Belgium

Branch Reporter
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Summary and conclusions

If Belgium is the resident state, it gives credit only for foreign immovable property. If Belgium is the *situs* state, it taxes only the Belgian immovable property. The tax administration admits that property companies qualify for credit.

This sounds like a logical system, but nevertheless many cases of double taxation remain. If the deceased has taken on debts, they may not be deductible in the *situs* state, but they will be taken into account for the calculation of the credit. The taxpayer may be different in both countries, the valuation may be different. This all leads to double taxation.

The case law of the European Court of Justice (ECJ) has only brought limited remedy for double taxation. Different treatment of domestic and external (cross-border) situations would be considered in breach of the Treaty of Rome. But where the double taxation is the result of two conflicting state legislations, there is no remedy, although the situation is considered to be an infringement of the free movement of capital. The ECJ considers that double taxation agreements are the appropriate way to solve this problem.

Belgium has concluded only two treaties to avoid double inheritance taxation, both dating from before the OECD model of 1969, one with Sweden, which has since abolished inheritance tax, and one with France. Although the rules they prescribe are more or less similar to the model, it is clear that this is insufficient to avoid double taxation in the modern world: there are citizens of 150 different states living in Brussels.

To conclude double taxation agreements would take a lot of time. Moreover, inheritance taxes (and gift taxes) are regional taxes: the proceeds go to the regions. The federal state, which continues to levy them, is therefore less interested in these taxes. A multilateral agreement would be in practice impossible to reach, probably for political reasons.

It might be a good idea, therefore, to include estate and inheritance taxes in the income tax double taxation agreements. If capital gains taxes and taxes on capital (article 22) can be included in the agreement, there seems to be no logical argument for excluding estate and inheritance taxes from these agreements.

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1. Introduction

1.1. The private law rules of the succession

The law of private inheritance in Belgium is governed by the civil code, which is largely still the original *Code Napoléon*, although with important modifications: the whole matrimonial law has been rewritten, and the situation of the surviving spouse has been substantially improved.

1.2. Pluralism of succession law: federal vs. regional rules

Civil law, including private international law, is the same throughout the Belgian territory, while inheritance tax is a regional tax.

Being a regional tax does not mean that the tax is levied by the regional authorities, however. It means that the proceeds go to one of the three regions (Flanders, Brussels and Wallonia), depending on where the deceased had his main fiscal residence in the last five years of his life.[1]

1.3. Private law rules applicable to the succession

1.3.1. Intestate successions

If the deceased dies without having made a valid will, the estate passes to the heirs in the order shown in Table 1.

1.3.2. Testate successions

Legitimate portions (*de reserve, la réserve)* are as follows:

(a) The spouse has a right to:
- half of the usufruct of the estate;
- at least the usufruct of the last common dwelling and its furniture.

(b) Children have a legitimate claim to half (one child), one-third (two children), one-quarter (three children), or together three-quarters (more than three children); for as long as the surviving spouse lives, his or her portion is reduced to bare property, although the children (as well as the surviving spouse) have a right to convert the usufruct into full property, into capital or into a guaranteed life interest.

(c) The parents are entitled to one-quarter each, minimum (also reduced to bare property during the life of the surviving spouse), if there are no descendants.

The surviving legal partner has no legitimate portion. The legitimate portion has to be asked for. The request can be informal, but gifts and legacies are not reduced automatically.

[1] *Bijzondere wet van 16 januari 1989 betreffende de financiering van de Gemeenschappen en de Gewesten*, BS 17 January 1989, art. 3(4); art. 5§2(4).

Table 1. Intestate succession

Order	Heirs	Rights of a surviving spouse	Rights of a surviving legal partner
First	Children (legitimate or illegitimate) and their descendants	The usufruct of the entire estate	The usufruct of the common house and its furniture[a]
Second	Parents (each one quarter), brothers and sisters (receiving equal shares of the remainder)	The matrimonial property and the usufruct of the other goods	
Third	Parents and ascendants (the nearest in line receive half of the estate belonging to that line)		
Fourth	Uncles, aunts, etc. and other relatives in the side lines		
Fifth	The surviving spouse		
Sixth	The Belgian state		

Note: An individual cannot legally have a spouse and a legal partner at the same time.
[a] Unless the legal partner is a descendant of the deceased.

1.3.3. Meaning of "death", "ownership" and "estate"

"Death" includes absence. Five years after a judgment establishing the presumption of absence, or seven years after the last news was received from an absent person, a declaration of absence can be pronounced by the court,[2] with the same effect as death.

For the calculation of the legitimate portion (civil law), the estate includes all lifetime gifts given by the deceased, without any time limitation.

For the calculation of death duties (tax law), gifts in the three years before death are taken into account, unless donation tax was paid on these gifts.

1.4. Private law rules applicable to the administration of the estate

The estate passes from the deceased to the heirs automatically, without further formalities. They become the owners of the estate from the moment of the death, and any unequivocal act of acceptance of the estate has retroactive effect to that moment: *le mort saisit le vif*.[3] The estate has no legal personality, cannot sue and be sued or conclude contracts as such.

[2] Art. 118 Civ. Code.
[3] Art. 777 Civ. C.

An executor of the will may be appointed, but with limited powers.[4] If the executor of the will has a mandate to file the inheritance tax return, he is personally liable for the tax "in so far as it depended upon him to follow the rules of the law".[5]

Trusts are not known in Belgian civil law, except for references to foreign trusts in private international law.[6]

1.5. Domestic conflict of law rules

According to domestic rules,[7] inheritance is governed by the law of the state in the territory in which the deceased had his habitual residence at the time of his death.

The inheritance of immovable property is governed by the law of the state in the territory of which the immovable property is located. However, if foreign law refers to the law of the state in the territory of which the deceased had his habitual residence at the time of his death, the latter will be applied (*renvoi*).

Choice of law is possible with certain restrictions.[8]

1.6. International conventions on private international law

Belgium has ratified the Convention on the Conflicts of Law Concerning the Form of Testamentary Dispositions, signed in The Hague on 5 October 1961, the Convention on the Establishment of a Scheme of Registration of Wills, signed in Basle on 16 May 1972 and the Convention Providing a Uniform Law on the Form of an International Will, signed in Washington on 26 October 1973.

2. Taxes applicable upon the death of a person

2.1. List of relevant taxes

The main taxes levied upon the death of a person are "estate duties",[9] including the "estate duty" for residents, and the "right of transfer upon death" for non-residents.

Other taxes may be due, especially income tax or VAT, but the impact is less significant.

