CHAPTER 2

Death taxes and taxes on gifts

The purpose of this chapter is to provide an overview of death taxes and taxes on gifts. This overview is important for the understanding of the problems of cross-border death and gift taxation that I will present in chapter 3. Furthermore, the justifications of death taxation (section 2.4) contribute to the understanding of the benchmark of this study (that I will present in chapter 4 of this study) and of the impact of the problems in a cross-border setting (that I will present in chapter 5 of this study).

As mentioned above, death is an event, which can result in the imposition of different types of taxes from state to state. A brief look at the legislation of the states reveals that not only can inheritance and estate taxes be levied upon death but also *mortis causa* income and capital gains taxes, registration levies and stamp duties. It seems, therefore, that states have been very creative when deciding what type of death tax they will levy when a person dies in their territory or leaves property in their territory. Moreover, I note that even the legislation of states, which levy the same type of death tax, may vary considerably, thereby making the need for a comprehensive overview of death taxes essential in the context of this study. The same applies to taxes on gifts.

In the following sections, I will provide an overview of the key features (section 2.1) and the jurisdictional rules of death taxes and taxes on gifts (section 2.2). Furthermore, I will discuss the revenue trends of death taxes (section 2.3) as well as the justifications of death taxation (section 2.4).

2.1 Key features of death taxes and taxes on gifts

2.1.1 Inheritance and estate taxes

States imposing a transfer tax upon death levy either an inheritance or an estate tax. These taxes are the most common ones among the states. Civil law states usually levy an inheritance tax, which is an acquisition-based transfer tax applicable to the share of the inherited property received by each beneficiary (and, thus, not on the estate as a whole). Its taxable event is the enrichment of the beneficiary upon the deceased's death and the taxable person is each beneficiary who receives the inheritance.[1]

The inheritance tax rates reflect, to a large extent, the state's overall conception of succession.[2] In the majority of states, the tax rates are progressive and often depend on the size of the inherited property for each beneficiary and the degree of kinship between

1 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.
2 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010): 29.

the deceased and the beneficiary.[3] As a rule of thumb, the higher the amount of the *mortis causa* transferred property, the higher the applicable tax rate. Furthermore, the closer the kinship between the deceased and the beneficiary, the lower the applicable tax rate.[4]

On the contrary, the taxable event of the estate tax is the *mortis causa* transfer of property, in which case the deceased's entire estate (or sometimes the deceased) is regarded as the taxable person.[5] As a result, the estate as a whole, rather than the property received by each particular beneficiary, becomes the point of departure.[6, 7, 8] Moreover, the estate is often treated as a legal person under both domestic and tax treaty law and the tax is often determined based on progressive tax rates that depend on the size of the estate and usually the degree of kinship between the deceased and the beneficiaries. With regard to this point, Van Vijfeijken (2006) noted that the introduction of elements "looking at" the degree of kinship between the deceased and the beneficiaries have altered the nature of the otherwise "impersonal" estate tax, which initially focused on the mere transfer of property from the deceased to the beneficiaries.[9] Finally, since estate tax is levied on the entire estate, it includes the money used to pay the tax, in comparison to inheritance tax.[10, 11]

States levying inheritance and estates taxes usually provide for subjective and objective tax exemptions[12] and/or tax-free allowances. In most states, the subjective tax exemptions refer to the surviving spouse or the children and thus follow the kinship between the parties involved. On the other hand, the objective tax exemptions are numerous and find their origins in several different policy reasons (e.g. social, environmental and cultural reasons).[13] I note that those exemptions are often territorial and are not only granted in cases where the deceased and the beneficiaries share a degree of kinship.

3 Or the marital status of the deceased and the beneficiary. See, Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 8.

4 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 89.

5 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.

6 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 83.

7 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.

8 Because of this, Maisto noted that estate taxes have been criticized insofar as they may frustrate the ability-to-pay principle and disregard the magnitude of the enrichment of the beneficiary and his relationship with the deceased.

9 Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 151.

10 Patricia Brandstetter, *"Taxes Covered": A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011), 182.

11 Here, one must note that the inheritance tax rates in some states are determined based on the size of the estate as a whole and, therefore, not on the beneficiary's share of the inherited property. Thus, such an "inheritance" tax legislation combines elements of inheritance tax (e.g. available deductions and taxable persons) and estate tax (e.g. tax rates determined based on the estate as a whole). Interestingly in some states, the tax rates applicable in the event of inheritance between persons having no parental relationship can be extremely high, thereby having a *de facto* confiscatory effect.

12 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA, (The Hague: Sdu Uitgevers, 2010), 30.

13 *Id.*

It is not only the exemptions that vary considerably from state to state, but also the property valuation rules. Most inheritance and estate tax laws provide for a general principle of market value, but several exemptions exist (e.g. the cadastral value or even the market value after death).[14] Furthermore, some states apply the same valuation rules for income/capital and death tax purposes.

On the contrary, rules on debt deductions show similarities in many states where tax debts of the deceased are deductible, along with the costs incurred after death (in principle, funeral expenses and probate or notary fees related to the inheritance proceedings). Moreover, some states provide an apportionment of liabilities and costs between the taxable and non-taxable shares of the property because, for example, some assets are not included in the tax base. This is because either an exemption applies to these assets or some assets are excluded from the jurisdictional scope of the applicable inheritance or estate tax legislation.[15]

2.1.2 Other types of taxes levied upon death

As mentioned above, death does not only trigger the levying of inheritance and estate taxes. It may also trigger other types of taxes, for example, *mortis causa* income or capital gains taxes. More specifically, there are states which levy *mortis causa* income taxes payable by the beneficiaries who receive "income from inheritance" that increases their ability-to-pay taxes. In other states, death results in a deemed disposition of the deceased's property immediately before his death to his beneficiaries, with the deceased being the taxable person for whom his beneficiaries file his last income tax return. In some other states, a *mortis causa* capital gains tax is levied on the beneficiaries who are taxed on the accrued gain received upon the deceased's death, with the acquisition price of the transferred property set at zero. Furthermore, some states levy territorial taxes, e.g. registration taxes and stamp duties on the mere transfer of immovable property located in their territory. Strictly speaking, however, those taxes are not death taxes but are levied on the mere transfer of the property located in their territory (irrespective of the event triggering such a transfer). Finally, there are states that levy taxes ancillary to the death taxes to counterbalance the deferral of a capital acquisition tax, which arises as a consequence of using several civil or common law arrangements such as trusts, usufruct, fideicommissum, and foundations.[16]

2.1.3 Taxes on gifts

The term "taxes on gifts" is intended to cover all taxes levied on the wealth, property or assets of an individual which are the subject of a gratuitous *inter vivos* transfer, whether such taxes are levied on the donor or the donee.[17] I observe that states levy two types of taxes on gifts: gift taxes and income taxes on gifts. The taxable event of gift taxes is the enrichment of the donee who often becomes the liable person upon the receipt of the gift.

14 *Id.*, p. 31.
15 *Id.*, p. 31–32.
16 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 84.
17 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 17.

Nevertheless, in some states, the tax is paid by the donor and not the donee. Furthermore, most states levy gift taxes in accordance with the same tables of rates as for inheritance taxes.[18] As a result, the gift tax rates are often determined based on the size of the donation and the degree of kinship between the donor and the donee. Finally, I observe that states provide objective and subjective tax exemptions and/or tax-free allowances to donations. In many cases, these exemptions and allowances are the same as for inheritance tax purposes.

On the other hand, *inter vivos* income taxes on gifts often follow the income tax rules. As a result, the beneficiary is usually liable to pay the income tax on the received gift.

2.2 Establishment of tax jurisdiction

2.2.1 Inheritance and estate taxes

States establish inheritance or estate tax jurisdiction based on either a personal or an objective nexus of a person with their territory.

2.2.1.1 The personal nexus

As a rule of thumb, states levying inheritance or estate taxes rely on the deceased's or the beneficiary's personal nexus with their territory, which, if satisfied, makes the share that is attributable to the beneficiary (in the case of an inheritance tax) or the entire estate (in the case of an estate tax) taxable on a worldwide basis.[19] Thus, the deceased's entire property is subject to inheritance or estate tax, usually including immovable or movable property outside the state's territory. Nevertheless, some states delimit their taxing rights even if a personal nexus is met, presumably to eliminate possible double or multiple taxation of the deceased's property. For instance, they may exempt the foreign-located immovable and/or movable property under certain conditions.

