Broadcast

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FACTSHEET: BREXIT AND INHERITANCE TAX (IHT)

SPECIAL ISSUE

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INHERITANCE TAX PLANNING POST-BREXIT: WHAT YOU NEED TO CONSIDER

It has long been a common misconception that UK individuals owning property in, say, France can only pass that property to their beneficiaries, subject to local rules such as forced heirships, triggering UK inheritance tax (IHT) issues.

In this update, we examine how the EU Succession Regulations can still be used by UK individuals, despite Brexit, and the tax and succession implications of doing so. Article 22 states that the habitual residence position can be displaced by an election made in the Will of a person for the law of their nationality. The fact that the UK has now left the EU does not make any difference to the ability of a UK individual to choose UK law to govern the succession to a property owned in, say, France or Spain by that citizen.

Example

If you are a UK citizen with a house in France, the effect of this is that, on the death of the testator having elected for English law in the Will, the English court will say initially that French law applies to the house because it is the "law of situs". But, due to the election, France will not 'accept the renvoi', (renvoi refers to the rules of private international law under which one country may decide that the law of another country should apply to the succession) and will say that the internal law of England – allowing freedom of testation – applies. France will therefore give effect to the election by accepting the provisions of the Will and passing the property to those named.

Therefore, a UK citizen can choose UK law to govern the succession and thus allow assets situated in an EU country to pass per their wishes and without the application of any forced heirship rules. The same principle will apply to a person with some other nationality which allows freedom of testation. In all such cases, an election should usually be made and the client should not rely on the habitual resident default position.

Drafting and using the election

The UK comprises England, Scotland, Wales and Northern Ireland (as readers will be aware) which are different jurisdictions and have different rules regarding succession. Thus, an election is taken to mean an election for the law of the place within the state elected for, with which the person has their closest connection.

In drafting the election, it is usual if electing for the law of the UK to make a statement that, for example, England is the place with which the testator has the closest connection. Assuming the election is made, it is then necessary to consider other points concerning the provisions in the Will. In particular, as a general rule, it is better to avoid any trust language so far as possible regarding any gift or assets in a civil law jurisdiction, such as France or Spain, both for succession and tax reasons. For the same reasons, it is usually also better for the EU property to be left under a separate simple legacy, rather than allow it to fall into residue, where some type of trust is more likely to arise.

In general, the legatees of the EU assets and the executor of the Will, or at least the executor of the assets in the EU jurisdiction(s), should be the same person because it has been known for an argument to be put forward that the executor should be treated as if they had some beneficial interest in the property. Alternatively, by drafting the Will so that the executor is only appointed in relation to the non-EU estate, the EU assets can vest directly with the intended beneficiaries.

Tax issues in the EU

France is relatively unusual among EU countries in having a complete spouse exemption – there is usually not a complete exemption for assets passing to a spouse. In Italy, there is a generous tax-free allowance of €1m for spouses and each child, with excess being taxed at 4%.

Depending on values, it may well be necessary to obtain local tax advice to understand the full effect of a disposition of assets in the EU under the main Will.

How we can help

The Succession Regulations are a very useful tool for clients who have property in the EU (except for Ireland and Denmark) as well as for foreign clients who are located in the UK and may have acquired British nationality.

Useful, or not, it needs to be taken into account when tax planning wherever there is a connection, however tenuous, with Europe in the estate – whether this is by the testator, an asset or a beneficiary.

Our tax team can assist you with this matter, or can liaise with other tax representatives on your behalf to bring clarity to your situation. As always, to speak to a tax team member, contact us on **01753 888211** or email **info@nhllp.com**.