DEATH AS A TAXABLE EVENT — THE PROBLEM OF MULTI-JURISDICTIONAL ESTATES FOR CANADIANS AND THEIR HEIRS AND A ROAD MAP FOR ASSESSING POTENTIAL LIABILITY

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Summary: Canadians have both family and economic ties in all parts of the globe. The issue of taxation on death and the clash of various international tax systems on a deceased's estate at death has become a matter of international concern. This paper examines how this issue impacts Canadians (and provides some practical approaches to reducing or eliminating multiple layers of tax liability on death).

Introduction

Canada is a country of immigrants. The 2006 Census confirmed that 19.8% of the total population or virtually one in five Canadians is foreign-born. According to Statistics Canada this is the highest proportion in 75 years.[1] The census also confirmed that more than two-thirds of Canada's population growth since 2001 is based on newcomers to Canada.

Based on these statistics, it is no surprise that Canadians have both family and economic ties in all parts of the globe. One of the results of this is the potential for multiple jurisdictions to levy a tax

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1. According to Statistics Canada, Canada's total population increased by 1.6 million between 2001 and 2006, a growth rate of 5.4% from 2001. The census estimated 1,110,000 newcomers arrived in the country between January 1, 2001 and May 16, 2006. They were responsible for more than two-thirds (69.3%) of this population growth. See Statistics Canada, *2006 Census: Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census: Highlights*, online: Statistics Canada <http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-557/p1-eng.cfm>. In 2001 18% of Canadians were new immigrants, and 39% were first- or second-generation immigrants. In 2001 immigration made up 70% of population growth and it is anticipated that within 25 years it may be the only source of net population growth in Canada. See Citizenship and Immigration Canada, *Pursuing Canada's Commitment to Immigration: The Immigration Plan for 2002* (Ottawa: Citizenship and Immigration Canada, 2002).

on the death of a Canadian tax resident based on criteria such as the domicile of the heir, the residence, domicile, nationality or citizenship of the deceased, or the situs of the property. This is not a problem that is unique to Canadians. The potential for multiple layers of taxation on death is a possibility whenever the deceased, the assets, and the heirs are not all located in the same tax jurisdiction. The problem is exacerbated in the case of Canada as Canada adopts a different approach than most other tax jurisdictions to tax liability on death — specifically Canada imposes an income tax on the deceased based on deemed disposition rules instead of inheritance or estate tax.

This was not always the case. Commencing in 1972, the federal government abolished succession duty (inheritance tax) in Canada and replaced it with the current system of deemed dispositions on death for income tax purposes. In general terms, under the Canadian system the taxable event is death and the taxpayer is deemed to have disposed of his or her assets for Canadian income tax purposes immediately prior to death for an amount equal to fair market value. Tax liability is based on the type of income generated as the result of the deemed disposition and the taxpayer's tax rate. This liability is considered to be that of the deceased and is payable out of his or her estate. Both resident and non-resident taxpayers[2] are subject to this regime; resident taxpayers on their world assets, non-residents — discussed further below — on dispositions of taxable Canadian property that is not treaty protected.[3]

Although the specter of death may result in tax liability in other jurisdictions, both the taxable event and the taxable person are often very different from that found in Canada. For example, in some jurisdictions the taxable event is the increase in wealth on death and the beneficiary is the taxable person. In others, the taxable event is the transfer of property on death and the deceased's estate is liable.[4] Some countries levy tax on wealth annually as an alternative to, or in addition to tax on death.[5] The taxable event in

2. Generally non-residents are taxable on the disposition of taxable Canadian property. This includes real property in Canada, an interest in or an option in respect of, or an interest in a trust, partnership or a corporation whose assets consist primarily of real property.
3. A "treaty-protected property" of a taxpayer at any time is a property any income or gain from the disposition of which by the taxpayer at that time would, because of a tax treaty with another country, be exempt from tax under the Part I of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*).
4. Some countries levying estate tax provide for deductions from the estate if beneficiaries have a close parental relationship with the deceased. See for example Chile.

those countries is ownership of property and the owner is the taxable person.

The amount of initial tax payable under each of these systems depends on factors such as applicable tax rates, deductions or exemptions available (generally for spouses and children), and the valuation method used. Additional tax liability may result in other jurisdictions depending on the tax criteria applied and whether, for example, taxes paid in one jurisdiction are creditable against any taxes owing in the other,[6] or are recognized in the cost base of assets for income tax purposes in the other jurisdiction.[7] This paper examines these issues in a Canadian context.[8]

The paper begins with a brief overview of the inheritance, estate or other taxes levied on death in 42 surveyed countries[9] and how the application of these taxes can lead to multiple layers of tax liability for Canadians. A discussion of common factors used in determining tax liability such as the taxable event, tax rates, exemptions, deductions and tax jurisdiction issues follows as Part II. The purpose is to alert advisors to the most common forms of tax liability on death in jurisdiction other than Canada and the jurisdictional basis for levying the applicable tax — typically the domicile or residence of the

5. Wealth tax is levied on the value of the assets on an annual basis and often replaces tax on death. The taxable event for inheritance tax (enrichment) or estate tax (transfer of the estate) is different from that of income tax (realization of income) and wealth tax (ownership), which affect different taxable persons.
6. In order to avoid double or multiple taxation some countries concluded tax treaties for the avoidance of double taxation on estate, inheritance and sometimes also gift taxes. In spite of the existence of the 1982 OECD Model Convention, there are very few treaties on the avoidance of double taxation on estate, inheritance and gift taxes. Countries may apply unilateral measures to avoid this double taxation; however, in most cases this does not solve the problem(s).
7. For example, will taxes paid in another jurisdiction be recognized in Canada by a step up in the cost base of assets transferred to the Canadian heirs?
8. The data provided is based in large part on material compiled for a Conference in Rome in 2010 entitled “Death As A Taxable Event and Its International Ramifications”, at which the writer served as a panelist. Some 42 countries provided detailed information about the operation of their respective tax systems on death. See *Death as a Taxable Event and its International Ramifications*, vol. 95B (*Cahiers de Droit Fiscal International*, 2010). It has been updated in the examples to reflect 2011 tax rates.
9. Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Chinese Taipei, Colombia, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Israel, Italy, Japan, Korea, Luxembourg, Mexico, New Zealand, Norway, Peru, Poland, Portugal, Russia, Serbia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, Ukraine, the United States, Uruguay and Venezuela.

deceased or the heirs or the situs of the assets. The discussion will also assist advisors in identifying the questions they may want to ask clients when devising an estate plan that includes non-resident beneficiaries or assets located outside of Canada.

Part III of the paper consists of a series of hypotheticals. These include a hypothetical involving a Canadian taxpayer, German assets, and heirs together with a more detailed discussion of the tax issues that will arise when both Canada and Germany impose tax liability as a consequence of a death. Its purpose is to be illustrative only. However, the framework provided for the discussion and the issues that arise will be typical of many multi-jurisdictional estates, in particular those involving European immigrants, heirs or assets. These should be considerable in number. According to the 2006 census previously mentioned, newcomers born in Europe made up the second-largest group (16.1%) of recent immigrants. By 1971, they accounted for 61.6% of newcomers to Canada.[10] Part III continues the hypothetical and compares the outcome assuming the assets or heirs are located in Chile or Argentina.

The paper concludes with a discussion of potential tax treaty relief and some thoughts on avoiding some of the most onerous aspects of multiple taxation on death.

Part I. Taxes on Death

Most developed countries and many developing countries impose taxes on the death of an individual.[11] The most common transfer taxes found in the surveyed tax jurisdictions include:

- Estate tax (ET). This tax is usually levied on the total wealth transferred as a result of death (subject to certain exemptions). The rate of tax is largely governed by the size of the estate.[12]
- Inheritance tax or succession duty (IHT). This tax paid is generally governed by the amount received by the beneficiary.[13]

10. Statistics Canada, *op. cit.*, footnote 1.
11. Exceptions include India and Argentina (except the Argentinean province of Buenos Aires).
12. For example, Chile, South Africa, Graubünden and Solothurn Cantons in Switzerland, and the United States) apply an estate tax that is levied on the estate, which becomes a taxable person by virtue of the mere *mortis causa* transfer. The United Kingdom also applies an estate tax but it is called an inheritance tax. The estate tax is considered to be administratively the simplest because it is based on the value of the estate.
13. For example, Chile, Croatia, Finland, France, Greece, Hungary, Italy, the Netherlands, Norway, Poland, Venezuela, all Cantons of Switzerland (except Graubünden and Solothurn, which apply an estate tax and Schwyz, which

- Accessions tax (ACT).[14] The tax is imposed on the recipient of gifts and bequests. The rate of tax is governed by the total amount received from all such sources, usually on a lifetime basis;[15] and
- Combination. In some countries the tax levied on death includes features of both estate tax and inheritance tax. The beneficiaries are the taxable persons, but the rate is under certain circumstances determined taking into account the overall value of the estate of the deceased person.[16]
- Income tax. A few countries charge ordinary income taxes (or capital gain taxes when such taxes are levied separately) based on the deemed gain accrued on assets that are transferred by virtue of the succession.[17]

Most countries, including Canada, also impose a gift tax based on the transfer of wealth during the life of a donor. This is usually intended to counter attempts to avoid tax on death.

(a) The Problem of Multiple Layers of Taxation

The majority of countries in the survey group impose either an inheritance tax or an estate tax.[18] As a result, when planning for the deemed disposition that occurs on the death of a Canadian tax resident, and assuming the assets or heirs are in such a jurisdiction, close attention should be paid to the interaction of the applicable inheritance and estate taxes in that jurisdiction with the Canadian tax laws.

For example, assume the deceased is a Canadian tax resident who owns rental property situated in the United Kingdom. On death the

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has no death taxes), the Czech Republic, and Luxembourg. Heirs are liable to tax on the value of the portion of the estate received regardless of the overall value of the estate.

14. Accessions tax, although administratively more difficult to implement, are often viewed as more equitable because they take into account the circumstances of the recipient.
15. See for example Austria and Ireland.
16. See for example Belgium, Chinese Taipei, Korea, and Denmark.
17. For example Russia and Ukraine. Other jurisdictions apply income tax under special circumstances. For example, a *mortis causa* transfer triggers either estate tax (or an inheritance tax) and capital gains tax in South Africa, the United Kingdom (when the deceased owned offshore accumulation funds that for income tax purposes generate income and not gains). In Australia, the transmission of assets on death is a taxable event for income tax purposes but exemptions and rollover rules ensure that no tax is levied in most cases.
18. In the survey group, 26 countries out of 42 apply estate or inheritance taxes.

taxpayer is deemed to have disposed of the asset immediately prior to death at fair market value for Canadian income tax purposes. The United Kingdom will also impose an estate tax (referred to in the United Kingdom as an inheritance tax) based on the fair market value of the Canadian's rental property situated in the United Kingdom. Because the tax is not an income or profits tax for Canadian tax purposes,[19] there is no unilateral tax relief provided in Canada for the inheritance tax paid in the United Kingdom. As discussed below, there is also no relief provided under Canada's tax treaty with the United Kingdom, again because the tax imposed by the United Kingdom is not an income or profits tax.[20]

Triple tax may also arise if the heir, the assets, and the deceased are each in a different jurisdiction. Assume, for example, that the deceased was resident in Canada, the assets consist of United States stocks, and the beneficiary, a married daughter, lives in Germany. On the death of the Canadian resident, all three countries would impose tax. Canada would impose an income tax on the capital gain based on the deemed disposition rules on death. The United States would levy an estate tax the value of United States-situs property, and Germany would impose an inheritance tax on the daughter who inherits the U.S. stocks.[21]

The Canadian heirs of non-residents who bequeath them taxable Canadian property[22] may also find the property subject to multiple

19. Generally, subsec.126(1) of the *ITA* provides a tax credit in Canada for "income or profits tax" on non-business income paid to a foreign government and subsec. 126(2) provides a tax credit for "income or profits tax" on business income paid to a foreign government. As an alternative to claiming a subsec. 126(1) foreign tax credit, the *ITA* also permits, pursuant to subsec. 20(12), "income or profits tax" on non-business income to be deducted in computing a taxpayer's income.
20. The exception is the treaties with France and the United States.
21. See discussion, *infra*, part III Example 1.
22. *ITA*, *supra*, footnote 3. "Taxable Canadian property" for the purpose of para. 2(3)(c) is defined in subsec. 248(1), *inter alia*, as follows: real property in Canada, capital property used in carrying on a business (other than an insurance business or ships and aircraft used principally in international traffic and personal property pertaining to their operation in some circumstances) in Canada, capital property that is designated insurance property of a non-resident insure a share in a corporation listed on a prescribed stock exchange, or a share of the capital stock of a mutual fund corporation, if the 25% ownership test described in para. (f) of the definition "taxable Canadian property" is met, a capital interest in a trust resident in Canada (other than a unit trust), a unit of a unit trust resident in Canada (other than a mutual fund trust), an interest in or option in respect of a property described in any of the above paragraphs, a Canadian resource property, a timber resource property, an income interest in a trust resident in

layers of tax. Non-residents are subject to Canada's deemed disposition rules on death[23] to the extent that they own taxable Canadian property (other than treaty-protected property).[24] In general this will include real property situated in Canada, Canadian resource property, timber resource property, shares, partnership interests or interests in trusts whose value is derived from such property, options in respect of such property and under some treaties, any property used in carrying on a business in Canada.[25] This same property may also be subject to inheritance or estate tax in the tax jurisdiction of the non-resident deceased.

Canada, a right to a share of the income or loss under an agreement referred to in para. 96(1.1)(a) (retired partnership interest), and a life insurance policy in Canada. It also includes shares of private corporations that derived their value principally from real property situated in Canada, Canadian resource property, or timber resource property at any time during the 60-month period preceding the disposition. Shares of private Canadian corporations were formerly considered to be taxable Canadian property. They are excluded after April 27, 2010 provided their value is not based on other taxable Canadian property. This exclusion also applies to other interests including interests in partnerships or trusts.

23. A person who is not resident in Canada may be subject to tax under Part I or Part XIII of the *ITA*.
24. Treaty protected property would include most taxable Canadian property other than direct or indirect interests in real property. On the death of a non-resident treaty protected taxable Canadian property will be subject to the Canadian deemed disposition rules but exempt from tax in Canada under the capital gain or alienation provisions of the applicable tax treaty. This is not always the case. For example, there are some treaty countries whose residents will not be exempt from Canadian tax on capital gains from the disposition of taxable Canadian property other than real property. For example, Australia and New Zealand do not have capital gains articles in their Canadian treaties. The Canada-China treaty reverses typical treaty practice and gives the source country rather than the residence country the right to tax capital gains. For a discussion of this issue see Michael Cadesky, "The Multijurisdictional Estate: Selected Canadian Income Tax Issues," Report of Proceedings of Fifty-Eighth Tax Conference, 2006 Tax Conference (Toronto: Canadian Tax Foundation, 2007), 30:1-17.
25. See for example art. XII(2) of the *Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland: For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains*, S.C. 1980-81-82-83, c. 44 as amended. It may also include shares of private corporations other interests including interests in partnerships or trusts that derived their value principally from certain real property situated in Canada, at any time during the 60-month period preceding the disposition. See discussion, *supra*, at footnote 22.

(b) The Role of Tax Treaties

Canada is a signatory to more than 90 tax treaties. Do these provide relief against double taxation on death? In general the answer is no. Canada's tax treaties apply to taxes on income and capital, but not to wealth, inheritance, estate, or gift taxes except, as discussed below, in the case of France and the United States. In short, Canada does not provide tax relief to its residents, or the estates of deceased residents, who have been subject to wealth, inheritance, estate, or gift taxes in another Contracting State.

The Canada Revenue Agency (CRA) has confirmed this position under the treaties concluded with Denmark[26] and the United Kingdom.[27] It follows that the same result will occur under all of Canada's other tax treaties, which are based on similar wording.

The Canada-United States[28] and the Canada-France[29] income tax treaties provide an exception to the general rule that no tax relief will be provided in Canada for taxes other than income or profits tax paid as a consequence of death. The Canada-United States Treaty allows a credit against Canadian income tax payable by Canadian residents and conjugal trusts for United States Federal estate and state estate or inheritance taxes paid on United States situs property.[30] Double taxation, however, is not fully relieved as the credit cannot be claimed against Canadian provincial income taxes.

A similar provision is included in the Canada-France Treaty;[31] that is Canada provides a credit for inheritance tax payable in France that forms part of the estate of a deceased Canadian taxpayer. As France levies an inheritance tax but not an income tax upon death, the treaty provides for a deduction against French inheritance tax levied on any French resident for income taxes paid in Canada on Canadian situs assets. Interestingly, the deduction is also granted by France also against inheritance tax levied on Canadian residents for French situs property.