In most states, the deceased*'s* personal nexus with the territory determines whether the state concerned enjoys worldwide inheritance or estate tax jurisdiction. If the deceased had a personal nexus with a particular state at the time of his death, then his worldwide property is subject to tax in this state with the tax being paid by the beneficiaries regardless of their personal nexus with the state. On the other hand, a few states use the *beneficiary's* personal nexus with their territory to levy an inheritance or estate tax on a worldwide basis. If, therefore, the beneficiary has a personal nexus at the time of the deceased's death with a state, this state can tax the share of the deceased's worldwide property inherited by the beneficiary (irrespective of the state of the deceased's personal nexus). Finally, the personal nexus may be assessed in some states at either *the deceased* or the *beneficiary*, meaning that an inheritance or estate tax may be levied on a worldwide basis if there is a personal nexus of the deceased or the beneficiary with their territory.

When levying inheritance or estate taxes, states apply a variety of concepts (or a combination thereof) to determine the deceased's or beneficiary's personal nexus with

18 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (1985), 57.

19 See also, Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 38.

their territory. Rust observed that there are certain characteristics that personal nexus concepts should meet. These are: i) maintaining equality among different jurisdictions, ii) being administratively easy, and iii) being difficult to be manipulated.[20]

I observe that most states use the residence concept to establish worldwide inheritance or estate tax jurisdiction. In some states, the concept of residence for inheritance and estate tax purposes differs from that of residence for income tax purposes. Some other states also apply the income tax residence concept for inheritance and estate tax purposes. In that regard, Jones argued that residence, based on the six months' presence criterion, may be right for taxing one year's income, but seems much less apposite for charging lifetime capita. Nevertheless, some states apply income tax residence as a personal nexus concept.[21] A notable factor is that some states apply extended residence rules and impose an extended worldwide tax liability on nationals who die within a certain number of years after immigrating to another state. These states usually provide for a credit for the taxes paid in the other state that may also seek to tax the deceased's worldwide property based on the deceased's actual residence there. The concept of residence for inheritance and estate tax purposes will be further examined in chapter 3 of this study.

Other states use the concept of the domicile to levy an inheritance or estate tax on a worldwide basis. The concept of domicile differs from that of residence as inferred by the income tax law; apart from the physical presence of a person in a state (on which the income tax concept of residence mainly focuses), the intention of the person to stay there indefinitely plays an essential role for the determination of whether he is domiciled there.

The concept of domicile may have different meanings. Under the domicile concept of the English law, every person must have a domicile, but cannot have more than one domicile. More specifically, every person is born with a domicile of origin. A domicile of origin is attributed to every person at birth by operation of law. This domicile does not depend on the place where the child is born, nor on the place where his mother or father reside, but on the domicile of the appropriate parent at the time of birth. As a result of this rule, a domicile of origin may be transmitted through several generations, no member of which has ever resided for any length of time in the country of the domicile of origin. It is generally accepted that a legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth.[22] Furthermore, a person may acquire a domicile of choice by moving from one state to another and living there with the intention to reside permanently or indefinitely in the new state (the so-called "animus manendi").[23] In such a case, the domicile of choice replaces his domicile of origin. It is noted that Sonneveldt (2002) was of the view that domicile as a concept aiming at finding a lifetime connection with a country, is particularly

20 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 86.

21 See also, J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 335.

22 More on the domicile of origin, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collings (London: Sweet & Maxwell, 2012).

23 More on the domicile of choice, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collings (London: Sweet & Maxwell, 2012).

suitable for death taxation. In comparing this criterion with residence, it may be said that it is more difficult to use than its civil law counterpart.[24]

Finally, a state may establish worldwide inheritance and estate tax jurisdiction based on the deceased's or the beneficiary's nationality. It is true that nationality represents the most stable relationship between taxpayers and their state. Nevertheless, problems may arise in the case of multiple nationalities, which are becoming less rare due to globalisation and the free movement of persons, especially within the EU. Furthermore, taxation based on the nationality seems to disregard the individuals' intention not to live permanently in the state of their nationality, especially if they do not occasionally visit this state in the absence of familial and economic ties.

2.2.1.2 The objective nexus

In the absence of a personal nexus, states may still levy inheritance and estate taxes based on an objective nexus of the deceased or the beneficiary with the state concerned. The objective nexus justifies the levying of inheritance and estate taxes solely on domestic assets (the so-called "situs principle").

In that regard, states can be divided into two categories concerning the determination of domestic assets that may seek to tax. The first category includes states that seek to tax only a few types of assets located in their territory, such as immovable property and certain types of movable property (narrow basis). On the other hand, the second category includes states that seek to tax a broad range of assets (broad basis).

Several states rely on private international law rules to determine the situs of assets while other countries rely on specific tax criteria. The differences in these rules, however, can often lead to jurisdictional overlaps and double situs taxation if both states classify an asset (e.g. copyrights, shares, bonds, and other securities) as a situs/domestic asset. For example, the situs rules of a state may stipulate that the company shares are located in the state of the registered office of the company which issued these shares whereas the situs rules of the other state may prescribe that the company shares are located in the state of the deceased's or donor's last domicile or residence. Double situs taxation is arguably the worst form of double taxation since no unilateral tax relief is available in such a case, as is discussed in the next chapter.

Finally, it should be noted that there are states which abstain from levying inheritance and estate taxes based on the situs principle in the absence of a personal link of the deceased or beneficiary with their territory.

2.2.2 Other types of taxes levied upon death

States levying *mortis causa* income taxes on the "income from inheritance" often determine their taxing rights based on the income tax rules under which the residence/domicile of the income recipient is decisive. Therefore, the resident beneficiary declares his worldwide "income from inheritance" in his annual tax return, in aggregation with the other types of income earned worldwide. Alternatively, the non-resident beneficiary declares only the

24 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

"income from inheritance" sourced in the territory of the state concerned. Similar rules apply in states levying *mortis causa* capital gains taxes. Finally, registration and stamp duties are territorial taxes, levied on the mere transfer of immovable property located in the territory of a state irrespective of the beneficiary's or the deceased's personal nexus with the territory.

2.2.3 Taxes on gifts

Most states impose gift taxes on the total value of gifts made by a donor who has a personal nexus with their territory regardless of the situs of the donated property. Some other states impose gift taxes on the total value of gifts received by a donee who has a personal nexus with their territory. Finally, some states impose gift taxes both on the total value of gifts made by a donor who has a personal nexus with their territory and on the total value of gifts received by a donee who has a personal nexus with their territory. In that regard, the personal nexus is often determined under the same concepts used as for death tax purposes[25] (i.e. residence, domicile and nationality). Of note is that some states exempt foreign immovable property when they tax in their capacity as states of the personal nexus (as in the case of inheritance taxes).

In most countries where neither the donor nor the donee has a personal nexus with their territory, gift taxes are levied on gifts of the same category of locally situated property as those which are subject to death tax (e.g. an inheritance tax) (the objective nexus).[26]

On the other hand, the tax jurisdiction in the case of income taxes on gifts is often determined under the income tax rules.

2.3 History of death taxes and revenue trends

Death taxation is one of the oldest forms of taxation, with roots that are believed to date back to ancient Egypt[27] and Greece. Researchers have traced land transfer taxes to the reign of Psametichus I (654-616 BC) in ancient Egypt. Land transferred by inheritance carried a ten per cent tax.[28] Close families members were not exempted.[29] Scholars assume that the Greeks borrowed the inheritance tax from the Egyptians. The tax apparently raised substantial revenue while simultaneously producing complaints, evasion, and fraud.[30]

In ancient Rome, Emperor Augustus (r.27 BC-14 AD) established an inheritance tax in Rome in 6 AD to fund military pensions.[31] By threatening the Roman people with the reimposition of a prior and reportedly much-hated direct land tax, Augustus won the passage

25 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 57.
26 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 57.
27 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 17.
28 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 366; Max West, *Inheritance Tax* (New York: Columbia College Studies, 1893), 181-183.
29 William J. Shultz, *The taxation of inheritance* (New York: Houghton Mifflin Company, 1926), 3.
30 William J. Shultz, *The taxation of inheritance* (New York: Houghton Mifflin Company, 1926), 4.
31 See also Kenneth Scheve and David Stasavage, *Taxing the rich* (New Jersey: Princeton University Press and Russel Sage Foundation, 2016), 93.

