities of UU domestic law, particularly the system of taxation on citizenship. The agreement with Canada reflects also the specificities of the Canadian capital gains tax system upon the death, and is coupled with a specific agreement with Quebec based on the same idea.

- For the sake of exhaustivity it can be noted that France also signed agreements with certain French overseas communities with (partial) fiscal autonomy: Nouvelle Calédonie, St Pierre et Miquelon, Mayotte (terminated since 2014).

2.2. Clauses reflecting the specific features of French domestic law and how France negotiates to reflect these in its Estate tax treaties

2.2.1. Brief reminder of the French domestic law

Under French law, the territorial scope of gift and inheritance taxes (Article 750 *ter* of the French Tax Code) covers the following:

- If **the deceased/donor is a French tax resident**, all movable and immovable properties, regardless their location are taxable in France, including assets owned in trusts;

- If the deceased/donor is a non-French tax resident but **the heir/donee is a French tax resident**, all movable or immovable properties (received by this beneficiary), including assets owned in trusts, located in France or outside France, are taxable in France;

- If **neither the deceased/donor nor the heir/donee is a French tax resident, only French assets** received (tangible assets, French debts and securities, real properties located in France regardless their structure of ownership) including French assets owned in a trusts, are taxable in France.

2.2.1.1. The deceased/donor is a French tax resident

The criterion relating to the French tax residence of the decedent/donor is standard and widely used in many other States' domestic laws.

Under French tax law (art. 4B of the FTC), residence is defined in the same way for all tax purposes (income tax, wealth tax, IFI, gift and inheritance tax). Four alternative tests are provided for determining whether an individual is treated as a resident for tax purposes:

- He/she has his/her home in France;
- His/her primary place of residence is in France;
- He/she performs an activity in France;
- His/her centre of economic interest is in France.

Any individual meeting at least one of the above criteria will be deemed a resident of France for tax purposes, and may therefore be liable to French taxes - in particular inheritance tax or gift tax- except when a tax treaty provides otherwise (see §3.1).

2.2.1.2. The deceased/donor is a non-French tax resident, but the heir/donee is a French tax resident

This criterion is one of the specificities of the French law on inheritance/gift taxes and is rarely found other States' domestic laws. It was introduced in 1999 (effective since 2000) with the aim to counter tax avoidance schemes whereby a person transfers their tax residence outside France and makes tax-free gifts to their children who remain resident in France.

The originality of the French system is therefore that it combines the two criteria, i.e. the residence of the decedent/donor and that of the heir/donee.

However, this provision only applies where the heir/donee has been resident in France for tax purposes for at least six of the ten years preceding the year in which he receives the assets (this six-year period in the ten years preceding the taxable event does not necessarily have to be continuous). This allows to exclude people who are required to stay in France temporarily for professional mobility reasons (the so-called "impatriate" workers).

The existence of an Estate tax treaty will generally have the effect of setting aside this connecting factor (see §3 and §3.3.2), with a few exceptions.

2.2.1.3. *Neither the deceased/donor nor the heir/donee is a French tax resident*

In such a case, only assets deemed to be located in France are liable to French inheritance tax or gift tax or (article 750 ter, 2° of the French tax code).

Under French law, the notion of "movable and immovable assets located is France" is broad and aims both at tangible assets (movable or immovable) and non-tangible assets, such a securities and receivables.

This general rule calls for one main remark concerning real property located in France.

French tax law provides for specific provisions under which certain shareholdings in foreign legal companies or entities owning directly or indirectly French real estate are deemed to be French assets. This applies in the following cases:

- The shares of a foreign company will be deemed French assets if the company qualifies as a "real estate company" (*Société à prépondérance immobilière*) under Article 750 ter of the FTC (§2°, al. 4), i.e. if the market value of the French real property that it owns (directly or indirectly) exceeds the market value of its other French located assets;

- The shares of a foreign company will be deemed French assets if the same "family group" owns more than 50% (directly or through intermediary companies or entities) of the company's share capital, even if the foreign company owning French real property is not a "real estate company" (Art. 750 ter of the FTC, §2, al. 2).

France seeks to reflect these specificities in the Estate tax treaties it signs (the more recent ones) in order not to lose this right to tax, which is based on a presumption (see §3.2 below).

2.2.1.4. *French domestic law provides for a mechanism to avoid double taxation*

Finally, it is interesting to note that although the France's Estate tax treaty network (37 treaties) is not very wide, French domestic law provides at least for a tax credit mechanism in order to limit or avoid double taxations when no tax treaty applies.