There is no "general wealth tax" in Belgium, only the so-called "tax to replace the estate tax" which is levied each year on non-profit associations (charities) at the rate of 0.17 per cent.[10]

4 Art. 1025 *et seq.* Civ. C.
5 Art. 74 InhTC.
6 Chapter XII of the Code of international private law (Code IPL), arts. 122–125.
7 Art. 78 of the Code of international private law (Code IPL).
8 Art. 79 Code IPL.
9 *Successierechten, droits de succession.*
10 Art. 147 InhTC. A similar tax is also levied on institutions for collective investment, banks and insurance companies (art. 161 InhTC) and on the Belgian coordination centre (art. 162*bis* InhTC), but at other rates.

2.2. Taxes levied upon the deceased

2.2.1. Inheritance and estate taxes

Belgium has an estate tax, due upon the death of a resident, irrespective of the residence of the recipient heir or legatee.

2.2.1.1. Legal sources and history

The source of the Belgian estate tax goes back to the French Law of 22 *frimaire* VII (12 December 1798), establishing a registration tax on several contracts and on transfer upon death, but not in direct line.[11] Estate tax was reinstated in 1821 (under Dutch rule). Estate tax between parents and children was introduced in 1851 after Belgian independence (1830), following lengthy parliamentary discussions.

2.2.1.2. Taxable event

The tax has characteristics of both an estate tax and an inheritance tax.

The taxable event is the death of a Belgian resident, not the Belgian residence of the heirs or legatees. The fiscal residence of the deceased determines the applicable legislation (of the Flemish, Brussels or Walloon regions). The fiscal residence is the place where the deceased had his actual residence in the last five years before his death; if he resided in more than one region during these five years, the region where he resided most of the time is his tax residence. These are the characteristics of an estate tax.

In general, the rate of tax is determined per heir or legatee, taking into account the portion of the estate he receives and his/her degree of kinship with the deceased. This is a characteristic of an inheritance tax. The rate between non-related persons is progressive, and, for Flanders and Brussels, is applied on the aggregate portion of what all the non-related persons receive (thus increasing the rate). This is again a characteristic of an estate tax.

2.2.1.3. Rates

The rates vary according to the region and the degree of kinship, and are progressive.

In Flanders, the maximum rate is 27 per cent in direct line and between spouses and cohabitants and a maximum of 65 per cent between other persons.

In Brussels and Wallonia, the maximum rate in direct line is 30 per cent and 80 per cent between non-related persons.

The rates are published in the long version of this report, published on the website.

[11] See on this topic the special number of *Tijdschrift voor Fiscaal Recht* of 21 October 1999: “Tweehonderd jaar frimairewet”, Larcier, 1999.

2.2.1.4. Subjective exemptions

Legacies in favour of the region where the deceased has his fiscal residence are tax exempt.[12]

Charities are not exempt, but benefit from a lower rate:

- 8.8 per cent in Flanders;
- 6.6 per cent, 12.5 per cent or 25 per cent in Brussels, depending on the type of charity;
- 7 per cent in Wallonia.

It is not the location of the charity's head office that decides the region, but the last tax residence (see section 2.2.1.2) of the deceased.

Charities qualify for the lower rates if they have their head office in the European Economic Area. In Wallonia special formalities and a recognition by the Minister of Finance of the Walloon region is required.[13]

2.2.1.5. Objective exemptions

Some assets are exempt from estate tax:

- social rights in UCITS investing in service flats for elderly people, if recognised by the Flemish government;[14]
- certain land of ecological interest in Flanders[15] and Wallonia;[16]
- forests in Flanders;[17]
- family-owned businesses (see section 2.2.1.12 below) in all three regions.

2.2.1.6. Value of assets and rights

In general, the taxable value of the asset and rights is their sales value at the time of death. Special rules apply:

- for revocable rights;[18]
- for foreign immovable property;[19]
- for receivables and interest thereon;[20]
- for public securities;[21]
- for perpetual rents;[22]
- for life annuities;[23]
- for usufruct;[24]

[12] Art. 59(1) InhTaxC.
[13] Art. 60 InhTC. Wall.
[14] Art. 55*bis* InhTC Fl.
[15] Art. 55*ter* InhTC. Fl.
[16] Art. 55bis InhTC. Wall.
[17] Art. 55*quater* InhTC. Fl.
[18] Art. 19(2) InhTC. But revocation can be a reason for reimbursement of estate tax: art. 135(4) InhTC.
[19] Art. 21(I) InhTC.
[20] Art. 21(II), InhTC. The nominal value is thus the maximum.
[21] This period has recently been extended by one or two months due to the financial crisis. Art. 21(III), InhTC.
[22] Art. 21(IV), InhTC. Here as well, the nominal value is the maximum.
[23] Art. 21(V), InhTC.
[24] Art. 21(VI) InhTC.

- for temporary annuities or temporary usufruct;[25]
- for bare ownership.[26]

2.2.1.7. Deductions

In principle, all debts are deductible, as well as the costs of the funeral, if the deceased was resident in Belgium.

For non-residents, where only immovable property is taxable, Belgium has been ordered to change its legislation in this respect by the ECJ,[27] and deduction of debts is now possible to some extent (see below).

2.2.1.8. Anti-abuse provisions

If the deceased owned property or goods during his life, then he is assumed to have been their owner at the time of his death, without any time limitation, unless the heirs prove otherwise. For tangible movable assets, this rule is only applied to assets held in the last three years of the deceased's life.[28]

The so-called anti-abuse rule states that the tax administration can requalify a transaction if the qualification was given by the taxpayer only for tax reasons.[29] This new rule is seldom used; requalification of transactions has always been possible.

2.2.1.9. Reporting obligations

In principle, the heirs and general legatees are liable for filing the tax return. The deadline is five months after the death, if the deceased died in Belgium. If he died outside Belgium but in Europe, six months, and if he died outside Europe, seven months.

2.2.1.10. Assessment procedure

There is no real assessment procedure in Belgium. Estate tax is due by the mere fact of the death, two months after the end of the deadline for filing the tax return.[30] It is usual, however, for the tax authorities to calculate the tax and to send a letter to the heirs with the amount due.

The heirs and general legatees are responsible for the payment.[31] The tax must be paid in cash, but it is possible to pay with works of art belonging to the estate, according to a special procedure with valuation, recognition of the international fame of the work, etc.[32]

The Director-General of estate taxes can agree to delayed payment (up to five years) if the assets are difficult to sell.[33]

25 Art. 21(VII) InhTC.
26 Art. 21(VIII) InhTC.
27 *Eckelkamp* case, C 11/07.
28 Art. 108 InhTC.
29 Art. 106(2) InhTC.
30 Art. 77 InhTC.
31 Art. 70 InhTC.
32 Art. 83-3 InhTC.
33 Art. 77 InhTC.