of the inheritance tax in its place. The tax, known as *vicesima hereditatium,* applied only to Roman citizens. Unlike the Egyptians, who taxed the property transferred, the Romans taxed the property received.[32] Certain close relatives and later all close relatives were exempt from the tax.[33] However, Hauser notes – quoting West – that Emperor Caracalla (r.212 – 217 AD) increased this fruitful revenue source by doubling the tax rate, abolishing exemptions for close relatives, and, in 212 AD, extending Roman citizenship, and with it liability to the inheritance tax, to all the free inhabitants of the whole Empire. The citizens did not welcome this change and the tax collector's position soon became a miserable one.[34]

The basis, however, of the current death taxes was established in the feudal states during the Middle Ages when the ownership of immovable property indicated economic and political power. Thus, such economic and political power could generate revenue for the feudal states, e.g. through the imposition of "the relief".[35, 36] Of note is that in the Middle Ages wartime revenue considerations prompted states to introduce a death levy.[37] In some states, the church collected a death payment too (the so-called "mortuary"[38]). According to van Vijfeijken (2006), the death tax of the past was based on the easily perceptible event of the death and was levied on the deceased's (presumably large) estate, with the states *usually* disregarding the beneficiaries' personal circumstances.[39] In this way, the death tax of the past (which, in essence, was an estate tax) could generate more tax revenue.[40]

Nevertheless, in the 20th century, people invented more complex systems of attribution of property and, thus, the ownership of immovable property did not always result in economic and political power. Furthermore, the consideration of the beneficiaries' circumstances – as shown by the application of tax rates determined by the degree of kinship between the deceased and his beneficiaries – led to the "birth" of inheritance tax and the gradual "personalisation" of estate taxes. The same is true due to the increased exemption thresholds and the granting or broadening of the subjective tax exemptions

32 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

33 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

34 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

35 "The relief" rested on the theory that the lord owned the land while the tenants occupied and farmed the land. When a tenant died, the tenant's heir could only obtain possession of the land by paying the relief tax to the lord. At first, the lords demanded arbitrary amounts, but later, the lords often fixed the amounts.

36 See also Max West, *Inheritance Tax* (New York: Columbia College Studies, 1893), 185-189.

37 For instance, in the Middle Ages, the "heriot tax" was one of the tenant's military support obligations. Tenants paid the tax on farm stock "loaned" to them based on the idea that the lords owned the chattels. See Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 369. Furthermore, in latter centuries, wealth taxes had been imposed explicitly for raising revenues (e.g. in the UK in 1984, in order to finance an impeding or an actual war, e.g. the First World War; – i) in the USA from 1797 to 1903 and in 1916; and ii) in Canada in 1941). See more, David G. Duff, "Taxing inherited wealth: A philosophical argument," *Canadian Journal of Law and Jurisprudence* 1, no. 6 (1993): 7.

38 The church intended these death payments to compensate for tithes or other duties that laymen had missed during their lifetime. See Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," Real Property, Probate and Trust Journal 34, no. 2 (1999): 370.

39 See also, Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 151.

40 *Id.*

to close relatives and spouses, even in states levying "impersonal" estate taxes. Arguably, the gradual personalisation of death taxes resulted in their decreasing revenue-raising capacity.[41, 42]

In relation to revenue trends of death taxes, the inheritance revenue rates in most OECD member countries are declining (according to the OECD Revenue Statistics). The revenue from death taxes represents less than 1% of the total revenue of the states,[43] and one can question whether states (should) attach significant importance to death taxes in general.[44] Nevertheless, I observe that the justifications of death taxes seem to be more important than their revenue-raising capacity.[45] According to Eisenstein, "[t]he permissible size of inherited wealth is an issue to be resolved on its own in the light of social policy. While one answer may collaterally yield more revenue than another, the wisdom of the answer has little to do with revenue."[46]

2.4 Justifications of death taxation

If, according to Eisenstein, the answer to the question "Why do states levy inheritance taxes?" has little to do with revenue, one may wonder why states continue levying these taxes in the 21st century. In my view, the justifications of death taxation provide the answer to this question.

It is true that the fact that death taxes have been in decline for the last 20 years comes as no surprise to the opponents of death taxation due to the inability of the traditional tax justifications to provide a convincing response as to why states should levy these taxes. It is worthy of note that some states do not levy death taxes and some other states have already abolished their death taxes.[47] Nevertheless, I question why only the traditional tax justifications need to be taken into account for the justification of death taxes, the nature and objectives of which differ from those of other types of taxes levied in a state.

Apart from the insufficient traditional justifications, the death taxation opponents put forward a fairness argument against death taxation. In their view, it is unfair that the deceased has to pay income tax during his lifetime and that his property is subject to death tax at the time of his death. To be blunt, the opponents of death taxation believe

41 See also, Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 33.

42 According to the OECD, "[l]ow revenues reflect the fact that inheritance/estate and gift tax bases are often narrowed by numerous exemptions and deductions, and avoidance opportunities are widely available." OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no.26, 2018), 23.

43 See also, J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 335.

44 According to the OECD revenue statistics, tax revenue from inheritance and estate taxes represented on average in 2018 0,4% of the total tax revenue earned in each OECD member country (OECD – average). See OECD revenue statistics, accessed January 29, 2020, https://stats.oecd.org/Index.aspx?DataSetCode=REV.

45 See also Lynne Oats, Angharad Miller and Emer Mulligan, "Principles of International Taxation" (Haywards Heath, Bloomsbury Professional, 2017), 7: "Wealth taxes are generally not imposed for their revenue-raising capabilities, but rather for the purposes of equality and effectiveness."

46 Louis Eisenstein, "The Rise and Decline of the Estate Tax," *Tax Law Review* 11, no. 22, (1956): 253.

47 For example, Sweden, Russia, Austria, Czech Republic, and Norway.

that it is unfair that an "uninvited" beneficiary, i.e. the fiscus (state treasury), inherits part of the deceased's savings upon his death. One could argue that this approach is flawed because two different persons pay two distinct and non-comparable taxes on two distinct taxable objects: the deceased was periodically paying income tax during his lifetime on his received income while his beneficiaries pay the inheritance tax upon the *mortis causa* receipt or transfer of a property. Thus, any allegation of *juridical* double taxation[48] may not be valid from a legal point of view.[49, 50] In that regard, I note that the OECD mentions that "[i]n the case where wealth transfer tax is levied on the recipient rather than on the donor (i.e. an inheritance tax rather than an estate tax), there is no double taxation of the donor himself and the inherited wealth is also only taxed once in the hands of the recipient".[51, 52] Nevertheless, I would expect that an economist may not share this view, focusing on the effect of the accumulation of taxes.[53, 54]

In parallel with the low contribution of death and gift taxes to the revenue inflow, the opponents of death taxation use the negative public opinion about death taxes as an argument against them in combination with the fact that not all states levy these taxes. Public opinion towards death taxes is indeed negative,[55] as people consider them unfair.

48 Double taxation is traditionally divided into two types, juridical double taxation and economic double taxation. Juridical double taxation may be described as the imposition of comparable taxes by two (or more) tax jurisdictions on the same taxpayer in respect of the same taxable object. Economic double taxation may be described as the imposition of two (or more) comparable taxes on the same taxable object.

49 In this respect, see Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 152-53.

50 With regard to wealth and death taxes, Christer Silfverberg noted that no international double taxation may take place except in cases where the death tax and the wealth tax are based on similar justifications (e.g. in cases where a death tax is perceived as a postponed wealth tax). See Christer Silfverberg, "Correlation between death taxes and wealth taxes," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 63. Cf. Claudio Sacchetto and Laura Castaldi, "Relationship between personal income tax on income from capital and other taxes on income from capital (corporate income tax, wealth tax, inheritance and gift tax and real-estate tax)," in *The Notion of Income from Capital*, eds. Peter Essers and Arie Rijkers (Amsterdam, EATLP/IBFD, 2007), 81.

51 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 58.

52 Stuart White is of the view that '[i]n fact, whether the [death] tax takes the form of a capital receipts tax or estate tax, it is always in effect the recipient who pays it. Quite simply, the 'donor' under the estate tax cannot pay the tax because he or she is dead. Dead people don't do much, and that includes paying taxes. Even under an estate tax, the tax itself is paid by the recipients of the estate." See Stuart White, "Moral objections to inheritance tax," in *Taxation: philosophical perspectives*, ed. Martin O' Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 173.