26. Canada Revenue Agency, Technical Interpretation 2005-0154081E5 (November 10, 2005).
27. Canada Revenue Agency, Technical Interpretation 2002-0161767 (December 20, 2002).
28. *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital*, S.C. 1984, c. 20, Part I (entered into force August 16, 1984) as amended (*Canada-US Tax Treaty*).
29. *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*, S.C. 1974-75-76, c. 104, Part I (entered into force July 29, 1976) (*Canada-France Treaty*).
30. *Canada-US Treaty*, *op. cit.*, footnote 28, art. XXIXB, at para 6.
31. *Canada-France Treaty*, *op. cit.*, footnote 29, art. 23.

As should be apparent from the discussion, there is substantial opportunity for multiple layers of taxation on death and very limited tax relief in Canada. An understanding of the basic principles underlying tax liability in other jurisdictions is thus an integral step to effective estate planning for Canadians.

Part II. Common Trends in Taxes Levied on Death in Other Jurisdictions

The survey of 42 countries reveals that almost all impose some form of tax on death[32] As discussed, a majority of these impose either an inheritance or estate tax (see sample chart below). A few, for example Russia and the Ukraine, impose an income tax or tax the capital gain on assets transferred by virtue of the succession. One country, South Africa, boasts both an in inheritance tax and a capital gains tax on assets that fall into the estate, resulting in a hefty level of tax liability. The common thread for all countries is that death triggers the tax liability for either the heir or the estate or both.

System	**Country**
Countries that impose Inheritance Tax. Heirs are liable to tax by virtue of their increased wealth, regardless of the size of the estate. The tax rate may vary depending on the relationship of the heir to the deceased and the value of the transferred assets.	Croatia, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Luxemburg, Netherlands, Norway, Poland, Serbia, Spain, Switzerland (most cantons), Venezuela.
Countries that apply Estate Tax. Taxes levied on the estate, generally based on the size of the estate.	Brazil, Chile, Chinese Taipei, South Africa, Switzerland (some cantons), United States, United Kingdom (called an inheritance tax).
Countries that contain aspects of both Inheritance and Estate Tax. The beneficiaries are taxable, but the rate is determined based on the value of the deceased's estate.	Belgium, Chinese Taipei, Croatia, Denmark, Korea.

32. Some of the exceptions include Argentina (except Buenos Aires) and India.

System	Country
Countries that impose inheritance or gift tax and tax on the deceased's capital gains.	Hungary, South Africa.
Countries that may tax the capital gain on death.	Australia, Israel, New Zealand, Sweden.
Countries that levy no tax on death.	Australia (largely through rollovers until disposition),[33] Austria (after 31 July 2008), Estonia, India, Mexico, Peru, Portugal,[34] Russia.

(a) Tax Rates, Exemptions and Deductions

The tax rates applied by each country are generally progressive and tied to the degree of kinship between the beneficiary/heir and the deceased. In general the lowest rates apply to a spouse (or in some jurisdictions, a common law partner).[35] As seen below, countries that impose inheritance or estate tax may also grant a full or partial exemption for the deceased's spouse (or in some cases cohabitants) or other identified categories of beneficiaries.

Exemption	Country
Full exemption for deceased's spouse.	Croatia, Czech Republic, Denmark, France, Luxembourg, Norway, Poland (if European Union national), Serbia, South Africa, United Kingdom, United States (if United States citizen).

33. A tax on the capital gain may be levied on the deceased's estate if the rollover conditions are not met, *e.g.*, the asset is transferred to a non-resident beneficiary and the asset is not taxable Australian taxable property (land owned in France by a deceased Australian and bequeathed to a Canadian taxpayer).
34. Transfer may be subject to Stamp Duties. See *Death as a Taxable Event and its International Ramifications*, *op. cit.*, footnote 8, at p. 643.
35. See for example the Czech Republic, where heirs are classified in three groups based on their relationship to the deceased: direct family members (parents and children) and spouses, secondary relatives (siblings, nephews, nieces, aunts, uncles) and cohabitants, and other individuals and organizations.

Exemption	Country
Partial Exemption for deceased's spouse.	Chile, Chinese Taipei, Finland, Germany, Hungary, Italy, Japan, Korea, the Netherlands, Spain, Switzerland, Venezuela.
Cohabitants (partners equated with spouses).	Finland, Germany, Luxembourg, the Netherlands, Norway, France, Switzerland some countries (include same sex partners).
Disabled or aged beneficiaries.	Korea

Many countries also exempt the principal residence of the deceased and certain cultural assets.[36] It is also common to find exemptions for family-owned and closely held businesses.[37] The rules for such exemptions vary widely, ranging from a requirement that the deceased must be the sole owner or in some cases a majority owner in an active business, to a more moderate requirement that the deceased hold only a minority interest provided related persons own the remaining shares.[38]

Deductions are generally available in calculating the size of the estate for liabilities of the deceased including bank loans, mortgages, tax debts, and costs incurred with respect to the estate including funeral expenses.[39]

An issue of particular concern for estate planners will be the basis for levying tax. Attention should be focused on both the valuation method used and the point in time that value is calculated. The approach to valuation among countries appears to vary widely even though a country may express the amount as market value. The time at which valuation occurs may also vary widely. The chart below provides a sampling.

36. See for example Chinese Taipei, Germany and Italy.
37. See for example Belgium, Germany, Italy, the Netherlands and United Kingdom.
38. See for example Germany, where the deceased must hold more than 25% of the corporation's share capital. In Italy, where a stake in an Italian resident company is transferred, an exemption will apply only where the control (*i.e.*, more than 50% of the voting rights) is acquired or reached by the heir. In contrast if the business is not incorporated no minimum equity ownership may be required.
39. See for example France, Japan, and United Kingdom.

Asset	Valuation Method or Time	Country
Immovable Property	Cadastral Value[40]	Brazil, Chile, Chinese Taipei, Italy, Switzerland (Vand, Valais).
Listed Shares	Date of death, date prior to death, average over defined period.	Belgium, Chile, Greece.
Non-Listed Shares	FMV-based on net asset value on last approved balance sheet (excludes goodwill & latent gains).	Italy
	Permits a 40% reduction on first NOK 10 Million.	Norway

(b) Tax Jurisdiction

Another important issue in evaluating overall tax liability is the basis for or jurisdiction to tax used by the country where either the heir or assets are situated. This will include determining whether a country imposes tax on a territorial or worldwide basis, whether a personal nexus is required, how the situs of assets (or debts) is determined and any special provisions with respect to immigration and emigration. The following considers each of these factors.

As the chart below illustrates, it is important to determine on what basis a country levies tax on death as well as on what assets it levies that tax. A threshold issue will be whether the tax is levied on a territorial or worldwide basis and when, and whether there are any exemptions from the relevant tax for foreign assets. Many countries that otherwise tax on a worldwide basis, for example, exempt foreign immovable property from inheritance[41] or estate tax or provide a credit against inheritance or estate tax for foreign taxes paid.[42]

40. An administrative value based on a survey and valuation of real estate in a country or region which is used as a base or a point of reference for certain actions taken by the public administration, such as taxation.
41. See for example, Hungary; *Death as a Taxable Event and its International Ramifications*, *op. cit.*, footnote 8, at p. 431.
42. See for example, Belgium; *Death as a Taxable Event and its International Ramifications*, *op. cit.*, footnote 8, at p. 156.

System	Tax result	Country	Exemptions
Territorial (IHT and ET)	IHT or ET levied solely on assets situated in the territory of the state regardless of nationality, residence or domicile of either the deceased person or the heirs or legatees.	Venezuela (IHT)	
Worldwide Personal nexus satisfied (IHT and ET)	The scope of application of IHT or ET relies on personal nexus with deceased person, heir, or legatee. Either entire estate or portion attributable to beneficiary taxable on a worldwide basis, subject to exemptions.	Argentina (Buenos Aires), Croatia, Czech Republic, Greece, Hungary, Luxemburg, Switzerland.	Foreign Immovable property (FIP).
		Norway	FIP and movable assets pertaining to a foreign permanent establishment (PE) that are subject to tax in the foreign jurisdiction.
Worldwide (personal nexus NOT satisfied- IHT and ET)	Taxing rights are generally exercised limited to assets situated in the territory of the state (similar to worldwide system of taxation adopted by many countries for income tax purposes).	Netherlands (after 2010)	No taxation of domestic situs assets.
		Belgium, Serbia, Luxemburg, Finland.	Tax only some domestic assets such as immovable property.

System	Tax result	Country	Exemptions
		Denmark, Norway.	Tax only immovable and movable assets pertaining to a PE.
Worldwide (income tax)	Tax on the gains upon death levied on worldwide or territorial taxation depending on whether the personal nexus is satisfied.	Canada, Australia, Israel.	

(c) Personal Nexus

Many countries use personal nexus as a criterion for imposing tax. A second important question will be what criteria are used to determine personal nexus and in particular whose personal nexus: the deceased's, the heir's or both? It will also be important to determine whether the definitions for establishing personal nexus such as residence and domicile could result in more than one country claiming jurisdiction to tax.[43] Finally, it will be important to determine whether the criteria for determining personal nexus such as residence or domicile are extended, for example on emigration.[44]

43. "Residence" and "domicile" are commonly used to establish personal nexus. The meaning of these terms varies widely across jurisdictions. For example, "domicile" may refer to the place where a person has a permanent home, thus requiring the intention to remain in that place permanently or indefinitely (such as in the United Kingdom, United States, and Norway), or to the place where the person habitually resides, the intention to reside there permanently or indefinitely being irrelevant (such as in France). See *Death as a Taxable Event and its International Ramifications*, *op. cit*., footnote 8, at p. 41.
44. Some countries retain the taxing rights for IHT or ET purposes for some years following the loss of the personal nexus; examples include Germany, Chinese Taipei, the Netherlands, United States, and United Kingdom. Specifically, Germany extends its worldwide taxation over the five years following the transfer of residence abroad by a German national and the Netherlands levies IHT if a Dutch national dies within 10 years after emigration.

(i) Personal Nexus-What criteria?

Criteria	Country
Permanent address	Czech Republic, Poland (permanent residence).
Habitual abode	Croatia
Nationality	Chinese Taipei, Czech Republic, Greece, Hungary, Japan, the Netherlands, Norway, Poland, United States.
Residence	Belgium, Chinese Taipei, Croatia, Denmark, Finland, Germany,[45] Hungary, Italy, Korea, Luxembourg, the Netherlands, Serbia, South Africa, Spain, United States.
Domicile	Brazil, Chile, France, Germany, Greece, Japan, Norway, Switzerland, United Kingdom.
Other criteria? Citizenship	Hungary, Croatia, Germany, Greece, the Netherlands, Norway, Japan, United States.[46]
Location of Wealth	Luxembourg,[47] Germany (domestic assets)

45. In Germany, residence is broadly defined to include the possession of a housing space, and is independent of time spent in Germany during a year.
46. In the United States, the former long-term residence of the deceased coupled with United States citizenship or the residence of the heir is by itself a nexus leading to the application of IHT on foreign assets (section 2801 IRC).
47. The location of wealth is the place from which a person administers and supervises his/her wealth.

(ii) Whose personal nexus?

Nexus	Country
Tax liability is based on personal nexus with the deceased	Belgium, Chile, Chinese Taipei, Croatia, Czech Republic, Denmark, Greece, Italy, Korea, Luxembourg, the Netherlands, Norway, South Africa, Switzerland, United Kingdom, United States.
Tax liability is based on personal nexus of the heir or donee	Argentina, Croatia, Hungary, Japan, Serbia, Spain.
Tax liability is based on personal nexus of both	Brazil, Finland, France, Germany.

If tax liability is based on the personal nexus of the heir, which is generally the case with an inheritance tax, the heir will be required to pay the tax regardless of the location of the deceased or the assets. Some countries restrict this tax to moveable property only, for example Hungary, and may provide an exemption if the asset has been subjected to tax in the jurisdiction of situs.

(d) Situs of assets

Most countries claim the right to tax on the disposition or acquisition of assets located within the country. Like Canada, which claims the right to tax non-residents on the disposition of taxable Canadian property, many countries claim the right to tax on the disposition or acquisition of assets by a non-resident based on the situs of the asset. Generally, only the assets of a non-resident that are "situated" within a particular country are subject to the relevant estate tax of the country. Most commonly, situs assets will include real and tangible personal property physically located within the country.

Assuming that the situs of the asset is used by the country as a criterion to tax, it will be important to determine how the situs of assets is determined. In the case of real property this is generally a simple question to answer — the situs of the asset is where the real property is located. In the case of moveable property a number of countries rely on private international law rules to determine situs.[48]

48. For example the Czech Republic, Finland, South Africa, Finland, Spain and the United Kingdom.

Double taxation issues may arise because countries determine the situs assets using different criteria. As a result, an asset may be regarded as located in more than one jurisdiction. Based on the surveys, the assets that appear to be most vulnerable to overlapping situs claims are copyrights,[49] and shares, bonds and other securities or debt issued by a person resident in a country.[50]

Part III. How Does the Application of These Taxes Impact a Canadian Taxpayer?

The Case of Germany (Inheritance Tax)

The following examples discuss the tax liability of a deceased Canadian tax resident with assets in Germany and/or heirs in Germany and the tax liability of a Canadian heir to German situs property.[51] The examples provide an outline of many of the general issues that should be addressed when considering the total tax liability that a Canadian tax resident and his or her heirs may face as a consequence of death when combined with a jurisdiction that imposes inheritance tax.

EXAMPLE 1

Christophe, a Canadian tax resident, owns German situs real property valued at €1 Million (approximately CDN$1.4 million). He would like to leave the property to his favorite niece, a 30-year-old German tax resident (a 'German heir'). Christophe inherited the property from his German resident grandparents a decade ago when it was worth €500,000. It has been in the family for nearly three centuries. The property is currently rented out as a holiday home. He

49. Reference is made to either the state in which the literary work is published or the state in which the copyright may be enforced (the Czech Republic) or the state in which the publication of the literary work was handled (Japan).
50. Greece looks to where the issuer has its place of effective management, the Czech Republic looks to the registered seat or place of management, Japan to the head office or principal office, Italy to the main object or seat of administration or legal seat and the United States to the place of incorporation. In contrast, States relying on private international law rules often look to whether the transfer of ownership must be registered within the state (South Africa), or to where the transfer of title to the security must be completed (United Kingdom).
51. I would like to acknowledge and thank Sebastian Wolski, B.Sc., for his research assistance and commentary.

requests general information about both the potential German and Canadian tax consequences of his proposed gift.

(a) German Tax Consequences

In general terms inheritance tax is due in Germany if the donor (the deceased) is resident in Germany. German inheritance tax is due on all transferred assets, whether located inside or outside Germany. Tax liability arises because the deceased is resident or domiciled in Germany. Resident means that the person has a residence or usual domicile in Germany. Residence is deemed if the deceased has unlimited access to accommodation. It is not necessary that he or she is the owner or tenant of the property. A taxpayer has his usual domicile in Germany if he stays continuously for more than six months in Germany. Short interruptions are not taken into account in determining this six-month period.

German inheritance tax is also due if the heir is resident or has his usual domicile in Germany. All assets inherited by the resident heir are subject to German inheritance tax, even if the donor is not resident in Germany at the time of the gift and that the assets are not German domestic property.

If neither the donor nor the heir is resident in Germany, only 'domestic assets' located in Germany are subject to inheritance tax. Domestic assets include, for example, German real property or stakes in German businesses.

Under an inheritance tax system, the heirs are liable for the tax due. The taxable event is the transfer of property on death. The transferee must inform the tax authorities of the acquisition within three months.[52] Christophe's niece will be liable for any tax due.

(b) Tax Rates

The inheritance tax rate in Germany depends both on how closely the heir is related to the deceased person and the value of the transferred assets. The general rule is that the closer the relationship of the heir to the deceased the lower the tax. The tax rate ranges from 7 to 50% after applicable allowances or exemptions are claimed (discussed below). The tax rate is determined based on the Tax Class of the heir. There are three tax classes. Tax Class I includes spouses, children, stepchildren, grandchildren, great grandchildren, parents, and grandparents. Tax Class II consists of brothers, sisters, nephews,

52. A gift, *inter vivos*, is also a taxable event for purposes of German inheritance tax.

nieces, stepparents, sons-in-law, daughters-in-law, parent's in-law, and divorced spouses. In the case of gifts, Tax Class II includes parents and grandparents. All other persons including legal entities fall into Tax Class III.

Christophe's niece falls into Class II. The rate for that class varies from 15 to 43% of the value of the property.[53] Inheritance tax is also due on all assets transferred to the German niece by Christophe, not just on the real property in Germany that she may receive from him.

Summary of Applicable Tax Rates

Value of acquisitioned assets up to . . . €	Tax rate in per cent for heirs in tax class . . .		
	I	II	III
75,000*	7	15	30
300,000	11	20	30
600,000	15	25	30
6,000,000	19	30	30
13,000,000	23	35	50
26,000,000	27	40	50
> 26,000,000	30	43	50

* Equals Approximately CDN$100,000.

The tax rates are not progressive but rather based on the value of the acquisition calculated at the time of the acquisition. They are applied after personal allowances have been claimed on the value of the transferred property. Some property is also exempt from inheritance tax under German law. Each of these matters is discussed further below.

