The Aver Advisory

WINTER 2022

presented by Aver Associates *Estate Planners & Trustees*

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Tax Residency

Office location of professional advisors may determine corporate tax residency

HR 2 July 2021, 20/01212, ECLI:NL:HR:2021:104, Dutch Supreme Court

The Dutch Supreme Court recently ruled that the location of a company's professional advisors may help to determine where its central management and control abides; and, therefore, the residence of a company for income tax purposes.

Facts. The case concerned cross-border dividend payments after emigration. The interested party, X BV, was a company incorporated under Dutch law with its registered office in the Netherlands. X BV functioned as the personal holding company of a Dutch resident individual, who was the sole shareholder and sole director.

In 2006, the shareholder emigrated to St. Maarten in the Netherlands Antilles. Prior to his emigration, the shareholder resigned as director of X BV and an employee of a trust company established in Singapore was appointed as the new director. From that time, X BV changed its registered address to an address in Singapore and was then taxed as a company resident in Singapore.

In 2010, the company paid dividends to the shareholder worth approximately EUR 35 million. The Dutch tax authority levied Dutch withholding tax on these distributions, despite the fact that the formal management was located in Singapore and the shareholder resided in St. Maarten.

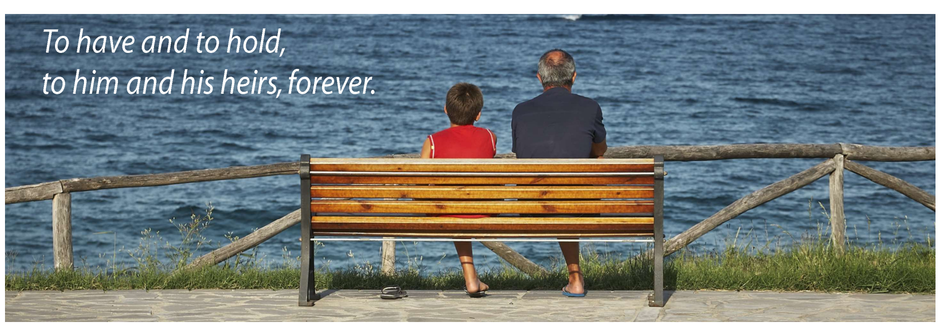
The tax authority determined that the company had in fact retained its place of effective management in the Netherlands, since all important decisions were made in the Netherlands by the son of the shareholder or by a Dutch tax advisor firm. Whether or not in consultation with the shareholder, they acted as initiators and coordinators with respect to the company's core activities. They gave the board important instructions that were slavishly followed. The company's board of directors in Singapore was determined to have ratified the decisions only formally.

Decision. The court found that X BV qualified as a resident of both the Netherlands and Singapore. It applied the dual residency tie breaker outlined in the tax treaty between the Netherlands and Singapore, under which a taxpayer is a resident of the State in which it is "managed and controlled".

X BV maintained that it was also a resident of St. Maarten because its shareholder made decisions from there. However, the tax authority had shown with flight data that the shareholder regularly stayed in the Netherlands for long periods of time.

X BV argued that the lower court incorrectly interpreted the term "managed and controlled" because a tax advisor does not make decisions, on behalf of its clients, with respect to business operations. However, the Supreme Court dismissed the appeal as unfounded.

The Supreme Court noted that it cannot be assumed that a tax advisor never makes business decisions with respect to a corporation belonging to his clientele. Nor does the fact that business decisions are taken in consultation with the shareholder inevitably lead to the conclusion that the shareholder is the director. Consequently, the company was held to be a resident of the Netherlands and, therefore, subject to Dutch taxation. ■



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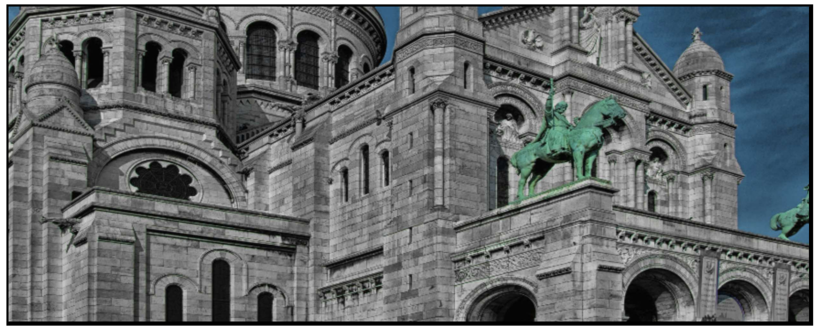

TAX PLANNING

Gift tax exemption in Franco-US connections

Gifts—including cash, shares, and debt obligations—from a US tax resident to a French tax resident—whether or not the recipient is a family member—may be completely exempt from French gift tax based on application of the *US-France Tax Treaty*, in combination with US and French domestic tax law.