Under this mechanism (article 784 A of the FTC), when France levies inheritance tax / gift tax in respect of a non-French asset, and when inheritance tax / gift tax has also been paid outside France in respect of this asset, a tax credit corresponding to the taxes paid abroad is granted in France, irrespective of whether these taxes have been levied on the decedent/donor or on the heir/done. Such a credit is only granted where French tax is due in France because the decedent/donor or the heir/donee is a resident of France.

The grant of a credit is limited to the amount of French tax paid on the property situated abroad.

Under this system, however, a difficulty can arise when the country where the property is situated does not levy a transfer tax on property transfers without valuable consideration, but taxes the capital gains realized during the operation instead.

2.2.1.5. The specific taxation of assets held in trusts

Up until 2011, France had no tax legislation dealing with the tax treatment of trusts in respect of gift and inheritance taxes (as well as wealth tax). Irrevocable and discretionary trusts benefited from a very favorable tax treatment in France.

A law passed on 29 July 2011 created a new body of rules, in particular with respect to transfers for no consideration (gifts and inheritance) made through a trust.

By virtue of this Law, the passing of the grantor, when occurred after 31 July 2011, is as a general rule a triggering event for inheritance tax.

For this purpose, when the grantor passes, the trust funds are deemed to be "provisionally" allocated to the beneficiaries (although not actually distributed), the purpose of which is to serve as a basis for the potential inheritance tax (and wealth tax) due.

In other words, inheritance tax is due upon the passing of the grantor as if no trust existed, i.e. the beneficiaries are liable for the payment of gift or inheritance tax, which is assessed on the value of the trust assets at the time of death.

The tax rate is determined in accordance with the relationship between the grantor and the beneficiary, assuming the value of the trust assets is included in the inheritance tax return established by the grantor's heirs.

If it is not possible to ascertain the shares of the beneficiaries in the trust fund on the death of the grantor, the trustee should pay the inheritance tax at the rate of (i) 45%, if the class of beneficiaries only contains descendants of the grantor, or (ii) 60%, if the class of beneficiaries contains non-descendants. Finally, a 60% inheritance tax rate will always apply if the trust is governed by the law of other non-cooperative states or territories, or if the was settled by a French resident after 11 May 2011.

As a final observation, it is essential to note that the French tax authorities' guidelines commenting the Law of 2011 specified that the existence of the trust has no impact on the application of international tax treaties relating to inheritance or gifts, which therefore apply under the standard conditions.

2.2.2. Influence of the French domestic law on the drafting of France's Estate tax treaties

Some of the points mentioned in §2.2.1 above, namely the connecting factor based on the French residence of the heir/donee and the assimilation of certain foreign companies holding French real estate as French assets, have had a significant influence on the way France has tried to negotiate the clauses of the treaties it has signed (especially the most recent ones), with varying degrees of success depending on the case.

In particular, the most recent Estate tax treaties (or amendments to such treaties) negotiated by France provide some striking examples of how these considerations were taken into account by the French negotiators.

For instance, this is partly or fully reflected in the 2004 Protocol agreed by France and the USA and the Estate tax treaty signed by France and Germany in 2006. These points are developed in §3 below.

On a related note, it is also very interesting to look at the clauses included in the Treaty which was signed in 2013 between France and Switzerland (not ratified by Switzerland and eventually abandoned), which clearly reflects France's aspirations when negotiating an estate tax agreement.

This treaty, which never came into force and led to a situation where France and Switzerland no longer have any conventional agreement in matters of inheritance tax and gift tax, paradoxically illustrates what has been exposed above.

This treaty did not cover gifts and provided that:

- Shares in real estate companies - in the broadest sense (see §2.2.1.3.) - were considered as real estate (to avoid double exemptions);

- Real estate held indirectly *via* an interposed company was taken into account, as long as this company was "controlled" by the deceased and the real estate represented at least 1/3 of the company's assets;
- France could tax all the assets located in France of a deceased Swiss resident, this rule being accompanied by the application of a tax credit for the Swiss tax;
- France could take into account the domicile of the heirs, provided that they had resided in France for at least 8 of the last 10 years.