53 In the case of an estate tax, Maisto notes that "the argument of […] double taxation […] holds true primarily for countries that apply [an estate tax] in addition to net wealth tax so that wealth is taxed not only on a current basis throughout the life of the individual but also upon death. See Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 34.

54 Stuart White notes that, even if it could be argued that death taxes involve double taxation, there is little reason to regard double taxation, as such, as unfair. In White's view, the reasons for favouring a death tax – such as equality of opportunity – are strong enough public interests to justify the tax even though it is a double tax, and in this specific respect, undesirable. See, Stuart White, "Moral objections to inheritance tax" in *Taxation: philosophical perspectives*, ed. Martin O' Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 174.

55 Particularly, inheritance and estate taxes.

For example, in 2015, a new YouGov poll asked the United Kingdom (UK) public how fair or unfair it considered several types of taxes, including inheritance tax, VAT, and the BBC licence fee. Of the voters, 59% considered inheritance tax to be unfair – the highest figure for all the taxes polled.[56] Some years ago, in 2009, the Netherlands company, TNS NIPO, conducted a similar survey and inheritance taxes emerged as the most unfair in the Netherlands with gift taxes being the sixth most hated tax.[57] Interestingly, these surveys compared the inheritance tax to other taxes, e.g. VAT/GTT, income tax, and car or fuel taxes.

In that regard, I partly attribute the negative public opinion on death taxes to their nature and design. The example of the imposition of the inheritance tax is illustrative. As previously mentioned, the tax is paid by the beneficiaries, but its taxable base is determined either based on the deceased's or/and beneficiaries' personal nexus, or an objective nexus. This may often create uncertainty as to the person liable to pay the tax due. Moreover, the inheritance tax rates are determined based on the size of the inherited property and sometimes the kinship between the deceased and the beneficiary. This may increase, in my view, the degree of uncertainty as to the person who is liable to pay the tax due, especially for people who are not familiar with death taxation.

On the other hand, income taxes seem to be less complicated. More specifically, a salaried employee expects that he will be taxed on a fixed tax base – his earned income – and at a certain rate, which is determined based on the size of this income. Most importantly, the employee expects that his residence will determine whether his worldwide income will be subject to tax ("resident taxpayer") or only the income sourced in the territory of the state ("non-resident taxpayer").

Complexity, however, should not run against fairness.[58] In my view, the justifications of death taxation provide a convincing answer to Eisenstein's question mentioned above. I present a total of fourteen justifications of death taxation as discussed in the academic literature or the work of the OECD or invoked by the states when introducing a death tax (in particular, an inheritance tax and an estate tax). It follows that the death tax laws of a state may refer to only one or two justifications of the overview here below or adopt a differentiated weighting of these justifications.

In my opinion, there are four categories of justifications of death taxation. The first category refers to justifications that are explained from the perspective of the beneficiary. This category includes most of the justifications of this overview, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain.

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56 See more, Guy Bentely, Inheritance tax seen as the most unfair by voters in all parties, published at citya.m., accessed January 27, 2019, http://www.cityam.com/212005/inheritance-tax-seen-most-unfair-voters-all-parties.

57 See more, Manno van der Berg, De 10 meest gehate belastingen, published at Telegraaf, accessed January 27, 2019, https://www.telegraaf.nl/nieuws/989570/de-10-meest-gehate-belastingen.

58 The public seems to oppose inheritance taxes for two more reasons:
   i) The inheritance tax is unfair because of the increasing house prices. Sharply rising house prices have brought net moderate estates within the purview of the inheritance tax, that is, estates that would have previously fallen well below the inheritance tax threshold.
   ii) The inheritance tax is unfair because it is not paid only by those who can most easily afford it, as they, through estate planning techniques, can reduce their tax burden to zero. See more Natalie Lee, "Inheritance Tax – An Equitable Tax no Longer: Time for Abolition?," *Legal Studies* 27, no. 4 (2007): 690.

The second category includes justifications that are explained from the perspective of the deceased, i.e. the penalty for the deceased's tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification.

The third category includes justifications that are explained from the perspective of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification.

Finally, the fourth category includes justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification. It is worthy of note that some of these justifications apply by analogy to taxes on gifts that are usually considered complementary to death taxes.[59]

2.4.1 The ability-to-pay-taxes justification (the theory of value)

The ability-to-pay-taxes justification, which is based on the theory of value, serves as the first, albeit not primary in my view, justification of death taxation. This justification is often discussed in parallel with the windfall justification (which is examined in the next section). Under the ability-to-pay-taxes justification, the *mortis causa* transfer of property increases the beneficiaries' financial capacity and, thus, their ability-to-pay-taxes. Therefore, any abolition of death taxation will create an "unjustifiable leak in taxation" as Tipke notes.[60] However, Ydema and Vording are of the view that it seems unreasonable for the states to levy death taxes based on the ability-to-pay-taxes justification. In their view, if it is argued that an inheritance constitutes taxable income for the beneficiary, any deviation from the normal rules of income taxation (author: as in the case of inheritance and estate taxes) would require another justification than the ability-to-pay-taxes one.[61] On the contrary, West regarded the ability-to-pay taxes justification as a justification of death taxation but he considered that the increase of the beneficiaries' ability-to-pay-taxes should not always be taken for granted. He noted that it is not true in every case that the inheritance of property indicates a real increase of tax-paying ability.[62] In that regard, West drew a distinction between transfers of property to close family members, on the one hand, and to distant relatives (or even to independent adult children), on the other. Regarding the former transfers, he noted – quoting Adam Smith – that the death of the head of the family may have a positive or a negative influence on the ability-to-pay-taxes of the rest of the family members: "If the deceased's income was from property and not from labour, the death of the head of the family will make little difference in the family income. In the case of passive income (e.g. interest), the economic situation of the family

59 Taxes on *inter vivos* gifts are viewed in most countries primarily as a device for preventing erosion of the inheritance tax base; there is no place where they seem to be intended to raise revenue or, in themselves, to redistribute wealth. See Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985). Furthermore, in the OECD's view, an inheritance tax needs to be complemented with a gift tax (given the tax avoidance strategy of transferring wealth through lifetime gifts). See, OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 68.

60 Klaus Tipke, *Die Steuerrechtsordnung, Band II*, (Cologne: Verlag Dr. Otto Schmidt, 2003), 877.

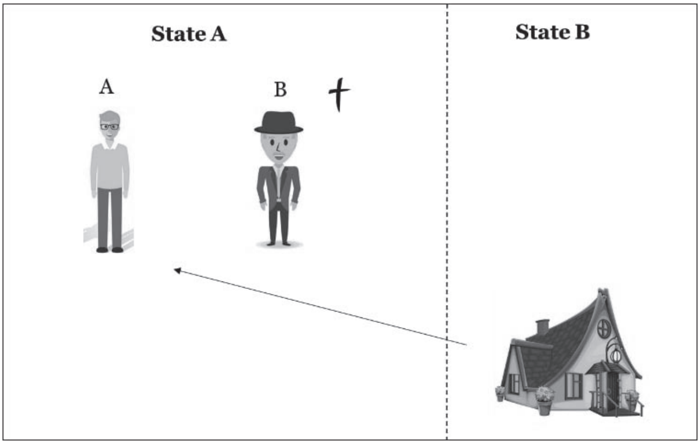
61 See also Onno Ydema and Henk Vording, "Charles Herckenrath's 100 Per Cent Death Tax Rate," in *Studies in the History of Tax Law,* ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 303-304.

62 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 434.