US domestic tax law. Gifts qualify as taxable transactions under US tax code Section 2502(a). A US tax resident donor would therefore be liable for the payment of 40% of the value of the gift as a US gift tax. However, Section 2505 also provides that a US tax resident may transfer their wealth by gift or bequest, free from gift or inheritance tax up to the prescribed amount, which for 2022 is $12.06 million for each US tax resident ($ 24.12 million for a couple).

To benefit from this tax exemption, the gift must be declared by the US tax resident donor using Form 709, and by the French recipient donee using Form 2735, along with a letter explaining why the operation is not taxable in France.

US-France Tax Treaty. Article 8 of the 1978 tax treaty entered into between the US and France for the avoidance of double taxation with respect to taxes on estates, inheritances, and gifts provides that gifts of corporate stock or currency "may be taxed by a Contracting State only if the decedent or donor was a citizen of or was domiciled in that State at the time of death or the making of a gift, and if taxable by that State under its laws."

Furthermore, Article 12(6) of the tax treaty address tax exemptions, stating that if "tax, though chargeable, is not paid (otherwise than as a result of a specific exemption, deduction, exclusion, credit, or allowance)", only then may tax "be imposed by reference to that property in the other Contracting State notwithstanding any other provision to the contrary." The $12.06 million US gift or inheritance tax exemption thus applies not only to gifts between a donor and a donee who are both US tax residents, but also to gifts from a US tax resident to a French tax resident.

French domestic tax law. French tax authorities have issued individual tax rulings confirming that gifts of securities or cash granted by a US tax resident donor to a French tax resident donee are not subject to any gift tax in France, because such gifts qualify as taxable transactions in the US even if no gift tax is actually paid in the US by reason of the exemption.

It should be noted, however, that individual tax rulings are applicable only to the facts specific to the ruling, and are not binding even if the facts under consideration are identical. ■

ESTATE PLANNING

Revision to Switzerland's forced heirship rules set to come into force in January 2023

Reforms to Switzerland's inheritance laws were approved by the Swiss parliament on December 18, 2020 and are scheduled to take effect on January 1, 2023. The reforms increase testamentary freedom by reducing the impact of Switzerland's forced heirship rules.

The Swiss legislator focused on reducing the "statutory portion"; that is, the portion of the estate which is mandatorily reserved to some particular inheritors. The statutory entitlement of descendants will be reduced from 75% to 50% of their succession rights, while the existing 50% statutory entitlement of parents will be abolished entirely.

Between spouses, the statutory entitlement of a surviving spouse is maintained at 50% of their succession right. The right to dispose where there is a usufruct in favour of the surviving spouse is increased from 25% to 50% the estate. A testator will thus be able to grant a surviving spouse or partner half the estate in full ownership and a usufruct on the other half.

In the event of a testator's death during divorce or partnership dissolution proceedings, the surviving spouse will, under certain conditions, lose his or her status as a forced heir and will not be entitled to a compulsory share of the estate. ■

TRUSTS

Court clarifies Cayman Islands' firewall trust provisions

Geneva Trust Company v IDF and MF (aka Re Stingray Trust), unreported, Kawaley J, December 21, 2020

The Stingray Trust is a trust governed by Cayman Islands law and subject to a "firewall" widely interpreted to confer exclusive jurisdiction on the Cayman courts when dealing with disputes concerning a Cayman law-governed trust.

Facts. The settlor, through her court appointed guardian, had applied to a court in Italy to set aside the Stingray Trust. It was the guardian's position that the trust had been established without the settlor's consent and was therefore invalid. The trustee applied to the Grand Court of the Cayman Islands for directions.

Decision. The Grand Court held that the Cayman *Trust Act* does not automatically confer exclusive jurisdiction on the Cayman courts regarding questions such as the validity of a Cayman trust. It also found that the Italian court was the most appropriate forum, given the circumstances, and imposed a condition on the proceedings before the Italian court; namely, that Cayman Islands law must be applied to the question of whether the trust is valid.