3. Material scope and practical application of conventions signed by France

For the purpose of this presentation, the development below will be limited to the following three main themes:

- The definition of residence/domicile: *inter alia*, how treaties address "double residency" issues, how treaties consider the residence of a heir/donee, how treaties address the U.S. "reserve clause" on citizens, etc;

- Assets / Rule of situs: How treaties address situs issues in order to avoid double taxation, and in particular how "real estate companies" are treated in this respect;

- Mechanisms to avoid double taxations (exclusive taxation, deduction, tax credits).

3.1. Residence/Domicile

As explained above (§2.2.1.1.), under French law, the notion of "residence", which is defined in the same ways for all taxes, determines France's right to tax. Being a French citizen is irrelevant.

Almost all the treaties signed by France provide for tie-breaker rules, the purpose of which is to determine the tax "domicile" of an individual, when a conflict of residence arises. These are usually based on the OECD model convention (article 4) under which, in a nutshell, when a person is deemed to be domiciled in both Contracting States, the issue is resolved by successively applying the following criteria: the permanent home available to the individual, the centre of vital interests, the place where an individual has his/her habitual abode and then nationality.

However, in practice, many Estate tax treaties signed by France may diverge widely from the OECD model, in order to reflect the specificities of the Contracting States.

This calls for two main observations:

- First, when Estate tax treaties refer to domicile, reference is made – almost always – to the domicile of the decedent (or the donor, when applicable).

  However, for the reasons exposed in § 2.2.1.2 above, because France's domestic law provides for a territorial criterion of taxation based on the heir's/donee's residence in France, some treaties may include provisions recognizing this circumstance as a taxation criterion.

  To date, the Germany-France Estate tax treaty is the only one signed by France currently into force (that signed with Switzerland in 2013 was not ratified and abandoned) providing for such a clause (see below).

- Secondly, and most importantly, many treaties provide for additional connecting factors other than that of residence as classically determined under the "model Article 4" criteria, either based on citizenship, "domicile" in the sense attributed to it by common law jurisdictions, or even based on intention in some "follow-up right" clauses.

The following examples are worth noticing:

- *The UK-France estate signed on 21 June 1963:*

Under Article 2, 3.a) of the Treaty "*For the purposes of the present Convention, the question whether a deceased person was domiciled at the time of his death in any part of the territory of one of the Contracting Parties shall be determined in accordance with the law in force in that territory*".

In practice, it follows from this provision that an individual having the status of "non-domiciled" resident in the UK will not be able to claim for the benefit of the UK-France estate tax treaty.

This treaty was therefore often unusable in practice. The possible limitation of the "non-dom" regime in the upcoming UK budget could mechanically extend the number of situations where the treaty may apply in the future.

- *The US-France estate tax treaty signed on 24 November 1978, as amended by Protocol on 8 December 2004*

To reflect the specificities of the US law, which provides in substance for connection criteria not only based on residence but also based on citizenship, the Treaty provides for three very specific sets of rules:

- First, regarding the scope itself of the Treaty, it is worth noticing that it applies to US citizens, even if the decedent is not domiciled in the US.

  Article 1 of the Treaty states that it applies to gifts/estates which are subject to the taxing jurisdiction of the United States, either by reason of the donor/decedent's domicile in the U.S. or by reason of his U.S. citizenship at the time of transfer.

  For instance, this means in practice that in the case of a US citizen residing in a State with which France has no Estate tax treaty, who has US intangible assets and a heir in France, the Treaty would apply and France may not be allowed to levy inheritance tax (assuming the US assets are taxable in the US).

- Secondly, regarding the definition of fiscal domicile, Article 4 of the Treaty first provides for the usual criteria allowing to determine the domicile of a person, and then adds specific rules concerning US citizens being residents of France.

  One practical consequence is that in the situation of a US citizen resident of France, the US remains allowed to tax its citizens as if the Treaty did not exist. In such a case, both States may levy taxes (France based on residence, the US based on citizenship), and double taxation is usually eliminated/limited on the American side, with a few exceptions (see § 3.3.1. below).

- Finally, article 4§3 of the Treaty also provides for specific rules regarding U.S. citizens temporarily domiciled in France.

Under these provisions, if, at the time of death or at the time of making a gift, a person is considered being a tax resident of both France and the U.S. under their respective domestic law, then this person – as a U.S. citizen – would be deemed to be a US tax resident if he/she had a clear intention to retain her domicile in the U.S. and was domiciled in France less than 5 years during the 7-year period ending with the year of her death or the making of a gift.