(c) Personal Allowances

The personal allowances vary widely ranging from a €20,000 allowance for Christophe's niece, who falls within Class II, to a €500,000 allowance for a spouse. Generally, the highest personal allowances are restricted to Class I heirs with children eligible for a €400,000 allowance, grandchildren to €200,000 and other Class I

53. Effective from January 1, 2010.

heirs such as parents and grandparents to €100,000 each. The lowest rate of €20,000 applies to Class II and III heirs. Additional allowances may apply to Class I heirs depending on their age. For example, a child in Class I who is under the age of five is eligible for a further allowance of €52,000.

(d) Exemptions

A number of special exemptions may also apply. The most generous of these also appear to apply to Class I heirs. For example, they receive a special exemption for household property of up to €41,000 and for other moveable assets of up to €12,000. In contrast, persons in Class II, such as Christophe's niece and those in Class III are limited to an exemption of €12,000.

(e) Valuation

An important factor in calculating liability for inheritance tax will be the valuation method used. The valuation of German assets for inheritance tax purposes has been a major issue for some years and the subject to significant reforms. As of 2009, the value of transferred assets is generally the fair market value. There are special exceptions. Real estate, for example, is valued according to its use. For family homes and condominiums a reference value is used which comes from a collection of sales prices.[54] However, if the property is used for commercial purposes a different valuation rule applies. Assuming Christophe's German property is rented out for more than 80% of the time, it will be valued based on its capitalized earnings value. Since this real property is within the EU or the EEA only 90% of the value will be taxed.[55]

(f) Income Tax Liability

Christophe should also consider a number of other issues. For example: does, the death of a non-resident who owns German real property result in income tax liability or just inheritance tax in Germany? In the case of Germany, only inheritance tax is due. Liability for income tax on Christophe's death is restricted to Canada. Capital gains tax may arise for German income tax purposes when the asset is disposed of by Christophe's niece.[56]

54. *Death as a Taxable Event and its International Ramifications*, *op. cit*., footnote 8, at p. 391.
55. See § 13c Abs. 1 ErbStG. (section 23 subsection 1 *German Inheritance Tax Act*).

(g) Cost Base

Does the German heir get a step up in the cost base of the real property based on the inheritance tax paid for income tax purposes? The answer to this question in the case of Germany is no. Inheritance tax is not treated as consideration for income tax purposes; it is a liability arising from the succession.

(h) Canadian Estate

Is Christophe potentially liable for German inheritance tax on other Canadian assets? The answer to this question depends on whether Christophe is viewed as a German tax resident because he has a secondary home in Germany. Under German law, inheritance and gift taxes as well as income tax are applied on a worldwide basis. Taxes are imposed if a person has a residence or domicile in Germany. Residence is defined very broadly as the possession of housing space. Housing space is a residence if the owner intends to maintain and use it. It is sufficient if the resident occasionally returns to the accommodation. It is not necessary that the accommodation be the primary residence of the person; it can be a secondary home. Christophe is currently renting out the German property. It would appear he would be wise to continue that practice and not to use it himself for family holidays. If Christophe has a residence in Germany at the time of his death, German inheritance tax will be imposed on a worldwide basis. Worldwide taxation applies to all foreign assets. Christophe is at risk of subjecting his Canadian assets to German inheritance tax.

(i) Canadian Tax Consequences

For Canadian tax purposes Christophe will be liable to income tax under the Canadian deemed disposition rules both on his worldwide income and with respect to his worldwide assets. He will therefore be deemed to have disposed of the German situs real property immediately prior to death at its fair market value for income tax purposes. Under the Canada-German Tax Treaty,[57] Germany has

56. For immovable and movable property there is an exception if the period of time between the procurement and the sale exceeds 10 years (section 23 *German Income Tax Act*). For inheritances and gifts the holding period of the deceased (donor) and the heir (donee) are added together. See *Death as a Taxable Event and its International Ramifications*, *op. cit.*, footnote 8, at p. 53.

57. *Agreement Between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation With Respect to Taxes on Income and Certain*

the right to tax gains on the disposition of real property located in Germany. Any income tax payable in Germany as a result of Christophe's death would be creditable against the Canadian tax due. There will be none.

Germany does not treat death as a taxable event for income tax purposes. As a result the capital gain on the German real property is taxable only in Canada. Unfortunately there is no mechanism in the Canada-German Tax Treaty or under German domestic law to reflect the fact that Canadian tax was paid on the asset for German income tax purposes. As a result, it appears the same gain that was subject to income tax on Christophe's death under the deemed disposition rules in Canada may be subject to income tax in Germany when the land is actually disposed of.[58]

Any inheritance tax paid by Christophe's niece may not be claimed against Canadian tax due.

Christophe must also determine the cost base of the German land for Canadian tax purposes. Recall that the property was inherited by Christophe from his German grandparents who for all tax purposes remained residents of Germany.

Can one assume that the cost base of the land for Canadian income tax purposes is its value at the time he inherited; that is the Canadian equivalent of €500,000? One would hope so. However some caution must be expressed. In a 2000 Technical Interpretation[59] the Canada Revenue Agency opined that the cost base of publicly traded shares gifted by a deceased from the United Kingdom to a Canadian heir was the shares' adjusted cost base. According to the CRA, the provisions in subsec. 70(5), which would ordinarily apply to increase the cost base of the shares to fair market value, did not apply as the shares were not subject to the Canadian deemed disposition rules. Canada was therefore entitled to tax the capital gain that accrued on the shares while they were owned by the United Kingdom resident. This remained the CRA's administrative position for almost two years until the CRA changed its mind[60] and agreed to recognize a cost base in the inherited shares equal to their fair market value at the time of acquisition. Notwithstanding that the CRA's revised position is good news for Christophe, the fact remains that there are no statutory provisions to provide this relief if there is another reversal. Recalling

Other Taxes, the Prevention of Fiscal Evasion and the Assistance in Tax Matters, S.C. 2001, c. 30, Part 8, art. XIII.

58. See *supra*, footnote 56. There will be no capital gains tax in Germany if the property is held for more than 10 years.

59. Canada Revenue Agency, Technical Interpretation 2000-0044165.

60. Canada Revenue Agency, Technical Interpretation 2002-0155735.

that the land has been in the family for almost three centuries, this could lead to a very hefty tax bill.

In summary there are two elements of double taxation with respect to the German real property that Christophe would like to leave to his German niece. The first arises with respect to the tax on the capital gain on the land that he must pay in Canada and that his niece may also be liable to pay tax on in Germany. The second arises with respect to the inheritance tax on the gift of the land that Christophe's niece must pay in Germany.[61]

EXAMPLE 2

In this example assume that Christophe remains the Canadian resident taxpayer who owns the German situs real property. Instead of leaving the property to his German niece as described in Example 1 above, Christophe has decided to leave the property to his niece who now lives in Canada (a Canadian heir).

(a) German Tax Consequences

As discussed, Germany has a worldwide inheritance tax system. Assuming Christophe remains a non-resident for German inheritance tax purposes, liability for inheritance tax is limited to assets situated in Germany. These include:[62]

- Agricultural and forestry property that is located in Germany;
- Any business property located in Germany;
- Immovable property located in Germany;
- Ten per cent shareholdings in corporations which have their legal seat or their place of management in Germany;
- Inventions, samples and topographies that are registered in Germany;
- Property that is rented or leased to a domestic business unit operation;
- Mortgage loans for domestic property or domestic ships;
- Profit claims of a silent partner or claims from a profit participating loan if the debtor has a residence, domicile, legal seat or place of management in Germany;

61. There will be some relief from double taxation in Germany. The Canadian tax on the capital gain is deductable in Germany as a 'liability arising from inheritance'. Consequently she would not pay the German inheritance tax based on the whole value of the legacy, but rather on the value of the legacy minus the Canadian tax paid.
62. *Death as a Taxable Event and its International Ramifications*, *op. cit*., footnote 8, at p. 396.

- The rights to use one of the above assets

Based on this list, it is clear that Christophe's property will be subject to German inheritance tax. Because the heir is a Canadian and not a German resident for inheritance tax purposes, German inheritance tax is due only on the assets situated in Germany. The applicable tax rate is the same as the rate calculated in Example 1 above assuming the heir remains one of Christophe's nieces and thus falls within Class II. Put differently, the applicable tax rate does not depend on the nationality or the tax residence of the heir, but rather on his or her relationship with the deceased.

(b) Canadian Tax Consequences

The Canadian tax consequences to Christophe remain the same. The German property will be subject to a deemed disposition on death under *ITA* subsec. 70(5).

Therefore, if the only property that Christophe plans to leave his niece is the German land it appears that the amount of inheritance tax due in Germany will not change regardless of whether he leaves the property to his Canadian or German niece. However, the income tax consequences on a subsequent disposition of the property will be further complicated by the potential liability of the Canadian heir to both German and Canadian income tax. If the Canadian niece disposes of the land she is taxable on her worldwide income, including any gain on the disposition. Germany also has the right to tax any gain under the Canada-German Tax Treaty because it is located there. The cost base of the land for Canadian tax purposes will be its fair market value determined under the provisions of *ITA* subsec. 70(5). Its tax cost for German tax purposes would be calculated independently under German domestic law. Any income tax payable in Germany on the disposition will be creditable against Canadian tax due. Any mismatch between the two systems may lead to double taxation.

EXAMPLE 3

In this example assume Christophe remains the Canadian resident taxpayer but instead owns Canadian situs real property and no German situs assets. He leaves the Canadian property to his German niece (German heir).

(a) German Tax Consequences

The tax consequences in Germany remain the same as they did in Example 1; that is, Christophe's niece will be liable to pay German inheritance tax on the value of the Canadian real property. This result occurs because for purposes of imposing German inheritance tax, the residence/domicile of the heir or legatee is relevant. Thus, notwithstanding that the deceased has a residence abroad and the land is located abroad in this example, and only the heir is resident in Germany, German inheritance tax is imposed on a worldwide basis. The only difference for purposes of German inheritance tax is that 100% of the value of the land will be subject to inheritance tax instead of 90% because the real property is in Canada.

(b) Canadian Tax Consequences

The Canadian tax consequences remain the same for Christophe. He will be subject to income tax under the deemed disposition rules on death and will be liable for tax on any gain. His niece will acquire the property for Canadian tax purposes at its fair market value. Under the Canada-Germany tax treaty, she will be liable for Canadian tax on any subsequent gain if she disposes of the property. She will also be subject to German income tax as Germany taxes its residents for income tax purposes on a worldwide basis.

EXAMPLE 4

In this example assume Christophe remains a Canadian resident taxpayer but instead owns Swiss situs real property. He leaves the Swiss property to his German niece (German heir).

(a) German Tax Consequences

The tax consequences in Germany remain the same as they did in Example 1; that is Christophe's niece will be liable to pay inheritance tax on the value of the Swiss real property because as a German resident she is subject to inheritance tax on worldwide assets. Again, 100% of the value will be taxed because the real property is in Switzerland.

(b) Canadian Tax Consequences

The Canadian tax consequences remain the same for Christophe. He will be subject to income tax under the deemed disposition rules on death and will be liable for tax in Canada on any gain.

(c) Swiss Tax Consequences

The Swiss real property may also be subject to estate tax in Switzerland. A number of Cantons in Switzerland levy estate taxes (including Graubünden and Solothurn). If this is the case, this will be a very heavily taxed disposition.

EXAMPLE 5

Assume that the deceased is a German tax resident who owns Canadian real property that he leaves to (a) a Canadian heir and (b) to a German heir.

(a) German Tax Consequences

Since the deceased is a German tax resident all his heirs have to pay German inheritance tax. The tax rate does not depend on nationality. One hundred per cent of the value will be taxed because the real property is in Canada and not within the EU or EEA.

(b) Canadian Tax Consequences

Because the real property is situated in Canada, it is subject to Canada's deemed disposition rules on death. These will apply to any taxable Canadian property owned by a non-resident on death. Both the Canadian and the German heirs may rely on the increase in value of the property as a result of the deemed disposition, for Canadian income tax purposes on any subsequent disposition.

The Case of Chile (Estate Tax)

The following examples discuss the tax liability of a deceased Canadian tax resident with assets in Chile and/or heirs in Chile, and the tax liability of a Canadian heir who receives Chilean situs property. It repeats the facts in Example 1 but replaces the German situs real property with a property or heir in Chile.

EXAMPLE 1

Manuel, a Canadian tax resident without children, owns Chilean situs real property with a fair market value of $385 Million Chilean pesos (approximately CND$1 million). He would like to leave the property to his favorite niece, a 30-year-old Chilean tax resident ('Chilean heir'). Manuel inherited the property from his Chilean resident grandparents a decade ago when it was worth

CND$500,000. It has been in the family for nearly three centuries. The property is currently rented out as a holiday home. He requests general information about both the potential Chilean and Canadian tax consequences of his proposed gift.

(a) Chilean Tax Consequences

Taxes on death in Chile are governed by the *Estate and Gift Tax Law*.[63] An estate tax is imposed upon the decedent's death. Under the Chilean territorial system of taxation the estate tax is levied based on a number of factors including the decedent's last domicile, location of the assets, origin of the resources used to acquire the assets,[64] and the decedent's nationality. Based on these criteria Manuel's estate is subject to estate taxes in Chile on assets situated within Chile, including the real property. This liability arises regardless of Manuel's nationality, residence or domicile, or that of the heir's.[65] Chile also levies estate tax on assets located abroad that belong to a foreigner if they were acquired with Chilean resources.

Under Chile's estate tax system, the tax due is calculated on the value of the gross estate after claiming appropriate deductions (*e.g.* funeral expenses) and exclusions. An exclusion is then provided for each individual that receives property. This, according to the National Report, "motivates individuals to distribute their assets to the largest possible number of persons".[66] Although the tax is levied on the gross estate of the decedent, the beneficiary is ultimately responsible for paying the tax due. It is due within two years of the death. Enforcement is simple; estate property cannot be sold until the estate tax has been paid. Chilean tax law therefore permits one beneficiary to pay all of the estate tax due and then sue the other beneficiaries for reimbursement.[67]

(b) Tax Rates

The estate tax rate in Chile depends both on how closely the heir is related to the deceased person and the value of the transferred assets.

63. *Estate and Gift Tax Law*, No 16,271.
64. Chilean estate tax is also due if the assets are located in Chile or abroad but were acquired with assets from Chile.
65. Article 14 of the Civil Code disposes that the laws of Chile are enforced on all inhabitants of the Republic, including foreigners, while article 16, paragraph 1 rules that goods situated in Chile are subject to Chilean law even if they belong to a foreigner not domiciled in Chile. See *Death as a Taxable Event and its International Ramifications*, *op. cit*., footnote 8, at p. 209.
66. *Death as a Taxable Event and its International Ramifications*, *ibid*., at p. 203.
67. *Ibid*., at p. 204.

The tax rate is progressive and ranges from 0 to 25% after applicable exemptions are claimed (discussed below). The tax rate is determined based on the relationship of the heir to the deceased. Spouses, parents, children, grand and great grandchildren, pay less estate tax than brothers, sisters, nephews, nieces, cousins, who in turn pay less tax than other non-relatives.

(c) Exemptions

The exclusion for estate tax is set at the Chilean peso equivalent of US$40,000 per "qualified heir". "Qualified heir" includes spouses, ascendants, and descendants. Therefore, if these individuals receive assets of up to US$40,000, no tax is due. If a qualified heir receives more than $40,000, a progressive tax rate ranging from 1% to 25% is applied. Brothers, sisters, nephews, nieces, cousins are limited to an exemption of US$4,000. They are also subject to 20% more tax than that applied to spouses, parents, and children, and so on. Non-relatives are subject to an additional 40% tax. Assuming a 1% estate tax rate for a spouse, this means that Manuel's niece will pay 1.2% and that other non-relatives will pay a rate of 1.4% on the amount of the gift in excess of the exemption.

(d) Valuation

An important factor in calculating liability for estate tax will be the valuation method used. The method to be applied is set out in the *Estate and Gift Tax Law*. Reference is made to fair market value but there are many exceptions. Of particular note for purposes of this discussion is the following pot pouri of valuation rules that may apply to real property:

- For immovable property: the fiscal value of the property, which is usually lower than the fair market value. However, if the property is purchased within three years of the decedent's death, the purchase price will be considered if higher than the fiscal value;
- For movable property: the fair market value. However, if the movable property is located within immovable property considered part of the estate, the heirs or donee can assume that the fair market value is 20% of the value of the real estate where the movable property is located;
- If within nine months of the decedent's death, assets belonging to the estate are subject to a public auction with third parties, the price paid at auction can be used;

- For assets located abroad, the IRS will determine the fair market value.[68]

Somewhat unusual valuation rules apply to business assets. It appears that for publicly traded stocks and bonds it is the average price over the last six months prior to the decedent's death. If the decedent or his heirs own more than 30% of a corporation, the IRS will determine the fair market value of those stocks. Because this rule does not apply to partnerships (LLPs) or limited companies (LLCs), the National report suggests that it can be easily avoided by transforming the corporation into a different kind of entity.[69]

(e) Other issues

Manuel should also consider a number of other issues. For example, does the death of a non-resident who owns Chilean real property result in income tax liability or just estate tax in Chile? In the case of Chile, only estate tax is due. Liability for income tax on Manuel's death is restricted to Canada. Capital gains tax may arise for Chilean income tax purposes when the asset is disposed of by Manuel's niece.[70]

Does the Chilean heir get a step up in the cost base of the real property based on the estate tax paid for income tax purposes? The answer to this question in the case of Chile is yes. For income tax purposes, when assets are received as a bequest a step up of the tax basis of the assets acquired after death is granted to the beneficiary. The new tax cost is based on the value of the asset for estate and gift tax purposes calculated under the valuation rules in the *Estate and Gift Tax Law*.