Table 2. Family owned business exemptions in Flanders

A. Exemption	3 years before death	5 years after death
Participation condition	• a wholly owned enterprise, together with spouse • or at least 50% of the shares in company,[a] owned together with spouse and family, and having its seat in the EEA[b] • receivables in a qualifying company	No condition
Employment condition	At least € 500,000 must have been paid to employees[c] in the EEA in the last 3 years before death[d]	An amount of 5/3 of the salary, paid in the 3 years before death, must be paid out in the 5 years after death
Capital requirements	Capital increases have to meet financial or economic purpose test	Capital decreases or repayment of exempted receivables is forbidden
Formal requirements	• Bookkeeping must be held as required by law • Special request to Flemish government, which issues a certificate • Spontaneous declaration in the estate tax return	• Bookkeeping • New declaration after 5-year term

[a] No industrial or commercial activity is needed for companies.
[b] Family includes: the descendant and his/her spouse; his ascendants and descendants and their spouses; his brothers and sisters and their spouses; the children of predeceased spouses (art. 60*bis* § 1 W. Succ. Vl.)
[c] Salary paid out to the deceased and his family counts only for a maximum of 300,000 euro. All amounts are linked to the index of consumer prices.
[d] If this is not the case, a proportionate exemption applies. E.g. if only 200,000 euro salary has been paid, the family enterprise or family company is exempt for two-thirds, and taxable for one-third.

2.2.1.11. Subsequent discovery of assets belonging to the deceased

If assets belonging to the deceased are discovered after filing the original tax return, then an additional tax return must be filed.

2.2.1.12. Transfers of family owned and "closely held" businesses

There is full tax exemption for family owned businesses in Flanders and Wallonia, and a reduced rate of 3 per cent in Brussels. Conditions vary strongly according to the region. The regime was introduced in 1997 in Flanders, and subsequently in Brussels and Wallonia.

The conditions are, in a simplified form, as shown in Tables 2, 3 and 4.

Table 3. Family owned business exemptions in Brussels

B. Brussels: 3% tax	**3 years before death**	**5 years after death**
Participation condition	• A wholly owned enterprise, in the hands of the deceased or his spouse • Or at least 25% of the full ownership of shares of a company, – situated in the EEA, – carrying on a business or profession	The activity of the enterprise must be continued for at least 5 years
Employment condition	There must be fewer than 250 employees	At least 75% of the number of employees must be kept
Capital requirements	• Either the turnover of the enterprise must be less than €40 m • or the total balance sheet must be less than €27 million • Capital increases have to meet financial or economic purpose test	Capital decreases are forbidden
Formal requirements	• Special request to Brussels government • If less than 50% of the votes is transferred, a shareholders agreement has to be concluded with the engagement that the conditions after death will be met	Each year, evidence has to be given that conditions are still fulfilled

If the material conditions after death are not met in Flanders, there is a proportional loss of the exemption. If the formal conditions are not met, the exemption is totally lost.

If the conditions after death are not met in Brussels, there is a total loss of the exemption.

If the conditions after death are not met in Wallonia, there is a total loss of the exemption, except in case of *force majeure* (Act of God).

2.2.1.13. Revenue

The revenue of the estate taxes is:

- for Flanders: 1,022,486,000 euro out of a total budget of 4,693,547,000 euro;[34]

[34] http://jsp.vlaamsparlement.be/docs/stukken/2008-2009/g13-1-a.pdf.

Table 4. Family owned business exemptions in Wallonia

Exemption	3 years before death	5 years after death
Participation condition	• Wholly owned enterprise, in the hands of the deceased or his spouse • or the 10% of the shares in company, – situated in the EEA, – carrying on a business or profession, either itself or with its subsidiaries • Receivables in a qualifying company up to an amount equal to the paid up equity	The activity of the enterprise must be continued for at least 5 years
Employment condition	• At least 1 employee • Or if the decedent and his spouse and legal descendents are the only independent workers	At least 75% of the number of employees must be kept
Capital requirements	Capital increases have to meet financial or economic purpose test	Capital decreases are forbidden
Formal requirements	• Special request to Walloon government • If less than 50% of the votes is transferred, a shareholders agreement has to be concluded with the engagement that the conditions after death will be met	Each year, evidence has to be given that that conditions are still fulfilled

- for Brussels: 317,061,000 euro out of a total budget of 1,061,950,000 euro;[35]
- for Wallonia: 521,000,000 euro out of a total budget of 3,918,843,000 euro.[36]

2.2.1.14. Developments

For many decades, estate tax underwent very few legislative changes: apart from the rates, no basic changes took place.

Since 1989, the regions (Flanders, Brussels and Wallonia) have had the legislative power to change the rates, and also to change the taxable base for estate tax. However, it was not until 1996 that the first region, Flanders, made major changes in the Inheritance Tax Code, but since the first Flemish regional decree of 20

35 http://www.vanhengel.info/documents/090106%20-%20afsluiting%202009%20(3%201).pdf.
36 http://wallex.wallonie.be/PdfLoader.php?type=doc&linkpdf=13917-14452-1171.

December 1996, many others have followed in the three regions, Flanders usually taking the lead.

Belgium has been ordered to change its legislation both by the European Commission and by the ECJ. Flanders has its legislation for family owned businesses, deduction of debts for non-resident decedents, and for foreign charities.

The Walloon tax of 90 per cent for non-related persons on inherited portions exceeding 175,000 euro has been declared unconstitutional.[37]

There are, to the reporter's knowledge, no specific plans to abolish inheritance tax in any of the regions. Given the amount of revenue it generates, it seems rather unlikely that any changes will be made in the near future.

2.2.1.15. Interaction with gift taxes

There is a clear interaction between inheritance tax and gift tax. Belgian gift tax has a rule that payment of the tax on movable goods (not on Belgian immovable property) depends in a certain sense upon the decision of the taxpayer. If he makes a gift of movable assets (cash, shares, portfolio) before a Belgian notary, gift tax will be due (mostly at 3 per cent or 7 per cent).[38] If a deed is made before a foreign (e.g. Dutch) notary, or no deed is drawn up at all, no gift tax is due.

If the donor dies, however, in the three years following the gift, inheritance tax is payable if the gift tax had not been paid. This is a clear incentive to pay the gift tax, especially if the donor is already elderly or in poor health. Special rules apply to conditional gifts.

Gifts of Belgian immovable property have to be registered and are subject to the (much higher) registration tax. If the donor dies within three years, the assets are added to the estate to calculate the inheritance tax.