- *The Germany-France Estate tax treaty signed on 12 October 2006*

- The Germany-France Estate tax treaty is the only one signed by France currently into force (that signed with Switzerland in 2013 was not ratified and abandoned) providing that where an heir/donee was domiciled in France at the time of the decedent's death or at the time of the gift, France may tax all assets received by that person in accordance with its domestic law and offset, against the French tax, the tax paid in Germany (limited to the German tax on the assets that are not taxable in France under the treaty) (article 11, 1-c).

- Article 4, §3 provides for a "citizenship" connection for people who are temporarily in another country. Quite similarly to what is provided in the US-France treaty (see above), if, at the time of the death or the gift, a person is considered being a tax resident of both France and Germany under their respective domestic law, and is a German citizen, this person will be deemed to be resident in Germany if he/she had a clear intention of not retaining his/her domicile in France and was domiciled in France less than 5 years during the previous 7 years.

- Finally, Article 2 of the Protocol to the treaty introduces a "follow-up" clause for Germany, under which any person who possessed German nationality and had been residing outside the Federal Republic for a maximum of five years at the time of death or donation is deemed to be domiciled in Germany.

3.2. Situs rules

As exposed in §2.2.1.3. above, one of the most important observations regarding the situs rules usually set out in the Estate tax treaties signed by France relates to how these treaties take into consideration the indirect holding of French real estate through intermediary companies, either (i) because such intermediary companies hold assets mainly consisting of French real property ("real estate companies") or (ii) because such companies own directly or indirectly French real estate – even if not the majority – and are controlled by a same family group ("majority shareholding").

The following examples are worth noticing:

- *The US-France estate tax treaty signed on 24 November 1978, as amended by Protocol on 8 December 2004*

Article 5 of the US-France Estate tax treaty provides (paragraph 1) that "real property" may be taxed by a contracting State if such property is situated in that State, being specified (paragraph 3) that the term "real property" shall also include shares of companies (regardless of their country of incorporation) of which 50% of the assets – held directly or through other underlying companies – consist of real property located in one State.

Said Article 5 (§4) eventually specifies that the above provisions shall also apply to the real property of an enterprise and to real property used for the purpose of independent personal activity.

➢ *The Germany-France Estate tax treaty signed on 12 October 2006*

The Germany-France tax treaty is very interesting in this respect, in the sense that it provides for two sets of rules regarding the situs of shares in intermediary companies holding real estate:

- First, a clause (article 5, §3) providing that shares of "real estate companies" (i.e., of which the assets mainly consist of real property) are deemed to be situated in the State where the underlying real properties are located. Contrary to the provisions of the US-France estate tax treaty, property used by the company for its own business operations or for the exercise of an independent business activity are not taken into account.

- Secondly, a clause (article 5, §4) providing that when a real property located in one State is owned by a company held for more than 50% by the decedent and his/her close relatives, this property is also deemed to form part of the estate taxable in that State.

➢ *The Italy-France Estate tax treaty signed on 20 December 1990*

Similarly, the Italy-France estate tax treaty also provides that shares of companies owning mainly real property located in France may be deemed to be situated in France (article 5 §3). Property used by the company for its own business operations or for the exercise of an independent business activity are not taken into account.

➢ *Some counter-examples*

On the contrary, the Belgium-France estate tax treaty signed on 20 January 1959 or the Monaco-France estate tax treaty signed on 1st April 1950 are significant examples of treaties which do not contain such a clause.

In such cases, France loses its right to tax, irrespective of whether (or not) the Contracting State will effectively levy inheritance tax or gift tax on the transfer of the shares of the intermediary company/entity holding French real estate (see our comments in §3.3.2 below exposing how Estate tax treaties apply primarily and not subsidiarily to French domestic law).

3.3. Mechanisms to avoid double taxations

3.3.1. Exemption method and imputation method (tax credit)

Unsurprisingly, both mechanisms can be found in the Estate tax treaties signed by France, with some specificities depending on each treaty.

Under the exemption method, the State in which the decedent was domiciled does not tax assets which are taxable in the other State (that of the situs). Each State is therefore granted an exclusive right to tax.

The traditional French practice generally aimed at retaining this method in the early treaties signed, usually applied in conjunction with the "effective rate" rule.

However, the more recent tax treaties now tend to use the imputation method.