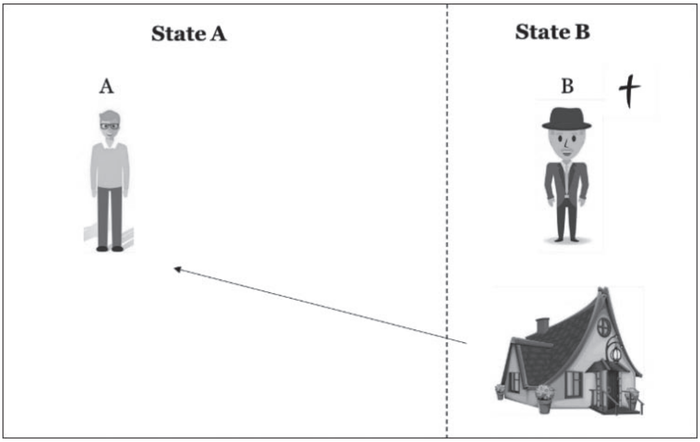
improves as the necessary expenditure diminishes by the death of a family member.[63] If, however, the deceased's income was wholly from labour, the increase of the beneficiaries' ability-to-pay-taxes should not be taken for granted if the deceased was the only working member of the family."[64] Concerning transfers of property to collateral relatives, West noted that "[w]here property goes to collateral relatives, or even to self-supporting adult children, there is a distinct increase of tax-paying ability."[65]

Irrespective of the above, I observe that the ability-to-pay-taxes justification may justify the imposition of death taxes at progressive tax rates depending only on the *size* of the estate. On the contrary, it does not seem to be able to justify progression based on the kinship between the parties involved which is an important element of most death tax laws. Therefore, the ability-to-pay taxes justification should not be considered the main justification of death taxation.[66]

Furthermore, in the literature, the ability-to-pay-taxes justification has been associated with the assessment of the personal nexus at the level of the deceased. More specifically, taxation based on the deceased's personal nexus with the state gives rise to the following logical gap if considered in the light of the beneficiaries' ability-to-pay-taxes, as shown by the two examples below.



63 *Id.*
64 *Id.*
65 *Id.*
66 On the contrary, the ability-to-pay-taxes justification may justify progression based on the proportion of the inherited wealth to the beneficiaries' wealth at the time of acquisition (the so-called "third progression").



In the first example, the deceased B was a resident of State A at the time of his death. His beneficiary A is also a resident of State A. He inherits property located in State B. State A levies inheritance taxes (as a type of death tax) based on the deceased's personal nexus (residence) and an objective nexus. As a result, beneficiary A has to pay tax in State A following the *mortis causa* transfer of the deceased's property that is located in State B (because the personal nexus with the deceased is satisfied).

In the second example, the deceased B was residing in State B at the time of his death. The deceased's beneficiary A is a resident in State A. The deceased's property is located in State B (i.e. the state of the deceased's residence). State A levies inheritance taxes based on the deceased's personal nexus (residence) and an objective nexus. In such a case, State A may not seek to tax the property inherited by beneficiary A as neither the personal nexus nor the objective nexus is satisfied: the deceased was not a resident of State A at the time of his death and the inherited property is not located in the territory of State A. However, one could argue that from State A's perspective, the ability-to-pay-taxes of beneficiary A in both examples increases following the *mortis causa* transfer of property. As a result, State A should treat them equally (as in the case of income taxation).

Because of this logical gap, it has been argued that the starting point of death taxation should be the beneficiary's and not the deceased's personal nexus with the state as being more in line with the ability-to-pay-taxes justification. More specifically, the supporters of the transition of the starting point of taxation from the deceased to the beneficiary invokes the personalisation of inheritance taxes argument mentioned in the previous section. In their view, the states already consider the situation of the beneficiaries through the increased exemption thresholds and the broadening of the subjective tax exemptions.[67]

Concerning this point, Sonneveldt (2016) noted that a distinction should be made between estate taxes and acquisition-based taxes such as inheritance taxes. In his view, an estate tax focuses on the increase in the deceased's property during his lifetime. Thus,

67 Inge van Vijfeijken and Hedwig van der Weerd-van Jolingen, "Double Taxation of Inheritances and the Recommendation of the European Commission," *EC Tax Review* 21, no. 6 (2012): 315; Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 152.

the starting point of estate taxation shall be the deceased's personal link with the state concerned, as estate taxation focuses on the deceased's estate and not on the individual acquisitions. The same should apply in the case of *mortis causa* capital gains taxation.[68] On the other hand, in the event of acquisition-based taxes, such as inheritance taxes, Sonneveldt (2016) noted that it is arguable to take as the starting point of taxation the beneficiaries' personal nexus with a state in light of their ability-to-pay taxes. The same should also apply, in his view, in the case of *mortis causa* income taxes.[69]

Nevertheless, the transition of the starting point of taxation from the deceased to the beneficiary may not be an easy task. Sonneveldt (2014) observed that worldwide taxation determined by the beneficiary's residence might not be easily applicable considering the limited control mechanisms that a state may have concerning the foreign property. Furthermore, he argued that a possible transition of the starting point of taxation would affect the OECD IHTMTC, which has been drafted based on the deceased's fiscal domicile (see section 5.1.1). Finally, most inheritance tax legislation has to be amended as it takes the deceased's personal nexus with their territory as the starting point of taxation.[70]

The discussion on the transition of the starting point of taxation from the deceased to the beneficiary falls outside the scope of this study, which focuses solely on the problems of cross-border inheritance and gift taxation. It is true, however, that the assessment of the personal link at two different persons by two states can often result in double taxation of the cross-border inheritance and donation as discussed in the next chapter.

2.4.2 The windfall justification (the accidental income theory)

The windfall justification or the justification of the unearned advantage serves as the second justification of death taxation. This justification rests upon the fortuitous nature of acquisitions under the accidental income theory. These acquisitions are sudden and perhaps unexpected accretions of property without labour on the part of the beneficiaries and manifestly increase their ability-to-pay-taxes. According to West, "[i]t is conceivable that where there is an income tax, inheritances might be taxed as income; but on account of their accidental or gratuitous nature it seems more just to subject them to a distinct tax greater in amount than the income tax, or in addition to the property tax."[71] The windfall justification seems also to have been officially recognised by the OECD. In that regard, the OECD notes that "[i]nheritances constitute an unearned advantage for recipients […]. From an equal opportunity perspective, wealth transfers can be viewed as a source of additional opportunity that is not linked to the recipient's efforts and that should therefore be taxed […]."[72]

68 Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.
69 Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.
70 Frans Sonneveldt, *Wegwijs in de Successiewet* (The Hague, Sdu Uitgevers, 2018), 4.
71 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 435.
72 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no.26, 2018), 53.

Contrary, however, to the ability-to-pay-taxes justification that justifies the imposition of death taxes at progressive rates depending only on the size of the acquisition concerned, the windfall justification arguably justifies progression depending also on the kinship between the parties involved. This type of progression shows that it is considered fair if states tax incidental and unexpected receipts of wealth and *at the same time* protect the family property when received by family members. Therefore, the windfall justification dictates that states should tax a *mortis causa* transfer of property (because it is unexpected), but they should also take into account possible family property considerations (that make a *mortis causa* transfer of property less unexpected when family members receive the property at hand). As a result, it could be argued that the windfall justification does not only explain *why* states may seek to levy a death tax but also *how* states may design such a tax.

The idea of protection of the family property is long-standing, which has been deeply reflected in the law and in religion through the centuries. For example, some authors refer to the Roman *vicesima hereditatium*, quoting Gaius Plinius Caecilius Secundus who advocated that a 5% tax is tolerable when imposed on distant beneficiaries but it becomes a heavy burden when imposed on the deceased's close relatives.[73] As mentioned in section 2.3, *vicesima hereditatium* was a tax that was introduced by Emperor Augustus (Lex Julia Vicesimaria) in ancient Rome and consisted of a 5% levy that every Roman citizen had to pay to the Roman army upon any inheritance or legacy left to him, except for property left to a citizen by his nearest relatives, and property below a certain sum. Later, Emperor Trajan ordered the exemption of almost all close relatives. Praising this reform, Pliny the Younger commented that the heavy tax would have been unfair to those who were entitled to their inheritance by birth, kinship, and community of family worship; *who had always regarded the property as their own possession*, to be passed on from them in turn to their heirs.[74]

Furthermore, Hauser notes that one of the oldest codes of law, dating from the rule of Hammurabi during the golden age of Babylonia (1792-1750 BC), refers, in places, to a sealed deed, an instrument similar to a trust, which directed *property to a family member* after one had "gone to his fate."[75] Moreover, Hauser refers to the codifications which occurred in early Roman law in 451 BC, when a delegation went from Rome to Greece to study the laws of Solon, an Athenian statesman, lawmaker and poet. The codification resulted in the so-called "Twelve Tables", which among other things, addressed inheritance as follows: "[i]f a man dies intestate to whom there is no *suus heres*,[76] let the nearest agnate[77] have the property [and] [i]f there is no agnate, let the members of the gens have the property."[78]

Finally, Hauser notes that many references in the Old Testament reinforce the importance of inheritance concerning the protection of the family property: "A good man leaveth an inheritance to his children's children." "The Lord forbid it me, that I should give the

73 See also Onno Ydema and Henk Vording, "Charles Herckenrath's 100 Per Cent Death Tax Rate," in *Studies in the History of Tax Law,* ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304-305.

