

OMNIA

LAW GROUP, APC

**ESTATE PLANNING
FOR
NONRESIDENT
ALIENS**

ABOUT US

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Education: B.A. – University of California Berkeley in 1992

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AGENDA

- **General Overview of Estate and Gift Taxes**
- **Determining Residency for Nonresident Aliens**
- **U.S. Transfer Taxation of Nonresident Aliens**
 - **Gift Taxation**
 - **Estate Taxation**

ESTATE AND GIFT TAXES

U.S. imposes transfer taxes on the gratuitous transfer of property:

- Estate Tax: applies to transfers at death;
- Gift Tax: applies to lifetime transfers to others.

First determine whether a non-citizen individual is

- (1) a nonresident alien for U.S. transfer tax purposes, or
- (2) a U.S. resident.

TRANSFER TAX RESIDENCY

Income Taxes

- Objective criteria
 - Green Card Test
 - Substantial Presence Test
 - First-Year Election

Transfer Taxes

- Subjective inquiry regarding individual's domicile
- *Domicile* – person's fixed and permanent place of abode where the person intends to remain indefinitely or where the person intends to return.

Possible for person to be resident for income tax purposes and **NOT** be a resident for transfer tax purposes, and vice-versa.

DOMICILE DEFINED

For U.S. tax purposes to be characterized as a U.S. domiciliary, a person must:

- (1) Live in the U.S.; and
- (2) Have no intention of leaving.

Intent is established by objective criteria or factors:

- Length of time spent in U.S. & abroad, amount of time traveling to/from U.S. and other countries;
- Value, size and locations of person's homes
- Whether person spends time in locale due to poor health, for pleasure, to avoid political problems in another country;
- Situs of valuable/meaningful TPP
- Where person's close friends/family are situated
- Locales in which person has religious and social affiliations or in which he partakes in civic affairs;
- Locales in which person's business interests are situated;
- Person's visa status;
- Places where the person states in legal documents where he resides;
- Jurisdiction where person is registered to vote.

TOTALITY OF THE CIRCUMSTANCES

GIFT TAXATION OF NONRESIDENT ALIENS

What is subject to Gift Tax?

- Generally, U.S. gift tax applies to gratuitous transfers made during donor's lifetime.
- U.S. Citizens and Residents = gratuitous transfers of *any property, wherever situated*
- Nonresident Aliens = only to gratuitous transfers of U.S. situs real and tangible personal property.

Gifts of intangible personal property by a nonresident alien are NOT subject to U.S. gift tax.

GIFT TAXATION OF NONRESIDENT ALIENS-Cont'd

Intangible Personal Property

- Stock in a U.S. Corporation
- Debt obligations, including bank deposits, issued by a U.S. borrower

Physical currency (bank notes and coins, i.e. “cash”) is considered TANGIBLE PERSONAL PROPERTY for gift tax purposes.

GIFT TAXATION OF NONRESIDENT ALIENS-Cont'd

Gifts to Spouses

- Taxation of gifts of U.S. situs property between spouses depends entirely on the *citizenship of the donee* spouse (not the domicile of the donor).

Spousal Gift Splitting

- Not available where one of the spouses is a nonresident (unless a gift tax treaty provides otherwise)
- Gift-splitting is available if *either or both* of the spouses is a non-citizen BUT both spouses must be U.S. residents for transfer tax purposes.

Nonresident aliens can make unlimited gifts on behalf of donees directly to educational and medical institutions.

ESTATE TAXATION OF NONRESIDENT ALIENS

U.S. Citizens and Residents

- Estate Tax is based on your TOTAL WORLD-WIDE Net Worth.
- Exemption for U.S. Citizens is \$11,200,000 for an individual or \$22,400,000 for married couples. (After 2025, this exemption will drop to approximately \$6 mill per parent).
- **Exemption for Non-Resident Aliens is \$60,000.**

ESTATE TAXATION OF NONRESIDENT ALIENS-Cont'd

What is subject to Estate Tax?