The decision brings clarity to the jurisdiction's firewall trust provisions. Indeed, in some cases, a foreign court can make enforceable orders against a Cayman trust, so long as it properly applies Cayman Islands law. ■

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ESTATE PLANNING

Court denies disclosure of estate-related documents
Johnson v. Johnson, 2021 ONSC 6415 (CanLII)

A woman who was left out of her mother's will has had her application for disclosure of estate-related documents denied by the Superior Court of Ontario in Canada. The court noted that "an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved," and that without such evidence, "estates would necessarily be exposed to needless expense and litigation."

Facts. Mabel Johnson died on August 23, 2020 at age 99. Her daughter Nancy Johnson, who had been disinherited from her mother's will, alleged suspicious circumstances and sought disclosure of several testamentary documents. The applicant claimed that her mother had always treated her three children equally, and that it was inexplicable that she would be left out of her mother's will.

The applicant's sister Janice Johnson, who is the executor of her mother's estate, says the applicant is very aware of why her mother disinherited her.

Decision. The court found evidence of a rational and entirely understandable reason for Mabel Johnson to have prepared a new will in August 2015 to remove the applicant as a beneficiary; namely, that the applicant, while owing her mother a fiduciary duty as her attorney for property, had named herself as the beneficiary of some of her mother's investment accounts and then refused or failed to provide her mother with an accounting.

Furthermore, her mother was required to start a court proceeding against the applicant to rectify the situation. There was evidence of a heated conversation between the applicant and her mother and evidence that the two remained estranged.

Finally, the court found no evidence of incapacity or undue influence, and ruled that the minimal evidentiary threshold was not met by the applicant. ■

CELEBRITY ESTATES

Kirk Douglas combined trusts, charitable donations and gift planning to minimize estate taxes

Hollywood screen legend Kirk Douglas—star of classic films like Spartacus and Gunfight at the OK Corral—died in 2020 at the age of 103. He is survived by his second wife Anne, who is 100 years old, and three sons including actor Michael Douglas.

The son of Jewish immigrants, Douglas endured an impoverished childhood and was an active philanthropist during his lifetime, donating to various schools, medical facilities, and non-profit causes.

Kirk Douglas was one of the first actors to demand a share of the profits from movies in which he starred. He later formed his own film production company and thereby retained the ownership rights to his most iconic films. Following an award-winning career spanning seven decades, Douglas had amassed a sizable fortune before his death.

While it was reported that he left his entire estate to charity, his is not the story of a movie star who disinherited his family. Indeed, his famous son Michael—worth an estimated $300 million—posted a touching tribute to his late father on Instagram praising his legacy as an actor and philanthropist.

Unlike many notable celebrities who have died in recent years without having done any estate planning, Douglas used trusts and foundations, combined with gifts and charitable donations, to execute an effective estate planning strategy over time.

In a 2015 interview, Douglas praised his business-savvy wife who had set up a family trust that over the decades created numerous tiers of holding companies and joint ventures. One of those joint ventures ended up owning land under Marina Del Rey; land that is virtually priceless today. The trust reportedly held a majority of their assets—including the actor's film and image rights—and was believed to be worth at least $80 million.

In 2012, Douglas and Anne formed the Douglas Family Foundation intended to benefit several non-profit organizations. When Douglas died in 2020, he left his entire estate tax-free to various charities, including St. Lawrence University (Douglas' alma mater), Sinai Temple of Westwood, the Kirk Douglas Theatre and the Children's Hospital Los Angeles, all of which Douglas and Anne had donated to before through the Douglas Foundation. ■

ESTATE ADMINISTRATION

Deceased's nominees can now be given access to Apple iCloud

Apple has announced a new Digital Legacy program—coming to iPhones, iPads and Macs—which allows account holders to nominate up to five family members or friends as Legacy Contacts. These contacts will then be able to access the deceased person's account.

Until now, court orders have been required to gain access to a deceased person's digital data. With Digital Legacy, the contacts will be given a code allowing them to access data stored in iCloud, provided they have a copy of the death certificate.

This right of survivorship has been a complicated issue for Apple, which has long touted its core principles of protecting users' privacy. Both Google and Facebook have systems in place for designating a deceased person's account access to other people, and it's good to see that Apple is catching up. ■