(f) Canadian Tax Consequences

For Canadian income tax purposes Manuel will be deemed to have disposed of the Chilean situs real property immediately prior to death at its fair market value. Under the Canada-Chilean Treaty[71] Chile has

68. *Ibid.*, pp. 205-206.
69. *Ibid.*
70. For immovable and movable property there is an exception if the period of time between the procurement and the sale exceeds 10 years (section 23 *Chilean Estate Tax Act*). For estates and gifts the holding period of the deceased (donor) and the heir (donee) are added together. See *Death as a Taxable Event and its International Ramifications*, *op. cit.*, footnote 8, at p. 63.
71. *Agreement Between Canada and the Federal Republic of Chile for the Avoidance of Double Taxation With Respect to Taxes on Income and Certain*

the right to tax gains on the disposition of real property located in Chile. Any income tax payable in Chile as a result of Manuel's death would be creditable against the Canadian tax due. There will be none. Chile does not treat death as a taxable event for income tax purposes. Fortunately the cost base of the property will be increased under Chilean law based on the value for estate tax purposes. This will help to prevent the capital gain on the Chilean real property that was taxable in Canada from being taxed again in Chile when the land is actually disposed of. Under Chilean law a capital gain is taxed as ordinary income. The gain may be exempt if the holding period is met, generally one year in the case of residential property.

Any estate tax paid by Manuel's niece may not be claimed against Canadian tax due.

Manuel must also determine the cost base of the inherited Chilean land for Canadian tax purposes. As discussed, the CRA[72] has agreed administratively to recognize a cost base in inherited property equal to its fair market value at the time of acquisition.

In summary there are still two elements of double taxation with respect to the Chilean real property that Manuel would like to leave to his Chilean niece. The first arises with respect to the tax on the capital gain on the land that he must pay in Canada and that his niece may also be liable to pay tax on in Chile. In this case the tax position is greatly improved over the situation where the land was in Germany due to the step up in the cost base of the property for Chilean income tax purposes. The second arises with respect to the estate tax on the bequest of the land that Manuel's niece must ultimately pay in Chile before she can dispose of the property.

EXAMPLE 2

In this example assume that Manuel remains the Canadian resident taxpayer who owns the Chilean situs real property. Instead of leaving the property to his Chilean niece as described in Example 1 above, Manuel has decided to leave it the property to his niece who now lives in Canada (a Canadian heir).

(a) Chilean Tax Consequences

As discussed, Chile has a worldwide estate tax system. Assuming Manuel remains a non-resident for Chilean estate tax purposes and is

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Other Taxes, the Prevention of Fiscal Evasion and the Assistance in Tax Matters, S.C. 1998, c. 33, Part 3, art. XIII.

72. Canada Revenue Agency, Technical Interpretation 2002-0155735.

not a Chilean national, liability for estate tax is limited to assets situated in Chile. Although the Chilean *Estate and Gift Tax Law* does not include situs rules it is probably safe to assume that Manuel's' real property located in Chile will be subject to Chilean estate tax. Because the heir is a Canadian and not a Chilean resident for estate tax purposes, Chilean estate tax is due only on the assets situated in Chile. The applicable tax rate is the same as the rate calculated in Example 1 above assuming the heir remains one of Manuel's nieces. The tax does not depend on the nationality or the tax residence of the heir, but rather on his or her relationship with the deceased.

(b) Canadian Tax Consequences

The Canadian tax consequences to Manuel remain the same. The Chilean property will be subject to a deemed disposition on death under *ITA* subsec. 70(5).

Therefore, if the only property that Manuel plans to leave his niece is the Chilean land it appears that the amount of estate tax due in Chile will not change regardless of whether he leaves the property to his Canadian or Chilean niece. However, the income tax consequences on a subsequent disposition of the property will be further complicated by the potential liability of the Canadian heir to both Chilean and Canadian income tax. If the Canadian niece disposes of the land she is taxable on her world income, including any gain on the disposition. Chile also has the right to tax any gain under the Canada-Chile Tax Treaty because it is located there. The cost base of the land for Canadian tax purposes will be its fair market value determined under the provisions of *ITA* subsec. 70(5). Its tax cost for Chilean tax purposes would be calculated independently under Chilean domestic law. As discussed, the cost base of the land will be increased to its value for estate tax purposes. Any income tax payable in Chile on a later disposition will be creditable against Canadian tax due. Any mismatch between the two systems in terms of timing or valuation may lead to double taxation.

EXAMPLE 3

In this example assume Manuel owns Canadian situs real property and no Chilean situs assets. He leaves the Canadian property to his Chilean niece (Chilean heir).

(a) Chilean Tax Consequences

There should be no tax consequences in Chile; that is Manuel's niece will not be liable to pay Chilean estate tax on the value of the Canadian real property at the time of receipt. This result occurs because for purposes of imposing Chilean estate tax, the residence/domicile of the heir or legatee is not relevant. The property will not be subject to Chilean estate or gift tax unless Manuel's niece dies or gifts it while alive.

(b) Canadian Tax Consequences

The Canadian tax consequences remain the same for Manuel. He will be subject to income tax under the deemed disposition rules on death and will be liable for tax on any gain. His niece will acquire the property for Canadian tax purposes at its fair market value. Under the Canada-Chile Tax Treaty, she will be liable for Canadian tax on any subsequent gain if she disposes of the property. She may also be subject to Chilean income tax as Chile taxes its residents for income tax purposes on a worldwide basis. Her tax liability will depend on whether the property is considered exempt from tax on the capital gain at the time of its disposition.

EXAMPLE 4

In this example assume Manuel owns Swiss situs real property. He leaves the Swiss property to his Chilean niece (Chilean heir).

(a) Chilean Tax Consequences

There should be no estate tax consequences in Chile; that is Manuel's niece will not be liable to pay estate tax on the value of the Swiss real property on receipt, but as discussed in the Example above it will form part of his niece's estate.

(b) Canadian Tax Consequences

The Canadian tax consequences remain the same for Manuel. He will be subject to income tax under the deemed disposition rules on death and will be liable for tax in Canada on any gain.

(c) Swiss Tax Consequences

The Swiss real property may also be subject to estate tax in Switzerland. A number of Cantons in Switzerland levy estate taxes including Graubünden or Solothurn. If this is the case this will be a very heavily taxed disposition.

EXAMPLE 5

Assume that the deceased is a Chilean tax resident who owns Canadian real property that he leaves to (a) a Canadian heir and (b) to a Chilean heir.

(a) Chilean Tax Consequences

The deceased's domicile is Chile. The Chilean *Estate and Gift Tax Law* applies the worldwide system for calculating estate tax and includes assets situated abroad. Because Chile also has forced heirship laws, it will be important to determine whether this gift can be made. Assuming the gift is valid, recall that none of the heirs may sell the inherited property until the estate tax has been paid.

(b) Canadian Tax Consequences

Because the real property is situated in Canada, it is subject to Canada's deemed disposition rules on death. These will apply to any taxable Canadian property owned by a non-resident on death. Both the Canadian and the Chilean heirs may rely on the increase in value of the property as a result of the deemed disposition, for Canadian income tax purposes on any subsequent disposition.

The Case of Argentina (No Inheritance or Estate Tax)

The following examples discuss the tax liability of a deceased Canadian tax resident with assets in Argentina and/or heirs in Argentina, and the tax liability of a Canadian heir who receives Argentinean situs property. It repeats the facts in Examples 1 and 2 but replaces the situs real property with a property in Argentina. The important issue in these examples is that, with the exception of the Province of Buenos Aires, there is no estate or inheritance tax imposed in Argentina. Notwithstanding, there remains the potential for double taxation.

The examples are discussed in a more summary form as there are limited tax consequences in Argentina.

Recall that in Example 1, a Canadian taxpayer was leaving Argentinean real property (not in Buenos Aires) to a niece domiciled in a Argentina (not Buenos Aires).

For Canadian income tax purposes Manuel will be deemed to have disposed of the Argentinean situs real property immediately prior to death at its fair market value. Under the Canada-Argentinean Tax Treaty,[73] Argentina has the right to tax gains on the disposition of real property located in Argentina. Any income tax payable in Argentina as a result of Manuel's death would be creditable against the Canadian tax due. There will be none. This is because Argentina does not treat death as a taxable event for income tax purposes. As a result, the capital gain on the Argentinean real property is taxable only in Canada. As was the case with Germany and Chile, there is no mechanism in the Canada-Argentinean Tax Treaty to reflect the fact that Canadian tax was paid on the asset for Argentinean income tax purposes. On the other hand individuals are not currently taxed in Argentina on realized capital gains.

Manuel must also determine the cost base of the Argentinean land for Canadian tax purposes to determine his tax liability on death. As discussed, the CRA[74] has agreed administratively to recognize a cost base in inherited property equal to its fair market value at the time of acquisition.

In summary it appears there is no element of double taxation with respect to the bequest of the Argentinean real property if Manuel leaves it to his Argentinean niece. Specifically, Manuel will pay Canadian income tax on the capital gain on the Argentinean land and his niece will not be liable to pay any tax in Argentina on the same gain when she disposes of the property.

In Example 2, Manuel bequeaths his Argentinean situs real property to his Canadian niece. The Canadian tax consequences to Manuel remain the same as if he left the property to his Argentinean niece. The Argentinean property will be subject to a deemed disposition on death for Canadian income tax purposes. The income tax consequences on a subsequent disposition of the property in this example will only have an effect on Canadian income tax as capital gains are not taxable in the hands of the niece in Argentina. If the Canadian niece disposes of the land she is taxable on her worldwide income, including any gain on the disposition. Argentina also has the right to tax any gain on the land under the Canada-Argentinean Tax Treaty because it is located there. The cost base of the land for Canadian tax purposes will be its fair market value determined under the provisions of *ITA* subsec. 70(5). If there is any income tax payable in Argentina on a later disposition, it will be creditable against Canadian tax due. Any mismatch between the two systems in terms of timing or valuation may lead to double taxation.

73. *Agreement Between Canada and the Federal Republic of Argentina for the Avoidance of Double Taxation With Respect to Taxes on Income and Certain Other Taxes, the Prevention of Fiscal Evasion and the Assistance in Tax Matters*, S.C. 1994, c. 17, Part IV.
74. Canada Revenue Agency, Technical Interpretation 2002-0155735.

In the third example, Manuel leaves Canadian situs real property to his Argentinean niece. The Canadian tax consequences remain the same for Manuel. He will be subject to income tax under the deemed disposition rules on death and will be liable for tax on any gain. His niece will acquire the property for Canadian tax purposes at its fair market value. Under the Canada-Argentina Tax Treaty, she will be liable for Canadian tax on any subsequent gain if she disposes of the property. If she decides to rent the property rather than to sell it, the niece may also be subject to Argentinean income tax on the rental income as Argentina taxes its residents for income tax purposes on a worldwide basis. On the other hand, if she decides to sell the property, Argentina will levy no tax on any capital gain. Her liability will depend on whether the capital gain is still exempted at the time the property is disposed of under the domestic law of Argentina.

In the fourth example, involving the bequest of Swiss situs real property to his Argentinean niece, the Canadian and Swiss tax consequences remain the same. Manuel is subject to Canadian income tax and the real property is subject to Swiss estate tax.

In the final example an Argentinean tax resident who owns Canadian real property leaves it to (a) a Canadian heir and (b) to an Argentinean heir. Because the real property is situated in Canada, it is subject to Canada's deemed disposition rules on death. These will apply to any taxable Canadian property owned by a non-resident on death. Both the Canadian and the Argentinean heirs may rely on the increase in value of the property as a result of the deemed disposition, for Canadian income tax purposes on any subsequent disposition.

Estate Planning Considerations

The examples above provide a sampling of some of the double taxation issues that may arise when the deceased, the heirs, and the assets are located in different jurisdictions that may apply different tax regimes on death. Assuming sufficient assets, it will be very important to carefully review the total estate plan with competent counsel from the jurisdictions where the heir or the assets are located. It will also be important to determine whether there are any special rules with respect to inter vivos gifts and on immigration or emigration that may subject the assets or heirs to ongoing tax liability on death.[74]

74. Most countries have rules regarding emigration, which generally allow the death tax imposed by that country to apply for a certain amount of years following emigration. Where a taxpayer ceases to reside in Canada, Canada imposes a "departure tax", which triggers a deemed disposition of most

Can steps be taken to avoid or reduce multiple layers of taxation on death? Clearly the answer to that question will depend on the applicable laws in the tax regime where the heirs or assets are located. A number of alternatives are commonly suggested ranging from the use of multiple wills that include only the assets located in the relevant jurisdiction, to incorporation to hold assets with a view to changing their situs. Such suggestions do little to avoid or reduce tax if the liability is based on a worldwide, rather than a territorial system. The use of corporations is also unhelpful if foreign corporations are not permitted to hold real property or there are look through rules if foreign property is held by the incorporated entity.

All of this brings us back to the basic questions that must be posed when devising an estate plan for a Canadian resident taxpayer who is subject to deemed disposition rules on death under an income tax system. Are there assets or heirs in another jurisdiction? If so, what is the relevant law with respect to the transfer of those assets? What concepts are employed to determine residence, domicile or situs of assets? Can local counsel provide advice or information about how to avoid or reduce those taxes?

For example, in Germany, after one year of ownership, most types of property can be disposed of without incurring a tax on the capital gain, with the exception of real property, which must be held for 10 years, and capital property, which is taxed at 25%. The applicability of these rules is not restricted to German residents. In addition, Germany provides for individual allowances based on proximity of relationship, for the transfer of property. These allowances can be used against German transfer taxes, and are available every 10 years. As the tax is applied to a German resident transferee, this allowance will be available even where the transferor is not resident in Germany.

Argentina provides another good example of how an understanding of local law will help to reduce or avoid double taxation problems. There are no inheritance taxes in Argentina with the exception of the province of Buenos Aires. Inheritance tax is payable to the province if the property is located in Buenos Aires or

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property at fair market value, thereby triggering a capital gain or capital loss. In Germany, inheritance taxes are imposed on German nationals on a worldwide basis for the first five years after emigration. France will only impose inheritance tax on property located in France; however, if the beneficiary is domiciled on the date of death and has been so for at least six of the last 10 years, the inheritance tax will be applied to the deceased's worldwide assets. The United States imposes tax liability on the basis of citizenship, and thus a change in domicile without a change in citizenship will not prevent the application of estate taxes, and there are rules in place to prevent expatriation for the purpose of avoiding estate taxes.

the heir, legatee or deceased are domiciled there. Domicile is a matter of choice. The Argentinean Civil Code presumes a person's domicile to be where his or her family lives. In Argentina, a person has a constitutional right to move freely about Argentina and can change his or her domicile at will.[75] If the gift of Canadian property is of sufficient value, the niece may want to consider whether a change of domicile is worthwhile.

The bottom line is that the complexity of estate planning for Canadians and their heirs is not going to go away. Canada is a country of immigrants with economic ties in all parts of the globe. The impact of double or triple taxation can, however be planned for, reduced or eliminated with sufficient foresight and an understanding of how other jurisdictions levy tax as a consequence of death.

The following provides a short reminder of circumstances that may require special attention:

- Persons with property located in other jurisdictions;
- Persons from abroad with property located in Canada;
- Persons who will be leaving significant bequests to persons in other jurisdictions;
- Persons who will be receiving significant bequests from persons in other jurisdictions;
- Persons who are in the course of immigrating to Canada who have significant means.

75. All that is required to change domicile is that the niece demonstrate her desire to change her address (subjective element) and the physical movement of her belongings (objective element).

Appendix A: Summary of Select National Reports from *Death as A Taxable Event*, Cahiers de Droit Fiscal International, International Fiscal Association, Vol. 95B, 2010.