- All property situated in the U.S. and owned at the death of the nonresident alien is included in the nonresident alien's U.S. taxable estate.
- Therefore, any tangible personal property physically located in the U.S. is subject to estate tax (i.e. automobiles, furnishings, jewelry, cash, currency, etc.)
- Certain intangible property is included in NRA's estate.

For estate tax purposes, certain U.S. situs property is subject to exceptions.

U.S. INTANGIBLE PROPERTY

Intangible property owned by a nonresident alien at death is generally subject to U.S. estate tax.

INCLUDED in NRA estate:

- Funds in bank or other brokerage accounts that are used in U.S. trade or business.
- Qualified retirement plans held in U.S.
- Stocks in U.S. corporations
- Life insurance policies held by decedent on the life of *another person*, issue by a U.S. insurance company
- Annuities on the life of *another person*, issued by a U.S. insurance company

NOT included in NRA estate:

- Savings accounts, checking accounts, certificates of deposit with U.S. bank (if not used in U.S. trade or business)
- Funds held in U.S. bank custody account.
- Funds deposited in a foreign branch of U.S. bank
- Proceeds of a life insurance policy on the life of a NRA, owned by the NRA and issued by a U.S. insurance company
- Debt obligations and certain short-term OID obligations of a U.S. person that qualify for the portfolio interest exemption under §871(h)

ESTATE AND GIFT TAX EXCLUSIONS FOR CITIZENS, NONRESIDENT ALIENS, AND RESIDENT ALIENS

| Decedent/Surviving Spouse | Gross Estate | Estate Tax Applicable Exclusion Amount | Estate Tax Marital Deduction | Annual Gift Tax Exclusion Amount to Non-Spouse | Annual Gift Tax Exclusion to Spouse |
|---------------------------|--------------------------------|--|------------------------------|--|-------------------------------------|
| U.S. Citizen/U.S. Citizen | All property wherever situated | \$11,200,000 | Unlimited | \$15,000 | Unlimited |
| U.S. Citizen/RA | All property wherever situated | \$11,200,000 | Only with a QDOT | \$15,000 | \$152,000 |
| U.S. Citizen/NRA | All property wherever situated | \$11,200,000 | Only with a QDOT | \$15,000 | \$152,000 |
| RA/U.S. Citizen | All property wherever situated | \$11,200,000 | Unlimited | \$15,000 | Unlimited |
| RA/RA | All property wherever situated | \$11,200,000 | Only with a QDOT | \$15,000 | \$152,000 |
| RA/NRA | All property wherever situated | \$11,200,000 | Only with a QDOT | \$15,000 | \$152,000 |
| NRA/U.S. Citizen | Property “situated” in U.S. | \$60,000 | Unlimited | \$15,000 | Unlimited |
| NRA/RA | Property “situated” in U.S. | \$60,000 | Only with a QDOT | \$15,000 | \$152,000 |
| NRA/NRA | Property “situated” in U.S. | \$60,000 | Only with a QDOT | \$15,000 | \$152,000 |

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TAX PLANNING STRATEGIES

NRA purchases life insurance that would cover the amount of the U.S. estate tax

- Life insurance proceeds on the life of an insured NRA are deemed to be non-U.S. situs property.

Ownership by a Foreign Corporation

PROS

- During NRA's lifetime, he can gift shares of foreign corporation free of gift tax, and sell shares free of U.S. income tax
- Dividends are not subject to U.S. income tax in hands of NRA

CONS

- Sale of U.S. real estate held by foreign corporation is deemed to be ECI under FIRPTA, subjecting the gain to additional 30% branch profits tax **ON TOP** of regular corporate tax
- At NRA's death, shares in corporation receive step-up in basis, but assets owned by the *entity* will not.

QUESTIONS?

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THANK YOU!