74 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

75 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," Real Property, Probate and Trust Journal 34, no. 2 (1999): 394.

76 An heir (such as a wife, son, daughter or slave) under the paternal power of the decedent at the latter's death.

77 *Agnati* were all persons from a common male ancestor.

78 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," Real Property, Probate and Trust Journal 34, no. 2 (1999): 395.

inheritance of my fathers unto thee." and "The Lord knoweth the days of the upright: and their inheritance shall be for ever".[79]

The idea of the protection of the family property is also reflected in modern succession laws (for example, in forced heirship rules[80, 81]) and in death tax laws (for example, through subjective tax exemptions to close relatives and spouse and the application of tax rates determined, amongst others, based on the kinship between the deceased and his beneficiaries). It follows that states, taxpayers and legislatures instinctively consider that kinship differentiates a family member from an alien (who does not have family bonds with the deceased). It is perceived in that regard that family members have contributed to the acquired property, and so the acquisition of the deceased's property becomes less incidental. On the other hand, the acquisition of the deceased's property by non-family members arguably remains incidental because it is perceived that they have not grown into the perception that the property would be eventually theirs;[82] they did not always regarded the property as their own possession; they had not contributed to it; and there was no "natural instinct of the parents to equip the new generation as well as they can".[83] As Hayek notes, "[t]he family's function of passing on standards and traditions is closely tied up with the possibility of transmitting material goods".[84]

Given the abovementioned considerations, West notes that "[o]n the whole, the accidental-income theory is perhaps the most satisfactory explanation of inheritance taxes as they actually exist".[85] Without the windfall justification, death taxation would thus not be defensible as a separate mode of taxation: the size of *mortis causa* acquired property cannot be said to be a perfect criterion of faculty, which can differentiate a death tax from other taxes levied, based on the size of the property transferred or acquired (e.g. net wealth taxes or capital gain taxes).

I agree with West that the windfall justification should be regarded as the primary justification of death taxation. The windfall justification seems to be the most convincing, complete and unique justification of death taxation as it explains why states consider it fair to tax incidental and unexpected receipts of wealth ("*why* to tax") and at the same time to protect the family property when acquired by family members ("*how* to tax"). Therefore, this justification can explain, in my view, progressivity based both on the size of

79 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," Real Property, Probate and Trust Journal 34, no. 2 (1999): 396.

80 See also, See also Onno Ydema and Henk Vording, "Charles Herckenrath's 100 Per Cent Death Tax Rate," in *Studies in the History of Tax Law,* ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304.

81 Forced heirship provisions restrict the individual's freedom to choose how their property is divided upon their death and confer an automatic entitlement on certain individuals to a portion of the deceased's estate. These individuals are known as "protected heirs" and typically include the surviving spouse, children and/or other relations of the deceased. These restrictive rules apply irrespective of the terms of the deceased's will and therefore, the stated wishes of the deceased may well be disrupted by disgruntled protected heirs.

82 See also, Onno Ydema and Henk Vording, "Charles Herckenrath's 100 Per Cent Death Tax Rate," in *Studies in the History of Tax Law*, ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304-305.

83 Friedrich A. Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy (Chicago: The University of Chicago Press, 2011), 154.

84 Friedrich A. Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy (Chicago: The University of Chicago Press, 2011), 154.

85 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 435.

the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, a counterargument that one may bring forward is that the death tax laws (and particularly, the inheritance and estate tax laws) deem that a distant relative or a beneficiary without any family connection with the deceased has not contributed to the *mortis causa* acquired property, which, however, may not always be the case.

2.4.3 The tax equality justification

The tax equality justification dictates that the tax system cannot penalise relatively moral behaviours; states should not treat less favourably taxpayers who work and contribute to the social good than taxpayers who have not contributed to the creation of their received wealth and have not participated in upholding the social good. Therefore, death taxes safeguard the equality between taxpayers who work contributing to the social good and taxpayers who do not work and receive an unearned advantage without contribution to the society.[86] From this perspective, the tax equality justification resembles the windfall justification. However, the windfall justification seems to focus more on the protection of the family property than the contribution to the social good.

There is another aspect of the tax equality justification that is based on a comparison between the individuals who have received an inheritance and those who have not (regardless of whether they are working). In the absence of inheritance, these individuals have comparable natural abilities to develop and benefit from their skills. However, the receipt of inheritance can give rise to inequalities among the members of the society, as individuals who have not received an inheritance have presumably fewer opportunities to evolve and benefit from their skills in the absence of financial support. Inequality in inheritance, however, might translate into inequality of opportunity.[87]

As a result, death taxation explained by the equality-of-opportunity justification safeguards the redistribution of inheritances through their taxation. It is input-oriented because it addresses the preconditions under which the members of the society enter competition over scarce material resources. By taking the private property that exists within the society and redistributing it equally as private property to the members of the next generation, this justification ensures that the members of the society will be given similar material starting positions.[88] Therefore, the equality-of-opportunity justification

86 See also Liam Murphy and Thomas Nagel, *The Myth of Ownership* (Oxford: Oxford University Press, 2002), 155. "Equal libertarianism implies that, in the absence of practical obstacles or other reasons to the contrary (a very large qualification), gratuitous receipts should be confiscated by the state and redistributed equally among all persons."

87 Rajiv Prabhakar, Karen Rowlingson and Stuart White, *How to Defend Inheritance Tax* (London: Fabian Society, 2008), 18.

88 Jens Beckert, "Why is the Inheritance Tax so Controversial," *The Foundation for Law, Justice and Society* 45, no. 6 (2008): 4.

safeguards the granting of equal chances to individuals with equal natural ability to develop and benefit from their skills.[89, 90]

However, one could argue that the aspect of the windfall justification concerning the protection of the family property cannot be easily reconciled with the tax equality justification based on which private property should be equally redistributed to the members of the *society* (and thus not only to family members). Therefore, I do not consider the tax equality justification the most important justification of death taxation as it does not seem to encompass family property considerations (that justify progression based on the kinship between the parties involved and the granting of subjective tax exemptions and allowances to parties sharing a degree of kinship).[91]

2.4.4 The diffusion-of-wealth justification

The diffusion-of-wealth justification serves as the fourth justification of death taxation. This justification does not apply only to death taxes but to any tax. Death taxation addresses the accumulation of wealth in large families and safeguards the distribution of this wealth to all the members of the society. According to the OECD, "[t]here is a clear case on distributional grounds for taxing wealth transfers at death. Although there is limited evidence on the relative importance of inherited wealth in total wealth and in the persistence of wealth inequality, there is a strong case for taxing wealth transfers to reduce intergenerational inequality and increase equality of opportunity by reducing and dispersing wealth holding at death."[92]

West considered the diffusion-of-wealth justification a socialistic justification and stated that it might be better for the children of the deceased in every way to be left with only a moderate amount of property. The inheritance of a large fortune may prove an encouragement to idleness rather than an incentive to industry and may be harmful to both the heir and the society. It might have been some such considerations that led to Montesquieu's remark: "La loi naturelle ordonne aux pères de nourrir leurs enfants; mais elle n'oblige pas de les faire héritiers."[93]

I note that the diffusion-of-wealth justification is closely related to the tax equality justification. Neither justification, however, explains the progressivity of the tax rates based on the kinship of the parties involved. Furthermore, it has been argued that death taxes do

89 Rajiv Prabhakar, Karen Rowlingson and Stuart White, *How to Defend Inheritance Tax* (London: Fabian Society, 2008), 18.

90 Stuart White notes that this does not *necessarily* mean that the person will have greater overall opportunity in the relevant sense, See Stuart White, "Moral objections to inheritance tax," in *Taxation: philosophical perspectives*, ed. Martin O' Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 170.

91 Cf. Mark Ascher, "Curtailing Inherited Wealth," *Michigan Law Review* 89, no. 1 (1990): 151. The author of this article is of the view that "[c]urtailing inheritance would significantly *increase* equality of opportunity."

92 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 52.

93 "The natural law obliges the father to bring up his children but it does not oblige him to make them his beneficiaries". Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 430.

not make a significant contribution to the objective of breaking up wealth concentration.[94] For these reasons, I do not consider this justification a primary justification of death taxation, such as the tax equality justification.