Country	Details
Argentina	The Estate→ **The estate is not considered a person enjoying rights and obligations, but a group of assets and rights without any legal personality** • Repealed tax on gratuitous transfer of property – inheritances, bequests and gifts are not taxed (except in Buenos Aires). • No IT/CGT levied on the gain accrued on assets that constitute the estate that is deemed realized at the time of death • Other taxes in force do NOT consider death as a taxable event • The estate is not considered a person with rights and obligations→ group of assets/rights without any legal personality • AIT: After TP's death and as a result of a legal fiction, AIT law grants the estate the responsibility of replacing the decedent and acting as TP→ obligation to pay corresponding tax on income obtained after the death of estate's owner and until acknowledgment of heirs • Personal assets tax: stipulates replacement of TP upon death by estate to pay personal assets tax. This applies to all assets (domestic/abroad). BUT if the individuals are not domiciled in or the estate is not located in Argentina, only assets situated in Argentine territory will be taxed. The estate will be situated in the place where succession judicial proceedings are initiated (usually determined by last domicile of decedent at time of death). Once the heirs are acknowledged, the heirs will replace the estate as TP's of personal assets tax • The transfer of immovable assets originated by inheritance/bequest/gift are not taxed due to their gratuitous nature. *Absence of inheritance/estate taxes→ domestic rules to unilaterally relieve/avoid double taxation do NOT exist* **Avoidance of Double Taxation under Treaties** • Foreign individuals with assets in Argentina or local residents with assets located abroad→ Argentine property related taxes do NOT tax the capital gain accrued on a decedent's assets at the time of death, and AIT does not tax the transfer of assets that constitute the estate of the decedent, and does not consider that capital gains are accrued upon his death • Estates are NOT strictly included in the definition of "person" in Argentina's tax treaties→ must look to domestic laws of contracting states to determine whether the treaty applies

Australia	***Australia does not treat death as a taxable event*** The estate→ the executor/administrator is considered a "trustee" for tax purposes and so the estate is subject to income tax trust provisions. *Taxes Levied on Deceased* Capital Gains Tax (CGT) • CGT will not apply in the case of death • Liability for tax in the case of death is rolled over to successors, and will only be assessed on any subsequent disposal • Accrued pre-death appreciation in the assets will be taxed when the asset is disposed of at a later time unless another CGT exemption applies • Automatic rollover applies so that any CG/CL arising on death is disregarded in deceased's final year tax return→ this rule defers taxation of the appreciation in value of such assets up to the date of death Taxable Event • Ownership of assets of deceased is transmitted by law on death→ taxable event, but Australia applies extensive statutory rollover rules that **defer tax on death** • In most cases, no income tax is imposed on the deceased/executor/beneficiary on transmission of assets • Four Classes of Assets→ separate rollover rules apply to each class of assets ○ (1) CGT Assets ○ (2) Business Assets and transfers of family owned and closely-held businesses ○ (3) Trading stock→ deemed disposal on death, market value just prior to death must be included in final year tax return→ beneficiary treated as having acquired trading stock for market value at time of death. A rollover election is available to the executor, and can only apply if executor continues to COB of deceased and trading stock continues to be held in that business (may also apply if passed to beneficiary who caries on the business). Rollover defers tax until trading stock is sold ○ (4) Partnership Assets→ partnership interest of a partner is a CGT asset for tax purposes *Taxes levied on beneficiary/executor* • Testamentary gifts (money/property) are not included in ordinary income of beneficiary • Where inherit property subject to rollover→ when subsequently sold, tax may be payable in accrued appreciation **Tax Jurisdiction**

	• Australia taxes residents on worldwide income and gains and non-residents on Australian source income and gains with nexus to Australia • Deceased Australian resident→ income tax applies to income/CG from all sources, BUT the transfer of appreciated assets on death is generally not taxable (rollover rules) • Transmission of assets out of the jurisdiction to a non-resident is problematic→ Australia may never be able to tax the accrued gain in the assets ○ Transmission of property from an Australian resident deceased to a foreign resident beneficiary *may give rise to a taxable CGT gain or loss* in the deceased's final year tax return where the bequeathed asset does NOT qualify as "taxable Australian property" (immovable property in Australia, non-portfolio investment (>10%) were underlying value of company is principally derived from Australian immovable property, assets used in COB through PE in Australia) ○ Example: where taxable Australian property (e.g., immovable property) in Australia is passed to foreign beneficiary, no immediate tax consequences arise for deceased's tax return→ taxed upon subsequent disposal ○ Immovable property located outside Australia and all personal property whether or not located in Australia (unless used in eligible business) may give rise to CGT loss/gain if passed to foreign beneficiary ○ Example: if Australian resident owns property in France and this was inherited by a non-resident, any appreciation in market value would be taxed in the deceased's final tax return • Non-resident deceased to non-resident beneficiary→ final tax return will only include income/gains from Australian sources, and assets *other than* taxable Australian property are not subject to tax in Australia • Where beneficiary is a non-resident→ no immediate tax consequences→ will only be taxed in the future upon the disposal of "taxable Australian property" **Avoidance of double taxation under domestic law** • Income of non-residents is exempt from tax except if it is from Australian sources or it is a gain on "taxable Australian property" • Foreign tax offset for Australian residents→ if deceased derived income from foreign source in final year, a foreign tax offset is allowed in respect of taxes that the individual was liable for and actually paid (taxes on income, profits gains or taxes subject to DTA's) **Tax Treaties for the avoidance of double taxation on income and capital** • Generally follow OECD model • Deceased is entitled to benefits under DTA where resident of Australia

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Article 13→ aside from Australian immovable property and interests in shares/units in companies with taxable Australian property assets, DTA's grant exclusive taxing rights for gains on alienation of other forms of property solely to the resident state.

Valuation

When beneficiary inherits property that has been subject to a rollover in the hands of the deceased (and so no tax was payable), they will generally take an "inherited cost" to the property so that when it is subsequently sold, tax may be payable in accrued appreciation or a loss may be generated)
Rollover for CGT assets→ defers the taxation of the appreciation in value of the assets up to the date of death

This also brings pre-CGT assets (acquired before Sept. 20 1985) into the tax net at a market value cost as at the date of death
Accrued pre-death appreciation in assets will be taxable when the asset is disposed of at a later time

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<tr><td>Austria</td><td>
<u>The Estate</u>→ does not pass directly from the deceased to the heirs, but first becomes a legal person subject to private law. At the time of death, all inheritable legal rights of the deceased pass to that legal person.
Inheritance and Gift Tax expired on July 31, 2008→ all taxable events have ceased to be applicable
<u>Still situations where death of a person/probate proceedings may trigger taxes</u>

Mortis causa transfer of shares from deceased resident of Austria to successor resident abroad triggers income tax on capital gains of the shares occurring before death
→exit taxation mortis causa
<u>Land Transfer Tax</u> for transfer of domestic immovable property (independent of residence of persons involved)

Arises if neither the deceased nor his legal successors are resident in Austria
Double taxation may arise if deceased and/or legal successor are resident outside Austria and transfer is subject to taxation abroad

Contribution to a private foundation→ <u>Foundation Entrance Tax</u> arises if transferor (deceased) is resident in Austria (of if foundation is resident in Austria)

Potential for double taxation

Note: for Land Transfer Tax and Foundation Entrance Tax may be able to apply to Federal Ministry of Finance for relief from double taxation

Income and Capital Gains Taxes
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- The income tax liability of a person ends upon his/her death
- **Exit Taxation (s. 31(2)(2) EStG)**→ circumstances causing the Republic of Austria to lose its right to tax in relation to other countries are deemed equivalent to a **sale**
  - If shares are transferred *mortis causa* from a deceased person resident of Austria to a person resident outside Austria
  - Gains arising on sale of shareholdings in corporations which have registered office/place of management in Austria are subject to limited income taxation for persons not resident in Austria→ transfer of such shareholdings is only subject to exit taxation *if the taxation right of Austria is restricted by a DTA with the residence state of the successor* (i.e., if the DTA attributes right to tax gains on alienation of shareholdings only in the state of residence of the alienator).
  - If a share of a foreign corporation is transferred *mortis causa* from deceased resident in Austria to person resident outside Austria, the transfer is always subject to exit taxation since future sales transactions will not trigger Austrian income tax (regardless of whether there is a DTA)
  - If conditions for exit taxation are satisfied, fictitious capital gain (FMV when death occurred – historical costs) is attributed to the last assessment period of the **deceased** and is taxed in his/her hands at ½ average income tax rate
  - Deferral is available if share is transferred to a person resident in a member state of the EU or of the EEA (where arrangements for assistance for recovery of tax)

→may apply for an **interest free deferral of tax debt** in connection with the transfer→tax debt is assessed upon actual disposition by the successor

Avoidance of Double Taxation

- Under domestic law→ can apply to Ministry of Finance for grant of unilateral relief to avoid double taxation
- Case law (VwGH)→ double taxation only arises if ***same or similar* taxes** are imposed in 2 or more states on the same person on account of the same taxable event for the same period/same point in time. (Austrian tax authorities take a less strict view)
- Tax treaties for the avoidance of double taxation on income and capital
  - **Exit Taxation and DTA's**→ ET was adopted in 1996, and it is doubtful that it will fall within the scope of the DTA's on income tax (**Canada DTA: 1999**)
  - ET will be brought either within the distribution rule on gains from alienation of property (OECD 13(4)) or within distributive rule on other income (A. 21 OECD income tax model)→ in both cases, the right to tax is allocated to state of residence of alienator (i.e., deceased), Austria has the right to tax.
  - **Exit taxation *mortis causa* is NOT restricted by the DTA's on income tax**

Belgium	The Estate→The estate has no legal personality, cannot sue, be sued, conclude contracts→ passes automatically from the deceased to the heirs ● If Belgium is the residence state, it gives credit only for foreign immovable property ● If Belgium is the *situs* state, it taxes only the Belgian immovable property ● Non-residents→ only immovable property is taxable ● Domestic Conflict of law rules ○ Inheritance is governed by the law of the state in the territory in which deceased had his habitual residence at the time of his death ○ Inheritance of immovable property governed by the law of the sate in the territory of which the immovable property is located Taxes Levied upon the Deceased *Inheritance Tax and Estate Taxes* ● Estate tax is due upon the death of a resident, irrespective of the residence of the recipient ● Taxable event→ death of a Belgian resident (NOT Belgian residence of heirs/legatees) ● The tax has the characteristics of BOTH an estate tax and an inheritance tax ○ Fiscal residence of deceased determines applicable legislation (regional: Flanders, Brussels, Wallonia)→ place where deceased had actual residence in the last 5 years before death (ETA) ○ Rate of tax determined *per heir or legatee*, taking into account portion of estate received and degree of kinship (IHT) ○ Rates vary according to the region and the degree of kinship→ *progressive* ● There are subjective and objective exemptions from estate tax→ e.g., family-owned businesses ● **Valuation of Assets and Rights**→ taxable value of an asset or right is the sales value at the time of death (some special rules for certain assets/rights, including public securities and foreign immovable property) ● **Gift Tax**→ interaction between IHT and Gift Tax ○ If Belgian makes gift of movable assets before a Belgian notary, gift tax will be due (if deed made before foreign notary or no need, no gift tax is due). If donor dies in 3 years following the gift, IHT is payable if gift tax was not paid ○ Gifts of Belgian immovable property→ must be registered, subject to high registration tax. If donor dies w/in 3 years, assets are added to the estate to calculate the IHT ○ Gifts of foreign immovable property are not subject to Gift Tax and are not added to the estate to calculate Belgian IHT→

	BUT there is an imputation system for foreign immovable property • Income tax is rarely levied on death→ only due on capital gains on assets used for professional activities Worldwide system of inheritance tax and levies taxes on basis of 2 criteria: • ***Inheritance tax***→ if deceased had his last residence in Belgium → levied on all assets (less any liabilities) constituting the estate • ***Transfer tax upon death***→ if deceased had his last residence outside Belgium→ only levied on Belgian immovable property • **NOTE: only time of death** counts→ if moved residence in the last days of life, no Belgian IHT except on Belgian real estate Avoidance of double taxation under domestic law Foreign estate or inheritance taxes on foreign immovable property are **credited** against Belgian Inheritance Tax→ **situs** of the property is important • Double taxation is avoided by the credit method (domestic law), but only on foreign immovable property→ credit calculated per heir (vs. the entire estate) • For immovable property, all foreign taxes on the estate are creditable (inheritance/estate taxes), ONLY if they have been paid ○ Avoids double *inheritance* taxation ○ ***Where the foreign state levies a capital gains tax or a transfer tax, no credit would be available, unless the tax is similar to the Belgian inheritance tax*** ○ **This would likely not be useful in a Belgian – Canadian context** Income Tax Treaties • Belgium-Canada DTA→ estate is considered a person • Exchange of information for the application of taxes other than income taxes→ this only applies to NATIONAL legislation, so cannot be used for levy/recovery of taxes imposed by regional authorities (i.e., IHT)
Brazil	• Tax levied upon transmission of immovable property and rights thereto→ municipal tax • Tax levied upon death (*causa mortis*) OR upon a free transmission of any assets and rights → state tax Taxable Event • **Conveyance of ownership of the asset or right to the heir** • Valuation→ market value indicated by state revenue authority Territoriality→ **hybrid system**

	• Subjective Territorial Link (domicile of decedent or heirs)→Transmission of movable assets OR if heir resides in Brazil, even if the assets (movable/immovable) are subject to a foreign probate process • *Locus rei sitae* (location of the asset)→ property located in Brazil, regardless of whether the deceased or heir resides in Brazil or abroad Avoidance of Double Taxation under Domestic Law *Assets located in Brazil, Brazilian or foreign heirs* • Inheritance tax will be owed to the state where the property is located→ property • Inheritance tax will be owed to the state where probate occurs→ movable assets *Assets located abroad, heirs in Brazil* • For property of any nature (movable/immovable), inheritance tax will be owed to the state where the heir is domiciled in Brazil (also where probate occurs)
Canada	**The estate is treated as a trust** No inheritance tax or estate tax • Income tax→ deemed disposition of capital property immediately before death at FMV • The resulting capital gains/losses are included in computing deceased's income in final personal income tax return • Canadian residents are taxed on their worldwide income • Non-residents of Canada are taxed if dispose of taxable Canadian property Foreign Tax Credits • Only available for "income or profits" tax→ CRA: inheritance tax or estate duty is NOT an income or profit tax ○ ITA does not provide for any relief for estate, inheritance or gift tax paid to another country • Many countries impose inheritance/estate taxes→ **double taxation** • Our treaties do not deal with inheritance or estate taxes
Chile	The estate→ all of decedent's assets and debts, but is also used to refer to the group of heirs that inherit the decedent's assets and debts Estate and Gift Tax Law (EGTL): Summary • Inheritance is considered non-taxable income for income tax purposes (a step up of the tax basis of the assets acquired after death is granted to beneficiary)

	• EGTL recognizes need to exempt a certain amount→ **exclusion** ("the exclusion") for estate tax is set at Chilean Peso equivalent of $40,000USD, and over this amount a progressive tax is applied (1-25% rate) • EGTL applies a worldwide system for a Chilean with domicile in Chile→ inclusion of assets located abroad to calculate domestic taxes. ○ Assets included in the estate that have paid taxes abroad may be entitled to a tax credit if certain requirements are met <u>Taxes applicable on the death of a person</u> • Chile imposes 2 taxes on gratuitous transfers: **estate tax and gift tax** (estate tax is imposed on any gratuitous transfer upon death→ imposed upon decedent's death) • EGTL embraces the concepts of taxable estate and taxable gift to determine tax liabilities acting together ○ (1) all assets belonging to decedent are included in the concept of <u>gross estate</u> ○ (2) Deductions are subtracted from the gross estate and the result is considered the taxable estate or gift • Applies an exclusion based on **each individual that receives property**, and not the total amount of assets owned by the decedent→ *this motivates individuals to distribute their assets to the largest possible number of persons* ○ A person must be alive or expected to be alive within 10 years of the date of decedent's death to be considered a valid heir (Chilean Civil Code) <u>Determination of Tax Liability</u> • TP must determine his taxable estate/gift→ apply deductions to gross estate and then use exclusion • NOTE: **gross estate** is very comprehensive, does not include life insurance→ basically includes ***ALL assets (in Chile and abroad) that a person who dies in Chile has when he dies*** • The beneficiary of the assignment is the **taxable person**→ must pay within 2 years of decedent's death • In order to dispose of the property, ALL taxes related to the assignment must be paid→ one beneficiary can pay all taxes on behalf of others, and the sue them for reimbursement • Estate tax is applied using a progressive rate (0-25%) on any property left to heirs that exceeds the <u>exclusion</u> • Deductions/tax rates are based on the family relationship between decedent and heir→ closer connection, larger deduction (lower tax rate levied) ○ E.g., parents/spouses/sons/daughters/grandchildren/great-grandchildren pay less than brothers/sisters/nephews/nieces/cousins/other relatives/non-relatives • Exemptions

- ○ Exclusion for estate tax is set at $40,000 USD (Chilean Peso equivalent) *per "qualified heir"*→ this includes spouses, ascendants, descendants
  - ■ I.e., if they receive assets up to $40,000, no tax is due→ if receive more, a progressive tax (1-25%) is applied
- Currently, there is no special provision for transfer of family owned and closely held businesses
- **Valuation of assets**
  - ○ Immovable property→ fiscal value of the property (usually < FMV), but if purchased within 3 years of death, purchase price if higher than fiscal value
  - ○ Publicly traded stocks/bonds→ average price over last 6 months prior to death, BUT if decedent and heirs own >30% of a corporation, IRS will determine the FMV of the stocks→ NOTE: this does NOT apply to partnerships (LLPs) or limited companies (LLCs)→ **can be easily avoided by transforming corporation into a different kind of entity**
  - ○ Assets located abroad→ IRS will determine FMV