Gifts of foreign immovable property are free of Belgian gift tax, and, strangely enough, are not added to the estate to calculate Belgian inheritance tax, although Belgium has an imputation system for foreign immovable property (article 17 – see below).

2.2.2. Income and capital gains taxes

Income tax may be levied on the occasion of death, but only rarely. It is only due on capital gains established on assets used for professional activities.[39] The mention of a value in the estate tax return or in a deed of partition is sufficient.[40]

If the activity is continued by the spouse, or by one or more heirs in direct line, no tax is due,[41] but there is also no step up in value in that case.[42]

Assessment follows according to the normal income tax procedure: a bill of assessment is sent to the heirs.[43]

[37] See decision 107/2005.
[38] Special rules apply in Wallonia.
[39] Art. 27 Inc.TC.
[40] Com IB no. 28/21.
[41] Art. 46 §1 Inc.TC.
[42] Art. 46 §2 Inc.TC.
[43] Art. 133 R.D. Inc.TC.

2.2.3. Other taxes

Member States may treat as a "supply of goods" the retention of goods by a taxable person, or by his heirs, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition (article 18(c) of the EC Directive no. 2006/112/EC).

According to Belgian legislation, such a retention is treated as a supply of goods for consideration (article 12, indent 1(5) of the Belgian VAT Code). Similar to the EC Directive, the Belgian VAT Code also provides that this fiction does not apply in case of a transfer of a going concern. The Belgian VAT authorities also agree that the fiction does not apply if, in the framework of the liquidation, the successors supply the stock and the remaining assets with VAT by using the VAT identification number of the taxable person.

It should be noted that in a Belgian context two specific situations occur:

- the fiction will in most cases not apply to the retention of a building. According to the Belgian VAT Code the supply of buildings is only subject to VAT as far as the property is new for VAT purposes (article 12 of the EC Directive no. 2006/112/EC). If the building is no longer new, the taxable person is obliged to perform a revision of the initially recovered VAT (i.e. if the revision period of 5 or 15 years has not yet expired).
- If the retention regards a car, VAT only becomes due, because of the deemed supply, on a reduced taxable basis. This is due to the initial limited VAT recovery of 50 per cent at the purchase of the car.

2.2.4. Taxes not levied but affected by the decease

In general, other taxes are not affected by the decease of the taxpayer. We can mention the following:

- children continue to be considered as dependants for the computation of income tax, if they die while they are dependent;[44]
- a step up in basis for the depreciation is possible, if the capital gain has been taxed with income tax on the occasion of the death (see section 2.2.2);[45]
- registration tax may be due on death of one of the co-owners of Belgian immovable property in case of joint property.[46]

2.2.5 Overall cap on taxes

There is no legal cap on the overall amount of taxes that are simultaneously levied on the moment of death. However, the Constitutional Court rules that a rate of 90 per cent is unconstitutional, as this would be unreasonably high and not proportionate to the targets of the legislation.[47] Therefore, if the application of two taxes would result in an overall taxation of more than 80 per cent, it may be argued that this would also be unconstitutional.

44 Art. 138 Inc. TC.
45 Art. 61 Inc. TC, j° 46 §2 Inc. TC.
46 Art. 44 j° 144 Reg TC.
47 Decision 10/2005.

3. Territoriality rules

3.1. Description of territoriality criteria

Belgium has a worldwide system of inheritance tax and levies taxes on the basis of two criteria:

- "inheritance tax" (*successierecht, droit de succession*), if the deceased had his last residence in Belgium, levied on all assets less any liabilities constituting the estate;
- the "transfer tax upon death" (*recht van overgang bij overlijden, droit de mutation par décès*) if the deceased had his last residence outside Belgium (only levied on Belgian immovable property).

Belgium no longer has overseas territories.

3.2. Subjective territorial link

3.2.1. The subjective links

The subjective link used by Belgian inheritance tax is residence. As a resident is considered, "he who, at the time of his death, has fixed his domicile or the centre of his fortune within the realm".[48]

Only the time of death counts. If the deceased moved his residence out of Belgium in the last days before his death, no Belgian inheritance tax is due (except on Belgian real estate).

The concept of residence is not very clear. Case law states that it is a factual concept, referring to the place where the deceased actually had the centre of his family and business relations. It can be independent from the legal domicile and from citizenship,[49] and depends only on the circumstances.[50] According to older case law, the centre of family relations and the centre of business relations coincided.[51] In later case law, these two notions were separated: it is now sufficient to have either the centre of family relations, or the centre of business relations in Belgium to subject the estate to Belgian inheritance tax.[52]

The link with the heir is irrelevant. If a Belgian inherits movable property from a Swiss resident, no Belgian inheritance is due.

There are special "fictions" in Belgian income tax law, stating that an individual is tax resident where his family lives or where he is registered with the local authority as resident.[53] These fictions are not applicable for inheritance tax.

There is a special rule for emigration from one Belgian region to another. If the fiscal residence of the deceased was situated in the five years before his death in

[48] Art. 1, 2nd al. InhTC.
[49] Cass. 6 October 1941, Pas. 1941 I 368.
[50] Cass. 19 July 1836, Pas. 1935 I 280.
[51] Trib. Bxl. 31 July 1835, confirmed by Cass. 19 July 1836 and also printed in Pas 1835 I 280.
[52] Cass. 7 September 1965, *Pas.* 1966 I 34, *Rec. gén. enr. not.* nr. 20972. This evolution was criticised by the reporter in "De fiscale woonplaats historisch bekeken", *Recht zonder omwegen, Fiscale opstellen aangeboden aan Prof. Dr. J.J. Couturier*, Larcier, 1999, pp. 3 *et seq.*
[53] Art. 2 §1(1), 2nd and 3rd paragraph Inc. TC.

more than one place in Belgium, he is deemed to have his fiscal residence at the time of his death in the place where his residence has been situated the longest time in this period (of five years).[54] This rule is applied only for moves inside Belgium. If a person immigrates to Belgium, he is considered to be a Belgian resident for Belgian inheritance taxes from day one.

3.3. *Situs* of property

3.3.1. Relevance of situs *of assets*

Foreign estate or inheritance taxes on foreign immovable property are credited against Belgian inheritance tax. The *situs* of property is therefore quite important.