2.4.5 The sluice justification

The sluice justification *(sluisgedachte*[95]*)* stipulates that tax burdens should be borne similarly by individuals who are in substantially similar circumstances, and differently where these circumstances differ.[96] According to this justification, an increase in property takes place either by employment income or by inheritance. Therefore, the income recipient and the beneficiary are comparable in the light of their property increase. Thus, as states levy income tax on individuals' employment income, the remainder of which becomes their "property", states should also levy a death tax upon a property increase due to an inheritance. In my view, this justification seems to be incomprehensible given that it does not explain why property should be taxed, even if states tax employment income.

2.4.6 The work stimulating justification/incentive to work justification

One of the most recent justifications for the death tax is that it motivates a person to work despite receiving gratuitous wealth, which is good for both the economy and the individual.[97] Under Wedgwood, an individual who inherits property might have less incentive to work to accumulate assets on his or her own. Therefore, taxing inherited wealth may increase the incentive for the beneficiary to work or, at least, will not act as a disincentive against work.[98]

Hauser, however, is of the view that to state that the death tax *does* motivate a person to work, is not at all clear. Moreover, in her view, the market value and individual moral value of paid work are not obvious truths. Hauser also refers to some scholars (amongst others, Edward McCaffery) who argued that the estate tax in the US suppresses the motivation to work. If one purpose of working is to accumulate wealth for the next generation, then "the estate tax is a tax on virtue. It punishes industry, thrift, intergenerational altruism and savings."[99] However, some scholars disagree that the estate tax suppresses the incentive to work. Hauser referred to Professor Ascher who argued that the transmission of property to the family is not the sole motivation for work.[100]

Regardless of whether a death tax does or does not suppress the incentive to work, I am of the view that one thing is clear: the work stimulating justification is based on the

94 John E. Donaldson, "The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement," 50 Washington and Lee Law Review (1993): 542.
95 As mentioned in the Netherlands inheritance tax laws (Parliamentary Papers II, 2008/09, 31 930, no. 9, p. 6.).
96 Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago, 1938), 50.
97 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 377.
98 Josiah Wedgwood, *The Economics of Inheritance* (Westminster, Penguin Books Limited, 1929), 206.
99 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 380.
100 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 380.

mere *assumption* that an individual may have no incentive to work if no death tax is levied. Thus, it should not be regarded as a primary justification of death taxation.

2.4.7 The wages-for-work justification

This justification is a combination of the sluice justification and the windfall justification. It stipulates that if states tax the employment income, they must also tax the inherited wealth, mainly because the beneficiaries have not contributed to the creation of the inheritance, as opposed to income recipients who have spent a lot of time and effort to receive their salary. One could argue, however, that this justification does not take into account family property considerations and therefore, it does not explain, in my view, progressivity based on the kinship between the parties involved. Consequently, I am of the view that it should not be regarded as a primary justification of death taxation.[101]

2.4.8 The justification of less pain

It was argued that death taxes might be justified on the ground that they satisfy Adam Smith's requirements for a "good" tax. One of these requirements is that, "[e]very tax ought to be levied at the time or in the manner, in which it is most likely to be convenient for the contributor to pay it."[102] In Smith's view, taxation should be imposed when it does not inconvenience the taxpayer ("the justification of less pain"). Although Adam Smith was referring to "rents, profit and wages", one could argue that the levying of death tax on the inherited property results in the beneficiary being less resistant to the taxation of his inherited property than taxpayers with regular or recurring receipts.[103] This is because i) he receives property from which the inheritance tax will be ultimately paid, and ii) he does not yet own the wealth (so taking some of it in taxes seems to be convenient).

One must nevertheless acknowledge that the justification of less pain, under which a beneficiary is less likely to be vexed by a death tax than other taxpayers, seems to be a "weak" justification of death taxation. It requires a comparison between the beneficiaries and other taxpayers (so that in such a case, it overlaps the tax equality justification) without explaining why a *separate* death tax needs to be levied on *mortis causa* transfers of property. Furthermore, in my view, the emotionally charged moment of death may not be perceived by all taxpayers as the most suitable moment for taxation. Moreover, Adam Smith's requirements build on the premise that taxes produce meaningful revenue, something that is not the case with death taxes as mentioned in section 2.3. Finally, Donaldson argues that "this revenue, comparatively insignificant, comes at the expense of a 'bad' tax system, one that lacks fairness, efficiency, and neutrality."[104]

101 Sonneveldt (2018), referring to J.P. Boer, is of the opinion that the wages-for-work justification is an insufficient justification of Netherlands inheritance tax legislation, see Frans Sonneveldt, *Wegwijs in de Successiewet* (The Hague, Sdu Uitgevers, 2018), 6.

102 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (New York: Bantam Classic Edition, 1776).

103 David G. Duff, "Taxing inherited wealth: A philosophical argument," *Canadian Journal of Law and Jurisprudence* 1, no. 6 (1993): 17.

104 John E. Donaldson, "The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement," 50 *Washington and Lee Law Review* (1993): 544.

2.4.9 The profit justification (the benefits theory and the co-heirship theory)

According to the profit justification,[105] when explained by the benefits theory, death taxes are regarded as payment in return for the various services rendered by the state to the beneficiaries. This justification does not apply only in the case of death taxes, but in the case of any tax. The revenue generated from death taxation – albeit lower than the revenue generated from other types of taxes – goes directly to the state's treasury. In other words, the government, as an "uninvited heir", "inherits" part of people's property and uses it to finance the payment of capital grants or services in line with its social and economic policies. Therefore, the levying of death tax serves as a medium for the state to finance the services that the state renders to the beneficiaries. Under the profit justification, however, these services do not have to be connected with the receipt of an inheritance.[106]

The profit justification – when explained by the co-heirship theory – focuses on the deceased. Several writers have argued that the state should inherit property from individuals because of what it does for them during their lives by providing a stable government environment. The state is sometimes represented as a larger family; according to Umpfenbach, the bond of kinship between distant relatives loses itself in the whole nation, which, therefore, inherits the property of individuals as the family inherits the property of its members.[107] Eschenbach pictured the state as a silent partner in the business of each citizen, without whose aid and protection it would be impossible to transact business or to accumulate wealth; when the partnership is dissolved by death, the silent partner, the state, is entitled to a share of the capital. Stated in this form, the argument seems rather fanciful; but in its essence it is simply a statement of the intimate relations which exist between the individual and the state, and of the manifold useful offices performed by government, which may be conceived to give the state a better claim to the property of a decedent than can be advanced by any individual who was of no assistance to the owner in acquiring it.[108]

Furthermore, according to West, the profit justification cannot justify progressivity in tax rates[109] based on the kinship between the parties involved. The same also applies, in my view, to tax deductions or tax-free allowances granted to close relatives. The profit justification justifies only the progressive, proportional or regressive rates, according to the view that could be taken of the relative importance of governmental action to the rich and to the poor.[110] Finally, the argument that people owe a debt to the government at death can be criticized because death taxes do not raise sufficient revenue to promote

105 Boris Bittker, Elias Clark and Grayson McCouch, *Federal Estate and Gift Taxation* (7th edition) (Minesota: West Academic Press, 1996), 5.
106 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 431.
107 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 436.
108 *Id.*, 431.
109 Although, surprisingly enough, Oliver Wendell Holmes, an American jurist, believed that the profit justification supported taxation and progressive rates. See also, Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 385.
110 *Id.*, 436.

government stability reasons.[111] Based on the above reasons, the profit justification does not seem to be a primary justification of death taxation.

2.4.10 The belated fee justification

States may view death taxes as a belated fee for protecting the property during the deceased's lifetime.[112] The belated fee justification overlaps the profit justification (when explained by the co-heirship theory) as both justifications look at the relationship between the state and the taxpayers. Therefore, I am of the view that the belated fee justification should not be considered a primary justification of death taxation for the same reasons as mentioned in the previous section.

2.4.11 The financing of the probate costs

States may view death taxes as an appropriate toll charged for the use of the probate machinery (when probate is required) and for other services used in facilitating the transfer of private property at death. The financing of the probate costs justification is more specific to the profit justification since it applies only to death taxes. This justification is associated with the particular service connected with the institution of an inheritance or bequest. West mentioned that, as these services are conferred by positive law, those who benefit from these services owe something to the state in return for the legal regulations which give them the right to the property of another after his death, for the proceedings necessary to put them in possession, and for the protection of the property in the meantime, when it would be especially liable to unlawful depredation.[113]

Moreover, according to West, this justification justifies progressive tax rates based on the relationship between the parties involved "[a]s there is some degree of probability that property might be transmitted in the direct line in a given case even if there were no laws of inheritance; the state may, therefore, be said to render a greater service when property goes to distant relatives, or strangers in blood, than when it is simply handed down from father to son."[114]

This justification does not seem to be a primary one, as not all states require that assets have to go through a probate process. Furthermore, the tax burden, in some cases, might be disproportionate to the aim of the financing of the probate costs.