Tax Jurisdiction

- ***Decedent's last domicile***
  - ○ All assets (Chile/abroad) owned by a person *that dies in Chile* when he/she dies included within the taxable estate
  - ○ All persons domiciled/resident in Chile will pay taxes over their whole income, despite origin, and non-residents will be subject to taxes only on Chilean source income (**NOTE: resident means any person physically remaining in Chile for an uninterrupted period of 6 or more months** – however, the Supreme Court says that the period does not have to be uninterrupted)
- ***Location of the assets***→ estate tax is levied on assets within Chilean territory *regardless* of nationality, residence, domicile of deceased or heirs
- ***Origin of the resources used to acquire the assets***
  - ○ Assets located abroad that belong to a foreigner (decedent) will be taxed if acquired with Chilean resources
- ***Decedent's nationality***
- Transnational succession→ Chilean TP will have to pay estate tax for assignment received (whether estate is located in Chile or abroad)
- If decedent is a foreigner, will only include assets located in Chile

Tax Credit

- EGTL permits a tax credit for estate tax paid abroad

	• **No requirement that foreign taxes must have the same nature or structure as domestic law in order to be creditable in Chile** • If use of the credit will mean a lesser tax burden in Chile than if assets located abroad were not included, such assets will not be considered for estate tax purposes **NOTE:** Capital Gains provisions in DTA's are NOT applicable→ acquisition of assets is not taxable in Chile (thus no capital gain is applied to the heirs)
Chinese Taipei	The Estate→ not regarded as a person and does not enjoy rights and obligations separate from the heirs and legatees (the heirs inherit all property rights and obligations of the deceased at the death of the deceased) Estate Tax • Imposed on the transfer of wealth upon the death of a person • **Gift tax**→ intended to avoid the evasion of estate tax through gift making ○ NOTE: annual exemption of NT$2.2M per year, and no cap of gifts over lifetime→ careful planning can substantially decrease estate/gift taxes payable) • **Flat rate of 10%** (until January 2009, was progressive up to 50%) ○ Imposed on the "total amount of the estate after deductions and exemptions are deducted" ○ Certain types of property are excluded from the "total amount of the estate" (donations, cultural items, insurance benefits, property that is inherited less than 5 years prior to death, etc.) ○ Exemptions→ an estate of less than NT$12M is exempted, and estate of less that NT$24M is exempt if deceased is military officer, police officer, government employee or public schoolteacher (US$1 ≈ NT$32.558) • Death of a person is a taxable event • Any national of Chinese Taipei (CT) who resides in CT and owns property rights when he dies should pay estate tax on all property rights (within CT or abroad) • When any national of CT who does not reside in CT or any person who is not a national of CT owns property rights in CT and dies, he should pay ETA on property rights within CT • *Who pays the estate tax?*→ (1) if will appoints an executor, the administrator is the payer, (2) if will does not appoint executor, heirs pay, (3) if no executors/heirs, administrator appointed pays • *Valuation of assets*→ taxed at market value at the death of the deceased (or time of gift). **NOTE:** for land and houses, market value is declared by the government • *Deductions*

	○ Surviving spouse, children/grandchildren, parents, etc. • **Anti-Abuse provision:** If deceased gives up CT nationality less than 2 years prior to death, ETA will be imposed as though he is still a national Income & Capital Gains Tax • CT does NOT charge ordinary income taxes on gain accrued on assets that are transferred by virtue of succession→ this is specially excluded from income tax • No general capital gains taxes Land Appreciation Tax • Specific kind of capital gains tax→ land value tax and house tax • Land value tax→ rate is progressive (1-5.5%) • House tax→ rate determined by local governments (rate depends on use of house→ residence, business, hospital) Tax Jurisdiction • Estate/gift taxes imposed on residences on a worldwide basis • If national and resident at time of death→ all assets, regardless of situs • If not a national of CT or is a national residing outside of CT at time of death, taxes are applied only to assets situated within CT • Two territorial links are required between the deceased and CT for ETA to apply→ (1) Nationality and (2) Residence • Situs of property is determined by the location of the property at the time of death (e.g., actual location, location of registration (e.g., car), location of financial institution (e.g., bank deposits), issuer's place of management (shares)) Avoidance of Double Taxation: Domestic Law • **Credit method**→ credit of estate/gift taxes paid to foreign governments on assets outside of CT (limitation→ credit cannot exceed domestic taxes that are increased by including such assets outside CT as part of the estate) • **Gift tax/Land Tax**→ tax credit for when the gift was made within the 2 year period before death (included in estate, already paid gift and land appreciation tax)
Croatia	**The estate is not a legal entity or person — it does not have rights and obligations separate from the heirs** Taxes Levied upon the Deceased • Movable property, cash, cash receivables and securities are subject to **inheritance tax**

	• Immovable property is subject to **immovable property transfer tax** (same as all other transfers of immovable property) → "IPTT" • *The payer of BOTH of these taxes is the recipient of the estate* • **Taxable event**→ time when legal ownership passes from deceased to successors ○ The liability to pay inheritance tax is incurred at the time of the legal effectiveness of the inheritance ruling or decision of governmental body or court ○ Immovable property→ liability is incurred at the time of concluding an agreement or at the time of a legal deed through which immovable property is acquired ○ In either case, may be deemed to be at the time that legal ownership passes from deceased to successors (if successor relinquishes, taxable event occurs when estate is transferred to the other person) • Rates ○ IHT→ 5% (effective tax rate may depend on the value of each item→ exemptions for low value items) ○ IPTT→ 5% • Exemptions ○ Items of the estate with a value of less than 7,000euro are not subject to IHT ○ **IHT is NOT paid by:** spouse, linear relatives, adoptive, children/parents, brothers/sisters, descendents, the Republic of Croatia, government bodies, public institutions, religious communities, foundations, etc. ○ **In case of inheritance, immovable property will NOT be subject to taxation if inherited by:** spouse, descendents, ancestors, adopted children, brothers/sisters, etc. • **Valuation of assets** ○ Tax base determined as the market value of the immovable property at the time of transfer – if information is not available, market value will be deemed to be the price which could be obtained for it on the market ○ Inheritance→ tax base consists of amount of cash and the market value of financial and other property on the day the tax liability is determined→ determined by competent taxation body • If immovable property transferred to heirs would be taxable under IPTT→ certain exemptions provided that the immovable property may be deemed a residence used for the heirs (residence = place for permanent living) ○ Amount of residential space is relative to number of persons ○ Conditions to use this exemption→ Croatian citizen, the persons/members of their immediate family cannot own other

	○ immovable property that meets their housing needs. ○ This discriminates against foreign individuals purchasing immovable property for housing needs in Croatia→ assumption is that foreign individual will not use the property for long-term housing purposes (this may change with accession to the EU) <u>Jurisdiction</u> ● Residence of the person receiving the assets ● The situs of the succeeded estate is not relevant for taxation purposes ● Immovable property→ taxed if situated in Croatia (otherwise, *situs* is not relevant for the purpose of inheritance tax) ● No unilateral measures for avoidance of double taxation→ will need to be addressed when Croatia joins the EU
France *Personal succession system*	● Estate taxes→ due for all conveyances of properties resulting from death ● As of 2007, there is no longer estate tax between spouses <u>Calculation of estate tax</u> ● Calculated on the net fraction accruing to each heir ● Estate tax is calculated in 3 stages, and take into account any gifts made by the decedent before death (except gifts made more than 6 years earlier) ○ (1) application of deductions to net share of each taxpayer ○ (2) calculation of taxes on basis of a price scale (rate varies according to relationship between decedent and beneficiary) ○ (3) reduction of estate tax, where applicable ● *Conveyance of a family owned business* ○ Where the heirs agree not to sell the shares of the enterprise→ exempt from estate taxes up to 75% of the value of the enterprise ○ Partial exemption only applies to certain conveyances ● **Valuation of assets** ○ Fair market value as of the decedent's death (20% reduction to this value is used for the decedent's main residence when as of that date, the property is also occupied by the surviving spouse, partner or minor children)→ no statutory definition of FMV <u>Capital Gains</u>

	• A succession is not a conveyance subject to capital gains tax, however, death may cause certain (deferred or postponed) unrealized capital gains to become taxable (e.g., conveyance of a sole proprietorship or partnership) Jurisdiction→ **domicile** • Scope of estate or gift tax depends on the decedent's (donor's) domicile OR the heir's/beneficiary's domicile (heir's domicile *may* trigger the obligation to pay estate taxes)→ main criterion is decedent's tax domicile • Tax is due in France where the decedent is domiciled in France, where the beneficiary is domiciled in France and has been for at least 6 years in the last 10 years, or any transfer of French property or property located in France (even where decedent and beneficiary are both residents of another country) • Tax Domicile in France→ household/main place of residence, carrying out a professional activity, centre of economic interest • *Emigration*→if decedent leaves France, estate taxes will apply only to property located in France, however estate taxes will be applied to the whole of the decedent's assets if the beneficiary is domiciled in France on the date of the conveyance and had been domiciled in France during at least 6 years over the last 10 years. • *Immigration*→ if an immigrant establishes his tax domicile in France, all assets are subject to gift or estate taxes, regardless of their nature or location • "French property" is broadly defined→ immovable property located in France, amounts due by a French debtor, investment securities issued by a French company (even if deposited in a securities account maintained with a foreign bank), interests in companies holding immovable property (includes indirect holding) • Property characterization conflicts may give rise to double taxation Avoidance of double taxation • *Domestic law* ○ Credit→ limited to the foreign tax paid in respect of properties located outside of France ○ This is limited to gift taxes or estate taxes paid abroad, and does not apply where in the other country, successions are not subject to transfer duties, but rather to other taxes (e.g., income tax, capital gains tax) • *Treaties*→ possible to avoid double taxation re capital gains tax ○ Canada-France DTA (1995)→ Article 2, para 4 specifies that articles 4. 23, 25, 26 apply to duties levied on transfers made without valuable consideration. This makes it possible to eliminate the double taxation that may result from the application of Canadian income tax to unrealized capital gains arising in connection with the decedent's assets
Germany	***The estate is not a taxable person for income tax purposes***. The estate is not a resident person under income tax treaties • Inheritance tax→ Germany taxes the transfer to an heir (no tax on the estate)→ inheritance tax is reduced if the estate is

	divided between several heirs. • *Taxable event:* the transfer of property in the event of death is subject to IHT(a gift *inter vivos* is also a taxable event — same rules apply). • It seems like they treat inheritance as a purchase through *mortis causa.* Rates • Depends on the relationship→ 3 tax classes; the closer the relationship to the deceased, the lower the tax class and tax burden ○ Class I: spouses, children stepchildren, grandchildren, great-grandchildren, parents and grandparents ○ Class II: brothers, sisters, nephews, nieces, stepparents, sons/daughters-in-law, parents-in-law, divorced spouses ○ Class III: all other persons – includes legal entities and same sex partners • There are also personal allowances provided (also dependent on relationship) Exemptions • Special exemption for household property and other moveable assets (Class I heirs – spouses, children, grandchildren, parents, etc.) • Principal residence can be transferred tax free to spouses, same sex partners and children if the new owner immediately uses the house for own residence purposes • Art collections, science collections, libraries, archives, property, parts of property→ only 20% or 40% of the real value will be taxed if the objects are important for arts, history or science and the regular income of these objects is lower than the costs. Tax free if under a preservation order or have been in family possession for more than 20 years. • Additional tax allowance for the surviving spouse or same-sex partner, and for children (Class I) dependent on their age. *Business Relief* • Business relief for family owned and closely held businesses → deceased must hold more than 25% of corporation's share capital, no minimum participation for partnerships (normally 85% of the assets are tax free, and an allowance is deductible from the taxable rest)→ this will fall under the Class I tax rate **Valuation of assets:** FMV, Valuation Tax Act contains detailed provisions about the valuation of assets for inheritance tax purposes (FMV = price at which a good could be sold under common circumstances) Anti-Abuse Provisions • An abuse of the law is not recognized for tax purposes→ the law is abused if the legal form which is used for a transaction has

the sole purpose of reducing taxes

Other Taxes

- Capital gains taxes are only applicable on disposal and not on purchase through *mortis causa*
- Immovable property transfer tax is not applicable on inheritances and gifts

Jurisdiction→ **residence or domicile**

- Germany has a worldwide inheritance tax system→ for non-residents, tax liability is limited to assets situated in Germany
- Residence→ **very broadly defined**
  - ○ The possession of housing space (any building that is suitable for living). → does not need to meet the usual standard of living. Residence if the owner intends to maintain and use it (sufficient if resident occasionally returns to the accommodation)
  - ○ A secondary home is residence → frequent short visits may lead to unlimited tax liability
  - ○ Definition of residence is independent of time spent in Germany during a year
  - ○ Must have possession of the housing space owner, tenant, factual possession (e.g., if have keys to an apartment and occasionally use it).
- Domicile→given when a person stays in Germany continuously for more than 6 months (stay of more than 1 year if connected to a health treatment)
- If the deceased is resident or domiciled in Germany at the time of death, taxes are imposed on a worldwide basis (includes all foreign property)
- **The residence/domicile of the heir is also relevant**→ if the deceased has a residence abroad and only the heir has a residence/domicile in Germany, German IHT is imposed on a worldwide basis→ **this frequently leads to double taxation**

Emigration

- Inheritance taxes are imposed on a worldwide basis in the first 5 years after moving to a foreign country (for German nationals).
- Property with *situs* in Germany and all property that is not considered foreign property (not situated in a foreign country under German tax provisions) will be subject to inheritance tax in the first 10 years after the emigration of a German National
- If German property is transferred to a foreign family foundation, trust or corporation in order to prevent this broader tax liability, German tax law looks through the foreign entity. In order to prevent this tax liability, the emigrant must transfer the assets to the new home country (usually possible without any resulting income tax liability)

	Situs Criteria • Agricultural/forestry property located in Germany, business property located in Germany, immovable property located in Germany • 10% shareholdings in corporations which have their legal seat or place of management in Germany • Inventions, samples, topographies registered in Germany • Property that is rented or leased to a domestic business unit operation • Mortgage loans for domestic property/ships • Profit claims of a silent partner or claims for a profit participating loan if the debtor has residence, domicile, legal seat or place of management in Germany • The right to use all of the above assets • These criteria may give rise to double taxation if the country of residence does not prevent double taxation of assets situated in Germany or if there is a conflict regarding where the asset is situated. • These criteria also determine the amount of foreign taxes that can be credited→ tax credit is only possible if the foreign tax is levied on property situated in a foreign country from the point of view of German tax law Avoidance of Double Taxation→**exemption method** • A tax credit is only possible in the case of unlimited tax liability • Foreign tax must be levied on foreign assets (foreign under German law) • The foreign tax can only be credited against German tax if it is levied on the occasion of the death of the deceased or a gift (foreign ETA, ITA, and gift taxes) • **Federal Tax Court determined that Canadian capital gains tax CANNOT be credited against German inheritance tax**
Greece	• Inheritance tax → imposed on the property accruing to each beneficiary of the estate (IHT is classified as a tax on the transfer of property) The Estate • The estate is not a separate taxable subject and cannot establish a residence of its own • Income tax treaties do not treat the estate as a taxable person nor as a resident of one of the contracting states. • **The estate does not have rights or obligations separate from the heirs and legatees** *The passing of property on death does not qualify as an alienation of property for the purpose of capital gains taxation in Greek tax treaties. Only inheritance taxation is triggered in the event of death*