The tax authorities accept therefore qualification by the country where the assets are situated. An example was given by the French Law of 28 October 1946, characterising war indemnity claims in the same way as the assets they indemnified. If the claim was related to French immovable property, it was accepted that the claim was also immovable, and the French inheritance tax on it can be credited.[55]

A second example is Dutch "economic ownership", resulting from the sale of Dutch real estate, but before the notarial deed is signed. If Dutch inheritance tax is levied on the legal ownership, Belgium will give credit.[56]

A third example are the shares of a Dutch property company. If more than 70 per cent of the assets of a company are Dutch property, then the shares are considered as *situs* assets, and hence taxable in the estate of a non-resident. A decision of the Belgian tax authorities accepts that these assets are also to be considered as immovable property for Belgian inheritance tax, and that credit is given for the Dutch tax.[57] The decision may be against the view of the legislator according to the preparatory works of the law, but it was welcomed by legal scholars.[58]

To generalise, this could mean that Belgium would also give a credit for shares of a tax-haven company, owning Italian property, and hence taxable in Italy according to the rule in *Corte di Cass.* 11 June 2007.[59]

It may be relevant to know the *situs* of assets other than immovable property for procedural matters. It is only possible to ask for a binding expert valuation before or after filing the tax return for assets situated in Belgium.[60] The possibility of a binding expert valuation has an indirect influence on the time limit. For assets subject to this valuation, the prescription time is two years, for other assets, ten years (see section 6 below on compatibility with European law).

Also, the fine for non-declaration of Belgian immovable property in the tax return is one times the inheritance tax, for foreign property the fine is twice the inheritance tax.[61]

54 Art. 5 §1(4) of the Special Law of 16 January 1989 concerning the financing of Communities and Regions, B.S. 17 January 1989.
55 Adm. Dec. 26 March 1959, S17/04-01.
56 Adm. Dec. 20 August 1998, no. E.E./96.289, S17/06-03.
57 Adm. Dec. 20 March 2008, no. E.E. 102.537, quoted in Nijs and Maelfait, T.F.R. no. 351, 2008, p. 997.
58 *Ibid.*
59 Commented in Deblauwe, T.F.R. no. 346, 2008, p. 750.
60 Art. 20 and 111 InhTC.
61 Art. 126 InhTC.

3.3.2. *Relevance of* situs *of debts*

The *situs* of debts had no importance, until very recently, except for a very minor matter of valuation of yearly rents, payable in kind, where the residence of the debtor determines which market is to be taken into account.[62] This rule is hardly[63] or never[64] used in practice.

Belgium has, however, been ordered to change its legislation with respect to the deduction of debts in the estate of non-residents. The traditional rule (dating back to the law of *frimaire*)[65] was that, for non-residents, the gross value of Belgian real estate was taxable, without any deduction of debts. The ECJ ruled in the *Eckelkamp* case (no. C-11/07) that

> "the combined provisions of Articles 56 EC and 58 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated."

Stated otherwise: if debts are deductible in the estate of resident deceased persons, then for non-residents at least debts "secured"[66] on Belgian property must be deductible.

The Flemish regional Parliament has accepted therefore the deduction of "debts which have been taken on to acquire or to maintain those goods".[67] It is questionable whether this modification is sufficient to bring the law into conformity with European law.[68] The other regions (Brussels and Wallonia) have not yet adapted their legislation (see section 6 below on compatibility with European law).

3.3.3. *Discrepancy between* situs *rules for death duties and* situs *rules for income tax*

The new Flemish rule mentioned above was clearly inspired by the income tax rules, where deduction of interest is allowed if the debt has been taken on to acquire or maintain the property in question. So, there is no discrepancy.

62 Art. 23 InhT.
63 Decuyper, no. 640.
64 Van Acoleyen, no. 253.
65 *Loi du 22 frimaire* VII = 12 December 1789.
66 French: "dettes grevant ce bien immeuble"; Dutch: "op deze onroerende zaak rustende schulden".
67 Decree of 19 December 2008, modifying art. 27 InhT Fl.
68 See the reporter's comments in *De Standaard* of 5 March 2009.

Table 5. Valuation of usufruct (%)

Age more than … years	Belgium	France	The Netherlands
0	72	90	96
20	68	80	90
30	64	70	84
40	56	60	78
50	52	50	72
55	44	50	66
60	38	40	60
65	32	40	48
70	24	30	42
75	16	30	30
80	8	20	24
85	8	20	18
90	8	10	12

3.3.4. Situs *rules as a cause of double taxation*

General *situs* rules do not cause double taxation, as Belgium taxes all assets, with deduction of all debts. Double taxation may arise under the Flemish *Eckelkamp* rule, allowing only the deduction of debts taken on for the acquiring or maintaining of Belgian property. If a foreign state were to give credit according to the decision of the ECJ ("debts secured") then double taxation may arise. Indeed, debts may be secured on Belgian property, without having been taken out for its acquisition or maintenance.

4. Avoidance of double taxation under domestic law

4.1. Introduction

Double taxation is avoided by the credit method, but in domestic law, only on foreign immovable property. The character of the property is determined according to the local legislation (see section 3.3.1 above).

For movable assets, no avoidance of double inheritance taxation is possible, not even a deduction of foreign taxes from the taxable base.[69] Only if the foreign tax is not levied on the heirs personally (inheritance tax), but on the estate as a whole (estate tax), will the tax administration allow a deduction from the taxable base.[70]

For immovable property, all foreign taxes on the estate are creditable, both inheritance and estate taxes,[71] but only if they have been really paid. Exemption is not equal to payment; there is no notional tax credit granted in such cases.[72]

69 Decuyper, no. 512.
70 *Ibid.*
71 Adm. Dec. 21 November 1968, Rep RJS 17/07.01, Decuyper no. 514.
72 The rule "exemption vaut impôt" is not applied: Adm. Dec.15 February 1962, Rep. RJS 17/06.01; Decuyper, no. 520.

