

FUNDAMENTAL INTERNATIONAL TAX AND WEALTH TRANSFER CONCEPTS FROM A UNITED STATES PERSPECTIVE

November 8, 2019

“Cross-Border Asian-American Estate Planning”

2019 NYSBA GLOBAL MEETING

Tokyo, Japan

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I
U.S. TAXATION

A. U.S. FEDERAL INCOME TAX

U.S. PERSONAL INCOME TAX RATES

- HIGHEST RATE OF 37% FOR “ORDINARY” TAXABLE INCOME EXCEEDING \$510,300 (SEPARATE FILERS) OR \$612,350 (MARRIED FILING JOINTLY)
- HIGHEST RATE OF 20% FOR LONG-TERM CAPITAL GAINS OF SINGLE FILERS WITH \$434,550 TAXABLE INCOME AND MARRIED JOINT FILEERS WITH TAXABLE INCOME OF \$488,850.

B. U.S. FEDERAL HEALTHCARE TAXES

- ADDITIONAL TAX OF 3.8% ON “UNEARNED INCOME” POSSIBLE FOR CERTAIN TAXPAYERS WITH MORE THAN \$200,000 ADJUSTED GROSS INCOME (SINGLE FILERS) OR \$250,000 (MARRIED FILING JOINTLY).
- ADDITIONAL TAX OF .9% ON EMPLOYMENT AND SELF-EMPLOYMENT WAGES EXCEEDING \$200,000 (SINGLE FILERS) OR \$250,000 (MARRIED FILING JOINTLY).

WORLDWIDE U.S. FEDERAL INCOME TAXATION

1. U.S. CITIZENS
2. LAWFUL PERMANENT RESIDENTS (“GREEN CARD”)
3. “SUBSTANTIAL PRESENCE”

SUBSTANTIAL PRESENCE TEST

1. 183 DAYS IN CURRENT CALENDAR YEAR
2. DAYS IN PRIOR YEAR COUNT AS 1/3 OF ONE DAY
3. DAYS IN NEXT TO LAST YEAR COUNT AS 1/6 OF ONE DAY.

Example One*Non-Resident*

	<u>2017</u>	<u>2018</u>	<u>2019</u>	
Days	121	121	121	
Calculation	20 1/6	40 1/3	121 =	181 1/2

Example Two

Resident

	<u>2017</u>	<u>2018</u>	<u>2019</u>	
Days	122	122	122	
Calculation	20 1/3	40 2/3	122 =	183

IMMIGRATION RELATED EXCLUSIONS:

- Foreign Government Representations: (“A” visas)
- Employees of Public International Institutions: (“G” visas)
- Full-Time Students: (“F” or “M” visas)*
- Teachers and Trainees (Exchange Programs): (“J” or “Q” visas)*
- Immediate Family Members of Same

** Subject to time limitations and, in the case where one’s “tax home” has shifted to the USA, subject to 30% withholding tax on foreign as well as domestic capital gains*

NON-CITIZEN NON-RESIDENTS:

“NON-RESIDENT ALIENS” ARE ONLY SUBJECT TO U.S. INCOME TAX ON U.S. SOURCE INCOME

- “PERIODIC INCOME” – WITHHOLDING TAX OF 30% (OR TREATY RATE)
- EARNED INCOME PAID BY US EMPLOYER AT REGULAR RATES (subject to exception for income paid by foreign employer within 90 day period not exceeding \$3000)
- INCOME EFFECTIVELY CONNECTED TO U.S. TRADE OR BUSINESS AT REGULAR RATES

EXCLUSIONS OF INCOME

- BANK ACCOUNT INTEREST
- MOST BOND INCOME
- GENERALLY, CAPITAL GAINS ON SALES OF U.S. PROPERTY (OTHER THAN SALES OF U.S. “REAL PROPERTY INTERESTS”)

C. U.S. FEDERAL WEALTH TRANSFER TAXES:

U.S. GIFT AND ESTATE TAX RATES

- FOR U.S. DONORS AND DECEDENTS, EFFECTIVE RATE IS 40% ON TAXABLE GIFTS AND ESTATES EXCEEDING U.S. EXEMPTION OF \$11,400,000 (2019, INDEXED; SUNSETS BEGINNING IN 2026)
- FOR NON-U.S. DONORS AND DECEDENTS, MARGINAL RATES HITTING 40% ON \$1,000,000 OF CUMULATIVE GIFTS AND U.S. LEGACIES ON TAXABLE GIFTS (NO EXEMPTION) AND ESTATES EXCEEDING EXEMPTION OF \$60,000 (NO INDEXING)