	Taxable event: transfer of property *mortis causa*→ the taxable person is the beneficiary. Rates • 3 classes of beneficiaries: ○ Class A: spouses, children, grandchildren, parents ○ Class B: other ascendants/descendents, brothers, sisters, stepbrothers/stepsisters, nephews/nieces, aunts/uncles, foster parents, children from a previous marriage of the spouse, sons and daughters in law ○ Class C: all other beneficiaries not included in Classes A and B ○ A and B are taxed at flat rates which vary depending on the type of estate assets ○ A and B are entitled to a tax-free threshold Exemptions→ apply either to the heir or particular estate assets, and rarely, to the decedent **Valuation of assets:** FMV at the time of death Anti-Abuse Provisions→ provisions aiming to counteract tax avoidance or tax fraud. • Gift taxes share the same rules, tax bases, beneficiary classes, etc. Jurisdiction→***situs*, nationality**, **domicile** • Assets of an estate situated in Greece, regardless of decedent's nationality or domicile • Foreign assets belonging to Greek nationals or people domiciled in Greece at the time of their death (this is limited to movable property situated in a foreign country, i.e., **immovable assets are exempt from inheritance tax** • Emigrants remain subject to Greek IHT unless they give up their Greek nationality (in the case of immovable foreign assets) • Certain assets are deemed to be situated in Greece at the time of death • Situs criteria may give rise to double taxation→ e.g., company shares, amounts deposited in Greek banks, contractual claims Avoidance of Double Taxation • Per country tax credit with respect to foreign movable property→ foreign tax must be levied on movable estate assets located in a foreign state which is taxable in Greece (foreign tax due on assets not subject to Greek taxation may not be credited, same for foreign tax on property situated in Greece) • It must be a tax assessed on the occasion of death. If the tax able event is other than the decedent's death, the resulting tax cannot be allowed for credit. • **There is no formal requirement that the foreign tax to be credited must be of the same nature as domestic inheritance tax.** Capital

	gains tax may be allowed or credit
Hungary	**The estate is a pool of assets and does not qualify as a legal person** When a person dies, income tax is levied on the deceased, and inheritance tax is levied on the heirs→ main criterion for levying tax is *situs* • IHT applies to all types of property located in Hungary, and to movable property located outside Hungary inherited by a Hungarian citizen or non-Hungarian citizen who lives in Hungary, but only if no inheritance tax is levied in the country of origin. • No tax is payable on immovable property located abroad. • **Taxable event**→ transfer of property <u>Rates</u> • Depend on the proximity of the deceased to the beneficiary • Three categories: (1) children/spouses/parents, (2) other close relatives, (3) others • Inheritance of vehicles→ transfer tax rate are doubled <u>Exemptions</u> • National scientific, artistic, educational, cultural or social purposes • Certain interests in business associations • Inheritance by child/spouse/parent/orphan grandchild (limit of HUF 20 million) • Immovable property up to HUF 300,000 per beneficiary • Beneficiary is a minor→ IHT may be paid within 2 years after beneficiary has reached 18 without any late payment interest. If the tax is paid earlier, IHT due is reduced by 10% every year it is paid earlier, but by not more than 70% • Agricultural lands→ only 50% of tax due is payable (75% exemption if heir is a farmer) **Valuation: fair market value of the estate** <u>Anti-Abuse provisions</u> • Hungarian law excludes the application of foreign rules related to any immovable property located in Hungary → rules significantly diminish the possibility of foreigners avoiding Hungarian inheritance law ○ E.g., specific rules of Hungarian inheritance law cannot be avoided by transferring ownership rights of Hungarian immovable property to an offshore company • If the country of origin does not tax movable property, Hungary can do so

	Income Tax • Tax is due upon death on income earned (not necessarily received) by the deceased before death→ **no capital gains are assessed** • Each heir is liable according to the percentage of his hereditary share • Exception for sole entrepreneurs if their business is carried on by spouse/heir→ the business is continued without tax liability being imposed Jurisdiction • Estate located in Hungary→ irrespective of nationality/residence status of beneficiaries • For heirs who are citizens/residents or domiciled in Hungary→ movable property locate outside Hungary, unless it is subject to tax in the country where it is located • Residents are subject to tax on their worldwide income • Resident: Hungarian citizen, foreign citizen with Hungarian residence permit, if stay in Hungary for >183 days Situs of Property • Immovable property located in Hungary is only taxed in Hungary Avoidance of double taxation • Movable property located outside Hungary inherited by Hungarian citizen or non-Hungarian citizen who lives in Hungary are only subject to IHT if no such tax is levied in the foreign country • No tax is payable on inheritance of immovable property located abroad.
India	***Estate is not defined*** • **Death is no longer a taxable event**→ estate duty was abolished as it failed to achieve its objectives of equitable distribution of wealth and raising funds for development schemes (The Estate Duty Act 1951 has been held in abeyance and no longer applies to deaths occurring on or after March 16 1985). • **There are no taxes imposed upon property bequeathed on the death of an individual** • Succession laws directly relate to the religion of the deceased→ Hindu Succession Act, Muslim Law, Indian Succession Act. • No capital gains on the transfer of property on death (no tax on transferred assets of the deceased to any individual(s)) Jurisdiction • Succession to immovable property in India shall be regulated by the law of India, wherever the person may have had his domicile at the time of death

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<tr><td></td><td>• Succession to movable property is regulated by the law of the country in which the person had his domicile at the time of death.
As there is no estate duty charged in India, their credit system does not apply to give relief from double taxation</td></tr>
<tr><td>Israel</td><td>• NOTE: the surviving spouse's share of marital assets belong to that spouse and do NOT form part of the deceased spouse's estate
• Israeli court will apply the succession laws of the residence of the deceased at the time of death.
• Estate tax was abolished in 1981→however, capital gains taxes and other taxes continue to apply
<u>Capital Gains Tax</u>
• Imposed upon a sale of assets in Israel by Israeli or foreign residents, and on a sale of assets outside Israel by an Israeli resident. "Sale" expressly includes an inheritance
• Sale of immovable property rights in Israel→ capital gains are subject to land appreciation tax (Real Estate Taxation Law, 1963). In principle, inheritances are outside the scope of this law, BUT if Israeli immovable property rights in an estate are sold, this is regarded as a taxable sale by the heirs.
<u>Rates</u>
• Real capital gains accruing prior to 2003 (Israeli immovable property prior to November 7, 2001) up to 46% (in 2009, expected to decrease)
• Real gains accruing after these dates→ 20% (this will increase to 25% if sellers sell shares in a company in which they hold 10% or more of any means of control)
• Pre-2005 real gains from foreign securities→ 35%
• Upon the acquisition of immovable property rights in Israel, the purchaser pays an acquisition tax of up to 5%.
<u>Exemptions</u>
• For foreign residents from Israeli capital gains tax
○ Israeli securities acquired after January 1, 2009 (before 2009 in certain circumstances)
○ If any exemption is provided in a tax treaty
• For Israeli residents
○ Exempt from Israeli CG tax on a sale of overseas assets if became Israeli residents within 10 years before sale
○ Exempt from Israeli tax on Israeli securities acquired before became Israeli resident if the securities do not relate to Israeli immovable property rights or PE in Israel</td></tr>
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Valuation: CG tax and land appreciation tax→ sale consideration from an actual or deemed sale is FMV (i.e., the price between a willing buyer and a willing seller, unencumbered by any charge, mortgage debt or other right securing any payment)

<u>Double taxation</u>

E.g., where Israeli residents sell foreign inherited assets (foreign estate tax and Israeli capital gains tax upon disposition) – similar to Canadian situation
Israeli Tax Authority is willing to prevent double taxation by granting Israeli resident heirs a step-up of the cost (“original price”) to the FMV of the foreign assets when they were inherited (this is also done in order to exempt Israeli taxpayers from tax on the portion of capital gains that accrued abroad on inherited foreign assets before they belonged to the Israeli resident taxpayer).
Alternatively, tax planning may be possible during the testator’s lifetime→ if testator is a non-Israeli resident with assets outside Israel and potential heirs live in Israel, they could use a “foreign resident settler trust” arrangement instead of a direct bequest to the Israeli residents.

<u>Jurisdiction→capital gains tax on inherited assets</u>

Residence→ centre of living
Israeli residents are subject to Israeli income tax or capital gains tax on worldwide income
An <u>exit tax</u> may apply to inherited assets if an heir leaves Israel→ capital gains tax as if he had sold the assets at FMV on the day <u>before</u> his departure. However, if the asset is located in Israel (and thus will be taxed upon disposition in Israel), then no exit tax is imposed.
The exit tax may result in double taxation
Immigration→ 10 year capital gains tax exemption

<u>Situs of Property</u>

Israel taxes Israeli residents on worldwide income and capital gains, including overseas inherited assets
Non-Israeli inheriting assets in Israel→ capital gains tax will be imposed on the entire CG accruing to the heir and testator, with no step-up upon inheritance

Solutions: check to see whether any domestic exemptions apply, whether any tax treaty exemptions apply, whether Israeli capital gains results in a foreign tax credit in the seller’s home country, request concessionary relief to reduce/eliminate Israeli tax if it cannot be credited in the home country.

<u>Elimination of Double Taxation</u>

Credit system to eliminate double taxation → only credit for foreign taxes paid on the same source of income (i.e., capital

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	gains). Foreign inheritance taxes are NOT creditable. **New Israeli step-up fast track procedure** • Taxpayers who receive an overseas asset by way of inheritance can step up the asset cost for Israeli capital gains purposes to its FMV when the donor died. This is available regardless of whether tax is paid abroad or who the transferor is. Must file a form to apply for this. • If the ruling is obtained overseas capital gains on the date of death will be outside the Israeli tax net, assuming the donor was a non-Israeli resident at death.
Italy	The Estate • The estate is not a legal person, but a pool of assets with no legal personality • However, should the succession be governed by foreign law, the qualification of the estate according to the foreign law may lead to the conclusion that the estate is a taxable person for Italian income tax purposes. A pool of assets, even without legal personality may be a taxable person for corporate income tax purposes provided that it falls within the concept of organization "with regard to whom the taxable event occurs independently and in a unitary way". In such a case, the estate will be considered resident for Italian corporate income tax purposes, and consequently for treaty purposes. Taxable Event • The current death duty is an inheritance tax, and the taxable event is the *mortis causa* transfer to the heir, who is the person liable to tax Rates • 4% if transfer is made to spouses and direct descendents or ancestors→ the transfer is subject to tax on the value exceeding 1M Euro (exempt amount applies to each beneficiary) • 6% if the transfer is made to brothers and sisters→ the transfer is subject to tax on the value exceeding 100,000 euro (exempt amount applies to each beneficiary) • 6% if the transfer is made to relatives up to the 4th degree, to persons related by direct affinity or persons related by collateral affinity up to the 3rd degree • 8% in all other cases. Exemptions • Exemptions may apply depending on the nature of the heir • Exemptions for certain assets (e.g., assets of cultural value are exempt, Italian immovable property of cultural value – 50% exemption)

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- Transfers of family owned and closely held businesses→ exemption applies provided they carry out an effective business activity, and only if the recipient receives a controlling stake or achieves control of the company, taking into account other participations owned before the transfer (i.e., more than 50% of voting rights)

Valuation of assets: depends on the type of assets

- Immovable property→ FMV
- Listed securities→ average quotation in the 3 month period preceding the death

<u>Anti-Abuse Provisions</u>

- Cash, jewellery and furniture are deemed to have been transferred for a value of at least 10% of the total taxable amount of the assets, other than cash, jewellery and furniture that are transmitted on death→ refutable presumption, not applicable to the non-resident deceased. Can be rebutted by making an inventory of the property belonging to the deceased upon death.
- Movables, securities and credits (includes bank accounts) owned by deceased together with other persons are deemed to have been owned in equal shares, unless otherwise provided.

<u>Other Taxes</u>

- Income tax is not levied upon the death of a person→ the demise does NOT trigger the realization of capital gains on the transferred assets
- Transfer of a business does not trigger the realization of capital gains and the tax base of the assets is rolled over the transferee
- The tax base of land, shares, etc. received by an individual upon a mortis causa is equal to the value computed in the taxable base of inheritance tax, increased by the amount of corresponding inheritance tax incurred.
- Capital gains realized by individuals upon the sale of immovable property (other than land) that has been received upon a *mortis causa* transfer are exempt from income tax.

<u>Jurisdiction</u>→ **residence of the deceased, *situs* of property**

- Worldwide system for inheritance tax→ if the deceased is a resident of Italy at the time of death, IHT is due on all properties and rights transferred, whether situated in Italy or abroad.
- If the deceased is not a resident of Italy at the time of death, IHT is due only on the properties and rights situated (at the date of death) in Italy
- **Residence:** the place where the person has his/her habitual abode
  - ○ Objective link with a specific immovable property in Italy and the intention to habitually reside there (habitualness is interpreted as the perception of the property as habitual, not the duration of use)

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	○ There are no rules regarding emigration or immigration • **Situs**→ certain assets are deemed to be situated in Italy ○ Shares, quotas, bonds, other securities are deemed to be located in Italy if the issuer has either the legal seat or the seat of management or the main object in Italy (NOTE: the main object refers to the activity carried out by the company, rather than the assets owned) ○ Includes bank accounts if bank is resident of Italy, irrespective of the location of the branch where the account is kept ○ These criteria may give rise to double taxation <u>Avoidance of Double Taxation</u>→ **foreign tax credit** • The foreign tax must be similar in nature to the Italian inheritance tax (e.g., estate taxes)→ foreign income taxes on the deemed capital gains realized upon a *mortis causa* transfer are NOT similar taxes and are thus not creditable against Italian IHT **NOTE:** it may be the case that foreign income taxes levied upon death (e.g., Canadian capital gains tax) are creditable against Italian income tax which may be due upon the following disposal of the assets received *mortis causa*. The OECD commentary recognizes that treaty relief should be available if both taxes are levied on the same income, regardless of the fact that the triggering event (i.e., the timing) is different. The OECD commentary may be used to argue that treaty relief should be provided even if the 2 states levy tax in the hands of different persons (e.g., Canada in the hands of the deceased, Italy in the hands of the heir). *However, this seems doubtful*
Japan	***Inheritance commences upon the death of the decedent→ from the time of commencement of inheritance, an heir inherits the blanket rights and duties attached to the property of the decedent.*** Inheritance tax is imposed on an individual who acquires assets by inheritance→ **Japan is increasing the level of inheritance tax to make it more burdensome** • Income tax is not levied on the deceased upon death • Inheritance tax is levied on the increase in net assets of an individual *resulting from* an inheritance→ assets acquired due to inheritance are NOT subject to income tax • Taxable event→ this is an acquisitions-based tax as a result of death <u>Rates</u> • Inheritance tax is imposed on the total value of all properties acquired by inheritance • Inheritance tax is calculated separately for each heir→ rate increases with value of heir's share (10-50%) • Surtax is imposed on heirs of any other than first degree of consanguinity or decedent's spouse→ 20%

	Exemptions ● If heir contributes an inherited asset to the national government, municipality, social welfare organization→ exempt Family owned & Closely held businesses ● If a transaction by a family corporation unreasonably reduces the tax burden of inheritance tax on related persons→ anti-avoidance rule is applied to deny transactions of the family corporation **Valuation:** value of assets acquired due to inheritance is appraised at its FMV at the time of inheritance Anti-Abuse Provisions ● Family corporations, adopted children (limits inclusion of the number of adopted children as legal heirs ● Purpose: avoidance of an unreasonable reduction of the burden of inheritance tax Interaction with Gift Taxes ● Gift tax burden is higher than inheritance tax→ prevent the avoidance of inheritance tax payment ● New system to promote transfer of assets to younger generations and contribute to a revitalization of the economy→ donee pays gift tax at time of gift and pays inheritance tax at time of death of donor, but the IHT burden is calculated by deducting the gift tax already paid. Income tax and capital gains taxes ● Increase in net assets resulting from succession is treated separately from income tax ● The appreciation of property acquired by an heir is NOT exempt from income tax→ income tax permits the deferral of the capital gain accrued on the property that is transferred by succession until any subsequent disposition is made. Jurisdiction ● Worldwide system of inheritance tax → domicile of heir, and nationality (partially introduced in order to counter tax avoidance) ● If heir is domiciled in Japan at time of death, subject to IHT on the whole property, wherever it is situated→ unlimited taxpayer ● If heir is not domiciled in Japan at time of death but is of Japanese nationality, the unlimited tax burden is determined by whether the deceased had lived in Japan for more than 5 years prior to death. → Otherwise, only subject to IHT on property situated in Japan (limited taxpayer) ○ Exception→ where neither the heir nor the deceased has been domiciled in Japan within 5 years prior to death ● No exit tax system, no relief for an immigrant who has been subject to exit tax (non-resident TP is not apply to apply a foreign tax credit) Situs of Property

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Location, head office, place of registration, etc.
Situs criteria as a cause of double taxation→ may arise by applying different situs criteria (e.g., insurance — in Japan, situs is head office, but other countries use place where proceeds are payable)→ foreign tax credit would apply in such a situation

<u>Avoidance of double taxation</u>

Foreign tax credit, however very few heirs apply it
Unilateral double taxation relief is granted only to foreign taxes levied on foreign property for inheritance tax→ this is applied only to unlimited taxpayers (domicile)
The creditable foreign tax must correspond to the Japanese inheritance tax
Note: some countries (like Canada) apply deemed income tax (deemed capital gain)→ foreign tax credit will be applied (mismatch of tax timing)

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<tr><td>Mexico</td><td>
Inheritance = the succession of all the assets of the deceased and all its rights and obligations not extinguished by death→ succession does not create a legal entity

Inheritance takes place at the time of death→ inheritance has no legal personality of its own, since the conveyance of assets takes place at the time of death, in favour of the heirs.
No inheritance or estate tax, no gift tax on death
No income tax or value-added tax when a transfer of property occurs because of the death of a person→ transfer of property realized by death will NOT be subject to tax
The tax cost of the property for the heir is the same as for the deceased→ the tax cost is transmitted by virtue of the succession (i.e., inherited)
Heirs/legatees who are Mexican residents are income tax exempt for the acquisition of property by means of death, when established by a will and the value received disclosed in the income tax return of the acquirer
A non-resident who acquires property with Mexican source is subject to income tax in Mexico.