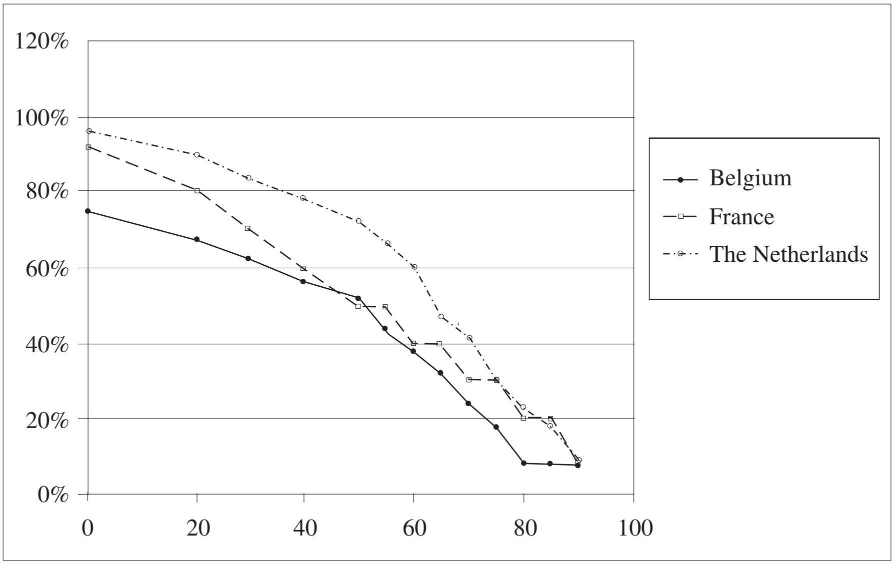

Figure 1.Valuation of usufruct

The credit is calculated per heir, not for the entire estate, according to the tax administration,[73] and limited to the part of the Belgian tax corresponding to the foreign real estate, calculated according to Belgian rules. This may result in insufficient relief, especially in cases with diverging valuations of assets. A known problem here in practice is the diverging valuation of usufruct in Belgium, France and the Netherlands. The valuation is as shown in Table 5 and Figure 1.

Another case of insufficient relief is the so called "parental division" in the Netherlands. Dutch nationals frequently make a division of their estate, attributing all their assets to their spouse, and a compensatory claim on the spouse to their children. If they emigrate to Belgium, and live here for more than 10 years, and still possess Dutch immovable property, the Netherlands will tax the Dutch property in the hands of the spouse. She is indeed the person receiving it, and the claim is ignored for the calculation of the Dutch inheritance tax. Belgium on the other hand will calculate the inheritance tax per heir, taking into account the net assets received. This means that Dutch taxes are only credited to the Belgian taxes for the net amount received by the spouse, which is often insignificant (e.g. 1 per cent). For criticism from a European point of view, see section 6 below.

The rule that credit is granted per heir is deducted by the tax authorities from the general system of the law, which, in principle, calculates the tax per heir. Since 1996 however, this system has no longer been generally applied, especially not in Flanders. As indicated above (section 2.2.1.3) the tax is, in direct line, calculated separately for immovable and movable assets; the tax between non-related persons

[73] Decuyper, nos. 526 and 527.

is calculated on the part received by all of them. This position may therefore be challenged.[74]

For the determination of *situs* of assets (real estate) see section 3.3 above.

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.

If the foreign state grants a deferral of payment, credit is granted.[75]

Credit will not be granted for foreign donation taxes. This is not necessary either, as donated foreign immovable property is not subject to Belgian inheritance tax, even if the donation took place immediately before the death.[76]

No credit is granted for exit taxes.

4.2. Exemption vs. credit

Belgium does not use the exemption method.

4.3. Assessment of the relief

As indicated above, a number of situations may exist where double (or multiple) taxation on death may arise.

This is partially due to the rule that credit is calculated per heir, not for the entire estate. But also the limitation of the credit to foreign immovable property (even if interpreted in a very broad way by a recent decision) can cause double taxation if the source state taxes other assets, such as business assets attributable to a permanent establishment, or other movable assets.

Belgium would not address the situation where another state would also consider a resident as resident or domiciled or as fictiously domiciled.

5. Avoidance of double taxation under treaties

5.1. Inheritance tax treaties

Belgium has only two inheritance tax treaties, one with Sweden, dating from 1956[77] (where inheritance taxes have since been abolished), and one with France from 1960.[78] Both date from before the 1969 OECD model.

74 The position of the tax authorities is the same as regards the renunciation of a succession, and was criticised in the reporter's article "Verwerping berekening per hoofd – of toch gezamenlijk?", *Nieuwsbrief successierechten*, 2008/2/1-9.

75 Decision 6 January 1959, Rep RJS 17/03.01, Decuyper no. 519.

76 Decision of 4 May 1929, Donnay in Rép. Not. no. 258, Decuyper no. 165.

77 *Overeenkomst tussen België en Zweden tot voorkoming van dubbele aanslag en tot regeling van zekere andere vraagstukken inzake belastingen op de erfenissen*, signed 18 January 1956, approved by Belgian Law of 28 February 1958, B.S. 5 April 1958.

78 *Overeenkomst tussen België en Frankrijk, tot voorkoming van dubbele aanslag en tot en tot regeling van zekere andere vraagstukken inzake belastingen op de erfenissen*, signed 20 January 1959, approved by Belgian Law of 20 April 1960, B.S. 10 June 1960.

The treaty with Sweden – which lost most of its practical use, given the abolition of Swedish inheritance taxes – is only applicable on estate or inheritance taxes and on similar taxes introduced after its signature; it is not applicable on gift taxes.[79] It is applicable in principle only on the estates of Belgian or Swedish nationals:[80] residency is not sufficient, but the rules for avoidance of double taxation have been extended to residents by the protocol.[81] Immovable property is taxable in the *situs* state;[82] also the right to compensation for the exploitation of mines is immovable,[83] but debts guaranteed on immovable property are movable.[84] There is no special article for ships.[85] Belgium gives a credit for Swedish tax on Swedish immovable property,[86] while Sweden exempts Belgian estates with reservation of progression.[87] All other assets are taxable only in the residence state.[88] Tie-breakers are the permanent home, then nationality, then mutual agreement.[89] Debts specially guaranteed on immovable property are first deducted from these goods,[90] then from the others. The convention mentions also expressly that no prejudice is done to the exemptions, according to the general rules of the law of nations.[91] Foreign nationals may not be taxed more heavily than their own nationals, especially for family deductions.[92] There is a limited exchange of information.[93]

The treaty with France of 1959 is quite similar. It is applicable to inheritance taxes on estates of residents.[94] Tie-breakers are the permanent home, being the centre of vital interests, then the principle abode, then nationality; if necessary, mutual agreement between the states.[95] Taxable in the *situs* state are not only immovable property, but also businesses (taxable where the registration in the register of commerce has been done).[96] Ships, boats and aircraft are taxable where they are registered.[97] Corporeal movable assets – including bank notes – are taxable in the state where they were actually situated on the time of death.[98] All other goods are taxable