Under the imputation method, as a general rule the State of domicile of the deceased does not exempt the assets taxed in the other State, but eliminates or limits double taxation by means of a tax credit, which is limited to the amount of tax paid in respect of this asset.

- *The US-France estate tax treaty signed on 24 November 1978, as amended by Protocol on 8 December 2004*

In essence, the 2004 Protocol replaced the previous exemption principle on the French side with a principle of imputation of US tax. The provisions derived from this 2004 Protocol offer a good example of how the imputation method can apply.

- In the standard case where the decedent is a non-US citizen, French resident, France may tax the whole Estate of the decedent, including the assets which are taxable in the US by virtue of the Treaty.

This applies for example for US real property and US tangible assets such as antiques, works of art, etc.

In this case, France grants a tax credit equal to the amount of tax paid in the US in respect of the property taxable thereon.

For the purpose of determining the estate tax imposed in the US (to be offset against French tax), the Treaty provides (article 12, 3.) that the estates of French residents benefit in the US from a "unified tax credit", equal to the greater of the following two sums:

- the amount of credit granted to US citizens under US law, in proportion to the assets of the estate located in the US (compared to the total value of the entire estate); or
- the amount of credit granted under US law to the estates of non-residents and non-US citizens individuals.

- In the case where the decedent is a French resident and a US citizen:

As explained in § 3.1 above, when the decedent is a US resident, the US may tax his/her whole Estate. One practical consequence is that in the situation of a US citizen resident of France, the US remains allowed to tax its citizens as if the Treaty did not exist

This will apply as a general rule to intangible assets, securities and cash (article 8 of the Treaty).

In such a case, both States may levy taxes (France based on residence, the US based on citizenship), and double taxation is eliminated or limited on the American side, by granting a tax credit equal to French tax.

However, US citizens residing in France can benefit from an exemption on US assets, which apply notably to real property and tangible assets located in the US. To this end, the provisions of the treaty specify (article 12, 2.-a)-iii) specify that on the French side, a tax credit in respect of the US assets is granted up to the amount of French tax on these assets, which leads to an exemption (*modulo* an impact on the effective tax rate).

- *Measures to avoid double exemptions:*

Because the French judicial Courts (competent in matter of inheritance and gift taxes) consider that the Estate tax treaties signed by France should apply primarily and not subsidiarily to French domestic law (see §3.3.2 below), in a situation where the Treaty grants an exclusive right to tax to a Contracting State but such State does not levy inheritance tax in practice, France cannot recover its right to tax and the situation is *de facto* tax exempt.

This explains for example why France sought to re-negotiate the old Estate tax treaty it had signed with Switzerland in 1953. Although a new Treaty has been negotiated and signed in 2013, it was not ratified by Switzerland. France therefore decided in 2014 to terminate the 1953 treaty in order to put an end to the situations of double non-taxation resulting from the articulation of the treaty provisions and Swiss domestic law.

More generally, in all treaties without a "real estate company" provision (e.g. the Belgium-France treaty or the France-Monaco treaty), when a decedent is domiciled in the Contracting State and owned shares in a company owning French real property, France cannot levy inheritance tax in respect of these shares.

To limit such situations, some treaties include provisions designed to eliminate cases of double exemption.

This is for instance the case of the US-France estate tax treaty. Under article 12, where an asset is taxable only in one State as a result of the Treaty – and that such tax is not paid for a reason other than a specific exemption, a particular abatement or exclusion – the other State may tax that asset, irrespective of any contrary provision contained in the Treaty.

3.3.2. General considerations on the hierarchy of norms, and whether Estate tax treaties should apply primarily (automatically) or subsidiarily to domestic laws

This paragraph addresses the fundamental question of whether the purpose of an international tax treaty is solely to avoid double taxation or whether it must also be interpreted in such a way as to avoid double exemptions.

Generally speaking, France's analysis of tax treaties is that they cannot allow double non-taxation. This is the position adopted by France in the case of income tax treaties, based on the principle of the subsidiary application of treaties, leaving France free to levy its own tax in the absence of double taxation.

However, this does not apply to Estate tax treaties. In France, indeed, inheritance tax and gift tax fall under the jurisdiction of Judicial Courts (as opposed Administrative Courts, which are competent for income tax).

Contrary to the Administrative Courts, the Judicial Courts do not apply the principle of treaty subsidiarity. On the contrary, they consider these international conventions to be of primary and immediate application.

This explains why the existence of an Estate tax treaty may lead to situations of double exemptions.

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