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111 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 385.

112 Boris Bittker, Elias Clark and Grayson McCouch, *Federal Estate and Gift Taxation* (7th edition) (Minesota: West Academic Press, 1996), 5.

113 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 432.

114 *Id.*

2.4.12 Penalty for the deceased's tax evasion (the back-taxes theory)

States may view a death tax as a penalty for any tax evasion that the deceased may have indulged in during his life.[115] According to Gutman and West, graduation according to kinship cannot be justified from this point of view, because the tax is regarded as being paid by the deceased and not by the beneficiaries. Furthermore, considered solely with reference to justice between individuals, the back-taxes theory is not very satisfactory, because the inheritance tax bears no necessary relation to the amount of taxes evaded in individual cases unless there is a tax which is so universally and uniformly evaded as to be practically a dead letter.[116]

I do not consider this justification a primary one as it takes for granted that the deceased was involved in tax evasion during his lifetime, which might not often be the case.

2.4.13 The substitution for not imposed taxes justification (apart from tax evasion)

West mentioned that death taxes could be viewed as in lieu of taxes that were not imposed during the deceased's lifetime. He stated in that regard that death taxes and, in particular, inheritance taxes are regarded as property transfer taxes which were not levied when the deceased was alive. Furthermore, West referred to Bastable who suggested that death taxes are a form of capitalised income tax, paid in a generation instead of once a year. It is paid after the death of the taxpayer, and hence at the time most convenient to him; or it may be regarded as being paid by the beneficiary in advance. The burden of annual taxes may thus be expected to be lightened (in light of the justification of less pain) when a death tax is introduced, and hence the latter is not an additional burden, but only a method of levying part of the property or income tax.[117]

In the same vein, with regard to taxes on gifts, Rudnick and Gordon stated that "[a]n income tax by itself does not tax wealth, only accretions to wealth. In virtually all income tax systems, gifts and bequests are not taxed as income to the recipient. There are a number of reasons for this exclusion, including problems of income averaging. Assuming that gifts and bequests are not included in the income tax base, a separate wealth transfer tax can serve as a surrogate to such inclusion."[118]

Finally, I note that according to the substitution for not imposed taxes justification, the tax must not be graduated according to the kinship of the parties involved, because

115 Laura and Noël Cunningham note in that regard that "[a]nother argument made by transfer tax proponents is that the taxes serve to backstop the income tax in two ways. First, they tax amounts that escape income taxation, and second, they add an additional degree of progressivity to a federal tax system that has become increasingly less progressive over the years." See Laura Cunningham and Noël Cunningham, "*The logic of the transfer taxes*" (St. Paul: West Academic Publishing, 2018), 4.

116 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 433.

117 Harry L. Gutman, "Reforming Federal Wealth Transfer Taxes after ERTA," *Virginia Law Review* 69, no. 7 (1983): 1185–1186, 1189–97. See also, Henry J. Aaron and Harvey Galper, "A Tax on Consumption, Gifts, and Bequests and Other Strategies for Reform," in *Options for Tax Reform*, ed. Joseph A. Pechman (Washington D.C.: The Brookings Institution, 1984), 106 and Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 384.

118 Rebecca S. Rudnick and Richard K. Gordon, "Taxation of Wealth," in *Tax Law Design and Drafting* (volume 1), ed. Victor Thuronyi (Alphen aan den Rijn: Kluwer Law International, 2000), 292-339.

it merely takes the place of another tax that is not graduated according to such kinship. Therefore, this justification does not seem to be a primary justification of death taxation.

2.4.14 A means for the abolition of the intestate inheritance

Writers have advocated that death taxes facilitate the abolition of intestate inheritance as to all but the closest relatives. West noted that the operation of intestate inheritance between distant relatives could be viewed as irrational and useless. The family consciousness extends scarcely further than to cousins-german,[119] and there is no good reason for extending rights of inheritance to the more remote degrees of relationship. However, since it is difficult to fix a precise point at which they should cease altogether, it is perhaps more equitable to take away these rights from some relatives only in part, by an inheritance tax graduated according to relationship and rising to a high percentage in the case of distant relatives.[120]

This justification relates, in my view, to the windfall justification and, more specifically, to the aspect relating to the protection of the family property.

2.5 Conclusion of Chapter 2

In this chapter, I provided an overview of death taxes and taxes on gifts. Such an overview is in line with the first purpose of the study, i.e. the description and systemisation of death and gift tax laws as such. More specifically, the overview includes the key features of the death taxes and taxes on gifts. In that regard, I have distinguished between inheritance and estate taxes, the other types of death taxes and taxes on gifts. More specifically, I observed that states imposing a transfer tax upon death levy either an inheritance or an estate tax. The inheritance tax is an acquisition-based transfer tax applicable to the share of the inherited property received by each beneficiary. Furthermore, its taxable event is the enrichment of the beneficiary upon the deceased's death. On the other hand, the taxable event of the estate tax is the mere *mortis causa* transfer of the deceased's estate to the beneficiaries. It is important to note that the gradual introduction of elements looking at beneficiaries have altered the nature of the otherwise "impersonal" estate tax, which, in the past, focused only on the mere transfer of property from the deceased to beneficiaries. Finally, I noted that states levy two main taxes on gifts: gift taxes and *inter vivos* income or capital gains taxes on gifts. Gift taxes are acquisition-based property transfer taxes while *inter vivos* income taxes on gifts often follow the income tax rules.

Furthermore, I discussed the establishment of tax jurisdiction in the case of inheritance and estate taxes, the other types of death taxes and taxes on gifts. More specifically, I observed that states establish inheritance or estate tax jurisdiction based on either a personal or an objective nexus of a person with their territory. As a rule of thumb, states levying inheritance or estate taxes rely on the deceased's or the beneficiary's personal nexus with their territory, which, if satisfied, makes the share attributable to the beneficiary (in the case of an inheritance tax) or to the entire estate (in the case of an estate tax) taxable on a worldwide basis. In the absence of such personal nexus, states may still levy inheritance and estate taxes based on an objective nexus of the deceased or the beneficiary with the

119 The child of one's aunt or uncle.
120 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 427.

state concerned. The objective nexus justifies the levying of inheritance and estate taxes solely on domestic assets (the so-called "situs principle"). Concerning the other types of death taxes, I observed that states levying *mortis causa* income or capital gains taxes often determine their taxing rights based on the income tax rules under which the residence/domicile of the income recipient is decisive. The same is true in the case of *inter vivos* income or capital gains taxes on gifts. On the other side, gift taxes are levied under a personal and objective nexus that is often determined under the same concepts used as for death tax purposes.

In addition, I noted that the death tax revenue rates in most OECD member countries are declining. Arguably, the gradual personalisation of estate taxes and the "birth" of the already personal inheritance tax resulted in the decreasing revenue-raising capacity trends of death taxes. Nevertheless, the justifications for death taxes seem to be more important than their revenue-raising capacity. In that regard, I provided an overview of the justifications of death taxation. However, not all justifications can be considered primary justifications of death taxation. Furthermore, there is a degree of overlap between certain justifications.

In my opinion, there are four categories of justifications of death taxation. The first category refers to justifications that are explained from the perspective of the beneficiary. This category includes most of the invoked justifications, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain. The second category includes justifications that are explained from the perspective of the deceased, i.e. the penalty for the deceased's tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification. The third category includes justifications that are explained from the perspectives of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification. The fourth category includes justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification. It is worthy of note that some of those justifications apply by analogy to taxes on gifts that are usually considered complementary to death taxes.

In my view, the windfall justification seems to be the most convincing, complete and unique justification of death taxation (and, by analogy, gift taxation) as it explains why states consider it fair to tax incidental and unexpected receipts of wealth ("*why* to tax") and at the same time, to protect the family property when received by family members ("*how* to tax"). Therefore, this justification can explain progressivity both based on the size of the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, I note that the OECD IHTMTC seems to recognise both the windfall justification and the ability-to-pay-taxes justification as primary justifications of death taxation, as discussed in chapter 4.