79 As the 1966 OECD model, but unlike the 1982 model.
80 Art. 1 §3 of the treaty: Dutch: *onderhorigen*, French: *ressortissants*, the same word used as tie-breaker in art 1 §3 of the treaty.
81 Protocol to art. 4 of the treaty.
82 Art. 2 §1.
83 *Ibid.*
84 Protocol to art. 2.
85 Unlike the OECD model of 1966
86 Art. 2 §2.
87 Art. 2 §3: Sweden is allowed to tax Belgian real estate, but the tax may not be higher than the tax which would be due if all assets had been subject to Swedish tax and the tax which would be due if Sweden had only taxed the Belgian assets.
88 Art. 3 §1.
89 Art. 3 §2.
90 The same test as used by the ECJ in the *Eckelkamp* case (C-11/07), but not the same as used now by the Flemish decree! (see section 3.3.2 above).
91 Art 5. So, the Belgian government admits that these exemptions exist!
92 Art 6. This is a strange rule, as Belgium has never made a distinction according to nationality. The intention is probably to refer to the rules for residents.
93 Art. 7.
94 The “correction” in the protocol, made in the treaty with Sweden, was not necessary here.
95 Art. 3.
96 Art. 5. This is one of the very few rules where registration in the register of commerce (now *kruispuntbank*) has tax consequences.
97 Art. 6.
98 Art. 7.

in the state of residence.[99] Deduction of debts has a similar provision as in the Swedish treaty. Each state (also the *situs* state!) keeps the right to tax with reservation of progression,[100] but the residence state has to give a tax credit for the *situs* state taxes.[101] Here again, the customary exemptions of diplomatic and consular personnel according to the law of the nations are confirmed.[102] A limited exchange of information is provided for.[103]

A draft convention with the USA was signed on 27 May 1954 and was ratified by the US Senate on 25 February 1955, but has not yet been ratified by the Belgian Federal Senate. In 1997, the Belgian Federal Minister of Finance claimed that this was because (a) the USA wanted to tax movable assets situated in the USA, while Belgium did not want to give credit for these assets and (b) that the exchange of information would "increase the number of cases of double taxation"![104] There was no intention to proceed with the ratification, as long as the USA insisted on taxing those movable assets. However, we note that the taxation of movable assets in the source state was accepted long before by Belgium in the Belgian-French treaty (see above).

Apart from these treaties, a few older treaties exist concerning the exchange of information, which may be among the oldest tax treaties in the world. A treaty with France of 12 August 1843[105] provided for an automatic exchange of information on immovable property in the other state, and on matrimonial contracts and registered wills in the other state. The treaty was, however, no longer executed, especially by France, and the Belgian administration decided not to keep the registers any longer after 1 January 1870.[106] This treaty came back into force in the treaty with France of 1960, stating that the treaty of 1843 would "continue to have its full force".[107]

Similar treaties were concluded with the Netherlands[108] and Luxembourg in 1845.[109] These two treaties seem never to have been approved by the Belgian Parliament, and may be challenged as unconstitutional and therefore void.[110]

So, in summary:

- the treaties with Sweden and France only cover inheritance tax;

99 Art. 8.
100 Art. 10(a) of the treaty; a very unusual provision, to the reporter's knowledge.
101 Art. 10(b).
102 Art. 11.
103 Art. 14(1) of the treaty. Art. 14(2) confirms the treaty of 1843, discussed below.
104 "De uitwisseling van inlichtingen aan de Amerikaanse administratie zal in feite de dubbele belasting doen toenemen vermits de Amerikaanse schatkist successiebelasting zal kunnen heffen op waarden die voordien totaal ontsnapten aan de belasting." *Vraag no. 147 van de heer Caluwé d.d.* 29 November 1996 (N.), Vr. Antw. Senaat, Zitting 1996–97, bulletin 1–39.
105 Not published in the Official Gazette (Belgisch Staatsblad), but in the Parlementaire Bescheiden, 1958–1959, 305/1, bijlage I, in *Wetboek Successierechten Story Scientia*, and in the *Pandectes belges*,Tôme 26, V° *Convention internationale (Dispositions fiscales)* col. 818.
106 Circular of 27 December 1869, no. 774, *Pand. b.* Tôme 26, V° *Convention internationale (Dispositions fiscales)* col. 827, no. 2.
107 Art. 14(2) of the treaty of 1960.
108 Convention of The Hague of 24 May 1845, *Pand. b.* Tôme 26, V° *Convention internationale (Dispositions fiscales)* col. 823.
109` Convention of Luxembourg of 11 October 1845, *Pand. b.* Tôme 26, V° *Convention internationale (Dispositions fiscales)* col. 826.
110 Art. 167 §2 of the Belgian Constitution.

- no treaty has been concluded according to the OECD model, either the 1966 or the 1982 model;
- gift taxes are not covered;
- the commentary of the OECD may have a certain authority, as international legal doctrine, but is certainly not binding;
- the treaties address residence source taxation as well as dual residence;
- they add little to the unilateral relief, except if there are substantial debts, or, in the case with France only, for French businesses and corporeal movable goods;
- double non-taxation is not an issue, as Belgium uses the credit method and gives no notional credit;
- the problems of incomplete credit remain, in case of diverging valuation or diverging taxable persons;
- if a conditional exemption is given, Belgium grants a conditional credit in its internal law, so also here the treaty offers little more than domestic law;[111]
- relief is not given for gift taxes, but Belgium does not tax foreign immovable property, even if given immediately before death;
- the treaty with France gives protection against French tax on the heir or legatee;
- no treaty would address double taxation arising from the levy of an exit tax, as they apply only to inheritance taxes.

5.2. Income tax treaties

Income tax treaties do not deal with estate taxes, not even article 22 on capital.[112] The Italian Supreme Court case of 11 June 2007, applying income tax treaties to estate taxes has been commented on by Belgian legal scholars,[113] but there is no similar case law in Belgium.

An estate is considered as a “person” for the application of certain income tax treaties concluded by Belgium: Canada,[114] Finland,[115] the USA,[116] Hong Kong.[117] According to article 29 of the treaty with Sweden, an estate is to be considered as transparent. This seems to be the general rule.[118]

There is no case law, to the knowledge of this reporter, on whether the term “alienation” in article 13 of the OECD model includes transfer upon death.

The OECD model allows exchange of information for the application of taxes other than income taxes.[119] It is interesting to see that the model allows exchange of

111 Adm. Decision 6 January 1959, Rep. R.J. s 79/01.01, Decuyper, *op. cit.*, no. 1433.
112 Commentary on art. 22: “1.This Article deals only with taxes on capital, to the exclusion of taxes on estates and inheritances and on gifts and of transfer duties”.
113 R. Deblauwe, “Italiaans recht van overgang bij overlijden kan geheven worden op buitenlandse vennootschap met Italiaanse deelneming – Uitspraak van de Corte di Cassazione Italia 11 juni 2007”, *TFR*, no. 346, pp. 750–754.
114 Treaty of 23 May 2002, art. 3 (only for Canadian estates).
115 Treaty of 18 May 1976, art. 4.
116 Treaty of 27 November 2006, art. 3.
117 Treaty of 10 December 2003, art. 3 (only for estates of Hong Kong).
118 Treaty of 5 February 1991.
119 Commentary on art. 26 concerning the exchange of information, no. 2: “The text of the Article makes it clear that the exchange of information is not restricted by Articles 1 and 2, so that the

information "concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities", while in the recent treaty with the Netherlands, exchange is limited to "information which is relevant to give execution to the dispositions … of the *national* legislation of the contracting parties".[120] This means that the information cannot be used for the levy and recovery of taxes levied by regional or local authorities.[121] It seems therefore that the inheritance tax which has become a regional tax (see above, section 1.2) cannot be levied or recovered on the basis of this information!