Property generates income from a Mexican source of wealth→ immovable property in Mexico, shares/securities issued by Mexican companies, shares/securities whose value derives directly/indirectly from more than 50% of immovable property in Mexico
25% of the appraisal value of the property received→ must be paid within 15 days of obtaining the income
The cost of the property for future dispositions, is the cost paid by the deceased→ double taxation, as the tax paid upon receipt is not recognized as a tax cost. Double taxation will occur at the time of sale/distribution of the property, as they will again pay tax on the difference between the appraisal value at the time at which it was distributed and the tax cost

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	available for the deceased. Other taxes • Local taxes→ tax on acquisition of property (immovable property) → taxes every act for which the transfer of property takes place, including those that occurred as a result of death. **This constitutes an expense on the acquisition of property** Avoidance of double taxation • Mexico eliminates double taxation in the case of Mexican residents by exempting the income in Mexico both for the dead person and for Mexican resident heirs/legatees ○ Sale or disposition of property by the deceased is not subject to income tax ○ Income obtained by Mexican resident taxpayers on inheritances and legacies is tax exempt in Mexico • Mexican residents are taxed on worldwide income, non-residents on Mexican source income • Credit method→ tax paid abroad from income originating from a source of wealth located abroad may be credited against income tax payable in Mexico, provided it concerns income for which tax is required under the terms of the law • *However*, given that income from inheritances/legacies is not taxed in Mexico, income tax withheld abroad for inheritances/ legacies is not credited (either for deceased or heirs)
Netherlands	***The estate does not qualify as a legal person with rights and obligations*** Inheritance tax is defined as an **acquisition tax** • Although the taxes contain elements which are characteristic of an estate tax, the prominent features point to an acquisition tax (i.e., inheritance tax) Taxable Event • Inheritance tax is due on the value of everything that is acquired by an individual/legal entity as a result of the death of a person, who at the time of death was a resident (or deemed resident) of the Netherlands→ **calculated per beneficiary** • IHT is NOT only due on what is acquired directly from an estate→ **fictitious acquisitions** (anti-abuse provisions) ○ Fictitious provisions to prevent tax avoidance by transactions during lifetime and to tax transactions that cannot be considered acquisitions by way of inheritance Tax rates→ *progressive rates*, depending on the size of the acquisition and the relationship between deceased and beneficiary • Spouses & Children→ 10-20% • Others → 30-40% • Special rates to avoid generation skipping→ grandchildren 18-36%

	• NOTE: Higher rate in each category is for 118,000 euro and above Exemptions • Spouses, children, grandchildren, disabled children, parents, others, charities, pension rights, government. • Relief is provided if a family business is inherited (dependent on the value of the business) **Valuation:** fair market value at the time of acquisition Income Tax & Capital Gains Tax • Death is a taxable event for personal income tax • At the time of death, the testator is deemed to have transferred his possessions to his heirs→ testator can be taxed on the value of business capital and substantial interest shares. ○ Can pass on this income tax claim to the heirs→ claim is postponed until the heirs realise the increase in value ○ **NOTE:** non-resident taxpayers do NOT qualify for the possibility to roll over the income tax claim→ the tax must be paid ○ Can obtain a conditional tax assessment, and Income tax is not collectable if the non-resident does not dispose of the substantial interest within 10 years, but after 10 years, Netherlands can still tax the profits arising from a substantial interest of Dutch corporations based on its national income tax rules for non-residents. Business Property • Deceased is deemed to have transferred business property and substantial share holders to his heirs upon death • The increase in value of these assets can be taxed, but if certain conditions are met, heirs can request a rollover of the taxable base • If the deceased was an entrepreneur, deemed to have transferred his enterprise prior to death at FMV • Substantial shareholding (5% or more of the shares of a company) → income tax is generally rolled over, but heirs may voluntarily pay the tax on behalf of deceased Immovable property • If immovable property is inherited, the acquisition is exempt from immovable property transfer tax (6% of the value of the property at the time of transfer) Worldwide system of inheritance tax→ **residence** • The actual residence of the deceased is the primary principle in determining whether inheritance tax can be levied→ nationality as an alternative ○ IHT is due if the deceased was an actual resident of the Netherlands at the time of death, OR

- ○ **<u>Deemed residence</u> on the basis of the ten-year rule**→ a person who dies within 10 years after leaving the Netherlands is <u>deemed resident</u> if he was a Dutch national at the time of emigration and of death.
- ○ No definition of "residence"→ case law: permanent home, place of residence of family, where children go to school, banking, work, nationality

<u>Situs of Property</u>

- Transfer tax is due on the acquisition of Dutch *situs* assets from an individual who at the time of death was not resident of the Netherlands
- Situs assets: business assets attributable to a Dutch PE, property rights to an enterprise (other than rights of a shareholder), immovable property located in the Netherlands or rights pertaining to such property, substantial shareholdings in immovable property companies.
- **Taxation on the basis of Dutch *situs* was abolished effective January 1, 2010**→ acquisition of *situs* property is no longer a taxable event
    - ○ Non-residents are NOT taxed on the acquisition of *situs* property in the Netherlands
    - ○ If the deceased is not a resident/deemed resident at the time of his death, no Dutch transfer tax is due with regard to Dutch *situs* property

<u>Double Taxation</u>

- Situs rules as a cause of double taxation→ given the broad scope for situs for the purposes of transfer tax, double taxation may occur. E.g., where another country taxes the Dutch *situs* assets on the basis of residence, domicile or nationality

<u>Avoidance of Double Taxation under Domestic Law</u>→ *Dutch Decree for the Avoidance of Double Taxation*

- Becomes applicable if prevent of DT has not been provided for in any other way
- In order to qualify for relief (recipient), the inheritance tax abroad must actually be **paid**.
- The foreign inheritance tax must be comparable with the Dutch inheritance tax→ comparable if it taxes the same cause (death) and the same object (the deceased's estate or each individual acquisition by way of inheritance)→ irrelevant whether the inheritance tax is an estate or acquisition tax.
- Credit method→ inheritance tax imposed abroad on foreign *situs* assets (immovable property or assets belonging to a PE)
- If the above cannot be applied and inheritance tax is also imposed abroad in respect of assets affected by Dutch inheritance tax, a deduction is allowed for foreign inheritance tax from the taxable acquisition (e.g., if different countries define "*situs* property" differently

New Zealand	**No specific estate or inheritance tax**→ do not receive tax credits paid in another state as tax credits arise in respect of a tax that is of substantially the same nature as that imposed in NZ • Deemed disposition of property at market value from deceased to executor/administrator, and a further deemed disposition when property is transferred from executor or administrator to the beneficiary **(income tax)** • Estate tax was abolished in 1992→ was not generating much revenue as many taxpayers used family trusts so that little or no estate tax was payable on death. • **Gift tax regime**→ specifically EXCLUDES a disposition of property made by a will, and is silent re disposition of property under intestate estates, although there is commentary that these are treated in the same way as estates for which there is a will (i.e., no gift tax) • The disposal may give rise to a profit in the hands of the deceased and it may be taxable to the taxpayer's estate→ this will depend on the tax position of the deceased • No specific capital gains tax, but some profits can be taxed upon realization→ if property acquired as part of a business dealing in that property, acquired for the purpose of disposing of it, acquired as part of an undertaking/scheme for the purpose of making profit Roll-Over Relief→ exceptions to the requirement of market value, and may have the effect of deferring any taxable gain on the sale that may have otherwise arisen, until the tame at which the beneficiary disposes of the property. • Spouse, civil union partner or de fact partner • Charities, relatives and others Residence • The residence of the heir is not relevant to the assessment of any tax resulting from the death of a taxpayer. • Residents are taxed on worldwide income→ resident if permanent place of abode in NZ (even if they have one elsewhere too), also if personally present in NZ for more than 183 days total in a 12 month period (treated as a resident from the first of the 183 days until ceases to be a resident (when absent from NZ for more than 325 days in a 12 month period — not resident from the first of the 325 days) • NZ residents may be subject to tax upon any income resulting from the deemed disposition of property that arises upon death. • Transitional Residents Rules→ immigration ○ Optional rules that exempt from NZ income tax any foreign source income derived by a natural person who is a transitional resident

	○ Exemption must be claimed and is for a period of up to 4 years → e.g., foreign interest/dividends, income from foreign trusts, foreign financial arrangements, rental income derived offshore • Situs of property→ NZ source income ○ Income derived form a business wholly carried on in NZ (or if partly carried on in NZ, income apportioned to NZ source) ○ Contracts made/performed in NZ, pensions payable by NZ gov't., scheme established in NZ, ○ Income from land owned in NZ, income from personal property used in NZ, income derived as consideration for the use/right to use personal property in NZ ○ Royalties, dividends, income from debt instruments. Double taxation • Where a person is treated as a resident in more than one state (e.g., if more than one permanent place of abode) • If person is a resident in another state but has property in NZ that produces income deemed to have a source in NZ Unilateral Measures to avoid double tax • Foreign tax credit for income received by NZ resident from non-resident payer • Tax must be a tax of substantially the same nature as that imposed in NZ
Switzerland	***The estate does not have legal personality or the capacity to appear before a court***→ until the estate has been liquidated, the heirs must act in common→ inheritance community, where heirs are owners in common of the estate's assets. Inheritance or estate tax jurisdiction is at the cantonal level (25 of 26 cantons apply such taxes)→ this is a description of general trends ***the canton of Schwyz does not levy any tax upon the death of a person *Most cantons levy* ***inheritance tax, 2 levy estate tax*** (Solothurn and Graubunden)→ cantons exempt unilaterally from ITA/ETA immovable property abroad as well as movable assets in the canto when the deceased was domiciled abroad. Taxes applicable on the death of a person • Inheritance Tax ○ Levied on the transfer of assets/distribution of units/parts of inheritance to the heir/beneficiary→due on behalf of the heir ○ Most often due on the transfer, attribution/acquisition of assets ○ Tax rate depends on **degree of relationship** between deceased and heir, and the actual **amount** to be received ○ In most cantons, surviving spouse/registered partner, children and charitable organizations are exempt from ITA

	• Estate Tax ○ The estate itself is taxable →paid from estate before distribution to heirs • **Valuation of assets** ○ Assets→ market value, rights→ capitalised value (take into account value at time of acquisition, time of succession, or time of death) Income and capital gains tax • Heirs of deceased TP succeed him in his income tax rights and obligations (answer to taxes owed by deceased at death) • Capital gains on privately held assets generally exempt from capital gains tax (but immovable property gains tax) • Property transfer by inheritance→ immovable property gains taxation is deferred Tax Jurisdiction • Worldwide system for residents, with an exception for immovable property abroad • Non-residents→ territorial system applied on immovable property in Switzerland and if in accordance with an international convention, movable assets (place of situation or PE — i.e., assets attributable to Swiss tax jurisdiction in accordance with a DTA — PE or fixed base) • Most cantons use the last domicile of the deceased as the connecting factor (**centre of personal interests** — personal/economic ties) ○ Emigration ends unlimited tax liability→ must prove that they have a new centre of interests at new domicile • Many cantons use opening of succession as a criterion for levy of ETA/ITA→ succession may be dealt with in Switzerland even where the individual is domiciled abroad→ this can prompt tax liability of individuals resident abroad Avoidance of Double Taxation • Exemption method→ value of the exempted assets will not be subject to ETA/IHT • This covers all immovable assets abroad as well as movable assets in the canton where there is no international convention to provide for the tax jurisdiction of such assets in Switzerland. • DTA→ Article 4 (OECD Model)→ individuals subject to lump-sum taxation in Switzerland must have their income from the source state subject to ordinary tax in Switzerland if they are to be considered residents.
United Kingdom	The Estate • The estate is not a separate legal person→ upon death, all of an individual's assets and liabilities devolve on his personal representatives

<u>Taxes Applicable on Death</u>

- Inheritance Tax (IHT)→ imposes a charge on the value of an individual's estate on death
  - This is an **estate tax** that is charged on an individual's death→ the individual is treated as making a transfer of value immediately before death
  - If the deceased dies within 7 years of making a lifetime gift, the gift becomes chargeable for IHT at the death rate
- Potentially Exempt Transfers (PETs)→ gift to an individual or the trustee of a bare trust (chargeable if deceased dies within 7 years)
- Lifetime transfers to relevant property settlements→ lifetime transfers to trusts chargeable at the time they are made
- Sliding scale for reducing the IHT chargeable on PETs and lifetime gifts based on the length of time the deceased lives after making the gift.
- Some lifetime gifts are exempt→ e.g., gifts to spouses, small gifts, etc.
- Income tax
- Capital Gains tax→ not charged upon death but is affected by death due to the rebasing of the acquisition value of the assets
  - Property within the estate of the deceased receives an automatic revaluation at the date of death→ the value at the date of death becomes the acquisition cost for the capital gains tax purposes in future disposals.

<u>Rates</u>

- Nil rate band→ 0% for the first £325,000 per person. Assets over the value of the nil rate band are charged to 40%

<u>Exemptions</u>

- The nil rate band is transferable between spouses – any percentage that is unused on the death of the first spouse can be used against the estate of the second spouse
- Unlimited exemption to charities→ must be for a charitable purpose
- Legacies between spouses – unlimited, unless one is UK domiciled and other is not, then only exempt up to £55,000
- Business property relief→ must be a trading business (not wholly/mainly for investment purposes)
- Transfers of family owned and closely held businesses→ any transfer of value is to be apportioned between SH's and IHT charged according to the individuals' circumstances.

Valuation of assets: price it might reasonably expect to fetch if sold on the open market immediately before death (i.e., FMV)

<u>Jurisdiction</u>→ **domicile of the deceased and *situs* of assets**

- Domiciled in UK→ subject to IHT on worldwide estate. If not domiciled in UK, subject only to ITH on estate situated in the UK
  - ○ An individual is domiciled where he has his permanent home
  - ○ An individual can have only one domicile at a time
  - ○ Domicile of origin acquired at birth domicile of the father (or mother if illegitimate) – domicile of dependency until 16, then can have an independent domicile
  - ○ Deemed domicile in UK if resident for tax purposes in at least 17 of the 20 tax years ending with the year in question
    - ■ Resident if spends 183 days or more in the UK in a tax year
  - ○ If leave the UK (become non-domiciled), will remain UK domiciled until the beginning of the 4th tax year after departure
  - ○ Domicile also relevant for taxation of trusts on the death of a beneficiary→ if settlor of the trust was not UK domiciled at time of transferring the assets, non-UK situs assets held in the trust are excluded property and are not within the scope of IHT (not included in the beneficiary's estate)
- Note: income tax and capital gains tax liability depends on residence and domicile (if resident and domiciled, subject to capital gains tax on worldwide assets)
- Emigration and immigration are relevant in determining domicile
- ***Situs* of property**
  - ○ Land and buildings→ located in the country where physically situated
  - ○ Chattels→ where located
  - ○ Registered shares and other securities → securities in a company are situated in the country where the transfer of title to the shares will be completed. Registered shares are located in the place where the register is kept. Bearer securities are located where the certificate is located.
  - ○ Intangible assets are located where they are recoverable or can be enforced

Double Taxation

- Double taxation may arise due to the situs of the assets (and domicile of the individual)
- Differences in taxable person→ UK the estate is taxed, other countries, the beneficiaries are taxed
- Assets may be regarded as located in more than one jurisdiction

Avoidance of Double Taxation

- Credit is available against UK tax for any foreign tax similar to IHT or even if not similar, if it is chargeable on death or a lifetime gift. This is available for assets of all kinds, and situated anywhere outside of the UK

Canada-France DTA

- Where the deceased was a resident of Canada at the time of death, Canada is required to provide a credit for inheritance tax payable in France in respect of property situated in France which forms part of that person's estate
- Where deceased was a resident of France, France will apply the inheritance tax to property subject to that tax, however, France must allow as a deduction from that tax an amount equal to the Canadian tax paid on the gains taxable in Canada. The deduction is not to exceed the share of French inheritance tax attributable to the property
- Where the deceased was a resident of Canada at the time of death, France may levy an inheritance tax on the subject property, however France must allow a deduction equal to the Canadian tax paid on the gains which are taxable only in Canada

Canada-USA DTA

- A Canadian resident will pay Canadian tax on the taxable capital gain realized on the deemed disposition of any US *situs* property, and will also be subject to US estate tax on the full value of the US *situs* property.
- A resident of Canada who is not a citizen of the USA is provided with a unified credit in calculating US estate tax
- Canada will allow a credit against Canadian tax payable by Canadian residents and Canadian spousal trusts for US federal estate taxes imposed on US *situs* property this can only be claimed against federal income tax and NOT provincial income taxes.
- Exemption from US estate tax for small estates (FMV less than US$1.2M)
- Canada provides some relief for US estate tax because of the close proximity between the US and Canada and because many Canadians have investments or other US *situs* assets