U.S. FEDERAL WORLDWIDE GIFT/ESTATE TAXATION:

ALL CITIZENS OF THE UNITED STATES ARE SUBJECT TO U.S. FEDERAL TRANSFER TAXES ON THEIR WORLDWIDE ASSETS:

- GIFT TAX
- ESTATE TAX
- GENERATION-SKIPPING TRANSFER TAX

NON-CITIZENS WHO ARE DOMICILED IN THE UNITED STATES ARE SUBJECT TO U.S. WORLDWIDE TRANSFER TAXATION:

- ESTATE TAX
- GIFT TAX
- GENERATION-SKIPPING TRANSFER TAX

SITUATION OF U.S. LEGAL PERMANENT RESIDENTS:

1. “GREEN CARDS” GRANTED ON ASSUMPTION THAT NON-U.S. PERSON INTENDS TO RESIDE “PERMANENTLY” IN THE UNITED STATES BUT DOES NOT PRECLUDE INTENT TO RETURN AT A LATER DATE TO A FOREIGN HOME
2. U.S. PERMANENT RESIDENT STATUS CREATES A REBUTTABLE PRESUMPTION THAT THE U.S. PERMANENT RESIDENT HAS ESTABLISHED U.S. DOMICILE

SITUATION OF U.S. TAX RESIDENT (SUBSTANTIAL PRESENCE TEST):

1. HOLDERS OF TEMPORARY WORK VISAS (H, L)
LESS LIKELY TO BE DOMICILIARIES BECAUSE OF
VISA TIME LIMITATIONS
2. PERSONS WHO ARE DAYS TEST TAX RESIDENTS
(INCLUDING HOLDERS OF “E” AND “O” VISAS) MAY
BE FOUND TO HAVE ESTABLISHED U.S. DOMICILE
BASED ON FACTS AND CIRCUMSTANCES

U.S. FEDERAL TRANSFER TAX ON GIFTS BY FOREIGN PERSONS:

1. U.S. REAL PROPERTY
2. U.S. TANGIBLE PROPERTY
 - *MAJOR PLANNING OPPORTUNITY FOR FOREIGN PERSONS WHO OWN U.S. AS WELL AS NON-U.S. INTANGIBLE PERSONAL OR FINANCIAL ASSETS AND HAVE U.S. FAMILY MEMBERS, BENEFICIARIES, ETC.*

U.S. ESTATES AND FOREIGN DECEDENTS:

ESTATES OF NON-U.S. DOMICILIARIES WHO ARE NOT U.S. CITIZENS ARE SUBJECT TO FEDERAL ESTATE TAX ON U.S. PROPERTY OWNED BY THEM AT TIME OF DEATH

- *SIGNIFICANT PLANNING OPPORTUNITY IF U.S. ASSETS ARE HELD BY A NON-U.S. ENTITY (NON-U.S. CORPORATION IS MOST SECURE) OWNED BY NON-U.S. DOMICILIARY RATHER THAN HELD BY NON-U.S. DOMICILIARY DIRECTLY*

EXCLUSIONS:

- U.S. BANK ACCOUNTS
- MOST U.S. BONDS
- U.S. LIFE INSURANCE POLICY ON LIFE OF NON-DOMICILIARY INSURED

U.S. FEDERAL EXPATRIATION TAX REGIME:

APPLIES TO CERTAIN

- U.S. CITIZENS
- LONG-TERM PERMANENT RESIDENTS (HAD PR STATUS IN ANY EIGHT OF PRIOR 15 YEARS)
 - a. Average annual net income tax over 5 years is greater than \$168,000
 - b. Net worth of \$2,000,000
 - c. Failure to be tax compliant for preceding 5 years



II
THE CHALLENGE OF NON-U.S.
SUCCESSION AND PROPERTY
LAW

U.S. PERSONS LIVING ABROAD OR OWNING PROPERTY ABROAD MUST OFTEN CONTEND WITH HEIRSHIP REGIMES AND PROPERTY REGIMES THAT MAY BE INCONSISTENT WITH THEIR U.S. ESTATE PLANNING GOALS:

NON-U.S. PERSONS MAY ALSO WISH TO AVOID THESE SAME RESTRICTIONS.

FORCED HEIRSHIP:

CIVIL LAW JURISDICTIONS IN EUROPE AND ASIA USUALLY REQUIRE THAT A DECEDENT'S DESCENDANTS RECEIVE A PORTION OF DECEDENT'S ESTATE AND OFTEN THAT DECEDENT'S SPOUSE AND EVEN PARENTS MUST ALSO RECEIVE A PORTION. SHARIA LAW JURISDICTIONS HAVE SIMILAR RULES.