5.3. Non-tax treaties

A lot of non-tax treaties have an influence on the perception of inheritance tax as they define the concept of residence. This is the case for certain diplomats working at NATO, SHAPE, the Council of the Association of Caribbean States, BENELUX, the Western European Union, the European Communities, the European Patent Office, the European Space Agency, [122] the OECD, the International Cotton Institute, and the Customs Cooperation Council.[123]

6. Compatibility with EC law

Belgium adapted its legislation (article 60 on foreign charities) after a formal notice from the European Commission, so that charities can now also benefit from the reduced rates (8.8 per cent in Flanders, 6.6 to 25 per cent in Brussels, 7 per cent in Wallonia) if (a) they are similar to the Belgian entities, and (b) if they have been formed in accordance with the law of a Member State of the European Economic Area (EEA) and (c) have their registered office, central administration or principal place of business within the EEA.[124]

One may wonder whether this is still in accordance with the European Treaty, after the decision in the *Hein Persche* case,[125] which ruled:

> "70. As regards charitable bodies in a non-member country, it must be added that it is, as a rule, legitimate for the Member State of taxation to refuse to grant such a tax advantage if, in particular, because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country."

cont.
information may include particulars about non-residents and may relate to the administration or enforcement of taxes not referred to in Article 2."

120 Art. 29 of the new treaty of 5 June 2001.

121 Ilse De Troyer, "Uitwisseling van inlichtingen", in Bernard Peeters (ed.), *Het Belgisch-Nederlands Dubbelbelastingverdrag, een artikelsgewijze bespreking*, 2nd edn, p. 720.

122 Adm. circular no. 8 dd. 28 February 1979.

123 See Decuyper, *Successierechten*, no. 15, pp. 23–25.

124 The definition is inspired by art. 48 of the treaty establishing the European Community, see http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/12002E.html.

125 Decision of 27 January 2009, C-318/07.

We may wonder whether the Flemish legislation conforms with the European freedom of capital, if it is possible "to obtain the necessary information" from the country where the deceased was resident. We have seen that the OECD model has this possibility in article 26 (see section 5.1 above). Suppose now that exchange of information is possible on the basis of a treaty concluded on the basis of this OECD model,[126] perhaps the court would hold that also legacies to charities with head offices outside the EEA must benefit from the lower tax rates.

In the *Geurts-Vogten* case (464/05), it was decided that the exemption for family owned businesses, on condition that they had at least five employees employed in the Flanders region, was against the freedom of settlement. Flanders has adapted article 60bis since, allowing also employment in other Member States of the EEA.

In the *Eckelkamp* case (11/07), it was decided that the taxation of Belgian immovable property in the estate of a non-resident on the gross value (without any deduction of debts "secured on such property") was contrary to European law. Flanders has changed its legislation since, but allowing only the deduction of debts "specifically contracted for the acquisition or conservation of these assets" if the deceased had his "domicile or the seat of his patrimony in the European Economic Area".[127] One might wonder whether this is not a supplementary – and therefore illegal – condition.

Also the conformity of the rules in section 3.3.1. concerning movable assets with the European rules is in the reporter's opinion questionable. The Dutch High Court (*Hoge Raad*) has already ruled that different time limitation rules for domestic and foreign assets is in principle against the European freedom of services or capital.[128] The ECJ[129] has confirmed this point of view, stating that an extended period of limitation is not justified if there is evidence of assets in the other state, unless the extended period is specifically intended to follow the mutual assistance procedure:

> "The second situation is where the tax authorities of a Member State have evidence concerning taxable items located in another Member State which enables an investigation to be initiated. In that situation, the application by the first Member State of an extended recovery period which is not specifically intended to permit the tax authorities of that Member State to have effective recourse to mechanisms of mutual assistance between Member States and which commences once the taxable items concerned are located in another Member State cannot be justified."

The fact, however, that double taxation arises from the application of the legislation of two Member States, is not sanctioned by the ECJ:[130]

[126] Belgium now accepts this provision in its new treaties: http://www.fiscus.fgov.be/interfafznl/nl/downloads/bankinlicht.pdf.

[127] New art. 27(2) W. Succ. Vl.

[128] Decision of 21 March 2008, no. 3.9.2. ,www.hogeraad.nl .

[129] Decision of 11 June 2009 in the joined cases C-155/08 and C-157/08, no. 74.

[130] Decision of 12 February 2009 (*Margarete Block* case), Case C-67/08.

> "30 Community law … does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. …
>
> It follows from this that … the Member States … are not obliged … to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted …"

If Spain taxes movable assets on its territory, Germany is not obliged to give credit for the Spanish tax. Belgium gives only credit for foreign immovable property,[131] and only insofar as these assets are subject to Belgian law, after deduction of debts, in the hands of the same heir or legatee. This is, often, a very incomplete way of avoiding double taxation, but the European treaty provides no remedy against it, according to this case law of the ECJ.

In the *Arens-Sikken* case,[132] it was ruled that it was contrary to the European free movement of capital if there is no provision for the deductibility of over-endowment debts resulting from a testamentary parental partition *inter vivos* if there was such a provision in the estate of residents, if there was a progressive rate of taxation and in so far as the combination of (a) the failure to take into account such debts and (b) that the progressive rate could result in a greater tax burden for heirs who were not in a position to rely on such deductibility.

It seems the Belgian legislation violates this rule as well. Article 65 of the InhTC provides for the deduction of any sum, rent or pension given by means of legacy to a third person from the taxable base of the heir who has to pay the sum or pension. This rule is, according to the text of the law, only applicable for residents.[133] According to the rule in *Arens-Sikken*, this seems contrary to the free movement of capital.

131 Interpreted broadly by the tax administration to also include shares of Dutch immovable property companies: see above section 3.3.1.

132 Decision of 11 September 2008, C-43/07.

133 Art. 65 is, according to its own wording, applicable only for the "inheritance tax" (*successierecht*), not for the "duty in case of transfer by death" (*recht van overgang van overlijden*): see above section 3.1.