FORCED HEIRSHIP:

- SWITZERLAND: SPOUSE AND CHILDREN MUST RECEIVE ONE-HALF OF INTESTATE SHARE
- FRANCE: IF ONE CHILD, CHILD MUST RECEIVE ONE-HALF, IF TWO, TWO-THIRDS, IF THREE OR MORE, THREE-FOURTHS
- JAPAN: SPOUSE AND CHILDREN CAN TAKE ONE-HALF OF STATUTORY SHARE; ASCENDANTS CAN TAKE ONE-THIRD OF SAME

MANY COMMON LAW JURISDICTIONS OUTSIDE THE UNITED STATES NOW PERMIT COURTS TO MAKE ADJUSTMENTS TO A DECEDENT'S WILL OR TO MAKE PROVISION FOR PERSONS WHO HAVE STRONG EQUITABLE REASONS FOR SHARING IN THE ESTATE

- NEW ZEALAND
- CANADA
- UNITED KINGDOM
- AUSTRALIA
- IRELAND

ISSUES POSED BY FOREIGN LAW PROPERTY REGIMES:

1. MANY CIVIL LAW JURISDICTIONS DO NOT HAVE TRUSTS AND GIVE VERY LIMITED, IF ANY, RECOGNITION TO COMMON LAW TRUSTS
2. MANY CIVIL LAW JURISDICTIONS DO NOT HAVE A COMMON LAW ESTATE AND HAVE A VERY LIMITED, IF ANY, CONCEPT OF AN EXECUTOR
3. MANY CIVIL LAW JURISDICTIONS HAVE PRESUMPTION THAT A DECEDENT'S BENEFICIARIES ASSUME UNLIMITED LIABILITY FOR THE DECEDENT DEBTS
4. MOST CIVIL LAW JURISDICTIONS OPERATE UNDER A COMMUNITY PROPERTY SYSTEM
5. MANY CIVIL LAW JURISDICTIONS HAVE DIFFERENT RULES FOR VALID EXECUTION OF WILLS

CHOICE OF LAW ISSUES RELATED TO FOREIGN INHERITANCE REGIMES:

1. MANY JURISDICTIONS DO NOT MAKE A DISTINCTION BETWEEN REAL PROPERTY AND INTANGIBLE PROPERTY AND APPLY A “UNITARY” RULE TO BOTH
2. OTHER JURISDICTIONS MAKE A DISTINCTION BETWEEN MOVABLE AND IMMOVABLE PROPERTY, RESULTING IN SOME ASSETS CONNECTED TO REAL PROPERTY SUCH AS MORTGAGES BEING TREATED THE SAME AS INTANGIBLE PROPERTY
3. IN MANY JURISDICTIONS GOVERNING LAW IS DETERMINED BY NATIONALITY OF DECEDENT
4. IN MANY JURISDICTIONS, EXTENT OF LIABILITY FOR TAX IS FREQUENTLY A FUNCTION OF RESIDENCE OF DECEDENT OR BENEFICIARY, NOT DECEDENT’S CITIZENSHIP

NEW DEVELOPMENT

ON AUGUST 17, 2015 THE EUROPEAN SUCCESSION REGULATION CAME INTO EFFECT, GIVING CITIZENS OF COUNTRIES SUCH AS CANADA, CHINA, JAPAN, KOREA AND THE UNITED STATES, WHO OWN EUROPEAN PROPERTY OR WHO LIVE IN EUROPE, THE OPTION OF ELECTING THE LAW OF THEIR NATIONALITY (IN THE CASE OF FEDERAL JURISDICTIONS LIKE CANADA OR THE UNITED STATES, THE LAW OF THE PROVINCE OR STATE TO WHICH THEY ARE MOST CLOSELY CONNECTED) TO GOVERN THEIR INHERITANCE.



III
**NEW YORK PLANNING OPTION
FOR NON-U.S. PERSONS**

NON-U.S. PERSONS MAY SEEK TO IMMUNIZE THE SUCCESSION OF THEIR ASSETS FROM CIVIL LAW AND SHARIA LAW REQUIREMENTS BY SITUATING THEIR ASSETS IN NEW YORK AND USING TRUSTS OR WILLS GOVERNED BY NEW YORK LAW

TRUSTS: NY EPTL § 7-1.10

“Whenever a person, not domiciled in this state, creates a trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust of:

- 1) Any trust property situated in this state at the time the trust is created
- 2) Personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this State or a national bank having an office in this State”

WILLS: NY EPTL § 3-5.1(h)

“Whenever a testator, not domiciled in this state at the time of death, provides in his Will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator’s general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state.”

See Estate of Renard, 56 N.Y.2d 973 (1982) (bank and brokerage accounts)

“NEW YORK SITUS PROPERTY” FOR PURPOSES OF NEW YORK EPTL § 3-5.1(h)

- REAL PROPERTY AND TANGIBLE PROPERTY LOCATED IN NEW YORK
- BANK AND BROKERAGE ACCOUNTS WITH NEW YORK BRANCHES OF BANKS AND BROKERAGE HOUSES
- ENTITIES ORGANIZED UNDER NEW YORK LAW

See Hutchinson v. Ross, 262 N.Y. 381 (1933) (“Tangible chattels and securities”) – situs in New York even if owned by non-N.Y. person

See also In re Tabbaghi’s Estate, 167 Misc 156 (1938)

See also Wyatt v. Fulrath, 38 Misc. 2d 1012 (1963)



IV
STRATEGY FOR U.S. PERSONS
OWNING ASSETS ABROAD

U.S. CITIZENS OWNING ASSETS OUTSIDE THE UNITED STATES SHOULD CONSIDER USING TAX EFFICIENT ENTITIES TO ACQUIRE FOREIGN ASSETS IN ORDER TO ELIMINATE OR MINIMIZE THE APPLICATION OF FOREIGN HEIRSHIP AND FOREIGN PROPERTY REGIMES, COMPLICATED CHOICE OF LAW RULES, AND SOME FOREIGN TAXES.

U.S. CITIZENS OWNING ASSETS IN EUROPE SHOULD ALSO CONSIDER MAKING AN ELECTION OF THE LAW OF A U.S. JURISDICTION TO GOVERN THEIR INHERITANCES.

TRUSTS:

- USEFUL TO HOLD PROPERTY IN DIFFERENT COMMON LAW JURISDICTIONS
- TRUSTS CAN OPERATE AS WILL SUBSTITUTES
- “STAR” OR “PURPOSE” TRUSTS OFFERED BY SOME JURISDICTIONS PROVIDE ALTERNATIVES TO TRADITIONAL TRUSTS WHERE TRUSTEE IS DIRECTLY ACCOUNTABLE TO BENEFICIARIES
- **THE USEFULNESS OF TRUSTS IS LIMITED BECAUSE A LARGE NUMBER OF JURISDICTIONS DO NOT RECOGNIZE ANY FORM OF TRUST**
- NEED FOR WIDER ADHESION TO HAGUE CONVENTION ON THE RECOGNITION OF TRUSTS
- SUBSTANTIAL TAX REPORTING FOR FOREIGN TRUSTS SETTLED BY U.S. PERSONS AND OFTEN ADVERSE U.S. TAX CONSEQUENCES

CORPORATIONS:

- EFFECTIVE VEHICLE FOR LIMITING LIABILITY
- NOT GENERALLY EFFECTIVE AS A WILL SUBSTITUTE
- “C” CORPORATIONS INVOLVE TWO LAYERS OF U.S. TAXATION
- “S” CORPORATION SHAREHOLDERS ARE LIMITED TO U.S. INDIVIDUALS AND ONLY CERTAIN TYPES OF TRUSTS
- NO STEP-UP IN COST BASIS FOR ASSETS INSIDE A CORPORATION
- **CFC AND PFIC REGIMES CREATE TAX REPORTING REQUIREMENTS FOR U.S. PERSONS AND ALSO ACCELERATE TAXES, LOSS OF CAPITAL GAINS RATES, AND POTENTIAL INTEREST ON DEFERRAL OF DIVIDENDS**

LIMITED LIABILITY COMPANIES:

- OFFER LIMITED LIABILITY
- NO U.S. FEDERAL ENTITY TAXATION BECAUSE GENERALLY TAXED AS PARTNERSHIPS
- SECTION 754 ELECTION CAN ELIMINATE DIFFERENCE BETWEEN INSIDE AND OUTSIDE BASIS IN CASE OF DECEDENT'S ESTATE
- U.S. FOREIGN PARTNERSHIP DISCLOSURE AND TAX REGIMES GENERALLY MORE FAVORABLE
- **SINGLE MEMBER LLCs ARE OR CAN BE DISREGARDED FOR U.S. TAX PURPOSES**

HAPPY INTERNATIONAL TAX, IMMIGRATION AND ESTATE PLANNING!

